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INSIGHT

Legislative Update

IN THIS ISSUE

On March 29, 2022, the House overwhelmingly passed H.R. 2954, the *Securing a Strong Retirement Act of 2021* (SSRA), by a vote of 414-5. The House version of the SSRA contains a number of provisions included in previous versions.

In particular, the SSRA contains provisions from the version of the bill approved by the House Ways and Means Committee in May 2021, including:
1) requiring automatic enrollment in new plans; 2) phasing-in an increase in the required minimum distribution age;
3) allowing a higher catch-up limit; and
4) facilitating matching contributions with respect to student loan repayments.

From the Education and Labor Committee's *RISE Act* (H.R. 5891) that was approved in November 2021, the legislation includes provisions for:
1) increasing retirement plan access for part-time workers; 2) allowing employers to offer small financial incentives, such as low-dollar gift cards, to increase plan participation; and 3) making changes to pooled employer plans.

The SSRA also includes provisions specific to governmental and tax-exempt plans, including provisions: 1) allowing 403(b) Multiple Employer Plans (MEPs) and Pooled Employer Plans (PEPs); 2) eliminating the "first day of the month" rule for 457(b) plans; and 3) conforming the 403(b) hardship withdrawal rules to those of 401(k) rules.

In addition, the version passed by the House contains a few notable changes from the bills approved by the committees last year. Some of the changes include: 1) expanding and simplifying the Saver's Credit;
2) eliminating the securities law amendment that would allow 403(b)s to invest in collective investment trusts; and 3) streamlining the Federal Retirement Savings Lost and Found online database.

The SSRA now heads to the Senate, where Senate committees are working on their own legislation. The Finance and Health, Education, Labor and Pensions (HELP) Committee members likely will not accept the House version of the SSRA, but may potentially look to pull popular provisions from various retirement bills that have been introduced in the Senate. Currently, the Finance Committee intends to hold a markup of its bill by Memorial Day, though that timeline is not set in stone.

All said, the likelihood of the Senate passing a retirement bill this year remains uncertain. However, there are clear indications of bipartisan support for many of the measures currently included, and the upcoming retirements of some key retirement champions may help to push the bill's passage. As demonstrated in prior efforts, the best chance for new retirement legislation may be in conjunction with a must-pass, year-end package.

IRS Updates Safe Harbor Methods for Meeting the "Substantially Equal Periodic Payment" Exception

Earlier this year, the Internal Revenue Service (IRS) issued Notice 2022-6[1] to update longstanding guidance regarding the exception to the 10% additional tax for "substantially equal periodic payments" under Internal Revenue Code Section 72(t)(2)(A)(iv). Generally, under Code Section 72(t), an early withdrawal (e.g., withdrawals before age 59½) from an IRA, 403(b), or qualified plan may be subject to an additional 10% income tax on the amount distributed. Among other exceptions, Section 72(t)(2)(A)(iv) provides an exception to the additional tax for distributions that are part of a series of "substantially equal periodic payments" over the taxpayer's life expectancy (or joint life expectancy with a beneficiary).

Previously, in Notice 89-25, Q&A-12, the IRS provided three safe harbor methods for satisfying the "substantially equal periodic payment" requirement. The methods include: 1) the fixed amortization method; 2) the fixed annuitization method; and 3) the required minimum distribution (RMD) method. The first two, the fixed amortization method and the fixed annuitization method, require that a fixed amount be distributed each year, while the third safe harbor method (the (RMD) method) varies the distribution amount based on the annual account value.

In accordance with Revenue Ruling 2002-62, taxpayers were permitted a one-time option to switch from either of the two fixed amount methods to the RMD method. Under the RMD method, the annual payment for each distribution year is calculated by dividing the account balance by the number of years from the life expectancy table chosen by the taxpayer (with the choice generally reflecting the desire for a higher or lower annual payment). This calculation is performed for each year, but the redetermination of the annual payment is not considered a "modification" of the series of substantially equal periodic payments, provided that the taxpayer continues to use the RMD method and the same life expectancy tables.

Notice 2022-6 includes a number of changes to the safe harbor methods. Specifically, the Notice modifies the interest rate to be used under the fixed amortization method or the fixed annuitization method to a rate not more than the greater of: i) 5%; or ii) 120% of the federal mid-term rate. The prior guidance did not include the 5% rate.

The Notice also updates the life expectancy tables that can be used to determine distribution applicable periods under the RMD method: 1) the Uniform Lifetime Table in Appendix A of Notice 2022-6; 2) the Single Life Table in Treasury Regulation Section 1.401(a)(9)-9(b); or 3) the Joint and Last Survivor Table in Treasury Regulation Section 1.401(a)(9)-9(d).

The guidance also clarifies that a taxpayer who begins distributions, using a safe harbor method other than the RMD method, may elect in any subsequent distribution year to switch to the RMD method to determine the payment for the distribution year of the switch and all subsequent distribution years without the change being treated as a modification within the meaning of Code Section 72(t)(4). However, any subsequent change from the RMD method would result in a modification.

Generally, the guidance in Notice 2022-6 must be used for payments commencing on or after January 1, 2023, but may also be used for distributions commencing in 2022. The Notice also reflects the fact that the RMD regulations were revised to update the distribution tables by providing some flexibility regarding the proper RMD tables to be used in certain other

[1] https://www.irs.gov/pub/irs-drop/n-22-06.pdf

situations. For example, for an individual under age 70½ or age 72 (as applicable) that was in pay status pre-2022, the old tables may continue to be used for calculations under the RMD method, with a change to the new tables allowed on a one-time basis in any later year without losing the relief.

Relief from Post-Retirement Hours and Earnings' Limitations

Under most public plans, a member who returns to service after commencing retirement benefits faces the potential suspension of their retirement benefits under the plan's hours of service or earnings' limitations. Over the past few years, often to address employee shortages in certain fields, and to some degree due to the COVID-19 emergency, there has been a wave of proposed and adopted legislation increasing or even removing these plan-imposed limits.

Although it has since expired, in 2019, North Carolina enacted legislation to address a teacher shortage. Under the legislation, post-retirement compensation earned as a "high-need retired teacher" was excluded for purposes of determining whether the earnings' limitation under the state plan for teachers was exceeded, meaning the member's retirement benefit would not be impacted by being rehired into such a position.

In 2021, Oklahoma and Massachusetts enacted legislation to provide relief to rehired retirees. In Oklahoma, the legislation was an extension and expansion of prior relief for teachers. Specifically, for a defined period, members who have been receiving retirement benefits for at least one year, with no intervening public school employment, are eligible to return to employment as an active classroom teacher in certain school districts without facing a suspension of their benefits due to the plan's otherwise applicable earnings' limitation.

The legislature in Massachusetts took a different path and addressed the hours' limitation under public plans, increasing the number of hours a rehired retiree is permitted to work, while leaving the earnings' limitation unchanged. Notably, in Massachusetts, the hours' limitation is a strict employment limitation, rather than a limitation tied to a suspension of benefits.

In New York, the Governor has provided relief by exempting post-retirement earnings from most public employers from the otherwise applicable earnings' limit during defined periods. In addition, the New York State legislature recently excepted earnings received by retirees who are employed by a school district or Board of Cooperative Educational Services (BOCES) from the earnings' limitation, effectively removing the suspension of benefit requirement for retirees hired into those positions.

In 2022, a number of other states have proposed similar legislation, including Louisiana, Alabama, and California. In Louisiana, the proposed legislation would allow post-retirement employment as a police officer for up to 50 hours per month or as an elected official (other than chief of police) without a corresponding suspension of retirement benefits under the state police retirement plan.

In Alabama, the proposed legislation would provide an across-the-board increase to the earnings' limitation under certain state retirement plans before a retiree faces a benefit suspension.

If passed, California's legislation would follow that of a few other states in providing relief under its state teachers' retirement plan to facilitate the hiring of retirees to fill teacher shortages. The proposed legislation would exempt compensation earned by a retired classroom teacher who returns to service after retirement in a special education position from the earnings' limitation that may otherwise require a benefit suspension.

Whether these changes are a sign of the times or an indication of a changing landscape remains to be seen.

Mental Health Parity 2022 Report to Congress

Section 203 of the *Consolidated Appropriations Act, 2021* (CAA) amended the *Mental Health Parity and Addiction Equity Act* (MHPAEA) to require the Departments of Health and Human Services, Labor and the Treasury (collectively, the Departments) to submit a report to Congress every year discussing compliance with the MHPAEA. The Departments submitted the 2022 MHPAEA Report to Congress (Report) at the beginning of this year.

The CAA also amended the MHPAEA to require plans and issuers to perform and document comparative analyses of all Non-Quantitative Treatment Limitations (NQTLs) imposed on Mental Health and Substance Use Disorder (MH/SUD) benefits. An NQTL is a limitation on the scope or duration of benefits that is not expressed numerically. Each NQTL comparative analysis must show that any NQTL applied to MH/SUD benefits is comparable to, and no more stringent than, the same NQTL applied to medical/surgical (M/S) benefits. Plans and issuers must be prepared to submit the comparative analyses to the Departments or applicable state authority upon request.

The Departments have not issued regulations with respect to the new MHPAEA amendments, so the Report provides some helpful insight into the information that should be submitted for the NQTL comparative analyses and any "red flags" to examine when preparing the comparative analyses.

Notably, the Report explains, "[n]one of the comparative analyses reviewed to date contained sufficient information upon initial receipt," and in response, follow-up letters noting deficiencies in the analyses were issued to plans and issuers that received requests for NQTL comparative analyses. The Report summarizes the most common reasons the comparative analyses "fell short," including plans and issuers making "conclusory assertions lacking specific supporting evidence or detailed explanation," providing analyses that have a "lack of meaningful comparison or meaningful analysis," "documents provided without adequate explanation," and "failure to demonstrate compliance of an NQTL as applied."

As of October 31, 2021, the Departments have not issued any *final* determinations of non-compliance. The CAA requires the Departments to publish in the Report the names of plans or issuers that are determined to be non-compliant with the NQTL comparative analyses requirement.

The next Report to Congress is required to be published in October of this year and the Departments note that they will continue enforcement efforts and should any of their reviews result in a final determination of non-compliance, the final determination will be included in the next Report.

Surprise Billing Update

The *No Surprises Act*, included as part of the *Consolidated Appropriations Act, 2021* (CAA), prohibits the practice of balance billing for emergency services provided by a non-participating provider or facility, non-emergency services provided by a non-participating provider at an in-network facility, and air ambulance services by a non-participating provider. Balance billing occurs when a non-participating provider bills a patient the balance for any items or services received by the patient after receiving a payment from the patient's plan or coverage.

The *No Surprises Act* creates a Federal Independent Dispute Resolution (IDR) process for use by a plan or issuer and a non-participating provider to resolve any payment disputes for emergency services, non-emergency services provided at an in-network facility, and air ambulance services provided by non-participating providers. Through the Federal IDR process, the parties reach an agreement with respect to an out-of-network (OON) rate by submitting offers to a certified IDR entity, and the certified IDR entity selects one of the offers as the final payment amount.

The enrollee/patient is only required to pay cost-sharing, which must be the same as the in-network cost-share under the plan or coverage. Also, for cost-sharing that is not a fixed amount, plans and issuers are required to calculate the cost-sharing based on the lesser of the billed charge or the Qualifying Payment Amount (QPA), which is the median in-network rate that was in place in 2019, increased for inflation.

The Departments of Health and Human Services, Labor, and the Treasury (collectively, the Departments) released an interim final rule (IFR) with respect to the Federal IDR process on September 30, 2021. The Texas Medical Association challenged the provisions of the IFR relating to the consideration of the QPA by the certified IDR entity.

The *No Surprises Act* requires the certified IDR entity to select an OON rate for the item or service from one of the offers submitted by either the plan/issuer or the OON provider, and the IFR directed the IDR entity to "select the offer closest to the QPA unless the certified IDR entity determines that credible information submitted [by either party] clearly demonstrates that the QPA is materially different from the OON" rate. The IFR defined "material difference" as "a substantial likelihood that a reasonable person with the training and qualifications of a certified IDR entity making a payment determination would consider the submitted information significant in determining the OON rate and would view the information as showing that the QPA is not the appropriate OON rate."

The Texas Medical Association argued that the IFR created a presumption in favor of the QPA in violation of the *No Surprises Act* and the *Administrative Procedure Act* (APA). On February 23, 2022, a judge in the eastern district of Texas upheld the challenge from the Texas Medical Association and found that the IFR conflicts with the unambiguous text of the statute in violation of the APA.

Under the APA, a court must "hold unlawful and set aside" any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Here, the court held the text of the *No Surprises Act* was unambiguous, and the IFR directly contradicted the statute. Under the text of the *No Surprises Act*, the certified IDR entity "shall consider" the QPA and additional information described in the statute. This additional information includes level of training, experience, and outcome measurements, market share held by the OON provider of facility, acuity of the patient, and demonstrations of good faith efforts made by OON providers to enter into network agreements.

The court explained "because the word 'shall' usually connotes a requirement, the Act plainly requires arbitrators to consider all specified information in determining which offer to select." Additionally, the court found that nothing in the *No Surprises Act* instructs the certified IDR entity to weigh any one factor or circumstance more heavily than others. The court concluded that the IFR "places its thumb on the scale for the QPA…imposing a heightened burden on the remaining statutory factors to overcome that presumption."

Thus, the court held that, because the statute explicitly directs the certified IDR entity to consider the QPA *and* additional factors, the IFR violated the *No Surprises Act* in contravention of the APA. As a result, the judge vacated the portion of the IFR creating the presumption in favor of the QPA and remanded the regulations to the Departments for further review.

Importantly, the Departments filed a Notice of Appeal on April 22, 2022, but recently asked the court to stay the appeal, pending the Departments' release of the surprise billing final rule later this summer. The court granted the request to pause proceedings while the government issues a final rule.

In the midst of the ongoing litigation over the IFR, the Departments opened the online Federal IDR portal so providers or plans or issuers can now initiate the Federal IDR process.

Reminder: Transparency in Coverage Machine Readable File Posting

As a reminder, the Transparency in Coverage (TiC) Final Rule mandates the posting of two machine-readable files (MRF) on a public website by group health plans and health insurance issuers. FAQs released by the Departments of Health and Human Services, Labor and the Treasury (collectively, the Departments) note that, on July 1, 2022, the Departments intend to begin enforcing the requirement that plans and issuers publicly disclose information related to in-network rates and out-of-network allowed amounts and billed charges for plan years beginning on or after January 1, 2022.

For 2022 plan years and policy years beginning *subsequent* to July 1, 2022, plans and issuers should post the MRFs in the month in which the plan year begins, consistent with the applicability provision of the TiC Final Rules. The TiC Rule defines an MRF as a digital representation of data or information in a file that can be imported or read by a computer system for further processing without human intervention, while ensuring no semantic meaning is lost.

The "In-Network Rate MRF" will show negotiated rates, underlying fee schedules or derived amounts for all covered items and services between the plan or issuer and in-network providers. The "OON Allowed Amount MRF" will show historical payments to and billed charges from OON providers. The OON Allowed Amount file must contain the unique OON allowed amount and the billed charges during the 90-day time period beginning 180 days prior to the publication date of the MRF.

The TiC Rule also mandated the provision of a Prescription Drug MRF, which would have required the public posting of the in-network negotiated rates and historical net prices for all covered prescription drugs by a plan or issuer. However, Section 204 of the *Consolidated Appropriations Act, 2021* (CAA) also directs plans and issuers to report prescription drug pricing information and other costs. The Departments later described the CAA as significantly changing "the regulatory landscape since the TiC Rule was adopted."

Additionally, stakeholders expressed concern to the Departments over potentially duplicative and overlapping reporting requirements between the CAA and the TiC Rule. Therefore, the Departments announced that it will defer enforcement with respect to publishing the MRF related to prescription drug while it considers, through notice and comment rulemaking, whether the requirement remains appropriate following the enactment of the CAA.

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