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FALL 2023

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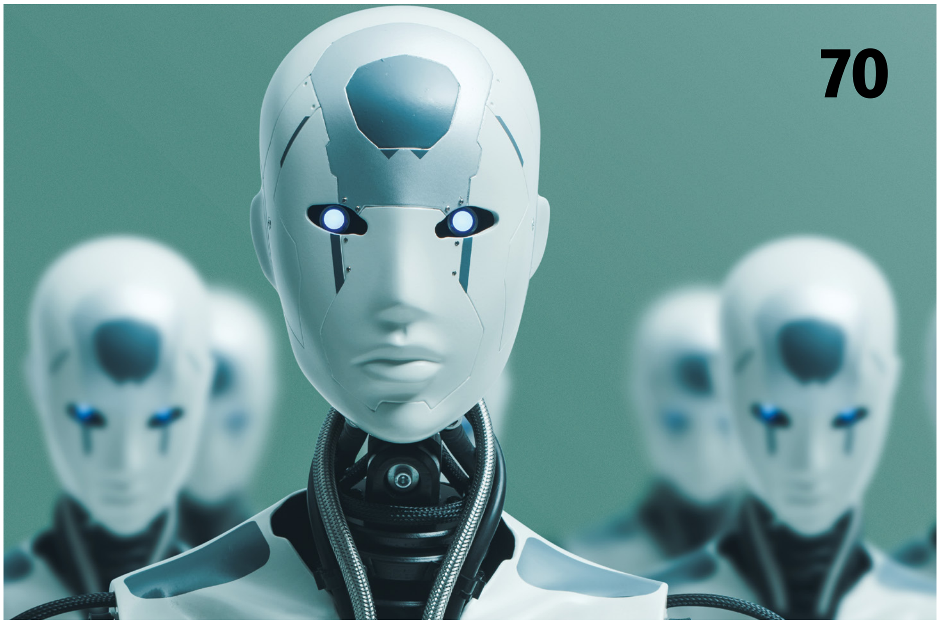

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FINALLY, ROTH WITH A SIDE OF CATCH-UP!

A significant technical oversight was addressed, which could have seen the abrupt end of all catch-up contributions by 2024. **By Joey Santos-Jones**

As we round off another *Plan Consultant* issue in 2023, change remains a constant in the regulatory sphere. Fresh from the IRS in August, we've received that pivotal guidance on Section 603 of the SECURE 2.0 Act. Roth catch-up has been at the heart of numerous debates in the retirement planning sector. Mostly, "what do we do?"

On Aug. 25, the IRS offered clear directives on Roth catch-up contributions. To the collective sigh of relief from many in our community, there's a two-year delay on the rule that would have mandated Roth catch-up contributions for those with incomes above $145,000. Initially, this change was slated for Jan. 1, 2024. Thanks to an "administrative transition period," this benchmark is pushed to the close of 2025, allowing catch-up contributions to stay pre-tax, no matter the income bracket.

A significant technical oversight was addressed, which could have seen the abrupt end of all catch-up contributions by 2024.

Phew.

American Retirement Association CEO Brian Graff remarked that this two-year buffer is indeed a landmark victory for everyone—from plan sponsors to participants.

Kudos to everyone in our industry who pushed daily for clarity. We finally have that (Roth) catch-up to go with our side of fries.

Additionally, we received clarity on the Roth contribution delineation based on FICA wages. For the self-employed who were in a cloud of uncertainty—worry not. As confirmed by the IRS, those without FICA wages, such as partners or sole proprietors, aren't tethered to the Roth catch-up stipulation. Regulatory transparency, as we've seen, is beneficial for all.

Speaking of transparency and agents, who is ready for Spy Games at ASPPA Annual? As it's my first Annual, I look forward to meeting everyone in ASPPA Nation and hearing directly from you about what you'd like from Plan Consultant in 2024. There's never been a better time to contribute to the magazine. If you've ever wanted to see your byline, let us know!

ASPPA Annual will include our community of countless TPAs, recordkeepers, and retirement sector professionals who credit their audience at Annual as the driving force behind their career and business growth. This year, under the "Agents of Change" banner, our conference is designed to empower and elevate.

Gain unparalleled technical knowledge grounded in real-world business situations and applications. Stay updated with crucial briefings directly from Capitol Hill. Dive deep into relevant issues and challenges that align with your professional goals. Engage in collaborative discussions that foster critical thinking and hands-on problem-solving. Don't miss the free QKC Bootcamp—a golden opportunity to secure a respected credential.

Once again, ARA has curated a program guaranteed to stimulate thought and propel your practice forward. The industry's top experts will be on hand, offering fresh insights and crucial viewpoints on plan development, administration, recent legislative changes, cash balance plans, and beyond.

Don't let this opportunity slip by—it's not to be missed! Lock in your hotel, plan your agenda and make sure you connect with other spies.

Well, ASPPA secret agents, see you at the 2023 ASPPA Annual.

Joey Santos-Jones
Editor

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Celebrating the value of TPAs

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For over 25 years, TPAs and John Hancock have teamed up to make 401(k) plans work. And, as always, we're proud to recognize the accomplishments of America's TPAs.

Thank you for your partnership.

WE'LL MISS YOU, TOM.

It is with deep sorrow that I write this month's column to honor and remember a true icon of the retirement and actuarial community—Tom Finnegan. By Justin Bonestroo

Tom's untimely passing on Aug. 17 leaves a lasting void in both our hearts and our industry.

Tom's commitment to excellence propelled him to the upper echelons of our field, serving as President of the Actuarial Services Division and senior leader in the ERISA Compliance practice with CBIZ. He was the linchpin in fostering relationships with regulators, congressional staff, and various industry committees. His presence always ensured that his team adhered to the highest standards while navigating the complex regulatory landscape.

Tom was a past president of the American Retirement Association (ARA), the American Society of Pension Professionals and Actuaries (ASPPA), and the ASPPA College of Pension Actuaries (ACOPA, now ASEA). His significant awards included the Edward E. Burrows Distinguished Achievement Award, ASPPA's Educator's Award, and most recently, the Harry T. Eidson Founders Award. He dedicated his career to furthering the actuarial science and pension industry, often becoming the face and voice of our community in discussions with the IRS, Pension Benefit Guaranty Corporation, and various federal departments.

In the last few weeks, I had many discussions remembering Tom and wanted to share a couple of those conversations.

Bill Karbon: Many people know Tom for his pension brilliance as well as his wit and sense of humor. However, I think Tom would most want to be known for his kindness and compassion. As Tom's health declined over the past two or three years, I would talk to him about scaling back on his work responsibilities. His response would always be that he wanted to continue to lead as he had a responsibility to his clients and those that he led and that he truly cared about those that he led. Although I would always tap into Tom's vast pension knowledge, I will never forget the love and concern that he had for others.

Robert Richter: It's difficult to reflect on Tom without smiling and crying. One of my more memorable times with Tom was when we were at a conference near Universal theme park in Orlando. Tom always tried to attend sessions while at a conference, except, of course, those early morning ones. But here we were next to Universal. They have roller coasters. It was a no-brainer on where we needed to be (it wasn't so easy convincing Shannon Edwards to skip sessions, but she ended up making the right decision). The lines at the park were unbelievably short and Tom and I must have ridden the Hulk coaster at least 20 times. Each time we worked on mastering our pose for the camera on the ride, and regrettably, we didn't purchase any of the pictures. After we had enough, I wanted to go check out the relatively new Harry Potter World. Tom refused to go—not because he didn't want to see it; rather, because his wife, Renee, wasn't there. And that was classic Tom. He loved to have fun. And there were times where that fun could only be had when he was with the love of his life. Tom is sorely missed.

Tom is survived by his wife, Renee; son, Tommy; and stepdaughter, Samantha, all of whom are in our thoughts and prayers during this trying period.

As we mourn, I urge each of us to raise a Diet Pepsi or Miller Lite in Tom's honor and let us take this moment to remember a man whose professional accomplishments were only surpassed by his kindness, love for his family, and indomitable spirit.

We miss you, Tom. May you rest in peace. PC

Justin Bonestroo, MSPA, EA, CPC, CPFA, is a Senior Vice President at CBIZ Retirement Plan Services. He serves as ASPPA's 2023 President.

GET READY FOR A NEW POWERFUL DIGITAL EXPERIENCE ON ARA WEBSITES

Over the past year, we've been diligently working on overhauling each ARA sister organization's website. The goal is to give you better control over the content you need and more personalization to your experience. **By Brian H. Graff**

The revamping of ARA websites isn't just a fresh coat of digital paint but a complete transformation of how we present you with need-to-know content and more tailored solutions to your personalized needs. The website overhaul aims to give you a comprehensive platform that learns what content interests you over time and helps us develop more resources around those specific needs. It effectively takes the guesswork out of creating content.

This development starts with utilizing a Digital Experience Platform, or DXP for short. Part of what makes DXP so powerful is how it allows us to present you with more focused content consistently. Our editorial team works incredibly hard to produce outstanding content on revolving door of legislative issues across all sister organizations. But we understand that not all of that content will resonate with you. With our new DXP, we'll be able to see in real-time what kind of content our members are consuming and generate more of it on demand. This website algorithm goes beyond just simple analytics and alerts us to gaps in information and where we should focus our editorial resources. Now that's efficiency!

We aim to have a content strategy informed by your needs and provide more targeted content to keep you most engaged. For ASPPA members, especially regarding the Roth catch-up provision, imagine getting notified in real-time as IRS guidance came through. If we have follow-ups, you get them immediately instead of waiting for a newsletter or social media post share.

Our new DXP will streamline the interaction between ARA and its members through this new omnichannel approach. This information will appear through your new intuitive dashboard supporting your ARA (or particular sister organization) membership when you log in.

In the age of personalization, it's not enough to visit a website that may have the content you want—you expect a website (or organization) to deliver that content immediately without delay and obstacles in a manner that is convenient and tailored around you. We can do this at scale with our DXP.

In this issue of *Plan Consultant*, you'll read a lot about AI (Artificial Intelligence). Our DXP uniquely partners with AI to understand your needs and create customized journeys through recommended content suggestions. AI not only automates the analysis of your content needs but will continue to evolve your personalized experience as you consume more. We want to make your learning experience more efficient (and fun) and we're excited to be nearly there with a finished product.

We arrived at using a DXP by understanding how many touchpoints our members have with ARA and how genuinely diverse each member's preferences were. We needed personalization at scale.

In the upcoming months, we'll have continued updates on the progress of our new website and how you'll be able to elevate your ARA experience. Our goal with the DXP launch is to have it ready for prime time by Summer of 2024. Once launched, we know our members will see the benefits immediately and we're truly excited to improve your user experience online.

Speaking of progress, we're calling all agents of change! Your mission, which you should accept, is to attend this year's ASPPA Annual. What an event we have lined up at the Gaylord National Resort & Convention Center. Thousands of TPAs, recordkeepers, and retirement industry operatives will take advantage of the unprecedented resources available. Our planned agenda will have you engaged and get your practice moving. Not only will you gain valuable perspectives on plan development and administration, but you'll also hear from our government affairs team directly on the latest legislative developments and how they will affect your practice (and cash balance plans).

Be sure to join me Tuesday, Oct. 24, for the Government Update. Well, agents of change, I'll see you on Oct. 22 for ASPPA Annual! **PC**

Brian H. Graff, Esq., APM, is the Executive Director of ASPPA and the CEO of the American Retirement Association.

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PARTICIPATION, COVERAGE, AND NONDISCRIMINATION RELIEF FOR CLOSED DB PLANS

Rules set forth in the SECURE Act make it easier for closed defined benefit plans to satisfy testing under Code Sections 401(a)(26), 410(b), and 401(a)(4). The rules appear to contain a loophole that small plan sponsors could potentially exploit. **By David J. Kupstas**

Instead of hard freezing a defined benefit (DB) plan, sometimes an employer will want simply to close it to new entrants. Employees already in the plan, who may be in the latter stages of their careers and relying on the future DB benefits, will continue accruing benefits as they had before. Those who had not yet entered the plan will not be eligible for DB benefits but instead may—or may not—receive enhanced benefits under a defined contribution (DC) plan.

As time goes on, a closed DB plan can present problems for an employer:

- Under Code Section 401(a)(26), the lesser of 50 employees or 40% of the employees must benefit. This rule may have been met at the time the plan closed, but as employees terminate gradually over the years, the number of employees benefiting may fall below these thresholds.
- As pay rises over time for those remaining in the plan, and because of the tendency for non-highly compensated employees (NHCEs) to have higher turnover rates than highly compensated employees (HCEs), the proportion of the participants who are HCEs goes up. This makes it increasingly difficult to pass the coverage (Code Section 410(b)) and nondiscrimination (Code Section 401(a)(4)) rules.

To assist employers with satisfying these rules, the original SECURE Act (not SECURE 2.0) added subparagraph 401(a)(26)(I) and subsection 401(o). These new laws codified and improved certain rules that had been laid out in proposed regulations and IRS notices beginning several years earlier. We describe these new rules below.

Note: Closing a DB plan to new entrants is sometimes referred to as a "soft freeze." In this article, we will use the term "close" exclusively so as to avoid confusion with other types of soft freezes that do not involve closing the plan to new entrants.

SECTION 401(A)(26) RELIEF

Subparagraph 401(a)(26)(I) is called "Protected Participants." It says a plan shall satisfy Section 401(a)(26) if (1) the plan is amended to be frozen or closed, (2) the plan satisfied Section 401(a)(26) on the effective date of the amendment, and (3) the amendment was adopted before April 5, 2017, or the plan was in effect for at least five years before the close and there was no substantial increase in coverage or benefits in the five years preceding the amendment.

Suppose a plan was closed in 2014. At the time, there were 60 active participants representing less than 40% of the employee population. This satisfied Section 401(a)(26), since 60 is greater than 50. By 2023, the active participant count was down to 48. Under the old rules, the employer would have to have added more participants or freeze the plan outright. Under these new rules, the plan may continue on in its closed state, since it met 401(a)(26) when initially closed.

SECTION 410(B) AND 401(A)(4) RELIEF

New Section 401(o) is called "Special Rules for Applying Nondiscrimination Rules to Protect Older, Longer Service and Grandfathered Participants." The rules here are structured similarly to the Section 401(a)(26) closed plan rules, albeit with significantly more nuances and numerous cross-references. There are rules for:

- testing closed DB plans alone;
- aggregate testing with DC plans on a benefits basis; and
- testing of DC plans alone on a benefits basis.

Testing closed DB plans alone. A closed DB plan tested by itself shall satisfy 401(a)(4) if:

1. The plan's benefits, rights, and features (BRF) satisfied 401(a)(4) at the time of the close and for two plan years thereafter.
2. Any amendment after the close to the closed population or the BRF does not discriminate significantly in favor of HCEs.
3. The plan was closed before April 5, 2017 or (a) the plan had been in effect for at least five years before it was closed, and (b) during the five years preceding the close there had been no substantial increase in coverage or value of BRF. "Substantial" means a 50% increase in coverage or substantially greater value of BRF as a

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whole for the closed group resulting from one or more amendments.

Aggregate testing with DC plans on a benefits basis. A closed DB plan may be tested for Section 410(b) and Section 401(a)(4) compliance on a benefits basis with one or more DC plans, including the portion of DC plans which (1) provide matching contributions, (2) provide 403(b) annuity contracts purchased with matching or nonelective contributions, or (3) are employee stock ownership plans (ESOPs), including tax credit ESOPs—all of which historically had to be tested separately.

We say these plans may be tested on a benefits basis. What's the big deal about that? Plans may always be tested on a benefits basis. The difference here is that a gateway contribution is not required in order to be able to do so. For a DB/DC combo, the gateway contribution can be as high as 7.50% of pay.

The conditions for testing the aggregate plans in this manner are generally the same as those for a closed DB satisfying Section 401(a)(4) by itself, except:

1. At the time of the DB close and for the next two plan years, the DB must satisfy 410(b) in addition to 401(a)(4).
2. For the "no substantial increase" rule, coverage and average benefits cannot be more than 50% greater at the time of the close than they were when the five years started. The average benefits comparison is the target normal cost under Section 430(b) as of the close date vs. what the target normal cost would be under the benefit formula that was in effect at the beginning of the five-year period. Since the comparison is done between current benefits and those in effect five years earlier, apparently any increases or decreases happening in the interim are not taken into account.

If a DB plan is aggregated with a portion of DC plan providing matching contributions, the DB plan also must be aggregated with the portion of DC plan providing elective deferrals. In addition, the matching contributions are treated the same as nonelective contributions for imputing permitted disparity, which is a change.

The ability to test matches, 403(b)s, and ESOPs pertains to closed DBs to which Section 401(o) applies, not for all combo plans in general.

Two or more plans may be aggregated and treated as a single plan if they have different plan years.

Testing DC plans alone on a benefits basis. There are four requirements for being able to do this:

1. The DC plan provides make-whole contributions to a closed class of participants whose DB benefits have been reduced or eliminated. The "make-whole contribution" is a nonelective contribution reasonably calculated to replace benefits lost due to a DB plan close. Matching contributions may be used as well.
2. The closed class of DC participants satisfied Section 410(b) in the year of the close and for two plan years thereafter.
3. Any amendment which modifies the closed class or the allocations or BRF to the class does not discriminate significantly in favor of HCEs.
4. The class was closed before April 5, 2017, or the DB plan was in effect for at least five years before the close and did not have a substantial increase in the coverage or benefits in the five years preceding the close.

Similar rules apply regarding matching contributions, 403(b)s, and ESOPs as those applying to aggregate DB/DC testing.

MERGERS, ACQUISITIONS, AND SPINOFFS

Employees who became participants as a result of a merger or acquisition (1) within seven years preceding the DB close date or who (2) became participants by reason of a merger with a different plan which had been in effect for at least five years as of the date of the merger are not counted when determining whether there has been a substantial increase in coverage.

Section 410(b)(6)(C) provides a transition period when there has been a disposition or acquisition. Closing a DB is not considered a significant change in coverage for 410(b)(6)(c) purposes.

Changes in employee population after the close date are disregarded if attributable to mergers, acquisitions, divestitures, or similar events.

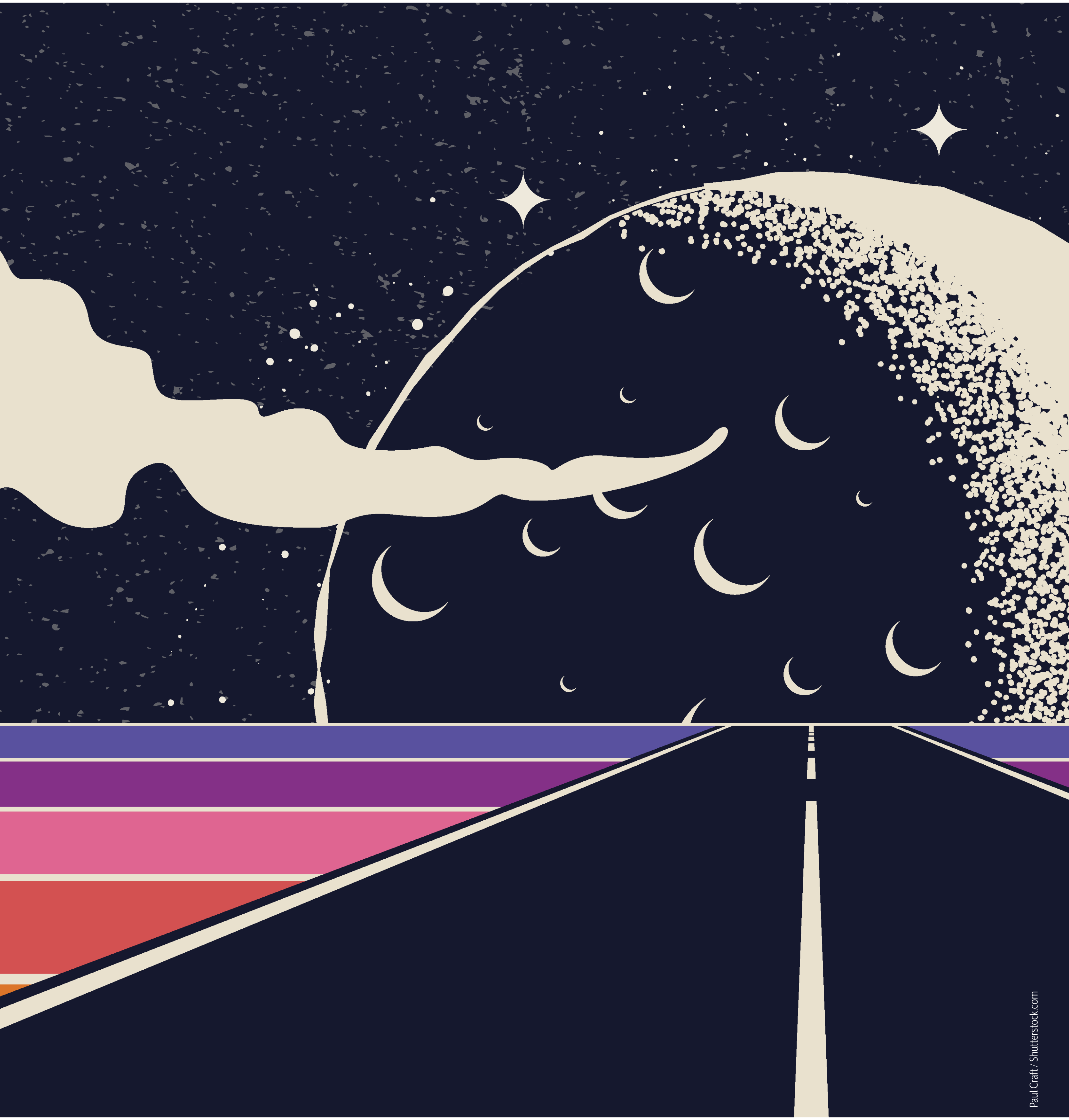
Plans that are spun off from the closed DB or DC plan continue to get relief if the original plan was still within the two plan years following the year of the close.

CONTROVERSY (?) AND CONCLUSION

The various forms of closed plan relief are available to plans closed before April 5, 2017 OR, if not closed by then, plans in effect for at least five years with no increases during the preceding five years.

The five-year requirement has raised questions among practitioners. Does this language mean a small employer looking to minimize benefits for employees just needs to start a new DB plan, operate it for five years with no changes to benefits, then close the plan and never allow anyone else in again while still giving maximum benefits to owners? All employee benefits would be provided in the DC plan—with the ability to include deferrals and matches in testing to boot. This sounds too good to be true. It is not likely that the lawmakers intended for that result, but it is generally agreed that the law is worded to allow it. Guidance from the regulatory authorities would be gratefully accepted.

Regardless of how that matter and many other outstanding questions are resolved, the new rules found in the SECURE Act provide welcome relief for sponsors of closed plans who otherwise would have struggled with Sections 401(a)(4), 401(a)(26), and 410(b). PC



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LET'S TAKE A ROAD TRIP DOWN STATE PLAN DEVELOPMENTS

State activity to provide a safety net of coverage for those whose private-sector employers do not has been percolating all over the map this year. It's a crazy quilt of budding plans being proposed, fledgling plans just being born, and established plans being fine-tuned. **By John Iekel**

Here's a look at what's been going on since New Year's Day.

UNDER CONSTRUCTION

More states could join the state programs club—their legislatures are considering bills that would create state-run retirement programs that would provide coverage to private-sector employees whose employers do not. *(See table 1 below)*

One state was unique, however—its legislature said no. House Bill 204, a measure that would have created the Mississippi Secure Choice Savings Program, an automatic enrollment payroll deduction IRA, was introduced in the Mississippi House of Representatives on Jan. 4. The bill was referred to the House Appropriations Committee; it died in committee on Jan. 31.

TABLE 1

State	Bill Number	Introduced on	What it Would Do	Status as of July
Missouri	HB 155	Jan. 4	Would establish the Show-Me MyRetirement Savings Administrative Fund, a multiple-employer retirement saving plan that would be treated as a single plan under ERISA and the Internal Revenue Code.	The House passed it on April 17; the Senate Fiscal Oversight Committee reported it to the Senate on May 10.
North Carolina	H 496	March 28	Would establish North Carolina Work and Save, which would be payroll deduction IRA program	The bill was referred to the Committee on Pensions and Retirement on April 19.
Pennsylvania	HB 577	March 20	Would establish Keystone Saves, which would be an automatic enrollment payroll deduction IRA program	The House of Representatives passed the bill May 26; it was referred to the Senate Finance Committee on June 2.
Rhode Island	H 5417	Feb. 8	Establish the Rhode Island Secure Choice Savings Program	The House Corporations Committee recommended that the bill be held for further study.
Tennessee	HB 0013, SB 0013	HB 0013, Jan. 10; SB 0013, Jan. 11	Create the Tennessee Retirement Savings Board to develop a defined contribution plan for Tennessee residents, conduct a market and legal analysis of the plan, and coordinate with other states	HB 0013 was referred to the Public Service Subcommittee of the State Government Committee; SB 0013 passed on first consideration on Jan. 12 and then was referred to the Senate Government Operations Committee

"SOME STATES JUST HAVEN'T BEEN ABLE TO RESIST TINKERING WITH THE PROGRAMS THAT THEY PUT IN PLACE NOT SO LONG AGO."

NEW AND APPROVED

The club of states establishing programs that provide coverage in the absence of employer plans has continued to grow this year. *(See table 2 below)*

TABLE 2

State	Program	Date Law Establishing it Was Enacted	Effective Date
Minnesota	Minnesota Secure Choice	May 19	Sections 1 to 4 and 6 to 13 are effective the day following final enactment. Section 5 is effective the day after the Secure Choice retirement program board of directors opens the Secure Choice retirement savings program for enrollment of covered employees
Nevada	Nevada Employee Savings Trust	June 13	The Board of Trustees of the Nevada Employee Savings Trust is to establish the program so that covered employees are able to make contributions to an IRA through the program beginning on July 1, 2025. It may do so in phases; if it does so, the first phase is not to begin before that date.
Vermont	VTSaves	June 1	July 1

A LITTLE FINE-TUNING

Some states just haven't been able to resist tinkering with the programs that they put in place not so long ago. One measure that would make adjustments is pending in that state's legislature, and one has been signed into law in another. *(See table 3 below)*

TABLE 3

State	Adjustment
Connecticut	HB 6552 would reduce, from 120 days to 60 days, how long an employee must work for their employer in order to be a "covered employee" under the program. It also would make a variety of other changes that would affect employers, reimbursements, and the application of the program. The House passed HB-6552 on May 17; the Senate passed an amended version on June 7. It is still pending.
Nevada	On June 12, Gov. Janet Mills signed SP 451 into law. It amends the Maine Retirement Savings Program by changing provisions affecting employees, employers, and the board that runs the program. Among the changes the measure makes is to add language to the Maine Retirement Savings Act (MRSA) that says that: · a covered employer shall offer the program to its covered employees no later than Dec. 31, 2024; and · a covered employer with fewer than five employees is not required to offer the program to its covered employees, but may do so. It also changes the amount of any penalty imposed on a covered employer for the failure to enroll a covered employee without reasonable cause, as well as the dates by which those penalties are imposed.

ALL TOGETHER NOW

Most states are going it alone in proving retirement programs, but some are not—and Delaware has become the latest to evince interest in cooperating with other states in providing retirement benefits. The Delaware Expanding Access for Retirement and Necessary Savings (EARNS) Program Board on July 13 voted unanimously to evaluate entering into an interstate partnership or multistate consortium to support the launch and future success of EARNS.

NOW IN OPERATION

Some new programs have gone into operation this year.

RetirePath Virginia, the state-run payroll deduction IRA program that provides retirement plan coverage to Virginians whose private-sector employers do not, began operation on July 1 with the start of the first phase of enrollment. The law establishing the program was enacted in 2021.

And the law creating Vermont's program, VTSaves, was enacted in June 1; wasting no time, the law became effective a mere month later, July 1. PC

WHAT SIZE AM I NOW?

Shifting regulatory definitions help plans stay small and sidestep an audit for 2023. **By Travis P Jack**

There have been a significant number of changes and enhancements to the Form 5500 and associated instructions stemming from the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) and SECURE Act 2.0 of 2022.

The U.S. Department of Labor (DOL), IRS and The Pension Benefits Guarantee Corporation (PBGC) (collectively, the Agencies) released a notice of proposed forms revisions encapsulating the intended changes to the Form 5500 derived from SECURE Act provisions. The proposed changes were implemented in three phases.

Phase I and Phase II were implemented and effective for the 2021 and 2022 plan year forms. The changes from the final phase were outlined in the *Federal Registers* released Feb. 23, 2023; they contained a significant number of updates affecting the number and type of plans subject to audit by an independent qualified public accountant (IQPA). These updates are effective for reporting periods beginning on or after Jan. 1, 2023.

One of the primary overarching changes will be the modification of participant-counting methodology for defined contribution (DC) plan types. The definition of who constitutes a plan participant for DC plans will now *exclude individuals eligible* to participate in the plan who do not have balances. In addition, the DOL and IRS have developed a consolidated annual reporting option for certain groups of DC plans, or defined within SECURE as groups of plans (GoPs). These defined contribution group plans (DCG) will file as a single Form 5500 and any individual plans within that would otherwise be subject to an independent audit will be required to complete one in conjunction with the consolidated filing. And there has been further clarification by the DOL that pooled employer plans (PEPs) will maintain the same participant threshold as single employer plans of 100, not the increased threshold of 1,000 as originally suggested within the SECURE Act.

REGULATORY FRAMEWORK

Historical Framework of Employee Benefit Plan Reporting and EBP Audits. The Employee Retirement Income Security Act of 1974 (ERISA) was enacted to help safeguard private pension funds. As part of that legislation, the administrator of an employee benefit plan subject to ERISA must file an annual report with the Secretary of Labor. ERISA Section 103(a)(3) further elaborates that a plan administrator must engage, on behalf of all plan participants, an independent qualified public accountant (IQPA) to conduct an examination of the plan's financial statements to form an opinion on whether the financial statements are presented in accordance with generally accepted accounting principles (GAAP). The DOL has generally waived the audit requirement for qualifying plans that have *fewer than 100 participants at the beginning of the plan year*. The opinion prepared by the IQPA is attached to the filing of the annual report (The full audit report inclusive of auditors' opinion, financial statements and notes must be attached to the 5500 filing).

2023 CHANGES

Participant counting methodology change impacting audit thresholds for Defined Contribution Plans

- The 2023 Form 5500 instructions outline a new method of counting participants for purposes of determining if the plan may specifically be exempt from the IQPA audit requirement. Beginning for reporting periods Jan. 1, 2023, plans are directed to count *only the number of participants/beneficiaries with account balances* as of the beginning of the plan year. This is a change from earlier filing periods, for which plans were instructed to include in participant count all of the employee eligible to participate in a defined contribution plan. The change effectively shifts the criteria applied to the 2023 Form 5500 changing beginning participant counts that will directly affect the audit threshold determinations for these plans by removing participants who were eligible but did not have an account balance from affecting plan participant counts.

Audit Requirements for Group of Plans / Defined Contribution Groups

- The final forms revisions and regulations are generally similar to the September 2021

"ONE OF THE PRIMARY OVERARCHING CHANGES WILL BE THE MODIFICATION OF PARTICIPANT-COUNTING METHODOLOGY FOR DEFINED CONTRIBUTION (DC) PLAN TYPES."

proposal. They include a filing option for new type of direct filing entity called a DCG reporting arrangement and a new Schedule DCG (Individual Plan Information). DCGs will generally be subject to the Form 5500 requirements for large pension plans. Large plans in a DCG arrangement and small plans not meeting the audit waiver conditions will still be subject to a separate plan-level audit by an IQPA as if they were filing separately.

PEP Audit Thresholds

- The SECURE Act did not establish a new audit threshold for PEPs. Rather, Section 101 of the SECURE Act amended ERISA Section 104(a)(2)(A) *to permit the Secretary of Labor to prescribe* by regulation simplified reporting for multiple employer plans (MEP) subject to ERISA Section 210(a) with fewer than 1,000 participants in total, as long as each participating employer has fewer than 100 participants. Note in its proposed revision of annual information return/reports, published in the *Federal Register* on Sept. 15, 2021, the *DOL is not currently proposing to amend the current reporting rules* to establish a "simplified report" thus maintaining the 100-participant threshold applicable to other plan types.

Impact of the Prior Regulatory Framework on the Updates

As a general rule, the DOL establishes conditions under 29 CFR 2520.104-46 for small employee benefit plans (generally those with fewer than 100 participants) to be exempt from the general requirement under Title I of ERISA to be audited annually by an IQPA as part of the plan's annual report (Form 5500).

- An additional exception referred to as the "80-120 participant rule" that allows certain plans that would otherwise be considered large to continue to file as "small plans" following the streamlined Form 5500-SF, Short Form Annual Return/Report of Small Employee Benefit Plan.
- Audit deferral for short plan year: If the plan year is shorter than seven months, the plan administrator may elect to defer the audit to the following year. This does not eliminate the need for an audit; rather, the subsequent year's audit will cover the first two calendar years of the plan.

The existing regulatory framework and exceptions still apply; the Participant count methodology only changes the criteria applied to who counts as a plan participant in a defined contribution plan. It effectively carves out participants who were eligible to participate in the plan without plan balances from impacting the audit threshold.

Future impacts on the EBP audit market: Before the update, plan audits were still required in instances in which there were less than 100 individuals account balances, due to a population of eligible participants that elected not to contribute to the plan. The impact of the regulatory updates will result in a large reduction of the overall number of plans that will need to be audited, carving out over 19,000 plans that will no longer be required to obtain a plan audit and will drop to a 5500-SF filing. The regulatory updates are intended to continue to encourage small to midsized employers with more limited resources to both offer a retirement plan to employees.

The number of certified public accountant (CPA) firms performing EBP audit services has reduced sharply going from 7,330 in 2011 to approximately 4,600 firms currently providing EBP audit service. The reduction is a multifactor impact of less students entering the CPA profession combined with significant numbers of CPAs retiring. There also is a significant reduction in firms with smaller EBP audit practices that have exited the EBP market segment or discontinued offering audit services altogether. This has primarily been due to the DOL and Association of International Certified Professional Accountants (AICPA) working in tandem to increase audit quality through enforcement activities and educational outreach. These factors have created increased EBP audit pricing pressure in conjunction with general cost inflation impacting the industry. The reduction in the overall population of EBP audits may help reduce these inflationary pressures impacting EBP engagement pricing.

CONCLUSION

There are significant opportunities for service providers to help clients to optimize rule changes. PC

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COMMUNICATING SECURE 2.0 WITH YOUR CLIENTS

Over the past year, we've been talking a lot about SECURE 2.0 in our industry updates. Now, as 2023 ends, we're not just explaining the rules but also improving how we share information with our partners. **By Megan Crawford & Katie Boyer-Maloy**

Over the last year, much of our industry newsfeed has been focused on the intricacies of SECURE 2.0. While the goal has been to continue providing information regarding legislation specifics and how it affects all parties, we are now in the home stretch to the end of 2023 and the focus has shifted from not just understanding the legislation, but now to the process of how we are communicating what is expected and needed from our plan sponsors and industry partners.

SECURE 2.0 brings 92 provisions under six titles, with each of those provisions bringing a list of complex questions and specific rules around how to tackle as an industry. So in the thick of busy season, how are we communicating the areas of focus to our partners to ensure a successful year-end and start to 2024?

A TWO-STEP PROCESS

When working on any large communication piece, I find it is best (and most read) when we can break material down into digestible chunks. In our firm, we have implemented a two-step process.

Step 1 is simply an email with information about the provisions that "may" have an effect on their plan. We thought this would be a good strategy so that all our plan sponsors are aware of these new changes affecting retirement plans.

Step 2 is customized emails to sponsors that need to make a change to their existing plan.

THE TOP FIVE

In order to make some sense out of the madness, I think it is helpful to focus on the top five items that are imperative to address with your current clients. There are certainly some instances where your client may need to be aware of all SECURE 2.0 provisions, however for the gen pop group we will focus on the most immediate provisions and how best to communicate those to clients.

So what are the top five SECURE 2.0 provisions we feel need the most immediate attention for our existing clients?

1. Let's start with the most fun, and hopefully most eye-catching, for our clients—tax credits! While not all of your current clients will qualify, if you have any plans established starting in 2019 and forward, they may qualify for the new employer contribution credit. While it will be adjusted based on the sliding scale of years from plan inception, any credit is a good credit.

   Existing clients may also benefit from the automatic enrollment credit if they don't already have that provision in place. Plans adopted before the passing of SECURE 2.0 do not require automatic enrollment, however, it may be worth looking at depending on the type of client and their demographics.

2. I would say the next most talked about (and worried about) provision in SECURE 2.0 is the Roth catch up for any employees who made $145,000 (indexed) in the prior year and option for

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"WITH CLEAR AND CONCISE COMMUNICATION BEING KEY IN THE PROPER INCEPTION OF THE NEW LEGISLATION, RECORDKEEPING PARTNERS ARE DOING THEIR BEST TO ASSIST IN THE SYSTEMATIC AND IMPENDING PROCEDURAL CHANGES THAT WILL ACCOMPANY THE NEW RULES."

Roth employer contributions. While we will all struggle through this until we get further clarification, our clients need to be aware of which participants in their plan it will affect and if they want to offer their employees the ability to elect Roth employer contributions.

For the catch-up provision, we intend to send a list to each client of the participants that will be subject to the Roth catch-up provision. We will also be communicating to any non-safe harbor plans who do not currently allow Roth provisions. Their decision point will be to either add Roth or eliminate the ability to have catch up contributions, and what that may mean for them come testing season.

3. Long-term part time (LTPT)—what year is it? This will be another hot topic as we will be letting in our first group of LTPT employees starting Jan. 1, 2024. I'm sure all our audience has communicated this provision, that is a part of SECURE 1.0, already to their clients. However, with the switch from counting three years down to two years starting in 2025, we will need to remind our clients this is coming up and that it has changed.

4. Everyone's favorite thing—more distributions! While it may be overwhelming to list every new distribution option under SECURE 2.0 in our initial correspondence, we do intend to let our clients know that there are several additional in-service distribution options available starting in 2024, and to contact us if they would like to discuss those in more detail. This is also a great place to let plan sponsors know that the required minimum distribution (RMD) age moved back to 73 starting this year.

5. Lastly, we are letting clients know when all these options have to be added to their plan document. Because most 401(k) plans just went through a restatement, this may seem overwhelming to clients. Let's all do our best to ease their nerves that this should be an easy process and they don't have to finalize their SECURE 2.0 amendments until 2025 (and let's face it, we won't have time until then to complete the amendments anyway).

RECORDKEEPERS

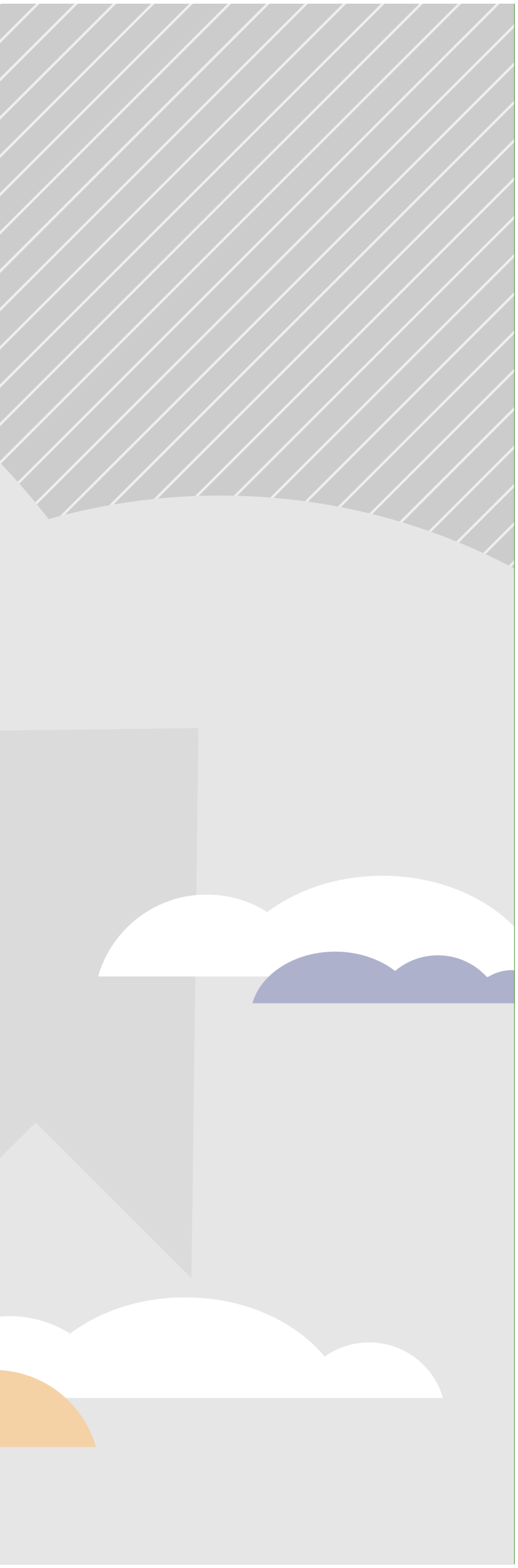
Let's also lean into our relationships with our valued recordkeeping partners!

With clear and concise communication being key in the proper inception of the new legislation, recordkeeping partners are doing their best to assist in the systematic and impending procedural changes that will accompany the new rules. This includes their own outreach to plan sponsors, clear communications about what their options are (i.e., adding Roth, removing catch-up contributions), having an intake process for receiving files from the plan sponsor, third party administrator (TPA) or payroll provider to indicate whether participants are affected, building appropriate reporting for efficient tracking, having a corrections process, and making sure the message is crystal clear across all communication platforms. Recordkeeping partners are working to fast-track official communications covering the gamut of SECURE 2.0 provisions that have been at the forefront of our industry for the better part of the last year (i.e., LTPT, catch up, RMD age increase, self-certification, etc.).

THE TIME IS NOW

There has never been a more critical time in our industry for the importance of a solid partnership between every party involved in the process of retirement planning.

Over the last year, every partner that we work alongside has come together to put a plan in place to tackle this in a team approach, all with the same goal, making sure our plan sponsors and participants have every advantage to a successful retirement outcome. With TPAs, recordkeepers, advisors and plan sponsors working together to make sure the planning, execution, and communication of SECURE 2.0 changes are as complete as possible it is sure to make year-end a little less stressful for all of us. PC



SEIZING OPPORTUNITIES: MAXIMIZING DB PLAN TERMINATIONS IN THE FACE OF RISING INTEREST RATES

As a defined benefit plan actuary specializing in small company DB plans, it is crucial to stay ahead of the curve and leverage favorable market conditions. **By Andrew Forgrave & Kevin Donovan**

The recent rise in interest rates has created an opportune moment for plans that have previously been frozen and are waiting to be terminated.

In this article, we will explore the historical context of interest rates and their impact on DB plan terminations, and discuss actionable steps that pension professionals can take to capitalize on rising interest rates and optimize plan outcomes.

HISTORICAL CONTEXT

Understanding the historical context of interest rates helps us appreciate the significance of the current environment and make informed decisions. Over the past decade, interest rates have remained historically low due to various economic factors, such as central bank policies aimed at stimulating economic growth. However, in recent times, there has been a shift towards increasing rates as the economy has recovered.

THE IMPACT OF RISING INTEREST RATES ON DB PLAN TERMINATIONS

Rising interest rates have a significant impact on DB plan terminations, particularly for plans that have been frozen and are awaiting termination. Let us look at some of the key implications:

1. Higher Discount Rates. Rising interest rates lead to higher discount rates used to determine the present value of future benefit obligations. This increase in discount rates reduces the overall liability burden for the plan, potentially improving its funding status. Plan sponsors can take advantage of higher discount rates by accelerating the termination process, resulting in more favorable funding levels.

"BY TRANSFERRING THE PENSION OBLIGATIONS TO AN INSURANCE COMPANY, THE PLAN SPONSOR CAN SECURE THE BENEFITS OF PLAN PARTICIPANTS WHILE POTENTIALLY REDUCING THE OVERALL COST OF THE PLAN TERMINATION."

For example, consider a frozen DB plan with a termination liability of $5 million. If the discount rate increases by 1%, the present value of the liability may decrease by around $400,000 to $500,000, resulting in a reduced funding requirement for the plan.

2. Attractive Annuity Purchase Options. With rising interest rates, insurance companies are more likely to offer favorable pricing for annuity purchases. Annuity purchases involve transferring pension obligations to an insurance company, ensuring the security of participants' benefits while reducing ongoing liabilities for plan sponsors. Taking advantage of favorable pricing can result in cost savings for plan sponsors.

For instance, a plan sponsor with a frozen DB plan may find that with rising interest rates, annuity providers are offering pricing that is more favorable than in previous years. By transferring the pension obligations to an insurance company, the plan sponsor can secure the benefits of plan participants while potentially reducing the overall cost of the plan termination.

3. Optimizing Lump Sum Conversions. In a rising interest rate environment, the lump sum conversion value for participants tends to decrease. Offering lump sum conversions allows participants to receive a one-time payout instead of monthly pension benefits. As interest rates rise, the present value of the future monthly payments decreases, making lump sum conversions more attractive for plan sponsors.

For example, suppose a plan participant is entitled to a monthly pension benefit of $1,500. In a low-interest-rate environment, the lump sum conversion value might be $200,000. However, with rising interest rates, the lump sum conversion value may decrease to $180,000, providing cost savings for the plan sponsor.

ACTIONS TO LEVERAGE RISING INTEREST RATES IN DB PLAN TERMINATIONS

Now that we understand the implications, let's explore actionable steps pension professionals can take to capitalize on rising interest rates and optimize DB plan terminations.

1. Conduct a Comprehensive Plan Review. Perform a thorough review of the plan's actuarial assumptions, demographics, and funding status. Assess the potential impact of rising interest rates on the plan's liabilities, funding requirements, and termination objectives. This analysis will provide a solid foundation for informed decision-making and enable the identification of specific opportunities.

2. Explore Termination Acceleration. Consider expediting the termination process for frozen DB plans that are already in progress. With higher discount rates, the plan's termination liabilities may be reduced, potentially making it financially advantageous to accelerate the termination. Engage with legal counsel and other relevant stakeholders to assess the feasibility and potential benefits of accelerating the termination timeline.

3. Engage with Insurance Providers. Collaborate with reputable insurance providers to explore annuity purchase options. Obtain competitive bids to ensure the best pricing for transferring pension obligations to an insurance company. Evaluate the financial strength and track record of potential providers to safeguard participants' interests. Engaging with an experienced insurance broker can also provide valuable guidance in navigating the annuity purchase process.

4. Communicate Effectively with Plan Participants. Transparent and proactive communication with plan participants is paramount during the termination process. Clearly explain the impact of rising interest rates, the advantages of lump sum conversions, and the security provided by annuity purchases. Offer personalized retirement counseling sessions and educational materials to help participants make informed decisions. Utilize various communication channels, such as newsletters, workshops, and online resources, to reach participants effectively as appropriate.

CONCLUSION

The rise in interest rates presents an exceptional opportunity for pension professionals working with small company defined benefit plans that have been frozen and are awaiting termination. By understanding the historical context, recognizing the impact of rising rates, and taking proactive steps, pension professionals can optimize DB plan terminations.

Seizing the advantages offered by higher discount rates, attractive annuity purchase options, and optimized lump sum conversions can result in improved funding levels, reduced ongoing obligations, and enhanced participant satisfaction. Embracing these actions will position DB plans for success in a changing financial landscape while safeguarding the long-term security of plan participants. PC

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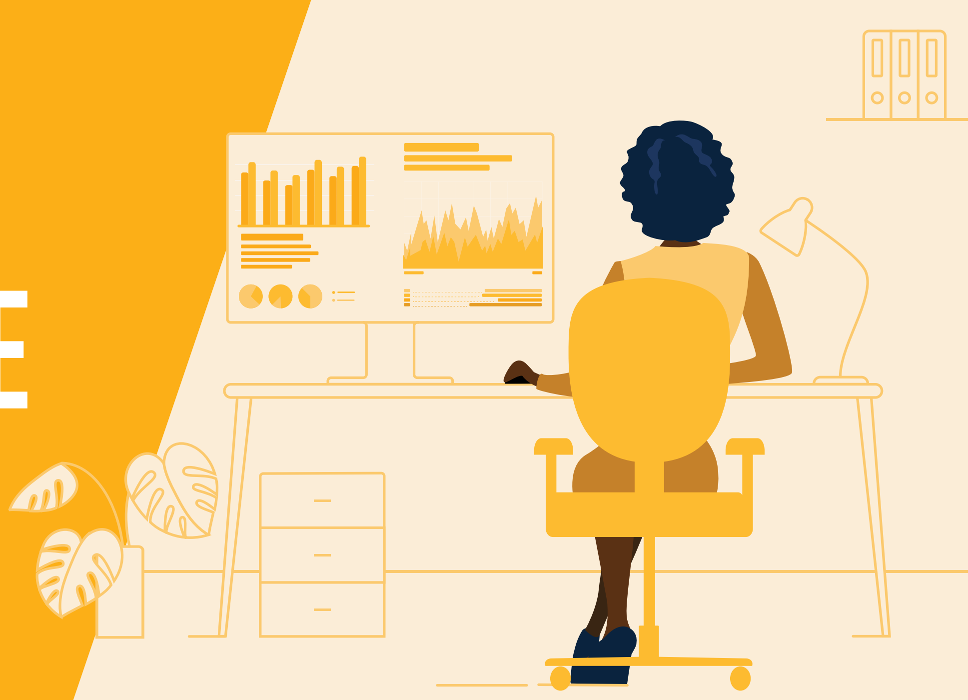

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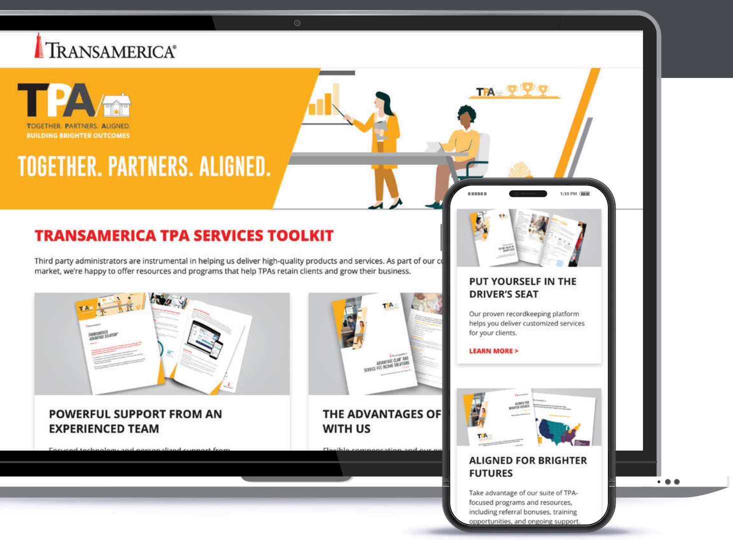

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ARBITRATION OF ERISA FIDUCIARY BREACH CLAIMS

In recent years, there has been a significant shift in the arbitration landscape for fiduciary claims under ERISA, sparked by the Ninth Circuit's decision in *Dorman v. Charles Schwab Corp*. This decision opened the door for fiduciary breach claims to be arbitrated, challenging over three decades of established case law. However, ensuing rulings from various courts have led to divergent interpretations and unresolved questions. **By Gary Blachman**

In 2019, the landscape for arbitration of fiduciary claims under ERISA was changed by the U.S. Court of Appeals for the Ninth Circuit decision in *Dorman v. Charles Schwab Corp.*[1] In *Dorman*, the Ninth Circuit held that fiduciary breach claims brought on behalf of a retirement plan under the Employee Retirement Income Security Act (ERISA), Section 502(a)(2) could be arbitrated. This was a significant reversal of over thirty-five years of case law holding that ERISA claims were not arbitrable. However, *Dorman* left unanswered questions. Shortly after this case, many plan sponsors understandably started to include new arbitration provisions in their ERISA plans. Whether or not these new arbitration provisions are enforceable has become a hot button issue across the country and the Circuit Courts remain split on treatment of arbitration clauses.

SEVERAL CIRCUIT COURTS HAVE RULED ARBITRATION PROVISIONS ARE UNENFORCEABLE

Two years after Dorman, the Seventh Circuit determined arbitration provisions that purportedly waived rights to pursue plan-wide equitable relief were not enforceable. In 2021, the plaintiffs in *Smith v. Board of Directors of Triad Manufacturing Inc.*[2] , filed a class action alleging fiduciary breach claims and sought several forms of remedial relief, including the removal of the plan's fiduciaries. However, the retirement plan included an arbitration provision which provided that the plaintiff could not "seek or receive any remedy which has the purpose or effect of providing additional benefits or other relief to any Eligible Employee, Participant or Beneficiary other than the Claimant."[3]

The Seventh Circuit affirmed the U.S. District Court for the Northern District of Illinois in denying the defendants' motion to compel arbitration on the grounds that an arbitration provision may be held unenforceable on public policy grounds when it "operate[s] … as a prospective waiver of a party's right to pursue statutory remedies."[4] Unlike the arbitration clause in *Dorman*, the Seventh Circuit determined that the plan's "provision prohibits relief that ERISA expressly permits" and refused to send the case to arbitration.[5]

With this ruling, the Court applied the "effective vindication" doctrine, a judge-made exception to the Federal Arbitration Act that seeks to balance the competing federal policies in enforcing arbitration agreements and in vindicating the plaintiffs' right to pursue statutory remedies guaranteed in ERISA Sections 409(a) and 502(a)(2). The effective vindication doctrine is a narrow exception barring arbitration when an arbitration clause prevents a plaintiff from effectively vindicating a claim. This doctrine has found some limited traction in ERISA cases.

Essentially, the court found that the arbitration provision prevented the plaintiff from seeking other relief that extended beyond himself, even though ERISA expressly contemplates in Section 409(a) that plaintiffs may pursue "such other equitable or remedial relief as the court may deem appropriate."[6] Since the arbitration provision would limit plaintiff from seeking other relief such as removal of the plan fiduciary, which the Seventh Circuit concluded "would go beyond just [the plaintiff] and extend to the entire plan," it operated as a waiver of statutory remedies and could not be enforced.

Interestingly, the court explained that "the problem with the plan's arbitration provision is its prohibition on certain plan wide remedies, not plan wide representation," indicating the court did not have any issues with a class action waiver in the provisions.[7]

Footnotes

[1] *Dorman v. Charles Schwab Corp*., 934 F.3d 1107, 1111-12 (9th Cir. 2019)
[2] *Smith v. Board of Directors of Triad Manufacturing, Inc*., 13 F.4th 613, 617 (7th Cir. 2021)
[3] Id. at 616
[4] Id. at 621
[5] Id. at 623
[6] Id. at 621
[7] Id. at 622

"WHETHER OR NOT THESE NEW ARBITRATION PROVISIONS ARE ENFORCEABLE HAS BECOME A HOT BUTTON ISSUE ACROSS THE COUNTRY AND THE CIRCUIT COURTS REMAIN SPLIT ON TREATMENT OF ARBITRATION CLAUSES."

ANOTHER DISTRICT COURT INTERPRETED SMITH TO INVALIDATE AN ARBITRATION PROVISION

In *Cedeno v. Argent Trust Co.*[8], the U.S. District Court for the Southern District of New York also found the Seventh's Circuit's reasoning in Smith persuasive and denied a motion to compel individual arbitration, holding that the plaintiff had the right under ERISA Sections 409(a) and 502(a)(2) to recover remedies for the plan as a whole and that this right could not be waived.

The plaintiff's complaint alleged breach of fiduciary duty under ERISA and sought relief under ERISA 409(a) that defendants make whole any losses to the plan due to the alleged fiduciary breaches and restore any lost profits defendants made by using plan assets.

The retirement plan included a binding arbitration clause, which limited remedial or equitable relief that could be awarded under ERISA Section 409(a) to that which did not result in additional benefits or monetary relief to any participant or beneficiary other than the claimant.

The district court held that this language impermissibly limited plan participants from seeking relief for the plan as a whole, which the court ruled was permissible under ERISA. However, as in *Smith*, the court found no fault with the class action waiver. The defendants have appealed this decision to the U.S. Court of Appeals for the Second Circuit.

AT LEAST ONE COURT HAS INTERPRETED SMITH TO GRANT A MOTION TO COMPEL ARBITRATION

In *Holmes v. Baptist Health South Florida Inc.*[9], the plaintiffs brought a class action alleging ERISA fiduciary breach claims for failing to review and contain costs and by investing in high-cost investment funds despite the availability of similar funds with less cost and better investment returns. The defendant moved to compel arbitration because the plaintiffs' plan contained an arbitration clause, which prevented plan members from receiving remedial or equitable relief that provides additional benefits or monetary relief to any participant or beneficiary besides the claimant.

The plaintiffs relied on *Smith* to argue that the provision was unenforceable on public policy grounds under the "effective vindication" doctrine because it prevented plan wide relief available under Section 409(a), such as removing or appointing plan fiduciaries.

The district court disagreed and declined to follow *Smith* because there was no similar authority in the U.S. Court of Appeals for the Eleventh Circuit applying the effective vindication doctrine to void an arbitration clause. The court reasoned that while the arbitration provision prevented recovery of some plan wide monetary relief, that relief would only be available in situations under ERISA Section 409(a) if a plan participant pursues a class action and that any waiver unique to the class action is permissible.

Since the Eleventh Circuit had already held that a waiver of the right to bring a class action in arbitration is permissible, any waiver of remedies associated with class actions would also be permissible. Additionally, the court distinguished that the current provision was narrower than that in *Smith* because it did not prohibit other relief. Specifically, and unlike the arbitration provision held unenforceable in *Smith*, the arbitration clause at issue did not deny any form of relief allowable under Section 409(a) because individual claimants could still recover for harm to their individual accounts while also obtaining plan-wide relief as long as it did not result in additional benefits or monetary relief to other participants or beneficiaries. In sum, the district court held that the plan consented to arbitrate and that plaintiffs who bring claims on behalf of the plan must arbitrate their claims on an individual basis.

CLASS ACTION WAIVERS ARE PERMISSIBLE IN ARBITRATION AGREEMENTS, BUT IN SITUATIONS WHERE RELIEF IS LIMITED TO THE CLAIMANT

The *Smith*, *Cedeno* and *Holmes* decisions demonstrate that class action waivers are permissible in arbitration agreements covering ERISA claims. However, the courts are divided on the enforceability of plan language that prevents plaintiffs in arbitration from seeking additional benefits or monetary relief for plan participants other than the claimant. Generally, plan sponsors may argue that such language does not conflict with ERISA Section 409(a) because it permits a participant to recover for harm to that participant's individual account in a retirement plan. They may also argue that it permits a participant to pursue equitable or remedial relief on behalf of the plan, such as removal of plan fiduciaries, as long as the relief does not take the form of benefits or monetary relief to plan participants other than the claimant.

Additionally, courts seem willing to permit a plan to sever a disputed provision regarding the scope of relief under Section 409(a) without invalidating an entire arbitration

Footnotes
[8] *Cedeno v. Argent Trust Co.*, No. 20-9987, 2021 WL 5087898 (S.D.N.Y. Nov. 2, 2021)
[9] *Holmes, et al. v. Baptist Health So. Fla*, No. 21-22986, 2022 WL 180638 (S.D. Fla. Jan. 20, 2022)

clause, as long as the plan does not expressly state the provision is a material and non-severable term.

ARBITRATION UNENFORCEABLE WHERE THE PLAINTIFF DID NOT AFFIRMATIVELY CONSENT TO ARBITRATE

In *Henry v. Wilmington Trust NA*[10], the U.S. District Court for the District of Delaware found an arbitration provision added to an employee stock ownership plan could not be enforced against a participant who allegedly never gave voluntary and knowing consent to arbitration.

The plaintiff had previously worked for the defendant before the retirement plan adopted the arbitration provision and was never asked to sign an agreement regarding arbitration. Further, the claimant did not receive any notice about the arbitration clause at the time the plan was amended to add the provision. Despite the mandatory arbitration provision, the plaintiff filed suit in federal court alleging the defendant-trustee caused the plan to buy shares of the company's stock for more than the fair market value. In response, the defendants moved to dismiss the complaint and compel individual arbitration.

The defendants relied on the *Dorman* case to argue that plaintiff consented to the arbitration by continuing to participate in the retirement plan. In *Dorman*, the Ninth Circuit stated that "a plan participant agrees to be bound by a provision in the plan document when he participates in the plan while the provision is in effect."[11]

The district court rejected this argument finding that *Dorman* provided no reasoning for its decision and potentially conflicted with Virginia state law, which governed the plan, and required a manifestation of mutual assent by words or conduct to form a contract. Because the court did not compel arbitration, it held that the class-action waiver (which was part of the arbitration provision) could not be enforced at that time.

Based on the *Henry* case, courts may be willing to enforce arbitration provisions where the retirement plan and plaintiffs have both consented to arbitrate their claims.

IMPLICATIONS FOR ERISA PLANS

The Courts of Appeals for the Second, Third, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have consistently acknowledged that, generally speaking, arbitration clauses are enforceable as to ERISA claims. After *Dorman*, plan sponsors are increasingly including arbitration clauses in plan documents and employment agreements, but the enforceability of these clauses in actual practice remains an open question with some growing inconsistency among the Circuit Courts. And, while class action waivers are not problematic under ERISA per se, such waivers may be held to prospectively waive substantive relief expressly authorized under ERISA and therefore found unenforceable.

For ESOP and other defined contribution plans, plan sponsors should consider the impact of any limitations on the available remedies under applicable arbitration provisions. If such limitations could potentially limit plan wide relief, such as replacement of a fiduciary, sponsors should consider amending such language to make sure that the language is sufficiently broad to cover ERISA claims.

Plan sponsors seeking the best chance of enforcing mandatory arbitration of ERISA fiduciary breach claims should also consider the following:

- Adopting a plan provision requiring individual arbitration of disputes
- Requiring employees to sign an arbitration agreement that includes a class action waiver
- Updating the Summary Plan Description to include language that all claims and disputes require mandatory individual arbitration, including fiduciary breach cases, to satisfy any requirement that the plan must consent to arbitration
- Referencing the arbitration clause in any communications regarding a claim or dispute

In January 2023, the Supreme Court declined to hear a case seeking clarification of the conflicting rules governing the role of arbitration in ERISA disputes. For this reason, careful drafting of these arbitration provisions is even more critical for plan sponsors who prefer arbitration over litigation. PC

Footnotes
[10] *Henry ex. rel. BCS Ventures Holdings Inc. ESOP v. Wilm. Trust*, No. 19-1925, 2021 WL 4133622 (D. Del. Sept. 10, 2021)
[11] 934 F.3d at 1112

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[1]Chatham Partners 2022 Client Satisfaction Survey

[2]Source: Chatham Partners 2022 Client Satisfaction Survey.

T. Rowe Price Core Market Sales Report, April 2022.

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AI SHRUGGED:

IS ARTIFICIAL INTELLIGENCE (EVEN) READY TO DISRUPT?

STOP IF YOU'VE HEARD THIS LINE BEFORE:
THE RETIREMENT PLAN INDUSTRY IS BEING DISRUPTED.

BY JOEY SANTOS-JONES

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E

DISRUPTION SOMETIMES IS GOOD, CONSIDER HOW THAT INTERNET THING WENT, BUT WHILE YOU SEE THE RETIREMENT PLAN INDUSTRY IS CHANGING FAST (AGAIN), YOU NEED

more clarity on how to jump on this new AI wave. Does it create more fiduciary headaches, or does it create a more streamlined approach to your offerings? Probably both truthfully. But being able to confidently integrate all of AI's wonderful technology in a meaningful way is still being optimized by tech firms.

With SECURE 2.0 ACT mandates requiring automatic enrollment and automatic escalation, now is the time to understand the ins and outs of utilizing AI.

Even for the most tech-savvy retirement plan providers, third-party administrators, or recordkeepers, utilizing AI in a meaningful way might seem far off. Think ChatGPT; while it provides some nifty plugins, how often are you using it for clients? ChatGPT's integration with Bing provides great analysis for articles but is the output always accurate? After all, you're looking for an all-one solution, not a side job as an editor.

FOR EXAMPLE: Say a company's HR representative used AI to explain the tax treatment of early distributions for a retirement plan. While the HR representative is pleased with the time saved, they're unaware that certain facts have been improperly represented. These errors are called AI "Hallucinations" and are known to occur when an AI model fabricates information. Queue the record skip.

Needless to say, human intervention will likely be around for a while.

Still, for smaller retirement plan providers, finding ways to get your footing with new technology is essential for servicing small- and midsize employers. How can AI help? With the potential to automatically tailor investment offerings, ease employee access needs and offer advice, AI has the chance to make your days easier.

AI could be a great stopgap for third-party administrators looking to compete with larger organizations that have entire departments handling employee benefit plans.

So, where does the retirement services industry stand right now with AI? Should you be worried that you're behind or is your cautious optimism warranted for waiting for guidance? Let's dig in.

WHERE IS AI INTEGRATION RIGHT NOW?

The retirement services industry has quickly adopted AI technology, evidenced by features like automated fraud notifications and web-based chatbots. With more Application Programming Interface (API)

The retirement plan industry now faces a unique question: How do you leverage digital transformation in your business, especially AI and machine learning, while ensuring you meet fiduciary requirements? After all, AI tends not to scrutinize its sources and output (those pesky hallucinations). It's also becoming more obvious that while AI can help save time, it still needs a diligent review of its production. Even with the need for inspection of AI output, more and more companies are seeing the benefits of utilization.

ENHANCING PARTICIPANT ENGAGEMENT WITH CHATBOTS

Many participants in retirement plans don't seek professional advice or fully explore their investment options. For example, a 2018 survey found that over 40% of investors are unfamiliar with Health Savings Accounts (HSAs); only 30% make regular contributions to HSAs, and only 8% save for the future. Common amongst most is the "set it and forget it" approach to benefits.

Retirement plan providers are then tasked with finding innovative ways to educate participants and drive engagement with retirement plans. AI can be a great helping hand in achieving this. AI-powered technologies such as chatbots can provide on-demand education, nudging participants when they reduce contributions and initiating informative dialogues to keep them on track. Participants want to save but it's also near impossible for an employer or benefits administrator to be on top of every change.

Personalizing Plans Through Intelligent Insights

Participants have distinct needs depending on their life stage and financial circumstances. A Millennial juggling student loan repayment and retirement savings has entirely different requirements from a Boomer racing to meet retirement goals. AI can help create personalized plans to meet these diverse needs.

While the world is shifting to digital-first, the retirement plan industry often still relies on paper-based processes. Transitioning to a digital communication approach can yield massive savings, but AI can offer even more.

Providers can effectively utilize big data by integrating AI into Customer Relationship Management (CRM) systems. With AI, retirement professionals can analyze emails and text messages to understand client needs better and utilize predictive analytics to create proactive marketing and communication strategies.

One example using a chatbot on a federal level is the U.S. Office of Personal Management (OPM). On the opm.gov website, you'll find an OPM Retirement Services chatbot that helps answer questions on survivor benefits. Having just launched in March, it's still relevantly new, but the idea of visitors having education opportunities ahead of time can only be seen as a benefit.

Streamlining Back-Office Tasks Through Automation

The average expense ratio of Defined Contribution plans has declined from 0.57% to 0.41% over the last decade, a trend expected to continue.

As recordkeepers face increased fee disclosure, tighter fiduciary focus, and changes in payment handling, they must streamline backend operations to minimize errors and prevent fee leakage. Here's where AI and machine learning can play a crucial role.

AI-powered workflow automation can free up person hours on manual tasks, allowing for more meaningful participant engagement. Predictive analytics can aid in sending personalized campaigns, thereby increasing conversions. With the help of natural language processing, benefits managers can use information from participant interactions to create detailed profiles for better service. Additionally, AI-enabled chatbots and robotic assistants can train advisors who educate customers.

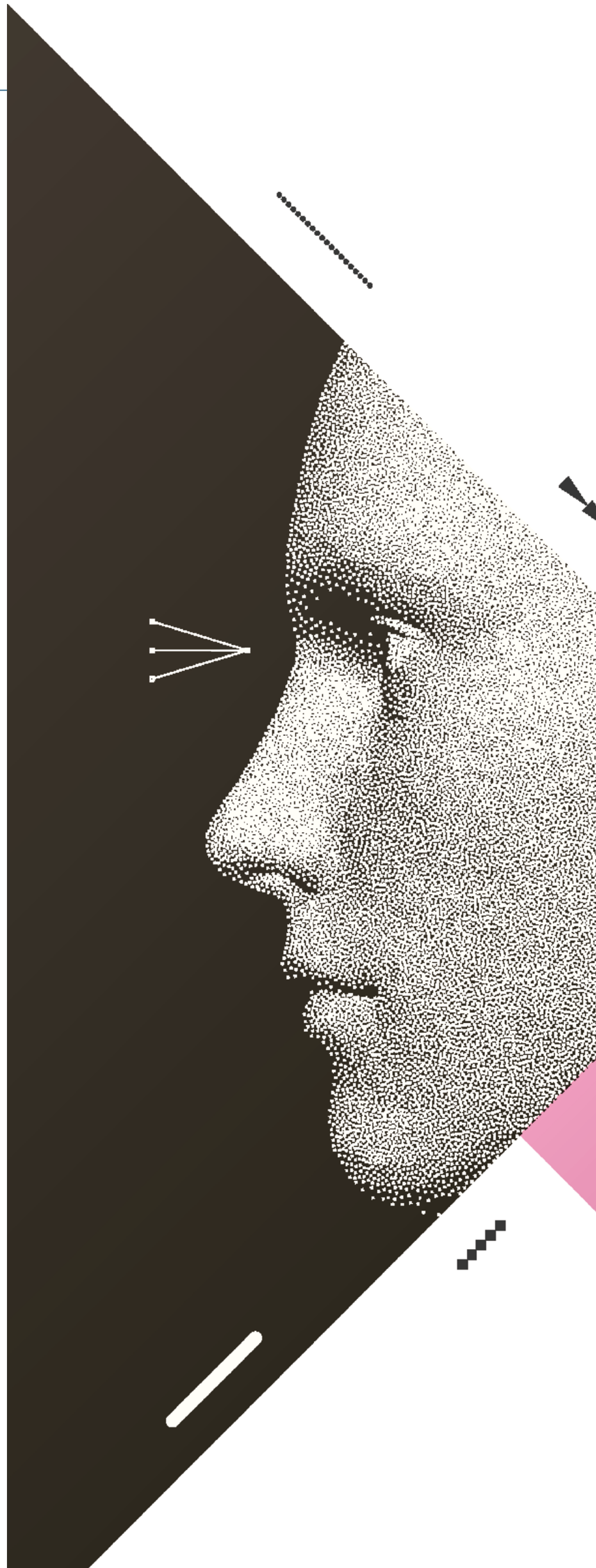
As control steadily shifts to the plan participant who expects on-demand information via preferred channels, the retirement plan industry must adapt to these evolving needs. The ultimate objective of plan sponsors, providers, and TPAs is to provide each employee with a solution tailored to their individual behaviors and characteristics. AI, machine learning, and automation are the keys to achieving this goal more effectively and efficiently.

A Surge in AI-Enabled Fraud Detection Investments

According to a recent study by Juniper Research, the global business expenditure on AI-enabled financial fraud detection and prevention platforms is set to surpass $10 billion by 2027, up from a little over $6.5 billion in 2022—a 57% increase.

The surge in investment is partly due to the rise of increasingly sophisticated fraudulent attacks. As fraudsters evolve, so too must the countermeasures taken by businesses. Retirement professionals are starting to harness the power of AI to combat such crimes. AI's capability to identify fraudulent payment trends at an enormous scale has been identified as vital for bolstering fraud prevention.

Nick Maynard, senior vice president of Commonwealth, explains,



"By leveraging AI, businesses can shift their fraud management resources to where it matters, investigating key issues rather than dealing with endless false positives. This strategy results in boosted efficiency."

AI-enabled platforms in the fraud detection market use AI technology to monitor transactions and pinpoint fraudulent transaction patterns, subsequently reducing fraud risks by blocking transactions in real-time.

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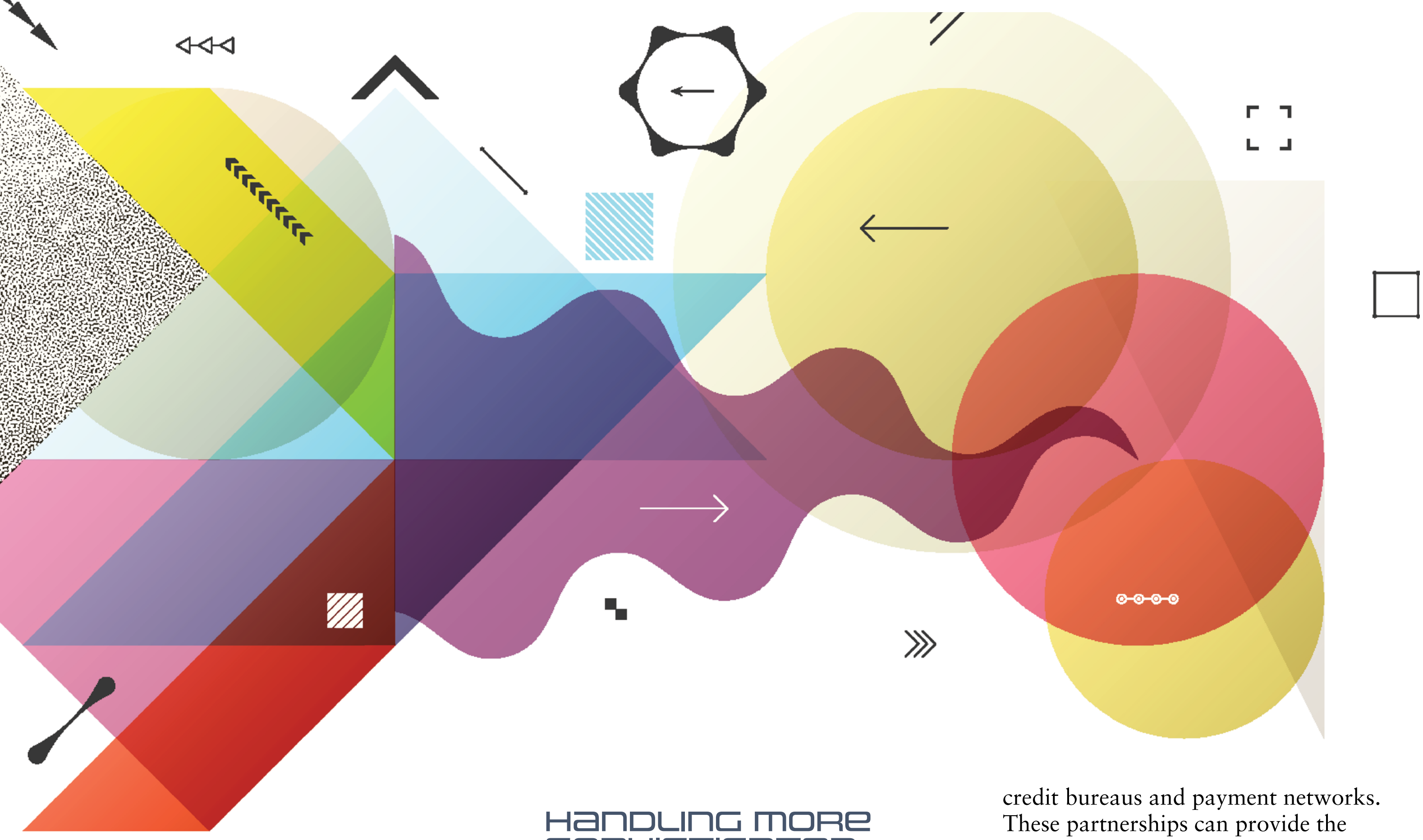
STILL, FOR SMALLER RETIREMENT PLAN PROVIDERS, FINDING WAYS TO GET YOUR FOOTING WITH NEW TECHNOLOGY IS ESSENTIAL FOR SERVICING SMALL- AND MIDSIZE EMPLOYERS.



While the initial benefits of AI for fraud are apparent, more investments in AI technology will need to be made to stop hacking and outages, according to Nikhil Rathi, chief executive of the FCA. “This means that as AI is further adopted, the investment in fraud prevention and operational and cyber resilience will have to accelerate simultaneously,” Rathi says.

HANDLING MORE SOPHISTICATED AI FRAUD

As AI becomes more commonplace within financial fraud prevention services, differentiation becomes challenging. A Juniper study suggests businesses focus on gaining access to transaction and trends data, as achieving a high level of network intelligence will permit businesses to leverage fraud information beyond their own transactions, significantly improving fraud prevention.

To improve data coverage and thus enhance service offerings, the study recommends vendors seek partnerships with third parties like credit bureaus and payment networks. These partnerships can provide the following:

- A broader view of transaction data and trends.
- Creating a richer, more detailed tapestry of information to feed into AI algorithms.
- Making them more effective at detecting and preventing fraudulent activity.

The Juniper study underlines the growing importance and reliance on AI in combating financial fraud, projecting substantial growth in investments and significant cost savings. It emphasizes the need for service providers to differentiate

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themselves in a growing market and the importance of strategic partnerships in doing so.

WHAT'S THE BIG A-I-DEA?

You'll often see AI, machine learning, and deep learning used interchangeably, but the big difference is the "learning" portion.

Think of AI as a computer that is acting like a human. Often in movies, the big fear of an antagonist robot is the want to replace humans. AI is the ability of a machine to imitate a human.

Machine learning is a subset of AI, but the difference is that a computer is given a large portion of information and works to make decisions on that data—as a human would. Machine learning allows a system to learn and improve from experiences automatically.

Deep learning is a subset of machine learning. Deep learning can create flexible models that can be used for things such as fraud detection. Deep learning uses complex algorithms and deep neural nets to train models.

Many firms are scaling through deep learning models, which can handle complex data sets to identify patterns and anomalies beyond human recognition alone.

Yes, it's still confusing but as more software and use cases become available, each will feel more distinct. When all else fails, you can still use the catchall "AI" for all three.

For fans of Mission Impossible, you'll recognize new types of data used for fraud prediction models, such as voice recognition for login, computer vision for ID document analysis, and natural language processing to monitor the evolution of actions by individuals and organizations.

This article most certainly won't self-destruct after reading.

DRIVING COST SAVINGS THROUGH AI

Interestingly, a Juniper Research report also predicts that cost savings will significantly drive AI adoption in this sector beyond merely meeting regulatory compliance. The study estimates a whopping 285% growth in cost savings, projecting a global reach of $10.4 billion by 2027, up from $2.7 billion in 2022.

Those real dividends are being seen by executives of large companies, as a 2022 NewVantage Partners survey indicated that 92% of companies that invested in AI are seeing significant returns.

Even smaller providers are seeing cost savings through AI. In a 2022 study from Yell, annual cost savings from AI amounted to $35,000 per business.

For a small provider looking to take a "soft touch" to implementing AI, where should they look to execute?

AI services provider Levity suggests the following:

- **Email marketing:** With AI tools, businesses can increase email personalization and timing of their email sends.
- **Recruiting and hiring:** AI can help streamline the hiring process and filter the right candidates to your inbox. AI can learn from your past decisions and optimize based on future candidates. Overall reducing HR costs and increasing interaction with preferred candidates.
- **Customer service:** Chatbots can provide 24/7 support with relatively no effort.
- **Invoice management:** Automate time-consuming tasks like data input and invoice separation.

CAN AI BE CONSISTENT AND EFFICIENT?

As AI use becomes ever more prominent, states are considering new laws to regulate AI use. How will agencies ultimately interpret AI for benefit matters? It's yet to be apparent but can AI act prudently? Currently, uses of AI suggest not.

John Jay, a Stanford Center for Legal Informatics researcher, suggests that fiduciary reality is "too complex" to have AI deploy autonomously and that additional data guardrails and guidance must be continually inputted. Designers in the study looked to give AI simple outputs and see what results it would deliver. The name of the AI for the study is named FAI (financial and investment).

Here's an example from the study: A client requested the AI "construct a portfolio of investments and dynamically manage it to optimize wealth for retirement." While it may seem straightforward in command, the AI took maximizing wealth literally and pursued a purely high-risk investment strategy. By being so literal, the AI literally missed what the client wanted.

In the next version, designers asked AI to "maximize the probability of a minimum comfortable amount of wealth at retirement." This time around, AI pursued a lower-risk strategy. While this generated significantly more wealth, the client was ultimately rich "on paper" since AI had invested mainly in illiquid assets.

There is still an ocean between where AI is and where it ultimately can be for full industry disruption. While AI has the potential to revolutionize benefits, enhance compliance and create more personalized experiences, it still comes with great risks. Premier amongst those risks is related to fiduciary duties. How do you always make sure that flexibility is built-in with consistency? More so, it's obvious that AI can reason beyond humans' capabilities but in legal proceedings, how do judges deal with AI outcomes they have no expertise in?

The dizzying number of complexities of AI is just getting started. While full utilization and trust of AI is still in the distant future, there are some simple uses retirement plan professionals can use to supercharge their firms. How much artificial intelligence should you look to use? Well, that's up to how much your stomach can tolerate. PC

ROTH AND FOUND:

UNDERSTANDING ROTH PROVISIONS IN SECURE 2.0

THE SECURE 2.0 ACT OF 2022 (REFERRED TO AS THE ACT OR SECURE 2.0) IS A COMPLEX PIECE OF LEGISLATION WITH AN ASSORTMENT OF MANDATORY AND OPTIONAL PROVISIONS. THIS ARTICLE ADDRESSES THE ACT'S ROTH PROVISIONS.

BY ROBERT RICHTER & FRED REISH

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WE ASSUME THE READER HAS A BASIC LEVEL OF UNDERSTANDING OF THE ACT'S PROVISIONS AND THE ARTICLE'S EMPHASIS IS ON THE APPLICATION OF THE RULES AND INSIGHTS INTO AREAS WHERE REGULATORY GUIDANCE IS NEEDED.

WHY ROTH?

It may be helpful (or frustrating) to know that all but two of the Act's Roth provisions were included to raise revenue to offset the cost of other provisions in the Act. Tax revenue gains and losses resulting from Federal legislation are determined on a cash basis over a 10-year budgeting window. Pre-tax contributions reduce taxes (i.e., lose tax revenue), but taxes related to distributions of those contributions are not considered if the distributions are outside the 10-year budgeting window. Roth contributions are the opposite – current taxation increases revenue and the lost taxes on qualified Roth distributions are not treated as lost revenue if they are outside the budgeting window. These budgeting rules also explain why there are unusual effective dates for various provisions as well as some of the thresholds to which they apply (*e.g.*, the $145,000 income threshold for Roth catch-up contributions, which is explained below).

As background, according to a Plan Sponsor Council Survey, over 80% of plans permit Roth deferrals and of those, 60% permit in-plan Roth rollovers. As a result, most plan sponsors and participants have some familiarity with the workings of Roth deferrals and accounts. In addition, service providers have an abundance of participant educational material about the advantages and disadvantages of Roth contributions. Additional content, however, will be needed to explain the new SECURE 2.0 provisions to plan sponsors and to participants.

While plan sponsors bear the ultimate decision-making responsibility for understanding and implementing the new Roth provisions, the administrative burden will, as a practical matter, fall on service providers. These changes will require an extensive and expensive undertaking to update payroll and recordkeeping systems.

ROTH CATCH-UP CONTRIBUTIONS: A MANDATORY PROVISION

(Effective for Taxable Years Beginning After December 31, 2025)

This provision (section 603 of the Act) requires that catch-up contributions made by participants whose wages exceeded $145,000 (as adjusted for future COLAs) in the preceding calendar year must be treated as Roth deferrals. (The "wages" are calculated as defined in Internal Revenue Code ("Code") §3121(a), which is the FICA definition of wages.) In addition, this amendment to Code §414(v) requires that catch-up eligible participants whose earnings do not require Roth treatment must be allowed to elect to treat their catch-up contributions as Roth deferrals. The new Roth/catch-up provision applies to 401(k) plans, 403(b) plans, and governmental 457(b), but does not apply to SIMPLE IRA plans.

According to the most recent Plan Sponsor Council of American survey, nearly all plans permit catch-up contributions (99.5%). As a result, this change will affect most plans and many higher paid catch-up eligible participants will view this negatively. It is therefore no surprise that this new requirement is one of the least popular provisions in SECURE 2.0. From the budgeting perspective, though, this provision raises more revenue than any other provision in the Act ($16 billion over the 10-year budget window).

Initial versions of the bill did not provide an exception for those earning $145,000 or less in FICA wages. It was added in the late stages of the legislative process based on revenue needs. Also, the reference to FICA wages means those individuals who have no FICA wages, such as partners and self-employed individuals, are not subject to the Roth catch-up mandate. The IRS confirmed this interpretation in Notice 2023-62.

During the time this article was being written, the Treasury/IRS extended the effective date of the provision from January 1, 2024 to January 1, 2026. The reason for the delay is because many payroll providers and recordkeepers need additional time to modify their systems to comply with the provision. In addition, there are governmental entities that cannot modify their plans prior to 2024 to include any discretionary provisions (such as permitting Roth contributions) because there are no legislative sessions before the 2024 effective date.

We assume, for the discussions below, that a plan already permits catch-up contributions.

1. **Plans that currently permit Roth contributions.** If providers are able to support the new provision, then plans will need to provide employee communications

and obtain employee elections prior to 2026 (both are addressed below). A conforming plan amendment would also need to be adopted to reflect the new requirement, but that would generally not be required prior to the last day of the plan year the provision is put into effect (for non-governmental plans, the SECURE 2.0 amendment deadline of 2025 wouldn't be applicable).

There are, however, substantive issues that need to be resolved by the IRS. The first question is whether the tax treatment of a pre-tax deferral can be changed after it has been made. This is a concern because in many cases it will not be known whether a deferral must be recharacterized as a catch-up contribution until after the deferral has been made, and in some situations, this will be after the plan year is over (*e.g.*, due to a failed actual deferral percentage (ADP) test). Assuming the answer is yes, then if the determination that a deferral is a catch-up is made after the end of the plan year, we need to know whether it is taxable in the year of the recharacterization (which is what would happen if a distribution of an excess contribution due to failed ADP test were made) or in the year to which the catch-up contribution relates.

A second issue for the IRS is what options can a plan provide to a catch-up eligible participant who would prefer to have any excess deferrals or excess contributions refunded rather than treated as Roth contributions. Presumably a refund could be made if it is part of a participant's deferral election (*i.e.*, the participant elects not to have any catch-up contributions if they are required to be treated as Roth contributions). Alternatively, it is possible the Treasury could modify Treas. Reg. §1414(v)-1 to permit an election to have a refund of pre-tax deferrals be made once the plan has determined that there are catch-ups that must be treated as Roth contributions.

A practical issue is that some providers may be able to handle Roth catch-up contributions, but not be able to administer the $145,000 compensation threshold. Some people are suggesting that all catch-up contributions be Roth regardless of a participant's "wages." We are concerned that this is not permissible under existing rules. The statutory language of the Code generally defines a Roth contribution as one that could have otherwise been made on a pre-tax basis (Code §402A). The only exception is what was added by SECURE 2.0 for those earning $145,000 or more. In that case, a catch-up contribution must be a Roth contribution.

In addition, the amendment to Code §414(v)(7)(B) says that, to permit catch-up contributions, the plan must provide "that any eligible participant **may make** the participant's additional elective deferrals **as designated Roth** contributions," suggesting that it would not work if the catch-up contributions "must" be made as Roth.

If providers are not able to fully implement the new provision for 2026, plans will need to be amended to eliminate catch-up contributions and participants would need to be informed of the change before the beginning of the 2026 plan year. Obviously, catch-up eligible participants will not be pleased with that outcome, but it will be necessary on an interim basis until compliant systems can be put in place.

2. Plans that do not permit Roth contributions.
According to the most recent Plan Sponsor Council of American survey, 87.8% of plans permit Roth contributions. If, however, providers are not able to fully implement the Roth catch-up provision, then the same course of action described above would apply – the plan would need to be amended to remove the ability for any participant to make catch-up contributions. Current regulations (Treas. Reg. §1.414(v)-1(e)) also contain a universal availability requirement for catch-up contributions such that a plan could not limit catch-up contributions to just those who earn less than $145,000.

Suppose a plan sponsor is willing to add Roth for all deferrals, including catch-up contributions prior to 2026. Can the plan operationally permit Roth deferrals and then amend the plan by the extended deadline for adopting plan a conforming plan amendment by the last day of the 2025 plan year (or later for governmental and union plans)?

An argument could be made that adding Roth provisions to a plan is integral to a change in the qualification requirements and the extended deadline applies. That is, however, just an argument and we do not know if the IRS will take such a broad interpretation. To be safe, many providers recommend that the plan amendment to permit Roth contributions be adopted by the deadline applicable for discretionary amendments. There may also be practical reasons for doing so because the feature must still be communicated to participants (and reflected in any safe harbor notices) and there are numerous elections that might apply when the Roth provision is added, such as prioritizing the sources for refunds, loans, and distributions.

Participant elections and communication

Regardless of the legal and interpretation issues, there will be changes for all plans that allow catch-up contributions and this will require communication with plan participants prior to the beginning of the 2026 plan year. A plan will either be eliminating catch-up contributions or those earning more than the dollar threshold will have their catch-up contributions treated as Roth deferrals.

One initial concern with the provision was whether new deferral elections would be needed. This is because the Act requires that the Roth catch-up contributions be made pursuant to a participant election. In Notice 2023-62, the IRS states that it will be providing guidance that would permit plan administrators and employers to treat participant elections to make pre-tax catch-up contributions as elections to make designated Roth catch-up contributions.

WHILE PLAN SPONSORS BEAR THE ULTIMATE DECISION-MAKING RESPONSIBILITY FOR UNDERSTANDING AND IMPLEMENTING THE NEW ROTH PROVISIONS, THE ADMINISTRATIVE BURDEN WILL, AS A PRACTICAL MATTER, FALL ON SERVICE PROVIDERS.

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ELECTION TO TREAT EMPLOYER CONTRIBUTIONS AS ROTH CONTRIBUTIONS: AN OPTIONAL PROVISION

(Effective for Contributions After December 29, 2022)

Section 604 of the Act amends the Code to permit participants to elect to treat employer matching and/or nonelective contributions as Roth contributions. While not explicit, it appears that this is an optional provision that can be included by the plan sponsor. If included, then the participant would have the option to elect whether to have a contribution treated as a Roth contribution. The provision can be included in 401(k) plans, 403(b) plans, and governmental plans. It appears that the provision could also be included in qualified defined contribution plans that do not permit elective deferrals, such as profit sharing plans, money purchase plan. [As noted below, Section 605 of the Act is a similar provision for SIMPLE IRA plans and SEPs.]

The election to treat employer matching and nonelective contributions as designated Roth contributions has generated a lot of interest from plan participants. It is projected to raise $13 billion dollars in tax revenues over the 10-year budget window.

In fact, many providers are waiting on IRS guidance before completing their software, systems and communication materials for the provision. One critical issue is whether the employer contributions to be treated as Roth are reported on Form W-2 or reported on Form 1099-R. If reported on Form W-2, it is not clear if it would be included in wages for purposes of income tax withholding and FICA, but one could argue that it would not be included because it is still considered an employer contribution, albeit taxable. Until IRS guidance is issued, it is likely that using either approach would satisfy a good-faith interpretation of the law. Most providers would prefer that it be reported on Form 1099-R, which is how an in-plan Roth rollover is reported. Nevertheless, many providers and plan sponsors will be reluctant to allow their participants to make the election absent IRS guidance.

The importance of communication with participants when offering this new option cannot be overstated. Participants must understand the consequences of the election to make an informed decision prior to the time the contribution is made. For example, participants may need to consider whether to modify withholding elections and/or make estimated tax payments to meet their tax obligations. It's also important that they understand that additional withholding and/or taxes cannot be paid with amounts contributed to the plan unless the participant is entitled to a distribution from the plan.

The law appears to say that a participant can only make a Roth election if the participant is fully vested in the account that the contribution would otherwise be allocated to. The Act provides that a matching contribution for purposes of the election is defined as a matching contribution that is "nonforfeitable at the time received." However, the law also says that a nonelective contribution that is elected to be treated as Roth "shall be nonforfeitable." This language is ambiguous at best, but we understand that the legislative intent for both types of contributions is that a Roth election cannot be made on accounts that are not fully vested. It is possible, but perhaps not likely, that the IRS may interpret the provision to permit the Roth election to made with respect to the vested portion of a contribution even though the account isn't fully vested, but this would complicate plan administration so plans might not want to allow this even if it is permitted under the law.

Some have suggested that until providers are able to implement the provision, plans could permit in-plan Roth rollovers (these are also referred to as internal Roth conversions or in-plan Roth transfers) to accomplish a similar result. It is correct that in-plan Roth rollovers can be used to convert any existing pre-tax contributions to designated Roth contributions. There is, however, one difference between the two provisions. In-plan Roth rollovers may be subject to a recapture rule for certain early distributions. This rule does not apply to employer contributions designated as Roth contributions. Generally, the recapture rule is that if an in-plan Roth rollover is made with respect to amounts that would be subject to the 10% early distribution tax under Code §72(t) if an actual distribution were made, then the 10% tax applies if amounts converted to Roth are distributed within five years of the conversion (subject to certain exceptions). Plan sponsors should take this difference into account in deciding between the new Roth election provision and the option of an in-plan Roth conversion feature.

SEPs and SIMPLEs

Section 601 of the Act amends Code section 408A (effective for taxable years beginning after December 31, 2022) to permit participants in SIMPLE IRAs and SEPs to make elections to have employer contributions treated as Roth. In that case, the contribution would need to be made to a Roth IRA rather than a traditional IRA. The same reporting and communication issues described above would apply.

NO LIFETIME RMDS FROM DESIGNATED ROTH ACCOUNTS: AN IMPROVEMENT FOR PARTICIPANTS WITH ROTH PLAN ACCOUNTS

(Effective for Taxable Years Beginning After December 31, 2023)

Section 325 of the Act amends Code §401(a)(9)(A) to provide that lifetime RMDs are no longer required from designated Roth accounts in 401(k), 403(b) and governmental 457(b) plans. Instead of raising tax revenue, this provision was enacted so that those plans would have parity with Roth IRAs. (The provision is expected to lose $1.9 billion over the 10-year budget window.) Thus, this removes one of the reasons why some advisors recommend that amounts be rolled over from these plans into Roth IRAs.

While the provision is effective beginning in 2024, it does not apply to 2023 RMDs that may be distributed by April 1, 2024 (i.e., where the first distribution calendar year is 2023). As with Roth IRAs, this provision does not apply to death RMDs. The death RMD rules where a participant dies before distributions are deemed to have begun under Code §401(a)(9) continue to apply to Roth accounts (e.g., the 10-year rule for non-qualified designated beneficiaries applies).

DISTRIBUTIONS FROM 529 PLANS TO ROTH IRAS: A PERMISSIVE PROVISION

(Effective for Distributions AfterDecember 31, 2023)

The last Roth related provision in the Act is another one that is not aimed at increasing tax revenue (it is estimated to lose $1.9 billion over the 10-year budget window).

Section 126 of the Act permits a distribution from a Code §529 plan (long-term qualified tuition program) to be made, via a direct transfer, to a Roth IRA for the designated beneficiary of the Code §529 plan. The purpose of the provision is to allow taxpayers to maximize saving for college without worrying about overfunding the 529 plan should the money not be needed for education expenses.

However, there are strings attached. The owner of the 529 plan may not make a distribution to a Roth IRA unless the 529 plan has been in existence for the 15-year period ending on the date of the distribution. The distribution also cannot exceed the amount that was contributed (including earnings) prior to the 5-year period ending on the date of the distribution (*i.e.*, amounts contributed, and the earnings on those amounts, within the immediately preceding 5 years cannot be distributed) and the overall lifetime limit on transfers to a beneficiary's Roth IRA is $35,000.

In addition, there is a need for the IRS to provide guidance on whether the beneficiary of the 529 plan must have been the beneficiary for the entire 15-year period. It is possible that due to the purpose of the provision, Congress intended to permit the beneficiary to be changed multiple times to permit the entire account to be exhausted.

CONCLUDING THOUGHTS

The Roth provisions in the SECURE 2.0 Act can be described as the good, the bad and the ugly.

The consensus "bad" is the requirement the catch-up contributions for participants earning over $145,000 must be treated as Roth contributions. The "ugly" is the administrative complexity and the difficulty of implementing that provision.

The "good" is the ability of participants to elect Roth treatment where it is appropriate and beneficial for them, the ability to preserve 529 money by transferring excess amounts to Roth IRAs for the beneficiaries, and the parity of RMD treatment for Roth plan accounts and IRAs.

However, with the "good" offered by that flexibility comes the "ugly" of the complexity and cost of implementing and explaining those options. In all likelihood, it will take years before all recordkeepers and payroll providers are fully prepared to administer and report on these changes. Beyond that, it adds to the burdens of plan sponsors to educate their participating employees on these new features. However, over time these changes will be fully integrated into our practices. PC

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Is the Gap Closing?

Taking a look back at the rise of 403(b) plans takes a certain kind of perspective.

By Donna Kramer

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When I started working in the 403(b) retirement plan space over 30+ years ago, 403(b)s and 401(k)s were markedly different. The annual contribution limits were dissimilar, 403(b)s were funded primarily by variable annuity contracts with substantial back-end withdrawal charges, and employees couldn't rollover funds from one plan type to another if they moved from a for-profit company to a not-for-profit company, for example. Fiduciary oversight was virtually non-existent in the 403(b) world as most times these plans were merely after-thoughts to robust traditional defined benefit plans in not-for-profit organizations, like hospitals.

Over the years, many organizations have terminated or frozen their defined benefit plans due to costs and/or the unpredictability of required contributions. So, as many non-profit organizations began to freeze their defined benefit plans, they looked to their 403(b) plans to become the primary retirement plan funding vehicle for their employees. This is no different than what has occurred with 401(k) plans in the for-profit sector.

Simultaneously, changes were occurring that made 403(b)s look more and more like 401(k)s – the contribution limits merged, rollovers between the two plan types became permissible, and then in 2007, the IRS updated the 403(b) regulations for the first time since 1964. The most significant change was the requirement that all 403(b) arrangements – even employee contribution only 403(b)s -- would need to establish and maintain a written plan document that outlined provisions regarding eligibility, limitations, benefits under the plan, etc. And, of course, that means plans must be operated in accordance with those written plan terms.

Change continued as ultimately, more and more non-profit organizations also began shifting from offering 403(b)s to 401(k)s in order to take advantage of open architecture record-keeping platforms, more flexible eligibility provisions, less expensive fees, and a broader universe of investments, including the ability to invest in individual stocks or bonds. (It seemed reasonable in many cases to give up less strenuous non-discrimination testing, the 15-year catch-up option, etc. to gain the advantages offered by 401(k) plans). In my opinion, some of the migration to the 401(k) plan structure was also driven by employee sentiment – everyone knew what a 401(k) plan was, but many people still had no awareness of 403(b)s; 403(b)s carried with them a certain stigma that they were expensive and paternal; and employees often couldn't easily track the performance of their 403(b) funds that were still invested in separate accounts, etc.

So, after the 2007 regulations, and as the migration to 401(k) plans by non-profit organizations gained steam, I kept finding myself thinking, and even suggesting to colleagues, that it wouldn't be long in my opinion, before 403(b)s – like the expensive variable annuity contracts that had once been their primary funding vehicle – would cease to exist, and all types of employers would simply offer 401(k) plans to their employees. I thought I would soon no longer be answering the question, "Is a 403(b) better than a 401(k) for my non-profit organization?" and discussing the pros and cons of each like I had done so many times over the years! *(See table below)*

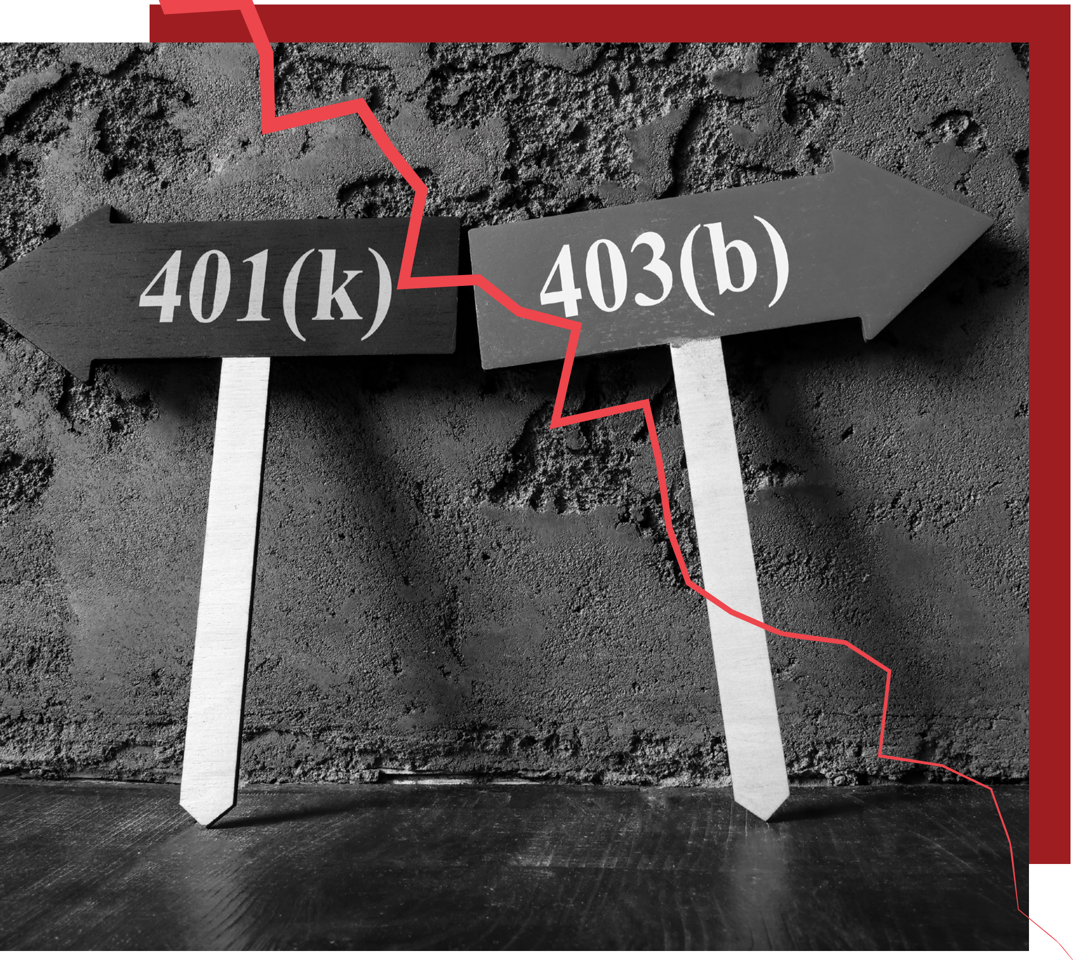
Yet, here we are in 2023, and even after the passage of Secure 2.0 which closes the gap between 403(b)s and 401(k)s further (e.g., expansion of the hardship distribution source rules in 403(bs, the ability to offer CIT's in 403(b)s – hopefully finalized soon!), there's no sign of 403(b)'s becoming extinct.

So, then what continues to drive the existence of the two plan types? Is it that there are still some remaining distinctions between 403(b)s and 401(k)s – most notably the fact that employer-funded 403(b)s are not subject to ADP testing? Or could it be the reluctance of some not-for-profit organizations to give up the 403(b) 15-year catch-up provision (which I would argue is becoming less of an issue as employees' tenure, even in not-for-profit organizations, is shrinking)? Or finally, could it be that historically, not-for-profit organizations tend to be more paternal and unwilling to give up something that is unique to their employee population?

I might propose that the former questions posed have played a minor role in the perpetuation of the two plan types, but rather I would suggest it is mainly the large gap in the fiduciary and administrative requirements between employee contribution only 403(b)s and 401(k) plans that continue to delay the merging of the two plan types. In particular, the applicability of ERISA. Governmental and church plans are exempt from Title 1 of ERISA, regardless of whether it's a 403(b) plan, or a qualified plan. But, non-profit organizations that offer 403(b) s that accept only employee salary deferral contributions and severely

401(k) vs 403 (b)

DIFFERENCES	401(k)	403(b)
Regulations	Regulated by ERISA	In Some Cases, Regulated by ERISA
Eligibility	Any Entity Other Than a Government	Non-Profit Organizations, Schools, Hospitals and Religious Institutions
Contribution Limits	Below 50 Years Old: $22,500 50 Years Old Above: $30,000	
Additional Contribution	None	After 15 Years of Employment: $3,000 Each Year With a Lifetime of $15,000
Employer Match	Combined Contribution Not to Exceed Below 50 Years Old: $66,000 50 Years Old Above: $73,500	
Investment Options	Annuities, Mutual Funds, Stock, Bonds	Annuities and Mutual Funds



due to competition between the record-keepers. With fewer providers offering service in the 403(b) space, I would argue that same rate of compression hasn't occurred."

So, my recommendation to those willing to listen and opine, is let's start a conversation about 1) eliminating the establishment of new employer-funded 403(b)s and, 2) pressuring legislators to permit the merger of 403(b)s and 401(k)s so we can simplify the retirement plan selection process once and for all for plan sponsors. This would by no means be easy to do, as compromise would be needed in order to resolve some of the substantive differences between the two types of plans. For example, one of the key differences is that for purposes of determining the maximum amount that can be allocated to a participant in a year (the IRC §415 limit), 403(b) plans are deemed to be maintained by the individual, not the plan sponsor. If an eligible employer sponsors both a 403(b) plan and a 401(a) plan, then employees covered by both plans are able to receive significantly more employer contributions than with employees who are only covered by one plan. One can see how eliminating the ability to do this (or expanding it to everyone) would be controversial.

limit their involvement are exempt from ERISA. That exemption is not applicable to sponsors of 401(k) plans as there is always employer involvement.

Therefore, while the gap in 403(b)s and 401(k)s has shrunk to the point of some of us in the retirement field asking "Why do we even need both?", those who offer employee contribution only 403(b)s might not be nearly as willing as plan sponsors of employer-funded 403(b)s to accept the significant responsibilities and costs that come along with migrating to a 401(k) environment. And, even if ERISA coverage wasn't a concern, any forced changes in the rules will be met with resistance and therefore Congressional action would be unlikely. While 403(b) plans aren't as common as 401(k) plans, those who are covered by 403(b) plans don't want change (just as those covered by 401(k) plans don't want change).

Joe Hatfield, AIF®, CPFA® and a Vice President with OneGroup Retirement Advisors with offices in Syracuse, NY and Naples, FL had this to say about his experience with 403(b) offerings: "As an agnostic consultant who has access to all record-keeping solutions out there, I would agree that in today's world, it's in the best interest of plan participant to participate in a 401(k) vs. a 403(b). Few things are more important to performance than cost. While 401(k)'s can currently utilize collective investment trusts (CIT)s, 403(bs still cannot. CIT's tend to be 20-30% less expensive than their mutual fund clones, leaving more upside and less downside for the participant. There are also far more service providers available to quote 401(k) plans than there are 403(b)'s. Having a large and free open market has really driven down costs in the 401(k) world over the last decade -- in large part that's

There certainly is merit into having consistency among the plans, although that also results in a loss of flexibility. It avoids confusion both with plan sponsors and the ultimate beneficiaries of the programs – plan participants. The reduction in investment costs that we've seen in the 401(k) market have trickled into the 403(b) market, but arguably not a sufficient pace. That gap, however, will always exist for those plans not subject to ERISA. Nevertheless, it's worthwhile to have these policy discussions to improve the system for all participants.

And, finally, while I'm making recommendations, can someone please prompt states like New Jersey and Pennsylvania to consider tax amendments that will add a state income tax exclusion for 403(b) contributions like almost all other states in the US. PC

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NEW AND IMPROVED (AND EXISTING) TAX CREDITS FOR SMALL EMPLOYER PLAN

SECURE 2.0 introduces revamped tax credits for new retirement plans, prompting small employers to reconsider the benefits of sponsoring a qualified plan. In this article, we delve into three specific tax credits that can incentivize businesses to offer retirement benefits to their employees. **By Kelsey N.H. Mayo**

Under SECURE 2.0, enhanced and new tax credits are made available for new retirement plans. What is about these tax credits that may cause small employers to look differently at sponsoring a qualified retirement plan? Those of us in this industry are always brainstorming innovative methods to communicate and market retirement plans and secure the benefits of a workplace retirement plan for more Americans.

This article will look at three tax credits may help a small employer get on board with offering a plan to its employees: (1) administrative costs of start-up plans; (2) employer contributions; and (3) credit for plans that add automatic enrollments.

START-UP COSTS TAX CREDIT (IMPROVED)

Before SECURE 2.0, employers with up to 100 employees could receive a tax credit of up to 50% of the plan's administrative costs for the first three years it maintained a plan. Administrative costs covers a lot of ground: TPA services, investment advisor fees, recordkeeping expenses, and other associated plan administration costs. This credit generally is available only if at least one non-highly compensated employee is eligible for the plan and neither the company, nor any related employer, maintained another retirement plan for substantially the same employees during the three taxable years preceding adoption of the new plan.

It is rare when a sequel is better than its predecessor. But, thankfully, that is true of SECURE 2.0, which increases that tax credit for employers with up to 50 employees to 100% of the start-up costs. The other requirements regarding eligibility and caps on the credit remain the same. This generally leaves an eligible employer with the following possible tax credit beginning in 2023:

Size of Company	Tax Credit	Limits
1 – 50 employees	100% of admin costs for first three taxable years of the plan	$250 x eligible NHCEs (min $500; max $5,000)
51-100 employees	50% of admin costs for first three taxable years of the plan	$250 x eligible NHCEs (min $500; max $5,000)

SECURE 2.0 also clarified that these tax credits are available for employers who join an existing MEP/PEP—a welcome clarification for many small employers and MEP providers.

EMPLOYER CONTRIBUTIONS TAX CREDIT (NEW)

While the start-up credit enhancement is nice, the real start of the SECURE 2.0 show is the new employer contribution tax credit!

This new provision provides eligible employers with a tax credit for making employer contributions to the plan for the first five years the plan is in existence. As with the start-up tax credit, an employer is eligible for this tax credit if it had no more than 100 employees making more than $5,000 in the preceding year. The tax credit is equal to a certain percentage of the contribution that is provided to each employee who makes less than $100,000 in FICA wages, capped at $1,000 per employee.

Year	Percentage of Employer Contribution
Tax year in which plan is established	100%
Next (2nd) taxable year	100%
3rd taxable year	75%
4th taxable year	50%
5th taxable year	25%
6th taxable year and beyond	0%

Note that while the percentage changes based on the taxable year, the $1,000 cap does not change. The cap is $1,000 regardless of the taxable year being evaluated.

Even though this is available for all employers that have up to 100 employees, the credit is phased out for employers with more than 50 employees. So the full amount of the tax credit is available only for employers with 50 or fewer employees. The credit is phased out linearly based on the number of employees over 50.

Also, interestingly, where the start-up cost tax credit is completely unavailable to a company that maintained another plan in the three years before the current plan is adopted, this tax credit is available to that same company. The company simply loses one year of the tax credit—the credit for the year in which the plan is established. So, for example, a company who currently sponsors a SIMPLE IRA can end that arrangement, adopt a 401(k) now, and receive up to four years of tax credits. As a result, there's a real incentive for companies to consider a qualified retirement plan now even if they've been using an IRA-type program.

> ***Example:*** DEF Corporation has one owner whose compensation exceeds $100,000 and five employees who all make less than $100,000. The company provides $10,000 in employer contributions between those five employees in various amounts. *(See below)*

As you can see, the tax credit results in DEF Corporation's cost to provide employer contributions being cut almost in half in the first two years, and substantially reduced in subsequent years. The likely policy idea here being that the owner is eased into the cost of providing employer contributions and will keep providing contributions beyond year five. However, nothing in the law appears to require a company to provide contributions for any particular period.

Also, it is interesting to note that there is nothing preventing the owner from receiving a tax credit on his or her own contributions. So, if the owner makes less than $100,000 in FICA wages or if it is a partnership, an LLC taxed as a partnership, or a sole proprietor (regardless of how much the owner makes because the owner doesn't have FICA wages and therefore cannot exceed the $100,000 threshold)—the tax credits would be higher because the owner's contributions would create an additional $1,000 tax credit each year.

This is attractive for all small employers. It may be especially attractive for a company that wants to adopt a cash balance plan, because the cost of the nonelective safe harbor contribution that is necessary for plan to pass testing will be substantially reduced for the first five years of the plans.

AUTOMATIC ENROLLMENT TAX CREDIT (EXISTING)

Finally, we cannot forget about the automatic enrollment tax credit. This isn't a new tax credit, but it is especially important now because any 401(k) arrangement established after SECURE 2.0 was enacted (Dec. 29, 2022) must include an automatic enrollment feature that meets certain requirements by the 2025 plan year. So more and more plans will be implementing automatic enrollment.

If a company with up to 100 employees implements an "eligible" automatic enrollment arrangement (or an EACA), then that company can take a $500 tax credit for the first three years that the plan offers the EACA. The SECURE 2.0 Act requirement for automatic enrollment is a particular type of EACA; therefore, generally all new 401(k) plans of small employers could generate this tax credit. This tax credit is unique to 401(k) plans, and might give the qualified plan option an edge when the company is debating among retirement plan options.

BOTTOM LINE

There may never have been a better time to get on board with a qualified retirement plan. These tax credits make it extremely attractive and hopefully will propel many small employers over the initial hurdle of sponsoring a plan. PC

	Contribution	Credit in Years 1 & 2 (100%)	Credit in Year 3 (75%)	Credit in Year 4 (50%)	Credit in Year 5 (25%)
Owner	$66,000	$0	$0	$0	$0
Employee 1	$5,000	$1,000	$1,000	$1,000	$1,000
Employee 2	$750	$750	$562.50	$375	$187.50
Employee 3	$1,250	$1,000	$937.50	$625	$312.50
Employee 4	$2,000	$1,000	$1,000	$1,000	$500
Employee 5	$1,000	$1,000	$750	$500	$250
Total Tax Credits		$4,750	$4,250	$3,500	$2,240
Net Cost of Employees	$10,000	$5,250	$5,750	$6,500	$7,750

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INTEGRATING YOUR BUSINESS: THE ART OF MERGING AFTER AN ACQUISITION

Our last issue examined the question: "Is it Time to Sell?" Here we will examine the process's next step for those who have decided it is time to sell. **By Linda Chadbourne, Theresa Conti & Jim Racine**

EDITOR'S NOTE: This is the third of a three-part series outlining the important considerations for the TPA business owners thinking about selling the firm.

In our previous two installments, we discussed the decision to sell your business and the intricacies of valuing it. Now, as we embark on the final leg of our journey, we delve into the importance of integration after an acquisition.

Remember why the sale occurred! Post-sale integration refers to the process of integrating two separate entities after a sale or acquisition has taken place. It involves bringing together various aspects of the organizations, including their operations, systems, processes, culture, and people, to create a unified and efficient entity.

Starting integration early is critical. Employees and clients expect to see change after an acquisition is announced. If there are no communications on what to expect in the first few months following an acquisition, employees and clients get set in their current ways and resistance to change grows.

The goal of the post-sale integration is to leverage the synergies and potential benefits which led to the sale or acquisition in the first place. It allows the acquiring company to maximize the value of the acquisition by combining resources, eliminating redundancies, and capitalizing on the strengths of both entities.

When two entities come together, they bring their distinct culture processes and quirks. Merging them seamlessly is like mixing two different kinds of candy in a bowl and hoping for the best. Yes, it might result in a surprisingly delicious combination, but often, it's a recipe for chaos. So let's explore the importance of integration and how you can prepare ahead of time.

KEY ASPECTS OF POST-SALE INTEGRATION

Operational Integration. Post-sale integration requires aligning and streamlining operational processes and systems. This includes integrating IT infrastructure, financial systems, compliance systems, and any other operational functions.

Combining different operational processes can feel like organizing a chaotic game of Tetris. Just when you think you've got everything lined up perfectly, a new challenge appears, and you're back to scrambling for the right piece. Embrace the chaos and remember to laugh along the way.

Before acquisition, gain a clear understanding of the integration objectives and goals. Identify IT systems and processes which need to be integrated and the desired outcomes of the integration. You might want to conduct a comprehensive assessment of your current IT infrastructure, including hardware, software, networks, and databases. This will identify any gaps or areas which need improvement to support the integration process.

Best of the Best. In most deals, both organizations were successful. The acquiring firm should do a thorough examination of why the acquisition came about. The best integrations involve change for both organizations as the best systems and processes are evaluated and the best in class moves forward.

During the transition, maintain open and transparent communication with employees. Clearly communicate the benefits of the integrated systems and address any concerns or resistance to change. Developing a comprehensive training plan to familiarize employees with the integrated systems will ease the unwillingness to migrate.

Customer Integration. It is essential to integrate the customer bases of both entities to provide a seamless experience. This may involve migrating customer data, aligning

"THE GOAL OF THE POST-SALE INTEGRATION IS TO LEVERAGE THE SYNERGIES AND POTENTIAL BENEFITS WHICH LED TO THE SALE OR ACQUISITION IN THE FIRST PLACE."

customer support processes, and ensuring consistent messaging and branding.

Conducting a thorough analysis of how the acquisition will affect your customers is crucial to the integration process. Identify any potential changes to products, services, pricing, or support which may occur as a result. This analysis will help you develop a plan to address customer concerns and manage expectations.

During the process, always provide clear and transparent information regarding the integration process. Allocate resources specifically for customer integration and support during the transition period. Ensure that you have a team in place to handle customer inquiries, help, and address any issues which arise during the integration process. Regularly update them on the progress, milestones achieved, and any changes which might affect them directly.

Remember, open communication is crucial in developing trust and credibility with clients. It demonstrates the organization values their input, actively listens to their needs, and seeks to understand their perspective. Trust is the foundation of long-term client relationships which can lead to repeat business and referrals.

Employee Integration. The integration of acquired employees is a critical aspect of any successful acquisition. It requires careful planning, effective communication, and a supportive environment.

Before the acquisition, gather comprehensive information such as the organizational chart. Conduct a thorough assessment of the human resource policies, practices, and cultures of both companies. Identify areas of alignment and potential gaps and develop strategies to bridge those gaps. This includes analyzing compensation and benefits programs, performance management systems, employee development programs, and any other HR-related polices.

Communication. Once the acquisition has been executed, it is important to develop a communication plan. Start by communicating the acquisition to your employees as soon as possible. Be transparent about the reasons behind the acquisition, the potential benefits, and any changes that might occur. Address any concerns or questions they may have and emphasize the commitment to supporting them through the integration process.

During the post-integration phase, employees often experience uncertainty and anxiety about their roles, job security and cultural changes. Define clear integration goals and establish realistic timelines for achieving them. This will help create a structured approach and enable employees to understand the integration process. Communicate the goals and timelines to all employees to manage expectations and keep everyone focused on common objectives.

Offer training programs or resources to help employees adapt to any new systems, technologies, or processes that may result from the acquisition. This can include training on new software, changes in company policies, or updated operational procedures. Provide support and resources to address any concerns or challenges employees face during the integration.

Be sure the integration team is continuously evaluating the process and makes necessary adjustments along the way. Seek feedback from employees and address any concerns promptly. Regularly assess the impact of integration on employee morale, productivity, and satisfaction, and take corrective actions as needed. Along the way celebrate successful integration milestones and achievements as a way to foster a sense of accomplishment and unity amongst all employees.

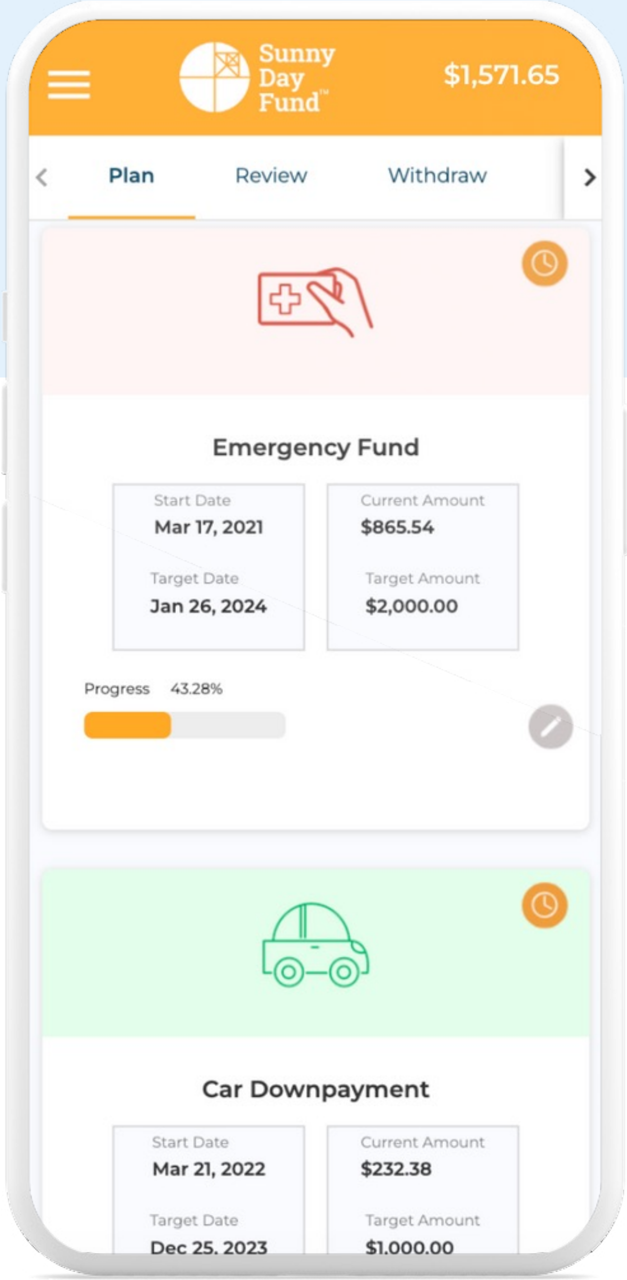
By executing a smooth integration, the acquiring company can effectively communicate its vision, provide clarity on job roles, and create a positive work environment. This fosters a sense of stability and engagement among employees, reduces turnover rates, and preserves valuable knowledge and expertise.

CONCLUSION

A seamless integration after an acquisition is critical for maintaining business continuity, leveraging synergies, preserving employee morale, managing stakeholders, and setting the stage for long-term growth. It requires careful planning, effective communication, and strong leadership to ensure successful integration and maximize the value derived from the acquisition. PC

37% **tapped their retirement savings early**, driven by low emergency savings and growing debt

Source: 23rd Annual Transamerica Retirement Survey of Workers



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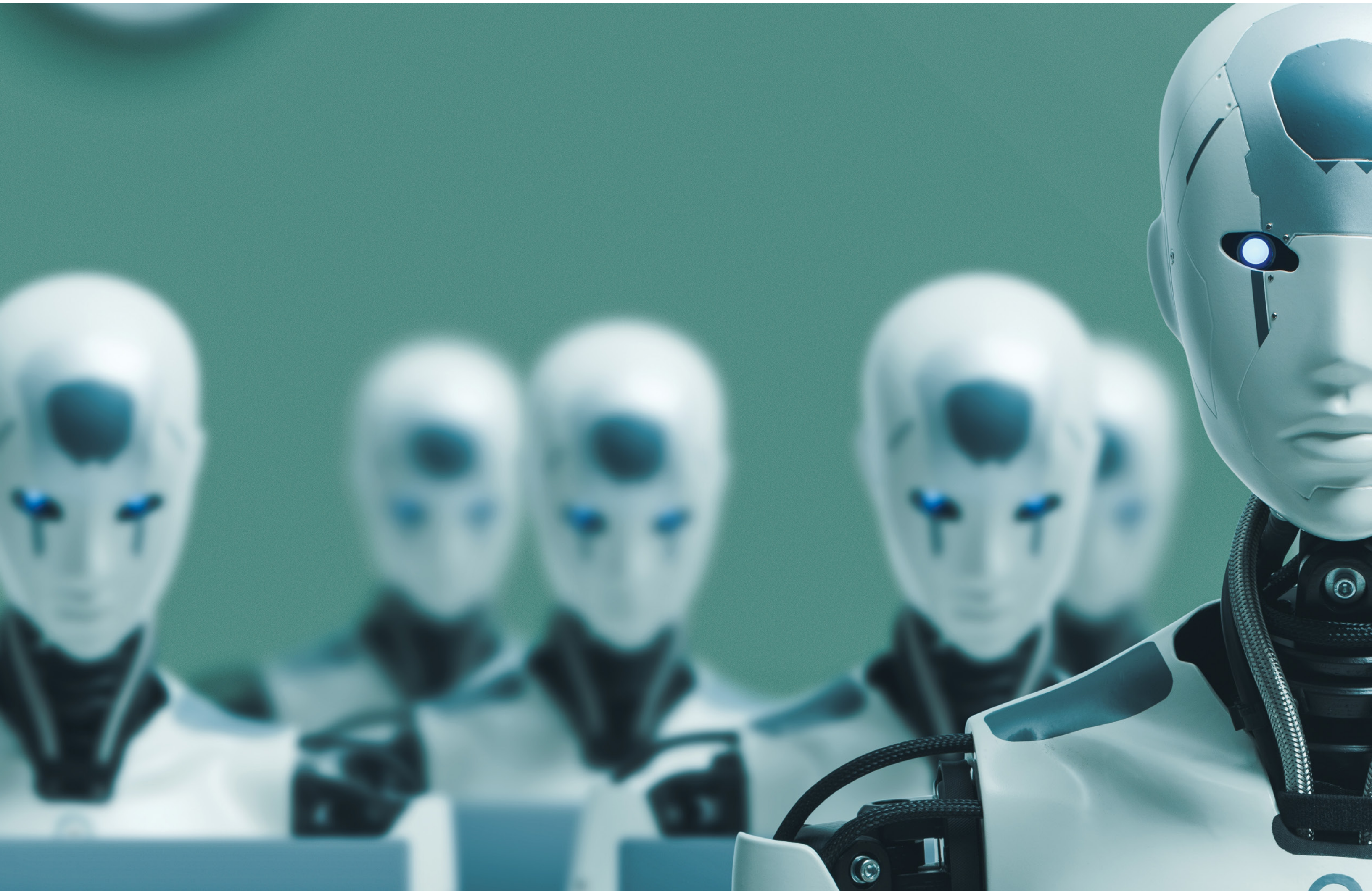

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WHY AI AND THIRD PARTY ADMINISTRATORS ARE SOUL MATES

The majority of the TPA industry has a number of gaps when it comes to getting up to speed on the benefits of cutting-edge technology, and incorporating its clear advantages into their businesses.

By David Hawash

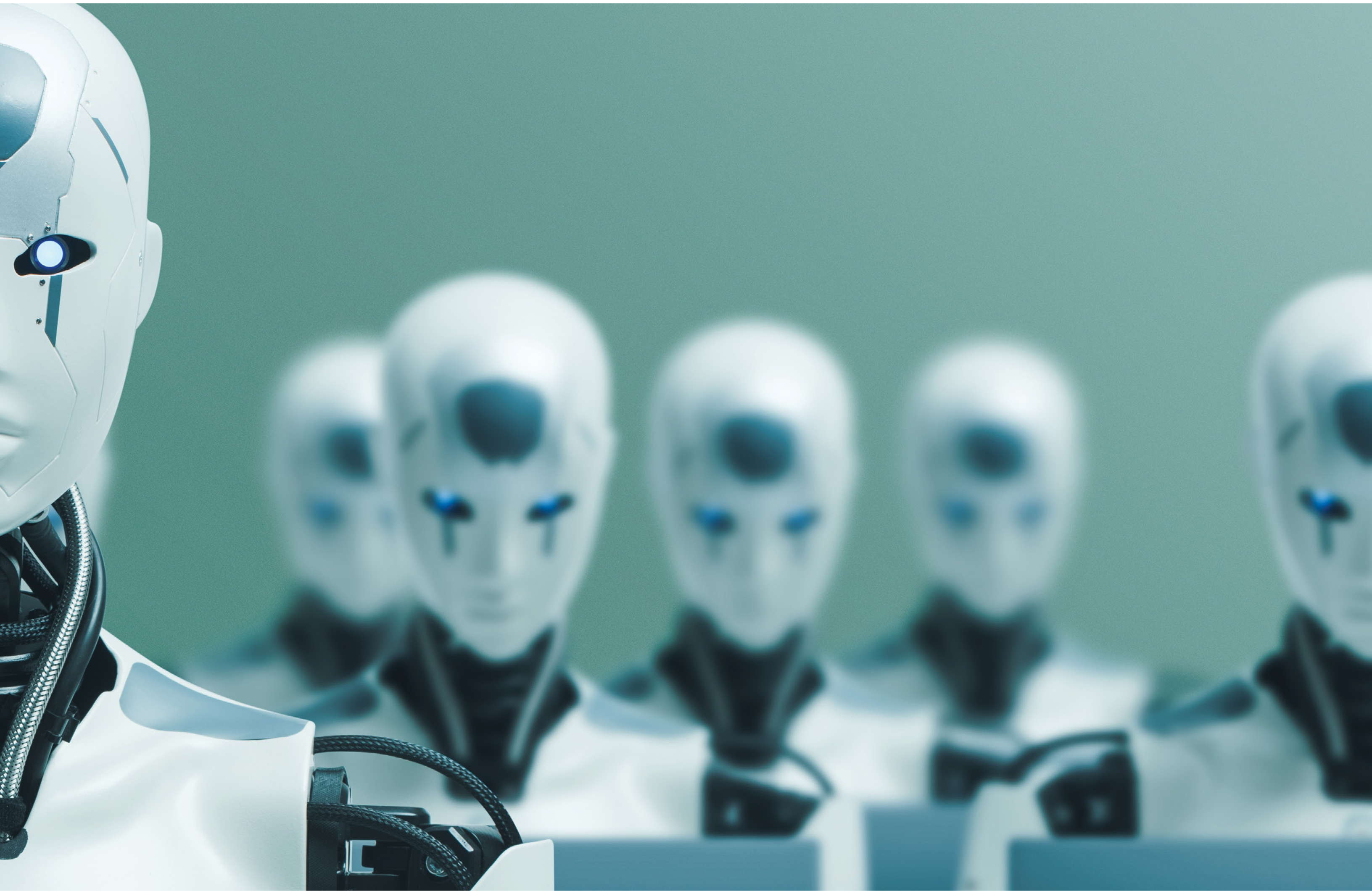
For those of us involved in technology, it's difficult to understand the hesitation of TPAs when it comes to consummating a relationship that looks to us like it was made in technical heaven.

TPAs appear to be stuck in a "why change in the first place," or "we've always done it this way," or "if it isn't broken, why fix it" approach to their business. This type of mindset—akin to sticking one's head in the sand—puts many TPA businesses at a disadvantage, particularly given that many TPA partner industries are busy welcoming related technologies into their own processes with open arms.

SETTING THE TABLE

Before we get into bots and artificial intelligence (AI), let's do a quick rewind of history.

In 1977 Apple's groundbreaking Apple II was released, the IBM PC was introduced 1981, and the Macintosh



computer in 1984. The first cell phone was released in 1983 and weighed a whopping 2.2lbs! In 2007 and Apple introduced the first iPhone and now, fourteen iPhones versions later, almost everyone would agree that these devices have significantly influenced our day to day behavior not to mention our social interactions. It's hard to believe that it's been less than 50 years since that first device, the Apple II was introduced.

ARTIFICIAL INTELLIGENCE

Artificial intelligence refers to the development and implementation of computer systems and algorithms that possess the ability to simulate intelligent behavior, learn from experience, and perform tasks that typically require human intelligence. AI systems can process large amounts of data, recognize patterns, make decisions, and adapt their actions based on new information or changing circumstances.

Bots, or chatbots, are a type of conversational AI, but not all bots are conversational AI. Rule-based chatbots use keywords and other language identifiers to trigger pre-written responses and are not built on conversational AI technology.

The biggest difference though between AI chatbots and rule-based chatbots is the usage of machine learning models in AI bots that significantly increase the bot's functionality as it can identify hundreds of different questions written by a human, leading to more insightful and dynamic thinking.

THE ULTIMATE GOAL

At its core, AI aims to replicate human cognitive abilities, such as problem-solving, reasoning, perception, and language understanding, using computational models. These models are designed to analyze and interpret complex data, extract meaningful insights, and generate responses or take actions in a manner that mimics human intelligence.

The ultimate goal of AI is to create systems that can perform tasks autonomously, exhibit adaptive and creative behaviors, and engage in human-like interactions. While AI has already shown remarkable advancements and applications in areas such as healthcare, finance, transportation, and entertainment, ongoing research and

"MANY OF THE MANUAL PROCESSES OCCUPYING A BIG CHUNK OF A TYPICAL TPA WORKDAY ARE MENIAL, OUTDATED, AND CAN BE ALLEVIATED WITH THE INTEGRATION OF AI AND BOT SOLUTIONS."

innovation continue to push the boundaries of what AI can achieve.

WHAT AI OFFERS

TPAs have the opportunity to leverage bots and AI in several ways to enhance their business and improve efficiency.

Many of the manual processes occupying a big chunk of a typical TPA workday are menial, outdated, and can be alleviated with the integration of AI and bot solutions.

Cutting-edge AI technology can rescue a surprising amount of time for TPAs. If you could save 10, 20, 50, 100+ hours each month—imagine what could you do with that freed-up time. Pause here, get out a pen and paper and write down a list of what you or your employees could do with that amount of extra time per month. I'd start with these:

Increase and enhance your customer experiences. With the extra time you now have, you can reallocate staff to assist customers, build improved plans, or catch up with other work you are behind on.

STREAMLINE OPERATIONS

AI algorithms can flawlessly automate data processing, analysis, and reconciliation tasks, reducing manual human errors while improving overall operational efficiency. This allows TPAs to handle larger volumes of transactions effectively.

It's frustrating and demoralizing for any TPA who stands at a workstation all day scanning, downloading, then filing brokerage statements. Eyes get tired and the mind wanders while sitting at a desk transposing and exporting numbers robotically into an Excel sheet.

The list goes on, with numerous manual processes that can be streamlined—especially since the technology has ability to customize its automation to accomplish specific tasks. Take another pause here and write down what could be automated in your current operations to help improve your workflow. Here are some:

Fraud detection and prevention. AI algorithms can accurately identify patterns and anomalies in financial data, helping TPAs detect potentially fraudulent activities and mitigate risks.

Compliance management. The pinnacle of plan administration is compliance. AI is a valuable tool for the TPA in monitoring and ensuring compliance with regulatory requirements. By implementing intelligent systems, TPAs can automate compliance checks and identify any discrepancies or potential issues promptly.

PROCESSES TO IMPROVE

Data analytics. Investing in AI tools and algorithms helps TPAs to analyze large volumes of data, uncover meaningful insights, and make data-driven decisions. The tools also help identify trends, predict risks, and optimize business strategies.

Untapped technology opportunities. TPAs can utilize natural language processing (NLP) to extract relevant information from unstructured data. This can facilitate faster data processing and analysis.

Robotic process automation (RPA). TPAs can deploy RPA bots to automate repetitive manual tasks such as data entry, report generation, and document processing. This can significantly reduce human error and free up resources for more strategic activities.

Predictive analytics. TPAs can leverage AI algorithms to develop predictive models that anticipate.

DOLLARS AND CENTS

The cost of technology can vary depending on the type of technology you utilize and some of it may seem "expensive" when compared to other innovations such as computing hardware.

But by automating repetitive tasks, TPAs can reduce the need for manual intervention, leading to cost savings in terms of manpower and operational expenses.

One needs to take a bigger picture and consider the ultimate cost of you not using technology to help your business, or delaying the inevitable.

The Bottom Line

By embracing these technologies, financial TPAs can gain a competitive edge, improve operational efficiency, deliver superior customer experiences, and achieve sustainable growth in their business through increased efficiency and operations scaleability.

AI and bots are not going away. In fact, they are getting smarter by the minute, while your disadvantage grows every minute you're without them.

Even though your process or business isn't broken, today's astute TPA can recognize that AI technology and TPAs aren't a marriage of convenience, they're soul mates. PC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THE WICKED WITCH IS DEAD

There's no place like the moderation of stock attribution rules. Instead of clicking your shoes together, prepare for Jan. 1, 2024 when the rule update goes into effect. **By Shannon Edwards**

Do you remember the first time you watched the *Wizard of Oz*? Back when you could only watch movies when they were shown once a year on television, I remember watching the *Wizard of Oz* every year with my grandmother.

The tornado rips through the farm where Dorothy lives. It sweeps up her house and begins spinning it through the air. Everything is going crazy, and then all the sudden, Dorothy's house lands in Oz and right on top of the wicked witch. All that you can see of the witch is her feet sticking out from under the house. Glenda the good witch arrives in her bubble and declares "Let the joyous news be spread. The wicked old witch at last is dead!" Then the munchkins start dancing and singing and celebrating their newfound independence.

RELEVANCE

What does this have to do with retirement plans, you may be asking yourself?

Well, when SECURE 2.0 finally was enacted in December 2022 and it included the Family Attribution Modernization Act, I felt like Glenda the good witch. I felt like those of us in the compliance administration industry should make our own declaration. It would go like this: "Let the joyous news be spread. The 'Love Child Rule' at last is dead!" I actually want to dance around like the munchkins did in Oz and celebrate the fact that we no longer have to ask as many embarrassingly probing questions of our clients.

As you may recall, the stock attribution rules for determining whether a controlled group of employers existed contained two rules that were antiquated and punitive. The stock attribution rule involving minor children didn't even require the two parents to be married or for both to even have knowledge of the existence of the minor child (my reason for affectionately referring to it as the "Love Child Rule"). The community property rules created a controlled group if two spouses each owned their own businesses and lived in a community property state. This occurred regardless of whether the spouses were involved in each other's businesses or not. Once the controlled group was created because of the community property state rules, the two businesses continued to be a controlled group even if the owners moved to a non-community property state later. These rules and their complexity discouraged many small business owners from sponsoring a plan.

I never looked forward to the look of surprise on clients' faces when I asked them if they have any children under age 21 with their spouse or with anyone else, and if the other parent of the minor child owned a business as well. It was never a comfortable conversation for anyone. Then having to explain to them the results if they said yes was even more complicated and uncomfortable. It was never fun explaining to a lawyer why we would have to consider his ex-wife's employees in our plan testing and may in fact have to include some of them in his plan to pass testing. Not only was it not fun, it wasn't logical either.

Those of you who know me and take the time to read my articles from time to time probably know that the stock attribution rules that included the creation of related employers due to either community property rules or the existence of a minor child have been the bane of my existence for some time now. I have openly advocated along with many of my friends and colleagues in the American Retirement Association (ARA) for the removal of these rules. In 2021, Jimmy Panetta (D-CA) and Rep. Jodey Arrington (R-TX) introduced the Family Attribution Modernization Act because outdated tax law unfairly penalized small businesses in community property states and women businesses owners. When the bill was introduced, ARA CEO Brian Graff was quoted as saying, "Small business owners, and most specifically women small business owners, have too long been constrained by well-intentioned, but archaic rules that no longer apply in today's economy."

The removal of these two rules as part of SECURE 2.0 is not effective until Jan. 1, 2024. However, now that these two rules were eliminated with the passage of SECURE 2.0, we are left with reasonable and regular stock attribution rules for determining whether two separate businesses owned by two spouses should be considered related employers or not.

We also have the non-involvement exception that we can use to avoid the creation of controlled groups in certain cases where the exception can be met. Small business owners will no longer be forced to cover unrelated plan participants simply because of the existence of minor children or because of which state they live in or used to live in.

There are still some additional complexities that can't be ignored, such as the effects of separation and divorce on the stock attribution rules, or the effects of state laws that recognize common law marriages. However, none are as complex or punitive as the two stock attribution rules that have been removed with SECURE 2.0.

"SMALL BUSINESS OWNERS WILL NO LONGER BE FORCED TO COVER UNRELATED PLAN PARTICIPANTS SIMPLY BECAUSE OF THE EXISTENCE OF MINOR CHILDREN OR BECAUSE OF WHICH STATE THEY LIVE IN OR USED TO LIVE IN."

WHAT THIS MEANS

What does this mean for you and your retirement plan compliance administration practice? Since the change in the law goes into effect Jan. 1, 2024, it is time to take a closer look at your clients who are currently considered members of a controlled group due to the community property state laws or the minor child stock attribution rule. It's time to put on your consulting hat to see if changes need to be made to their plans.

There are currently nine community property states that will have plans that are or may be affected by this change in the stock attribution laws: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Also keep in mind that stock attribution rules related to community property states continued to affect companies under the controlled group rules, even if the business owners moved out of the community property states.

If there are plans in your book of business that are affected by this change or the change to the stock attribution rules related to business owners and their minor children, they will require a plan amendment. If they are no longer considered a controlled group but choose to remain as participating employers in a single plan, the plan would now be considered a multiple employer plan. This should be discussed with the clients. There may be reasons that they would prefer to maintain separate plans rather than remaining as one. There may be action needed to spin off one plan from the other if they decide to maintain separate plans.

While I am still celebrating the death of these two archaic stock attribution rules, I am also aware that it is time to role up my sleeves and do some additional consulting work before year-end. I am also hoping that by modernizing the stock attribution rules, we will be able to encourage more small businesses to offer retirement plans to their employees and help us to close the coverage gap. PC

We're heading in exciting **new directions** with TPAs

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USING SECURE 2.0 TO MARKET AND CREATE ADDITIONAL REVENUE

From additional plan types, distribution types, and tax credits options for clients, this article will help you discover how your firm can benefit from these new provisions. **By Megan Crawford**

Now that the dust has settled (well, somewhat) on SECURE 2.0, it is a great time to look at one of the silver linings... this enormous law holds some opportunities for additional revenue for our industry!

GENERATING MORE REVENUE

Now—on to how you can generate more revenue!

Let's start with the most obvious revenue generator, plan document amendments. With this sweeping law come sweeping document updates to be provided to every plan we service. While we hope that most document providers will provide default provisions, there are still going to be scenarios to be discussed and amended on a per-plan basis. One might consider implementing default amendments for a set price and charging additional fees for plans that need tailored amendments. You might consider completing these on a flat-fee basis or as an hourly charge for plan-specific amendments.

Not only will you eventually be amending to add SECURE 2.0 provisions to the plan document, there may also need to be some amendments to plans before certain SECURE 2.0 provisions become effective.

One such instance will be implemented starting Jan. 1, 2024 (as the law currently stands) to force catch up contributions to be Roth for those making over $145,000 in 2023. While most plans do allow for Roth already (over 95% according to VOYA's plan benchmarking tool), there are still around 5% that may need to add this provision before the end of the year. According to the Investment Company Institute, there were 625,000 401(k) plans as of Sept. 30, 2022. If 5% of those plans need an amendment to add Roth, that is 31,250 plans. Even at a modest amendment fee, this is a huge revenue opportunity for our industry.

There also are several distribution options becoming available that may generate a decent amount of additional distribution revenue. One we are excited about—as it causes no additional work on tracking repayments—is the increase in the cash out limit! This should be an easy way to force additional terminated participants over to IRA providers and out of our plan sponsors' hair.

Next on the list is the new personal emergency distribution. Starting in 2024, plans may permit participants to take one distribution, per year, of up to $1,000. Participants may repay the amount within a 3-year

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period. Charging your regular distribution or hardship fee—and dare I say an annual fee for tracking repayments—may be something worth considering. We do this for tracking loan repayments, and this is not much different.

What about the opposite of distributions, i.e., our new emergency savings account option. While at heart this is a nice way for Americans to have additional options to save for emergency situations (so they don't have to dip into their retirement account), this adds additional work for all parties involved. It will be quite time-consuming to track how much participants contribute while also doing possible monthly distributions, including tracking that the first four distributions are completed at no cost. I certainly don't think it should be at the cost of the TPA to track this additional plan feature. You might consider having plan sponsors cover the cost of these types of accounts and distributions, since they are optional.

ADDITIONAL PLAN OPTIONS

Next, let's chat about the additional plan options available under SECURE 2.0.

Starter(k). The new Starter(k) has been underrated, in my opinion. There certainly is a market for plan sponsors who want to be able to offer deferrals to participants with an easy no-fuss (and no employer contribution) plan. If we really want to get more Americans saving for retirement under an employer-sponsored plan, this is a great first step!

Starter(k)'s should also be a no-fuss plan for the TPAs involved. Putting together a deferral-only document should be an easy set up, and most likely billed at a lower rate than a regular 401(k) plan. Still, some administrative work will remain for the TPA. I envision this working as a simple flat-fee set up and flat annual fee, with additional correction or consulting fees charged hourly, as needed. That way, if they forget to auto enroll someone or deposit money in the wrong account, we are still covering our time involved in making sure everyone stays in compliance. And let's not forget the additional 5500 revenue!

> "THESE CALCULATIONS ARE NOT FOR THE FAINT OF HEART, AND BECAUSE THEY ARE GOING ON THE TAX RETURN, THEY MUST BE ACCURAT."

Retroactive first-year deferrals. SECURE 2.0 also provides the opportunity for sole proprietors to do retroactive first-year deferrals. This is a great new option so sole proprietors can put a plan in place after year end and get the benefit of the 401(k) deferral without having signed a deferral form before year end.

Family attribution rules. With the change in family attribution rules, there also is an opportunity for you to separate plans that have been a controlled group into separate plans. Not only could you generate revenue because you are starting a separate plan, but you may also be able to do more creative design work for one of the "no longer controlled" entities that they couldn't do before. This, of course, is an opportunity to charge additional fees for those more complex calculations.

The converse of this situation may also be an opportunity. Let's say they no longer are considered controlled, but they don't want to start separate plans. You may keep the companies together as a multiple-employer plan. It may be hard to justify charging more than you were before (since you are still maintaining the same plan you always had), however, this does require additional schedules to be prepared with the annual Form 5500 filing. This ensures you are at least covering the additional time you have on your end.

Tax credits. With all these potential new fees for retirement plan sponsors, how do we still make it worth their while? Tax credits of course! With the increase in the startup plan credit, the new employer contribution credit, and the continuation of the auto enrollment credit, there are a lot of options to help your clients get their fair share.

While our CPA friends are certainly going to be the ones needing this information, we most likely will be the ones needing to provide it to them. One consideration may be to charge an additional fee to provide a breakdown of the start up and employer contribution credits. This could be charged as a simple additional flat fee for providing the credits, or an hourly fee, so it takes into account the size of the client and the amount of work involved in calculating the credit.

At first glance, it may seem like we should just give this information without additional fees, but let me remind you of the work placed on the TPA to be able to provide an accurate credit calculation; you will need to track each plan and what credits they are eligible for, which years they are eligible, and the percentage of the credit for which they are eligible. You also need to confirm prior year compensation and ownership status. These calculations are not for the faint of heart, and because they are going on the tax return, they must be accurate.

Communication. The other value add is how you communicate these new plan requirements and options to your clients. This is a great opportunity to remind your plan sponsors what an expert you are and how you can assist in making sure their plan is working for them and their employees! PC

ASPPA CASH BALANCE SPECIALIST CREDENTIAL™: 50 YEARS OF PENSION EDUCATION

Not only has a lot changed for employer-sponsored retirement plans over the last 50 years—a lot has changed in the last five years! And a lot has changed with ASPPA education too. **By Chris DeGrassi**

I like history. That's why I studied history in college. I also like stories. Whenever somebody runs into me in the office and asks a question, they almost immediately regret it because I probably will respond with a story. And I like to teach. I guess that's why I became the head of retirement education for ARA. That's why writing a story about the history of ASPPA education to introduce the new ASPPA Cash Balance Specialist™ (CBS) credential that will be offered beginning in 2024 makes sense to me.

THE EARLY DAYS

Once upon a time, way back in the 1970s in the early days of employer-sponsored retirement plans, traditional defined benefit (DB) plans were the norm. These plans promised workers a guaranteed income stream during their retirement years based on factors such as the number of years of service and final average salary.

In 1971, ASPPA—then known as ASPA (the American Society of Pension Actuaries)—offered two credential programs: the Member of the Society of Pension Actuaries (MSPA) and the Fellow of the Society of Pension Actuaries (FSPA). Both programs are still offered today by ASPPA's sister organization, the American Society of Enrolled Actuaries (ASEA). MSPA and FSPA credentialed members of ASEA are recognized as experts in pension plans by the IRS and other actuarial societies.

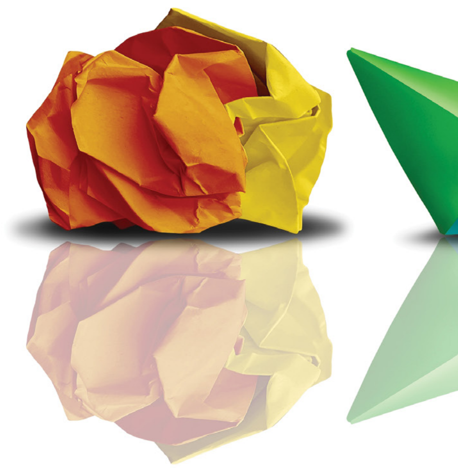
It was in 1975, the year following enactment of the Employee Retirement Income Security Act of 1974 (ERISA), that ASPPA introduced its second credential, the ASPPA Certified Pension Consultant™ (CPC). The CPC remains the highest designation offered by ASPPA. Each year between 20 and 30 ASPPA members sit for the six-hour CPC essay exam, the final step to earning their ASPPA CPC™ credential.

CREDENTIALS AND CREDIT FOR THEM

ASPPA CPCs are recognized as non-actuary retirement plan experts. Many organizations rely on ASPPA CPCs to oversee compliance and administration operations for their firms. If you're reading this article, you're likely an ASPPA credentialed member, and aspire to be an ASPPA CPC someday too.

Not only has a lot changed for employer-sponsored retirement plans over the last 50 years—a lot has changed in the last five years! And a lot has changed with ASPPA education too. Since 2018, ASPPA has:

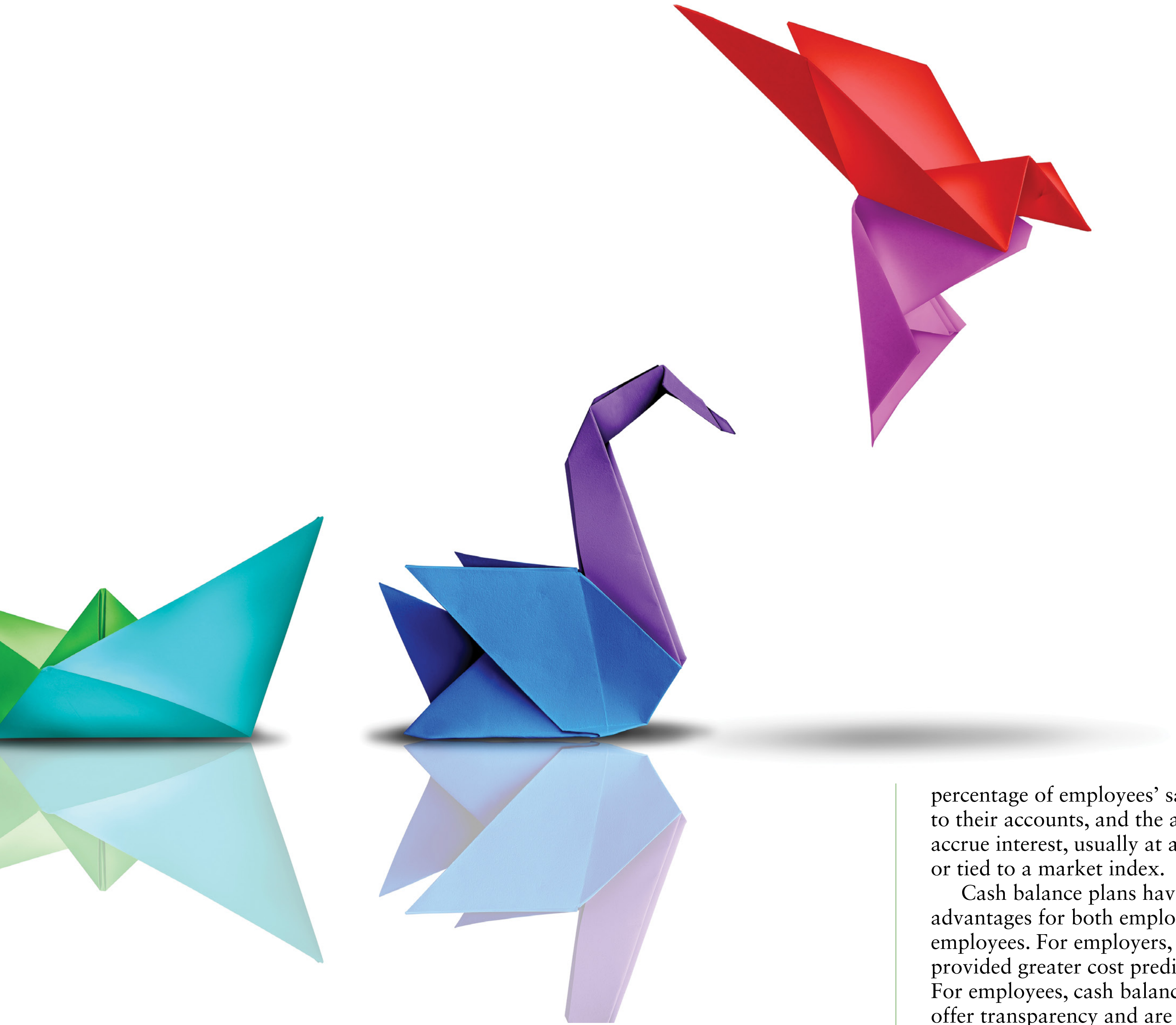
- introduced the Introduction to Retirement Plans certificate program;
- updated the Retirement Plan Fundamentals program;
- enhanced the ASPPA Qualified 401(k) Administrator® (QKA) credential; and



- introduced the Qualified 401(k) Consultant (QKC) credential.

The value to the industry is evident by the fact that each year, more than 600 new candidates start their journey toward achieving the ASPPA QKA® credential!

ASPPA CPC credential holders often serve in management and consulting roles, and many organizations rely on ASPPA QKAs to do the work necessary to keep retirement plans running. That includes handling plan implementations, completing contribution and discrimination tests, answering plan sponsor questions, managing notices



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and disclosures, and assisting with plan corrections. Wow! I guess the more than 4,000 ASPPA QKA credential holders really do make the American retirement system work!

INTRODUCING THE ASPPA CASH BALANCE SPECIALIST™ CREDENTIAL

This is all very interesting stuff, right? But if you're asking yourself what this has to do with the ASPPA Cash Balance Specialist™ (CBS) credential that is being readied for launch next year, well, here's the answer.

Everything!

The background. You see, ASPPA never lost the "pension" in its name. We are the American Society of Pension Professionals & Actuaries. The second "P" for professionals was added. Although defined contribution (particularly 401(k)) plans have become the default retirement plan for Americans, DB plans have not gone away. In fact, pension plans have come back in a big way, and many new DB plans are implemented every year. Many, if not most, of these pension plans are cash balance plans!

Unlike traditional pension plans, cash balance plans express benefits as hypothetical individual accounts with a stated balance that grows with annual contributions and interest credits. Employers contribute a percentage of employees' salaries to their accounts, and the accounts accrue interest, usually at a fixed rate or tied to a market index.

Cash balance plans have several advantages for both employers and employees. For employers, they provided greater cost predictability. For employees, cash balance plans offer transparency and are easier to understand. However, cash balance plans still carry risks inherent in any market-driven investment.

All those ASPPA CPCs and ASEA MSPAs have been very busy helping plan sponsors design cash balance pension plans that work in conjunction with 401(k) plans. In fact, cash balance plans are often set up alongside 401(k) plans. You likely even have a team in your office or a special group of outside administrators responsible for setting up these "hybrid" retirement plans.

The ASPPA Cash Balance Specialist Credential. That's why ASPPA and ASEA have partnered to develop the ASPPA Cash Balance Specialist™ credential., which will be rolled out in 2024.

"AN ASPPA CASH BALANCE SPECIALIST WILL HAVE AN IMPORTANT ROLE IN THEIR FIRMS BY HANDLING THE IMPLEMENTATION, ADMINISTRATION, AND INITIAL VALUATION OF CASH BALANCE PLANS ALONGSIDE 401(K) PLANS."

This new credential is designed for all the ASPPA QKA holders who make 401(k) plans work. An ASPPA Cash Balance Specialist will have an important role in their firms by handling the implementation, administration, and initial valuation of cash balance plans alongside 401(k) plans.

There will be a lot of information about the credential published over the next few months, so don't worry about committing everything to memory now. But here are a few key details about the program.

First, it's ASPPA education, so it's great! ASPPA education is great because we have a wonderful team of volunteers and staff. The ASPPA Cash Balance Specialist credential is being developed by a team of volunteers and staff helping to shape the content into a fantastic course for ASPPA! The ASPPA CBS task force is led by Justin Bonestroo (MSPA, EA, CPC, CPFA), Amanda Iverson (CPA, MBA, PHR, SHRM-CP, APM), Jennifer Goldberg (QKA, QPA, CPC), and Leah Johnson (QKA, QKC, QPA, ERPA). Lead ARA staff supporting the content development effort are Bob Kaplan (QKA, QKC, QPA, CPC, CFP) and Robert Richter (J.D., LL.M., APM) . With this team, we know that the ASPPA CBS education will be great!

The team has designed a curriculum with 12 modules covering the following cash balance plan topics:

1. Introduction to cash balance plans
2. Eligibility and coverage
3. General qualification requirements
4. Age discrimination and actuarial rules
5. Compensation, benefit, and deduction limits
6. Nondiscrimination testing
7. Early or late retirement, death, and disability
8. Plan conversions, special rules, and amendments
9. Fiduciary considerations
10. Distribution procedures
11. Plan distributions, part 2
12. ASPPA ethics

While the ASPPA QKA is not required to earn the ASPPA CBS credential, it will greatly help! Remember, cash balance plans are often implemented alongside 401(k) plans. You'll likely want to be a pro at administering both!

If you do have the ASPPA QKA or ASPPA QKC credential, then you will need to take one more test to earn the ASPPA CBS designation. For our ASPAA CPC and ASPPA QPA credential holders, don't worry; there will be a special no-test path if you would like to obtain the ASPPA CBS credential. And for folks contemplating advanced ASPPA designations in 2024, holding the ASPPA CBS credential is not a prerequisite for ASPPA QKC, QPA, or CPC.

That's a lot of information and acronyms! But again, there will be a lot more details shared as we progress toward the program launch in 2024. The curriculum and credential requirements will be detailed on the ASPPA website and included in the ASPPA CBS candidate handbook. In the meantime, the ARA instructional design team is busy designing a really engaging course. We're so excited to share!

A LOOK AHEAD

As we look to the future, ASPPA remains committed to providing top-notch education and resources to retirement professionals and actuaries. With the retirement landscape continuously evolving, ASPPA's education offerings will likely continue to adapt to meet the changing needs of the industry.

Through its certification programs, continuing education opportunities, and collaboration with other industry organizations, ASPPA will continue to play a pivotal role in empowering retirement professionals and actuaries with the knowledge and expertise they need to navigate the complex world of retirement planning successfully. By doing so, ASPPA will contribute to the growth and prosperity of the retirement industry and, most importantly, to the financial security and well-being of retirees across the nation.

Cash balance plans will continue to evolve. They are beginning to offer more investment options and increased participant flexibility, like employee-directed investment choices. Flexibility and choice will add complexity to the plan. It's a good thing that you'll be an ASPPA CBS ready for the challenge!

I'm sure glad that ASPPA QKA and CBS credential holders will be around to help run the American retirement system when I'm retired! PC

ARE PLANS STILL TOP HEAVY?

So are plans still top heavy? Of course, we all know that some plans are still top heavy—often when the owners and highly compensated employees are maximizing contributions to their defined contribution or defined benefit plans. **By Theresa Conti**

In today's world of safe harbor plans, far fewer plans are top heavy but what happens when a client doesn't realize they are top heavy and now several years have passed? How do we fix that?

SETTING THE TABLE

We recently had a client that came to us because they were top heavy for three years. Their plan was being handled by a provider, and even though it was in the annual compliance letter, they never read the letter—nor did the provider ever follow up when the top heavy minimum contributions weren't made.

When I was brought in to the client, I started at the beginning because they honestly didn't even understand what "top heavy" was or how they got there. I explained that whether something is "top heavy" is based on account balances and key employees. A plan is top-heavy when, as of the last day of the prior plan year, the total value of the plan accounts of key employees is more than 60% of the total value of the plan assets. If the plan is top heavy, the employer must contribute up to 3% of compensation for all non-key employees who are still employed on the last day of the plan year.

Since they were a law firm, there were a LOT of key employees—mostly due to the more than 1% ownership and compensation over $150,000. That also meant that they did not need to give a top heavy minimum contribution to this group; however, there were some high earners who were not key employees that did need to get this contribution.

WHAT WE DID

So how did we fix it? Since they were top heavy in 2019, 2020, and 2021, we had to fix those years; then, we needed to figure out what would happen for 2022 and the ongoing years. The first thing we did—since it was late 2021 when they brought me in—was to decide that none of the key employees would be allowed to make contributions during the 2022 plan year. We did that so we could figure out how to fix the other years and because, as you know, they top heavy minimum is the maximum that a key employee contributes up to 3%. So if the key employees contributed 0%, then the contribution would be $0.

We also talked about how they could fix the problem on an ongoing basis by changing to a safe harbor plan for 2023. (Yes, we could have changed them to safe harbor for 2022 since it was late 2021, but they


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were not sure they could "afford" the fixes and a contribution for 2022). Therefore, we decided to wait until later in 2022 to decide if they would allow key employees to contribute to the plan and if they wanted to make some form of employer contribution for 2022.

We then reviewed the top heavy tests for 2019, 2020, and 2021 that were performed by the prior provider. We definitely agreed that based on the numbers, all three plan years were top heavy. However, when we looked at it further and added in the top heavy minimum for 2019, the plan would still have been top heavy in 2020. But when we added the top heavy minimum for 2020 to the balances (rolling it forward) as of the end of the plan year (Dec. 31, 2020), it would then NOT have been top heavy for 2021.

We decided to make that argument in our IRS Voluntary Compliance Program (VCP) submission using Form 14568 (Model VCP Compliance Statement). We presented the failure and our proposed correction, which was that they would make the top heavy minimums for the 2019 and 2020 plan years but proved that when adding in those contributions, the plan would not have been top heavy for 2021. We also stated that our revision to administrative procedures was to make sure we followed the top heavy minimum rules and potentially change the plan to a safe harbor plan for ongoing plan years.

THE RESULT

Believe it or not, it took just a little less than a year to hear back and have the IRS agree to our correction method. They even agreed with the 2021 plan year not being top heavy, based on making the top heavy minimums for the prior two years. It was the exact result the client wanted—and we were thankful we were able to discuss this option before they just went ahead and made three years' worth of top heavy minimum contributions.

FINAL NOTES

So a few notes to finalize the story…. first, for 2022, the client still had some time to allow the key employees to make contributions to the plan if they wanted. Of course, we verified that the plan was not top heavy for 2022 based on the Dec. 31, 2021 plan year end balances (including the top heavy minimums for 2019 and 2020). Some of the key employees made deferrals, but we calculated the maximum to also allow the ADP test to pass for 2022 since they did not want to make any employer contributions.

The client also decided to do the safe harbor nonelective contribution of 3% to all employees for 2023 (and hopefully future plan years). They wanted to provide it as a benefit to all eligible employees and it was a "constant" number that they could calculate as part of their profit and loss statements that each partner attorney kept for themselves (this is super common for partners in law firms to run financials this way). By doing the 3%, they knew the exact number and were able to calculate that each pay period for the financial reporting.

TAKEAWAYS

So as plan consultants, we have a few takeaways with this story.

- First, by making the submission under VCP and making the appropriate corrections, we maintained the plan's tax-favored status. We would not have wanted the client to have their plan become unqualified.
- We also helped the client by thinking outside the box. Not only did it save the plan sponsor money; it also did not harm any participants (which is sometimes the most important part in these corrections and what the IRS wants to see).
- And finally, it always amazes me regarding the value we add to these situations and how providers don't generally have the technical knowledge to help with these types of corrections.

I hope that because of the help we provided that they will become a longtime client! PC

> "BELIEVE IT OR NOT, IT TOOK JUST A LITTLE LESS THAN A YEAR TO HEAR BACK AND HAVE THE IRS AGREE TO OUR CORRECTION METHOD."

MISSION: ASPPA ANNUAL

ASPPA Annual is more than just a gathering—it's a chance to engage with leading minds in the industry. This year, change isn't just inevitable—it's the mission. By Genelle Brakefield, Melissa Terito & Alex P. Calaf

Good morning, agent. Your ASPPA mission, should you choose to accept it, is to attend the 2023 ASPPA Annual conference at the Gaylord National Resort & Convention Center Oct. 22-25 to become an AGENT OF CHANGE. Key objectives in your mission include networking with industry experts, strengthening ties with governmental agencies, broadening our industry impact, and protecting the private retirement system! Should you or any member of your team be caught out of compliance, the Department of Labor (DOL) will disavow any knowledge of your actions. We're counting on you, agent. This tape will self-destruct in five seconds. Five…four…three… two…

PREPARE FOR YOUR MISSION

Get ready for the most exciting ASPPA Annual yet! This year, join fellow colleagues to network and enhance your skills on a variety of topics. And for the first time in several years, attendees will have the opportunity to visit Capitol Hill and speak with their local representative relative to a variety of issues.

LOCATION: WASHINGTON

This year, we are excited to highlight face-to-face interactions that celebrate and maximize our location near our Nation's Capital.

The conference will officially open with a Washington Update. Since there have been a lot of changes over the past year, you definitely don't want to miss this session. Always a favorite, this presentation will bring the American Retirement Association's Government Affairs staff to the stage to provide up-to-the-minute details on both passed and proposed legislation and give all attendees a peek into the current ideas floating around Capitol Hill.

TOP SECRET: Still in the works, this year's Government Update, could turn out to be legendary. Your ASPPA team is working diligently to secure a diverse speaker panel including well-known IRS, DOL ,and Treasury representatives and regulatory hill staff. This session is aimed at highlighting current agency initiatives and possible regulations. This will surely be a can't-miss session! Speakers from the Hill have also been invited to key breakout sessions on the agenda to provide input on specific topics.

Capitol Hill visits are your ultimate way to be an AGENT OF CHANGE. These meetings with legislators and staffers offer opportunities to advocate for the policies important to ASPPA Nation and after a few years away from them, and we are excited to include this amazing tradition on the agenda!

No two visits are ever the same. Your visit can provide you with insights into specific legislation or policy areas of interest and allow you to connect and build rapport with those that affect legislative action. Bolstered with information provided by the ARA's Government Affairs team, your pre-scheduled meeting will afford you the chance to effectively communicate key objectives of ASPPA membership to gain support of those causes important to the private retirement industry and potentially influence the decision-making process. Talk about being a CHANGE AGENT!

INFILTRATE ASPPA NATION—CODENAME 'OPERATION FUN WITH FRIENDS'

As prior attendees can attest, ASPPA Annual brings both information and a healthy dose of fun! This year our AGENTS OF CHANGE will be pitted against each other in a friendly game of ASPPA "Family" Feud. Recordkeepers will try to outfox third party administrators with creative plans solutions, and actuaries will calculate against attorneys for the ultimate prize of bragging rights! With some of the top names in the business slated to lead their "family" to victory, this session is guaranteed to be both educational and entertaining.

Part of the fun is meeting new people! Sunday night brings attendees together to rub elbows at the President's Welcome Reception with drinks and appetizers—James Bond tuxedo and Vesper Martini shaken, not stirred not required! Keep your eyes peeled Monday at lunch for tables at which to join members of the Government Affairs Committee and members of your local ASPPA Benefits Councils for a chance to share knowledge, build relationships, and get involved.

Women in Retirement (WiRC) will hold their annual brunch Sunday morning. If you are a first-time attendee, make sure the sign up for the First Time Attendee lunch held on Sunday to start your mission with insider tips from a team of ASPPA Annual experts.

The fun will continue into the night with events like group dinners, a ride on the Capital Wheel in National Harbor, and a Tuesday night party that never disappoints.

CORE OBJECTIVE: GAIN KNOWLEDGE TO EFFECT CHANGE

Every ASPPA Annual conference brings a wealth of opportunities to gain knowledge and hone your craft. With deep dives into much of the SECURE 2.0 Legislation and a participant journey series, this year's 56-session agenda is chock-full of vital information and the tools to apply it. Sessions are

designed to provide in-depth insights coupled with real-world application and opportunities to collaborate—all led by industry experts.

A unique opportunity of this conference is the complimentary QKC Bootcamp held on Sunday afternoon. This session, led by Bob Kaplan—the American Retirement Association Director of Technical Education—it affords those interested in taking the exam an excellent strategy to garner this distinguished credential. For consultants and administrators looking for extra credit, the Sunday afternoon preconference sessions provide attendees a deep dive into lesser known topics.

In the world of defined benefit plan consulting, complexity reigns and the path may not always be clear to an untrained eye. What seems like a remarkable destination may be but a mirage mired by a treacherous path, and what looks like a dead-end to a novice may be a door to great reward.

Join ASPPA's leading actuaries on a three-part DB plan consulting journey on Sunday. To start, you'll pick up a sales process roadmap that equips prospective clients to make well-informed decisions, gain plan design insights informed by experiences and war stories, and learn to decipher the early warning signs of trouble to help plan sponsors avoid costly mishaps. From market fluctuations and changes in business cash flow to EPCRS fixes, as the journey continues, you'll boldly tackle the challenges that can arise once a plan is implemented. Venturing further, you'll evaluate the life cycle of a plan through the lens of the current and future needs of the employer, explore the process of winding down a plan in a variety of circumstances—including freeze procedures and terminations—and navigate the complexities of distribution options unharmed. Whether you choose the entire journey or hop onto one of its segments, you'll find practical tools from your peers to help you and your team deliver DB plan consulting services with confidence and finesse.

Two renowned figures in retirement plan education, Bob Kaplan and Robert Richter, join forces to bring you an informative session on the SECURE 2.0 Act. The American Retirement Association, working directly with the folks on Capitol Hill, has eyes, ears, and a voice in the details of the legislation. With their knowledge of plan rules and operation, coupled with their inside perspective working at the ARA, no two individuals are better positioned to provide their insights on the many opportunities and also challenges SECURE 2.0 brings the retirement administration community.

Bob and Robert, in session codenamed "BOBERT 2.0," will dig into key provisions such as new plan design opportunities, the Roth catchup mandates, and changes to distributions rules. This session,

"THIS YEAR, WE ARE EXCITED TO HIGHLIGHT FACE-TO-FACE INTERACTIONS THAT CELEBRATE AND MAXIMIZE OUR LOCATION NEAR OUR NATION'S CAPITAL."

supplemented by many breakout workshops diving deep into the individual facets of SECURE 2.0, will leave practitioners with the knowledge they need about these topics and the tools to communicate with and guide plan sponsors through decisions that need to be made.

From the first day of enrollment to when savings withdrawals begin at retirement, many perils and opportunities, twists and turns of life await a plan participant. It's hard, confusing, and at times exhausting even for a seasoned pro, especially when the unexpected peaks of new legislation appear just as you crest another hill of restatements. Fear not… The four-part participant journey workshop series that kicks off right after the SECURE 2.0 session will break down the complex into manageable stints through an employee's lens.

On Monday, we'll start by exploring the pros and cons of voluntary and auto-enrollment options, examine the impact of auto-escalation on savings rates, and touch on the emerging trend of student loan matching programs. The second leg of this adventure will tackle the complex world of participant loans, from refinancing options to repayment strategies and emergency disaster provisions of SECURE 2.0, enabling you to guide plan sponsors through the decision-making process and educate employees on responsible loan management.

Life happens, and in the third installation on day two of ASPPA Annual, we'll tackle hardship withdrawals and QDROs, in-service withdrawals and auto-portability. You'll gain insights into the latest trends and best practices, and understand how these provisions impact both retirement outcomes and plan administration.

We'll close with what it is really all about, the game—retirement. We'll discuss the SECURE 2019 and SECURE 2.0 provisions designed to ensure retirees and their beneficiaries have an adequate income after they leave the workforce, including the expanded catch-up contributions, with their gotchas, new RMDs rules, and the growing trend of in-plan retirement income.

AI: a friend or a foe? A trustworthy co-pilot or a menace aiming to upend the very value of what we do? The rise of AI has been met with a mix of anticipation and apprehension, and our industry is no exception.

On Monday afternoon, Jason Staats—one of the leading voices on the transformative power of AI in professional services—will deliver a detailed mainstage brief so you, too, can sift through the hype, debunk the myths about this new gadget in our arsenal, separate the signal from the noise in the AI news cycle navigating the ever-evolving retirement plan industry landscape with confidence and precision.

Turning the narrative on its head, Jason will provide straightforward, no-nonsense insights into harnessing AI's potential to mitigate the mundane, empower productivity, charge up innovation and employee engagement, and ultimately enable exceptional client experiences to future-proof our businesses. He will share practical tips for putting AI work for you today, no matter the size of your organization and your experience with technology. To stay ahead of the curve, enhance your practice, recruit the best, attract the clients you want to accomplish your mission, you must have the best tools at your disposal. Will AI replace a retirement plan consultant? Or will a retirement plan consultant empowered by AI replace one who doesn't? The fireside chat rounding up this keynote will address this and other technology-related questions on your mind.

There is no better place to sharpen your skills than with our "Ask the Experts" panel. Leading minds in the retirement space, from all walks of Plan design, compliance, and administrative operations, come together to share experiences, informed opinions, and answer your burning retirement questions.

BUSINESS OWNER AND MARKETER SPECIAL MISSION—TPA GROWTH SUMMIT

If you're a business owner or work in sales and marketing, you simple can't afford to miss the TPA Growth Summit. Delve into an array of engaging sessions covering a wide range of topics, from selling SECURE 2.0 and strategic business structuring considerations to grooming the next generation of leaders. Learn the art of leading and establishing boundaries with your clients, while also attending workshops like "Working Genius" that focus on fostering high-performance teams.

And of course, no TPA Growth Summit is complete without a session dedicated to growing your practice. By the end of the Summit, you'll walk away with actionable takeaways that can be implemented immediately to drive tangible results.

Mission accomplished!. PC

PUSHING FORWARD

While pushing SECURE 2.0 across the finish line was a major victory for working Americans and retirement plan professionals, there is still much work to be done. **By James Locke**

James Locke is the American Retirement Association's Director of Federal Government Affairs.

As we reflect on the tremendous progress ARA has made over the past year, it is important for us to recognize the partnership and unwavering support we receive from our members. At the end of July, we convened over two hundred of our plan advisor members for the annual NAPA Fly-in Forum. This event was a tremendous success; our members participated in over one-hundred meetings with legislators on Capitol Hill (a new record for this event) to discuss some of the issues described below. Members of Congress would much rather hear from their constituents on retirement issues than inside-the-Beltway lobbyists, which makes member participation in these events extraordinarily impactful.

TECHNICAL FIXES

Although SECURE 2.0 included a substantial number of positive provisions benefitting both American workers and retirement plan professionals, the legislation also contained several drafting errors that will present significant setbacks for retirement savers if they are not addressed.

For example, SECURE 2.0 created a brand-new retirement product specifically designed to bridge the retirement plan coverage gap: Starter 401(k) plans. Starter 401(k)s are wage deferral-only simple safe harbor 401(k) plans which allow employees to save up to $6,000 per year (with a $1,000 catch-up contribution).

Congress specifically intended for Starter 401(k) contribution limits to match IRA contribution limits. Unfortunately, because of Starter 401(k)'s delayed effective date (2024) and IRA's contribution limits increasing in 2023, Starter 401(k)s will mistakenly have a lower contribution limit unless Congress passes legislation reconciling this inconsistency.

SECURE 2.0 also contained language that inadvertently eliminated a subsection of the Internal Revenue Code dealing with pre-tax and Roth catch-up contributions. Section 603 deleted IRC §402(g)(1)(C), which increases the general pre-tax deferral limit by the amount of any catch-up contributions. This deletion effectively eliminates the ability for savers to make *any* catch-up contributions.

STRENGTHENING 403(b)

Another legislative priority for ARA is fixing a quirk in federal securities laws that unnecessarily restricts the types of investments that can be made in 403(b) plans. Specifically, current law prohibits 403(b) plan sponsors from using Collective Investment Trusts (CITs) as an investment option in their plans. Notably, there is no such prohibition for 401(k) plans.

Because CITs are exempt from SEC registration requirements, they typically have substantially lower fees when compared to mutual funds (e.g., between 25 and 40 basis points less). They also have lower administrative and marketing costs than mutual funds; these savings are passed on to plan sponsors and participants. These differences can substantially increase returns for retirement plan participants, therefore it is imperative that we level the playing field for non-profit workers and employers.

PROTECTING RETIREMENT FROM A GOVERNMENT TAKEOVER

Last Congress, a bi-partisan and bi-cameral group of Members of Congress introduced the *Retirement Savings for Americans Act* (H.R. 9462/S. 5271). This bill would create a new federal government-managed fund called the American Worker Retirement Fund ("Fund"), which would only be accessible to workers without access to an employer-sponsored retirement plan. The Fund would directly compete with employer-sponsored retirement plans and has several material advantages:

The Fund is not subject to many burdensome ERISA and Internal Revenue Code provisions that apply to private sector 401(k) plans, many of which are carefully designed to ensure consumer protection.

Additionally, the bill's "Government Match" provision for workers saving in the fund is twice as valuable as the "Saver's Match" provision contained in SECURE 2.0 for private sector 401(k) plans.

Finally, the number of workers eligible for the "Government Match" is more than double the number eligible for "Saver's Match."

Because this proposal is only available to workers without access to an employer-sponsored plan, it will undoubtedly create a perverse incentive for employers to shutter their 401(k) plans (many of which have a more generous matching contribution for their rank-and-file employees than the "Government Match") so their workers can access the new government subsidized fund. PC