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INSIGHT

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Pension Plans Legislative Update

On December 29, 2022, President Biden signed into law the *Consolidated Appropriations Act, 2023* (CAA, 2023) to fund the government through September 30, 2023. The Act contains the *SECURE 2.0 Act of 2022* (SECURE 2.0)[1], which builds on the original *Setting Every Community Up for Retirement Enhancement Act of 2019* (SECURE 1.0). SECURE 2.0 includes numerous provisions which significantly affect retirement plans, potentially to a larger degree than that seen with SECURE 1.0, including provisions applicable only to governmental retirement plans.

The most significant changes applicable to governmental plans relate to plan distribution rules, including required minimum distributions (RMDs), early distributions (described later) and distributions on account of a disaster. Specifically, SECURE 2.0:

- Makes additional changes to the required minimum distribution rules for the age to determine a member's required beginning date: i) from age 72 to age 73 for members turning age 72 after December 31, 2022 and age 73 before January 1, 2033; and ii) from age 73 to age 75 for members turning age 74 after December 31, 2032.

- Reduces the applicable excise tax for a failure to timely take a required minimum distribution in and after 2023 from 50% of the shortfall to 25%, with a further reduction to 10% if the individual corrects during a two-year correction window.

- Allows a surviving spouse to irrevocably elect to be treated as the deceased employee for required minimum distribution purposes, beginning in 2024, with the applicable distribution period after the member's death determined under the uniform life table.

- Allows permanent disaster relief for distributions and loans to individuals impacted by federally declared disasters occurring on or after January 26, 2021, without waiting for Congressional relief to be issued on a disaster-by-disaster basis.

[1] *See Division T.*

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SECURE 2.0 also contains additional relief applicable solely to governmental plans. Specifically, the provisions provide:

- Additional guidance and relief related to the early withdrawal tax under Code Section 72(t) for qualified public safety employees, applicable for distributions after enactment of SECURE 2.0, which includes:
  - The exception to the early withdrawal tax for qualified public safety employees that have separated from service is expanded to include those members that have either attained age 50 or completed 25 years of service, whichever comes first.
  - The definition of qualified public safety employees to determine eligibility for this special exception to the tax under Code Section 72(t) is expanded to include certain corrections officers and forensic security employees.
- Effective for 2023, 457(b) plan members may change their deferral elections at any time prior to the compensation being available (removing the "first day of the month" rule).
- Distributions made after enactment of SECURE 2.0 for health and long-term care insurance that are excludible from income may now be made either directly to the insurer or the member (if the member includes a self-certification with their tax return that the distribution does not exceed the premiums paid for the year of the distribution).
- For plan years beginning after December 31, 2026, service-connected disability pension payments to first responders will be excluded from income after retirement age (up to a set amount).

While some of these changes have delayed effective dates, others took effect immediately. For those provisions which have a later effective date, consideration should still be given to whether any adopted changes will affect system programming or member decisions that will require action prior to the provision's effective date.

Establishment of 403(b) Plan Determination Letter Program

In November 2022, the Internal Revenue Service (IRS) issued Revenue Procedure 2022-40[2] to create a limited determination letter program for 403(b) plans, which provides a new opportunity for review of these plans. Under this program, plan sponsors can request an IRS determination letter for their "individually designed" 403(b) plans on initial plan qualification, plan termination, or in other limited circumstances to be established by the IRS.

While the 2009 final 403(b) regulations imposed a written plan document requirement for 403(b) plans, and the IRS began approving plan documents for "pre-approved" 403(b) plans in 2013, there was no similar program available for individually designed 403(b) plan documents. The prior option of requesting a private letter ruling was discontinued. Receipt of a favorable letter confirms the IRS' approval of the plan document's terms, which provides compliance support in the event of any inquiry relating to prior plan documents in the context of an audit.

Opportunities to apply for a determination letter in circumstances other than on initial plan qualification or plan termination will need to be established in future IRS guidance. In particular, the 403(b) plan determination letter program is currently not available for plan mergers in connection with corporate transactions, as with the tax-qualified plan program.

[2] *In addition to creating a determination letter program for 403(b) plans, Revenue Procedure 2022-40 conforms the tax-qualified plan remedial amendment periods for disqualifying provisions in new plans to align with those periods outlined in Revenue Procedure 2019-39 for new 403(b) plans.*

The Revenue Procedure also provides some helpful guidance with a broader impact. For both the 403(b) and qualified plan determination letter programs, it clarifies when a plan is eligible to apply for "initial" plan qualification by including examples of when a plan is (or is not) considered to have previously filed for a determination letter on Form 5300. For instance, a determination letter issued pursuant to a Form 5307 filing for a pre-approved plan no longer precludes a subsequent Form 5300 filing.

Although the 403(b) plan determination letter program generally opens on June 1, 2023, there is a staggered schedule over the next three years for plans applying for an initial determination letter, depending on the plan sponsor's Employer Identification Number (EIN) as follows:

Staggered Schedule for the Initial Plan Determination Letter Application

If the EIN of the Plan Sponsor ends in:	A determination letter application may be submitted beginning on:
1, 2, or 3	June 1, 2023
4, 5, 6, or 7	June 1, 2024
8, 9, or 0	June 1, 2025

Under both the 403(b) and qualified plan programs, applications for a determination letter upon plan termination must be filed by the later of: 1) one year from the effective date of the termination; or 2) one year from the date on which the action terminating the plan is taken, but in no event later than 12 months from the date of distribution of substantially all plan assets in connection with such termination.

The scope of the IRS's review for ongoing 403(b) plans will generally include the requirements provided on all Required Amendments Lists issued on or before the last day of the second calendar year preceding the year in which the application is submitted. In addition, the review will include any other Section 403(b) requirements that are not included on a Required Amendments List, but which were in effect on or before the last day of the second calendar year preceding the year in which the application is submitted.

The review for terminating plans is broader, encompassing all amendments required to be adopted to reflect Section 403(b) requirements that apply at the time of termination, regardless of whether they are included on a Required Amendments List.

Notably, defined benefit church 403(b)(9) retirement income accounts established prior to the *Tax Equity and Fiscal Responsibility Act of 1982* (TEFRA) and grandfathered 403(b) defined benefit plans[3] will not be eligible to be submitted for a determination letter.

Social Security Fairness Act Update

The House version of the *Social Security Fairness Act* (SSFA, H.R. 82), originally introduced in January 2021 by Reps. Rodney Davis (R-IL) and Abigail Spanberger (D-VA), has seen new life recently with the issuance of a report by the House Ways and Means Committee. (A similar bill in the Senate, introduced by Senator Sherrod Brown (D-OH), has not seen any further action since its introduction in April 2021.)

The SSFA seeks to eliminate both the Windfall Elimination Provision (WEP) and the Government Pension Offset (GPO), in contrast to some prior bills addressing the WEP and GPO that sought to reform the two provisions.

[3] *IRS Revenue Ruling 82-102.*

As detailed in the October 2019 issue of *GRS Insight*, the WEP and GPO could have a significant impact on the Social Security benefits received by public sector employees who work in positions not covered by Social Security. In short, the WEP reduces Social Security benefits for employees who also receive a pension or disability benefit from an employer for services in a noncovered position (i.e., for which Social Security taxes were not withheld), while the GPO reduces Social Security benefits for spouses, widows and widowers that also receive their own government pensions.

As noted in the July 2021 issue of *GRS Insight*, a version of the SSFA has been introduced in each Congress dating back to 2001. The current House version has over 300 cosponsors, an increase over other similar proposed bills, but not necessarily indicative of its potential for enactment. While the House Ways and Means Committee provided the report on the bill, it did not include a recommendation. Therefore, it remains to be seen whether the full House will take any action on the bill.

Health Legislative Update

CAA, 2023 Health Provisions

On December 29, 2022, President Biden signed into law the bipartisan *Consolidated Appropriations Act, 2023* (CAA, 2023). In addition to funding the government for the remainder of fiscal year 2023, the Act includes a significant change for telehealth and health savings accounts (HSAs).

The CAA, 2023 extended the HSA telehealth safe harbor that was scheduled to expire on December 31, 2022. The telehealth safe harbor provides that a High Deductible Health Plan (HDHP) can temporarily cover telehealth and "other remote care services" pre-deductible, and an individual can have stand-alone coverage for telehealth and other remote care services pre-deductible without impacting an individual's ability to contribute to an HSA. The Act extends the safe harbor for plan years beginning after December 31, 2022 and before January 1, 2025.

The extension of the telehealth safe harbor appears to create a gap for non-calendar year plans (i.e., plans that begin in 2022 and end in 2023) because neither the prior safe harbor nor the extended safe harbor will apply to the months of the 2022 plan year that fall in 2023.

Plans that would like to extend telehealth coverage under this extended safe harbor should review plan language and determine whether any amendments are needed for a January 1, 2023 effective date.

The CAA, 2023 also eliminates the option for self-funded non-federal governmental plans to "opt-out" of the Mental Health Parity and Addiction Equity Act (MHPAEA). The opt-out will not be eliminated mid-year 2023. If the plan is provided pursuant to a collective bargaining agreement, the plan may extend the opt-out election until the date on which the term of the last applicable collective bargaining agreement expires. If the plan is not provided pursuant to a collective bargaining agreement, the opt-out may not be renewed.

Extension and Good Faith Relief for Prescription Drug Reporting

Under the *Consolidated Appropriations Act, 2021* (CAA, 2021), group health plans and health insurance issuers are required to report certain information related to prescription drug and other health care expenditures. This information includes, among other things:

- General information regarding the plan or coverage;

- 50 most frequently dispensed brand prescription drugs, the 50 most costly prescription drugs by total annual spending, and the 50 prescription drugs with the greatest increase in plan expenditures over the preceding plan year;

- Total spending by the plan or coverage broken down by the type of costs;

- Average monthly premiums paid by participants, beneficiaries, enrollees, and paid by employers; and

- Impact on premiums of rebates, fees and any other remuneration paid by drug manufacturers to the plan or coverage or its administrators or service providers, including the amount paid with respect to each therapeutic class of drugs and for each of the 25 drugs that yielded the highest amount of rebates and other remuneration under the plan or coverage from drug manufacturers during the plan year.

The November 2021 interim final rules indicated that the Departments of Health and Human Services, Labor, and the Treasury (collectively, the Departments) would not initiate enforcement action against a plan or issuer that does not report the required information by the first statutory deadline for reporting (i.e., December 27, 2021) or the second statutory deadline for reporting (i.e., June 1, 2022), and that instead submits the required information for the 2020 and 2021 referenced years by December 27, 2022.

On December 23, 2022, the Departments issued a Frequently Asked Question (FAQ)[4] recognizing the significant operational challenges that plans and issuers may have encountered in complying with these reporting requirements. It includes arranging and coordinating submission of a plan's or issuer's data across multiple reporting entities, and accurately classifying, compiling, and validating the required data. The Departments noted that stakeholders have expressed concern that, "given the novelty and complexity of the requirements, there may be errors or other issues with the first round of data submissions, despite good faith efforts by plans and issuers."

In response to these concerns, for the 2020 and 2021 submissions that were due by December 27, 2022, the Departments will not take enforcement action with respect to any plan or issuer that uses a good faith, reasonable interpretation of the regulations and the Prescription Drug Data Collection (RxDC) Reporting Instructions in making a submission. The Departments also provided a submission grace period through January 31, 2023, and will not consider a plan or issuer to be out of compliance with the requirements provided that a good faith submission of 2020 and 2021 data is made on or before January 31, 2023.

The FAQ notes some clarifications and flexibilities for the 2020 and 2021 reporting, including issues related to multiple submissions by the same reporting entity, submissions by multiple reporting entities, aggregation restriction suspended, premium and life-years data by email for certain group health plans, optional reporting on vaccines, and optional reporting of amounts not applied to the deductible or out-of-pocket maximum.

The Departments will continue to monitor stakeholder efforts to comply to determine whether additional guidance is needed in advance of future reporting deadlines.

[4] *Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 56, Q1*
AFFORDABLE CARE ACT AND CONSOLIDATED APPROPRIATIONS ACT, 2021 IMPLEMENTATION PART 56 | U.S. Department of Labor (dol.gov).

Final Regulations on the Premium Tax Credit "Family Glitch"

On October 11, 2022, the Internal Revenue Service (IRS) issued final regulations (the 2022 Regulations) to fix the "Family Glitch" that impacted an employee's family members' eligibility for the premium tax credit (PTC). Under the 2022 Regulations, the affordability of employer-sponsored coverage for family members for PTC purposes is determined based on the cost of family coverage, rather than self-only coverage. These regulations are effective beginning with the 2023 tax year.

Background

Under Internal Revenue Code (Code) Section 36B, individuals are ineligible for a PTC if they receive an offer of affordable employer-sponsored coverage (one in which the employee's share of the cost of coverage is less than 9.5% of household income (indexed)). Code Section 36B cross-references part of the individual mandate provisions in Code Section 5000A, stating that an employee's cost of coverage is determined by the cost of self-only coverage. Based on this cross-reference, final regulations from 2012 (the 2012 Regulations) stated that the affordability of coverage for both employees and their family members was determined based on the cost of self-only coverage.

In January 2021, President Biden issued Executive Order 14009, which directed the Secretary of the Treasury to reconsider previous regulations that limit access to affordable coverage. On April 5, 2022, the IRS issued proposed regulations to fix the "Family Glitch." The preamble to the 2022 Regulations states that the IRS received 3,888 comments, "the overwhelming majority of which were in support" of revising the rule.

Impact of the 2022 Regulations on Employers

The 2022 Regulations do not affect the employer mandate penalty because affordability for the employer mandate is based on the cost of self-only coverage, and the employer mandate is only triggered when an employee, not a family member, receives a PTC. Therefore, if a family member receives a PTC, the employer will not be penalized for the failure to offer affordable coverage.

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