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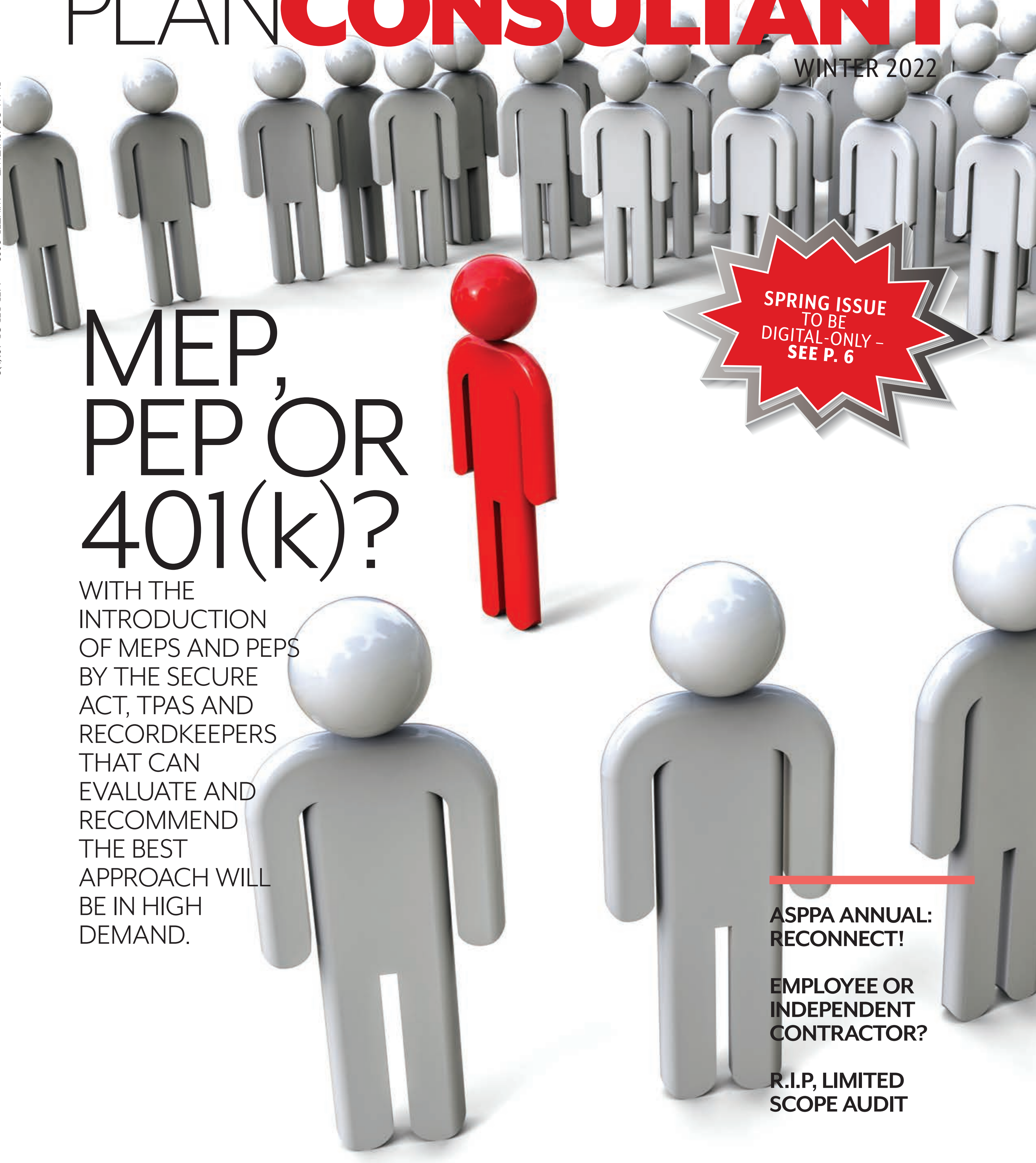

SPRING ISSUE TO BE DIGITAL-ONLY – SEE P. 6

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Jim Racine, CLU, ChFC, is the V.P. of TPA Business Development at Ascensus. He is a 30+ year industry veteran with recordkeeper and TPA management experience.

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SPRING ISSUE TO BE DIGITAL-ONLY

Something completely different and… something else completely different. **By John Ortman**

The next issue of *Plan Consultant* will be available on ASPPA Net as usual, but will not be printed or mailed. Also as usual, we'll notify you when it's been posted online via a member email and *ASPPA Connect*.

The current plan is to print and mail two issues in 2022, with this being the first (obviously) and the fall issue the second. This strategy is increasingly common in the magazine industry, especially with quarterlies like PC, since it cuts the significant annual costs of printing and mailing in half. Adding to the difficulty today: the worst inflation in 30 years and unprecedented shipping problems.

AND NOW FOR SOMETHING COMPLETELY DIFFERENT…

In our last issue, I launched a crowdsourced effort to create a "cracked" glossary of retirement industry terms and buzzwords that are all comically wrong—patterned after a regular feature in the great *Mad* magazine—and invited readers to make up their own definitions and send them in.

While the response was less than I had hoped for (what do you people do all day, work?) and some of the entries… well, the term "groaner" comes to mind… I think we have a serviceable, utterly useless glossary of completely wrong retirement industry terminology. So there's that.

You'll find it in the box to the right. (I promise not to let it out of the box.) Thanks to everyone who chipped in, and congratulations on your contribution to our little monstrosity. Future generations will sing Klingon victory songs in your honor, no doubt.

And if it put a smile on your face just once, mission accomplished.

Questions, comments, bright ideas? Email me at jortman@usaretirement.org.

Editor

Completely Wrong Retirement Glossary

401(k). A half-sized 802(v).
415 Cutback. When the drinking starts to slow down at a late, *late* night party.
Actuary. Where dead actors are embalmed.
Annuity. What's left after you've lost one of your two nuities.
ASEA. The section of the dictionary that starts after a B.
ASPPA: Your dad's butt.
Auto-enrollment. Formerly known as the draft.
Book of business. Can be found in the Old Testament after Isiah.
Cash balance plan. A way to increase your bank account.
Deferred Retirement Option Plan (DROP). Working until you DROP dead.
Discrimination testing. An exam that enlightened people can take to demonstrate their lack of bias.
Eligibility provisions. Your Tinder dating profile.
Floor offset. A rug.
Funding deficiency. What your teenagers have.
IRS. The part of the eye behind the cornea.
Leakage. Have you tried Depends?
Lottery. See "Retirement plan."
Normal retirement age. See "Deferred Retirement Option Plan."
Profit sharing. When two religions share one deity.
QDRO. The fourth row.
Quartile. Four tiles.
Recordkeeper. A person who will never throw out their Elton John albums even though they haven't owned a turntable in two decades.
Retirement plan. For radials, about every 60,000 miles.
RMD. The proper way to say you is a doctor.
Rollover IRA. How Ira got killed on that road paving project.
Third party. The one that starts at 2:00 a.m.
Vesting period. 3-piece suits have been out for 25 years. C'mon, man.
Windfall Elimination Provision. The income tax.

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Mark Your Calendars!

2022 Conference Calendar

DATE	CONFERENCE	LOCATION
January 12-14	Women in Retirement Conference	Ft. Lauderdale, FL
May 4-5	ASPPA Spring National	Online Event
June	ASEA Actuarial Insights	Online Event
August	ASEA Actuarial Symposium	Chicago, IL
October 23-26	ASPPA Annual & TPA Growth Summit	National Harbor, MD
December	ASPPA Winter Symposium	Online Event

EMBRACING CHANGE

The remote work environment appears to be here to stay, as many companies are implementing return-to-office plans that include hybrid models as well as fully remote options. **By Natalie Wyatt**

The Greek philosopher Heraclitus is quoted as saying, "change is the only constant in life." Since March 2020 we have seen this in the retirement plan world on many fronts, including work environments, technology advancements and participant behavior.

The "Reconnect" ASPPA Annual theme in October reflected our industry's desire to gather and share experiences in this changing environment, stay current on developments both regulatory and legislative, and network in National Harbor once again. While the conference attendance was smaller than in past years, the quality of interactions and sessions was noted by many in attendance.

The most dramatic change in the business environment over the last two years has been the need to migrate to remote working environments. Companies that had never entertained a remote workforce were forced to pivot and embrace home workspaces in order to continue to provide services to their client base. We have seen advances in the adoption of automation tools and collaborative workspaces, and an expansion of the available workforce now that geography is less of a factor. Glassdoor data shows that job searches for remote work are up 460% in the two years through June 2021. The remote work environment appears to be here to stay, as many companies are implementing return-to-office plans that include hybrid models as well as fully remote options.

"WHILE WE HAD FEWER SPENDING CHOICES AND RISING STOCK MARKETS, AMERICANS ADDED NEARLY $4 TRILLION TO THEIR SAVINGS DURING THE PANDEMIC."

The pandemic has had an unusual impact on savings in America. While we had fewer spending choices and rising stock markets, Americans added nearly $4 trillion to their savings during the pandemic, according to a study by Oxford Economics. Even with this great news, a systemic gap in savings opportunities remains for those employees who do not have an employer-sponsored retirement plan. Too many Americans lack the opportunity to participate in an employer-sponsored retirement plan and are less likely to save on their own, resulting in the lost opportunity to achieve a financially viable retirement.

As Brian Graff highlighted during the Washington Update at ASPPA Annual, by closing this gap in the private retirement sector, an additional impact would be to close the gap in coverage with respect to race. This retirement plan coverage gap and lack of retirement savings is pronounced in the black and Hispanic communities, according to a recent research report by Urban Institute Fellow Richard Johnson, who found that 52% of black Americans and 68 percent of Hispanic Americans do not currently have access to a workplace retirement plan.

The evidence that this type of a program can make a difference can be seen in state auto-IRA programs like OregonSaves. By utilizing automatic enrollment and deductions, results from Oregon show these gaps closing. The addition of a federal policy requiring a workplace savings program within the private retirement system would expand coverage by creating opportunities for retirement savings for individuals who have not previously been a covered by a plan. Within this policy, automatic enrollment and deductions will be key factors to success in closing the gaps in coverage. The American Retirement Association's work to support the addition of a federal policy addressing a required workplace savings program continues today on Capitol Hill.

The developments and changes made to bills recently highlight the importance and efficacy of our ARA Political Action Committee and the work that they do on our behalf. As Congress considers legislation with retirement provisions, ARA is working to ensure that our industry is prioritized. The ARA PAC protects your business by educating federal elected officials on how the employer-sponsored retirement system works for more than 90 million American workers. If you have not contributed to the PAC, I encourage you to do so to support ARA's work to improve and protect America's retirement.

I look forward to working together with you as ASPPA President in the year to come to help ensure a successful retirement outcome for our clients and their plan participants. PC

Natalie Wyatt, QPA, QPFC, has more than 30 years of experience in the retirement plan industry. She serves as ASPPA's 2022 President

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WAIT 'TIL NEXT YEAR

Remarkably, even in this year of partisan bickering, retirement issues remain an area in which potential solutions retain bipartisan support. **By Brian H. Graff**

"Wait 'til next year" is something that disappointed fans often say when their team has come close, but fallen short of that championship trophy.

Most of us were still catching our breath from 2020, when we had to go right from the passage of the SECURE Act to the extensive COVID relief contained in the CARES Act—with our industry (and the world) all working from home. Only to be confronted with a series of proposed and final regulations from the Trump administration—including a fiduciary standard that was ultimately allowed to take effect—and regulations on considerations regarding environmental, social & governance factors that the Biden administration said it would not enforce while it considered an alternative approach.

As for the latter, we expressed our concerns about the Trump administration's ESG regulation, then worked with the Biden administration to provide a level playing field for this investment class—only to see a new proposal that seems to overcorrect. So we still have some work to do—and likely a new regulation to absorb… next year.

This year we've also been highly engaged in the crafting of several significant pieces of legislation, notably the Automatic Retirement Plan Act, a bill introduced by House Ways and Means Committee Chairman Rep. Richard Neal (D-MA). This made it all the way to the "Build Back Better" budget reconciliation bill before it, along with other elements, was dropped during negotiations.

This, along with a proposal from Sen. Ron Wyden (D-OR) to expand and enhance the current Saver's Credit to a refundable Saver's Match, could create some 63 million new retirement savers and add more than $7 trillion in new savings over the next decade, according to projections we developed in partnership with Jack Vanderhei of the non-partisan Employee Benefit Research Institute and Judy Xanthopoulos of Quantria Strategies. Those potential outcomes were highlighted by Sen. Wyden as "jaw-dropping" in testimony we presented at a hearing before the Senate Finance Committee in last July—and indeed they are, including the potential expansion of more than 600,000 new plan sponsors.

Remarkably, even in this year of partisan bickering, retirement issues remain an area in which potential solutions retain bipartisan support. That was evident not only in the full turnout for the Senate Finance Committee hearing noted above, but also in the Retirement Security and Savings Act legislation introduced by Sens. Rob Portman (R-OH) and Ben Cardin (D-MD) and the Securing a Strong Retirement Act of 2021 (often referred to as SECURE 2.0), introduced by Rep. Neal and Ways and Means Committee Ranking Member Kevin Brady (R-TX). Both are sweeping pieces of legislation that could help remedy current issues in retirement saving by expanding eligibility, matching student debt repayments, expanding catch-up contribution limits, and helping more small businesses offer these programs. With both Portman and Brady announcing their retirement from Congress at the end of next year, the prospects for consideration and passage seem likely in 2022.

More recently, the Retirement Improvement and Savings Enhancement (RISE) Act was introduced by the House Education and Labor Committee's Chairman Bobby Scott (D-VA) and Ranking Member Virginia Foxx (R-NC), along with Rep. Mark DeSaulnier (D-CA), Chairman of the House Subcommittee on Health, Employment, Labor and Pensions, and Rep. Rick Allen (R-GA), that Subcommittee's ranking Republican. That legislation, which is supported by the American Retirement Association, contains many of the provisions included in the Securing a Strong Retirement Act of 2021, and in fact, will be merged with that bill—next year.

Of course, we're still working on, and advocating for, continued regulatory clarity on legislation regarding retirement income and pooled employer plans, and continue to work with Congress, the Biden administration and regulatory agencies on a host of initiatives to help improve and expand the nation's retirement system.

And if you think we've been busy in 2021… just wait 'til next year! PC

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

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LATE ADOPTION LESSONS

What is our time worth? The new late plan adoption rule has sharpened the focus on that question.

By Theresa Conti & Shannon Edwards

We will definitely discuss some of the technical aspects of the late adoption of retirement plans later in this article, but as retirement plan consultants, most of our impact on this topic is managing the clients who want a late adoption of a plan. Since 2021 was the first year that this occurred (for the 2020 plan year), we have definitely learned some lessons.

Why do clients always wait until the last minute? Our old year-end deadline used to put stress on us, but now that deadline is continual! We will move right from the Sept. 15 deadline to the Form 5500 deadline on Oct. 15 and then on to the new 401(k) plans that want to start up on Jan. 1.

We are both small/mid-sized TPA firms, and one of us is part of a larger firm. The larger firms probably had a cutoff much earlier in the year than smaller firms may have had. As smaller/mid-sized TPA firms we are often considered more "nimble," and we had clients trying to set up plans for 2020 through the early part of September. So how do we help these clients? Are the CPAs on board?

It is important to note that the CPA is a large part of the equation. Have they already filed the tax return? We know that we can't make 401(k) deferrals retroactively but we can make profit sharing and cash balance contributions. Do we have the income available to make a contribution (particularly if they are a corporation and we need W-2 income)? Is the client able to get us the clean and complete census data *today* in order for us to get the work done? It is a continual worry that the data we are getting is not really correct and complete under regular circumstances—and now we have to deal with a significantly decreased timeframe.

Do the clients really understand how this will impact them? It seems that sometimes we do work and calculations but the client doesn't move forward. If the client decides to put the plan in place, do they understand that we will do "double" work and therefore charge "double" fees? And what about all the time spent on doing these calculations and taking away from other clients? Should we start charging for illustrations and that type of work as we get closer to the tax filing and contribution deadlines?

Internally it also puts stress on our staff to make sure we can get the plan document done, complete the valuations and testing, make sure the client contributes the contribution, and get the Form 5500 done in a very short period of time. Whether you are a small, mid-sized or large service provider, should you be charging a premium for that work? There are so many questions and things to consider. (At least the IRS took care of the Form 5500 issue for late adopters, in that first-year plans have an automatic filing extension.)

If the plan is a cash balance plan, can we retroactively amend? Sometimes we list specific people in the plan document, but what if someone was missed? Can we still amend? Also, for cash balance plans, the 10% excise tax will apply for contributions after Sept. 15 but the tax filing due date could be Oct. 15. The PBGC form for cash balance plans also still applies for the plans.

In the past, most TPAs that sold plans and prepared plan documents would not take off the week between Christmas and New Year's knowing that they would have advisors and CPAs calling with clients who had waited until the last minute and needed to adopt a profit sharing plan prior to Dec. 31. At first glance the new rule allowing for late adoption of plans appeared that it would take some of the burden and stress off of us at year-end. Maybe we could actually take a Christmas vacation! However, as illustrated by the story below, it may have simply moved the stress into an already stressful time of year for us.

THE WHOLE STORY

The first week of September, I had an advisor ask me if there was any way we could get a cash balance plan in place and funded by Sept. 15. This

"REGARDLESS OF WHEN THE DEADLINE IS FOR ADOPTING AND FUNDING A PLAN, WE SHOULD CONSIDER THE FACT THAT OUR TIME IS VALUABLE. WE SHOULD CHARGE FOR IT, ESPECIALLY WHEN PUSHED TO A LIMIT."

was an advisor I had wanted to have the opportunity to work with. I said, "Yes—absolutely!"

I immediately checked with my actuary partner to make sure that I had not spoken too soon. Reluctantly they agreed, but said they couldn't give me a final answer until they had the census data and the existing 401(k) plan document. I went back to the advisor and immediately began collecting the needed information. I emphasized that we had to have the information immediately, and the client had to communicate with us as soon as possible.

The existing 401(k) plan was not with us; it was with a larger bundled provider. It had a safe harbor match with a pro rata profit sharing allocation. The advisor got us the requested data at the end of the week. On Monday, the actuary explained to me that while they normally don't charge for illustrations, they were going to have to charge me a rush fee. I explained this to the advisor and he told me that it would be fine, and that the client would take care of it. I gave the actuary the thumbs-up.

The actuary came back to me with the illustrations and explained that the client would have to adopt a second 401(a) plan because of the less-than-favorable plan design in the existing 401(k) plan and the need to give certain participants very specific contributions to make it work. Unfortunately, a couple of the participants who had to receive contributions had terminated employment—and one had not done so under the best of circumstances.

Long story short, the actuary had to run four versions of the allocations, trying to move participants around so that the terminated participants would receive contributions in the cash balance plan and not be vested in them. Finally, on the evening of Sept. 10, we got the thumbs-up from the advisor.

I was leaving for a conference the following day. However, I was nervous because I had had no direct communication with the client. Since I was leaving town, I went ahead and prepared the new 401(a) plan document and sent it to the actuary for approval—using up one of my licensed plan documents for the year. I also asked my office manager to prepare an invoice for 2020 and 2021 for the establishment of the second 401(a) plan and the cash balance plan. We emailed the invoice to the client and copied the advisor, asking for approval from the client so that we could move forward before engaging our actuary for their services.

We texted back and forth with the advisor and were finally told that the client was going to pass. They had decided that the second 401(a) plan added too much cost—even though we would eventually move the existing plan over, redesign it and merge the two plans for 2022—and that the small contributions that had to go to the terminated participants were not worth the tax deduction the cash balance plan would afford them.

THE LESSONS

This story illustrates what you need to consider for retroactive plans. First, I didn't set a reasonable deadline because I am a smaller TPA firm that can accommodate tight deadlines.

Second, I didn't charge for my time even though I spent a lot of time during a very busy time of our year. Unlike my actuary partner, I gave my time away without charging a rush fee. I gave my intellectual property away for free. I invested a lot of time in a plan that never came to fruition when I could have been working on billable projects.

To be clear, I bear no ill will toward the advisor. He asked me if I could perform a service and I agreed immediately. He was doing his job on behalf of his client. I never considered the fact that I was spending my time during a pressure-filled time of year to service a client that might say no.

WHAT'S OUR TIME WORTH?

I hope that this story also illustrates the fact that regardless of when the deadline is for adopting and funding a plan, we should consider the fact that our time is valuable. We should charge for it, especially when pushed to a limit. We should make sure that potential clients understand the potential costs before we invest the time—and more importantly, before we invest in the client and incur costs.

We have to remember that the services and knowledge we provide are not commodities. They are valuable. We are valuable partners. Our advisor partners are valuable partners too, and they are doing their job by having us partner with them and pulling us in—whether it's at the last minute or not. However, when it's late in the game as now allowed by the new rules, should we consider the fact that our expertise may be worth more at the last minute? PC

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R.I.P., LIMITED SCOPE AUDIT

Under SAS No. 136, it's now known as the ERISA section 103(a)(3)(C) audit. Here's a helpful primer.

By Brian Price

Are defined benefit plan sponsors ready to tell their auditors whether the conditions for electing an ERISA section 103(a)(3)(C) audit have been met? Probably not! Many auditing firms were not early adopters of changes made by Statement on Auditing Standards (SAS) No. 136. Beginning with the 2021 plan year audit, the new guidance must be followed.

My firm, PriceKubecka, PLLC, adopted the new SAS No. 136 requirements for the 2020 plan audits. When we asked our 250 plan audit clients to confirm in writing that we could rely on the certified investment statements for the plan to perform a limited scope audit again this year, many didn't even know what a certified investment statement was. Other clients had to be persuaded that this was actually part of their plan management duties going forward under the new guidance; and yes, they have to know what they're saying.

Here is a summary of what has changed and what can be expected with the next audit.

In July 2019, the American Institute of Certified Public Accountants (AICPA) Auditing Standards Board (ASB) issued SAS No. 136, which prescribes new performance requirements for ERISA plan financial statement audits and

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> "THE REPORT PROVIDES A TWO-PRONGED OPINION THAT IS BASED ON THE AUDIT AND ON THE PROCEDURES PERFORMED RELATING TO THE CERTIFIED INVESTMENT INFORMATION."

changes the form and content of the auditor's report. The changes are meant to enhance the quality and transparency of employee benefit plan audits and incorporate many best practices that are already being followed.

With the SAS No. 136 guidance, a limited scope audit will no longer be referred to as such but will be known as an "ERISA section 103(a)(3)(C) audit." The new EBP SAS notes that an ERISA section 103(a)(3)(C) audit is unique to employee benefit plans and is not considered a scope limitation; therefore the auditor would no longer issue a modified opinion (typically a disclaimer of opinion) due to information that is certified by a qualified institution. Instead, the report provides a two-pronged opinion that is based on the audit and on the procedures performed relating to the certified investment information. It provides an opinion on whether the information not covered by the certification is presented fairly, and an opinion on whether the certified investment information in the financial statements agrees to or is derived from the certification.

When management elects to have an ERISA section 103(a)(3)(C) audit, the auditor is required to inquire of management about how it determined that the entity preparing and certifying the investment information is a qualified institution under DOL rules and regulations and evaluate management's assessment of whether the institution is qualified. (This is the part our clients weren't ready for.)

What will plan management need to do differently?

Starting with the audit report and financial statements prepared for periods ending on or after Dec. 15, 2021, plan management will need to direct the auditor on whether the plan's investment information is sufficient and can be relied on without the need for the institution's statements to be audited in detail.

An individual is considered to be part of plan management if they are a named fiduciary in the plan document, are exercising discretion in the administration of the plan, or are a member of the plan's administrative committee.

Plan management will be required by the auditor to acknowledge in writing their responsibilities to:

1. Maintain the current plan instrument, including all plan amendments, in their records.
2. Administer the plan and determine that the plan's transactions which are presented and disclosed in the ERISA plan financial statements are in conformity with the plan's provisions, including maintaining sufficient records with respect to each of the participants to determine the benefits due or which may become due to such participants.
3. When management elects to have an ERISA section 103(a)(3)(C) audit, it has determined:
   a. an ERISA section 103(a)(3)(C) audit is permissible under the circumstances;
   b. the investment information is prepared and certified by a qualified institution as described in 29 CFR 2520.103-8, such as a bank; an insurance carrier that is regulated, supervised and subject to periodic examination by a state or federal agency; or a trust company;
   c. the certification meets the requirements in 29 CFR 2520.103-5; and
   d. the certified investment information is appropriately measured, presented and disclosed in accordance with the applicable financial reporting framework.
4. Provide to the auditor a substantially complete Form 5500 draft before the issuance of the auditor's report.

In meeting the more robust ERISA section 103(a)(3)(C) audit requirements, plan management can take the following steps to meet these new expectations.

- Engage an auditor or auditing firm that can guide you in meeting these new standards successfully.
- Retain complete copies of the current plan document and the related financial statements in plan records. Don't rely on vendors to maintain plan documentation over the life of the plan.
- Become familiar with what is considered a certified investment statement and the types of qualified institutions that are allowed to make the certification.
- Confirm that the certified investment information has been compared to other plan financial statements and supplemental information before being provided to the auditor.
- Review the annual Form 5500 draft to be sure it's consistent with all other reporting and operation of the plan.
- Incorporate these responsibilities and actions into the plan management committee meetings and document the process used to meet these responsibilities.
- Start the plan audit as soon as practicable after the end of the plan year once the certified investment information is available.

Even though our clients experienced a bit of a learning curve this year with the new standard, their plan management is now confident in their abilities. We will continue to work with them and their trusted advisors to provide tools and education needed for a hassle-free audit experience. PC

UPDATE ON STATE AUTO-IRA PROGRAMS

Developments in nine state programs nationwide during 2021.

By John Iekel

States from coast to coast continue to set up programs through which workers who are not covered by an employer-provided plan can better save for retirement. Nationwide, according to AKF Consulting's *State-run Retirement Program Market Report*, there is now approximately $344 million in assets under management in more than 400,000 accounts in state-run plans.

Last year was another dynamic one for state-run plans. Here's a closer look at state programs in 2021.

CALIFORNIA

CalSavers has been growing steadily in terms of employer registrations and employee participants. The CalSavers Retirement Savings Board reported that in June the number of employer registrations increased at double the rate at which they increased in May. By June 30, 12,886 had registered.

CalSavers grew by other measures, but not as dramatically. The number of accounts enrolled with their first contribution pending stood at 208,089. Total assets increased from May to June at the roughly the same rate as they did from April to May and stood at $12,873,939.

CONNECTICUT

The Connecticut Retirement Security Authority—a quasi-public agency headed by co-chairs State Comptroller Kevin Lembo and State Treasurer Denise Nappier that is responsible for implementing MyCTSavings—in August announced the launch of a pilot of MyCTSavings. The program began in September.

DELAWARE

In May, State Representative Larry Lambert (D-Claymont) introduced in the Delaware House of Representatives legislation that would establish the Delaware Expanding Access for Retirement and Necessary Savings (EARNS) program. In general, the bill would require private-sector businesses that (1) have five or more employees, (2) have been in business in the state for at least six months in the preceding calendar year and (3) do not offer employees access to a tax-favored retirement plan, to participate in the automatic payroll deduction IRA program. Employees could opt out. The House Labor Committee voted favorably on the measure; it is now before the House Appropriations Committee.

ILLINOIS

As 2020 ended, Illinois Secure Choice had growing assets and an opt-out rate that was roughly steady. There were 6,087 employers registered, and $46,989,251.70 in the accounts established.

As originally enacted, the Illinois Secure Choice Savings Program applied to employers with 25 or

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"NATIONWIDE, THERE IS NOW APPROXIMATELY $344 MILLION IN ASSETS UNDER MANAGEMENT IN MORE THAN 400,000 ACCOUNTS IN STATE-RUN PLANS."

more employees. However, Gov. J. B. Pritzker (D) on July 30 signed into law a measure that changes the definition of "small business" for purposes of the program from a business with 25 or fewer employees at any one time throughout the previous calendar year to five or fewer employees during any quarter of the previous calendar year. Now, Illinois employers that do not offer a plan, have at least five employees and have been in business at least two years must enroll their employees in the program.

MAINE

On June 24, Gov. Janet Mills (D) signed into law a measure requiring each covered employer to allow its covered employees to decide whether or not to contribute to a payroll deduction Roth IRA by automatically enrolling them. Employees may opt out; those who do will be automatically reenrolled at regular intervals, but can opt out again.

Covered employees will automatically contribute 5% of their salary or wages initially; they may adjust the rate. The law also calls for an annual increase of contribution rates by no more than 1% of wages or salary up to a maximum of 8%. Employer contributions are not allowed.

The Maine Retirement Savings Board will develop, implement and run the program. It provides that covered employers must offer the plan to covered employees by the following deadlines:

- April 1, 2023: 25 or more covered employees;
- Oct. 1, 2023: 15 to 24 covered employees; and
- April 1, 2024: 5 to 14 covered employees.

NEW JERSEY

In March, Gov. Phil Murphy (D) signed into law a measure creating the New Jersey Secure Choice Savings Program. It requires qualifying employers—those that employed at least 25 workers during the past calendar year, have been in business for at least two years and do not offer their employees the ability to participate in a qualified retirement plan—to automatically enroll their employees in the program by the end of 2021.

NEW YORK

In October, Gov. Kathy Hochul (D) signed into law legislation creating the New York State Secure Choice Savings plan. It converts New York State's voluntary participation state-run IRA program to one that is mandatory for employers that:

- employed 10 or more employees in the past year;
- have been in operation for at least two years, and
- do not offer a workplace retirement plan.

The law, which took effect immediately, requires that employers automatically enroll employees and create a payroll deposit arrangement within nine months after the program opens. It allows workers to opt out.

The Secure Choice Savings plan is overseen by the New York State Secure Choice Savings Board, composed of nine appointed members. The Department of Taxation and Finance will oversee the program's development and implementation.

OREGON

The figures for registrations and assets in OregonSaves reflect the growth in the pool of employers and employees covered by the registration requirements. As of June 1, 2018, 954 employers had registered, and OregonSaves had assets of more than $3.5 million. As of June 1, 2021, 16,919 employers had registered and assets amounted to $113,149,423.

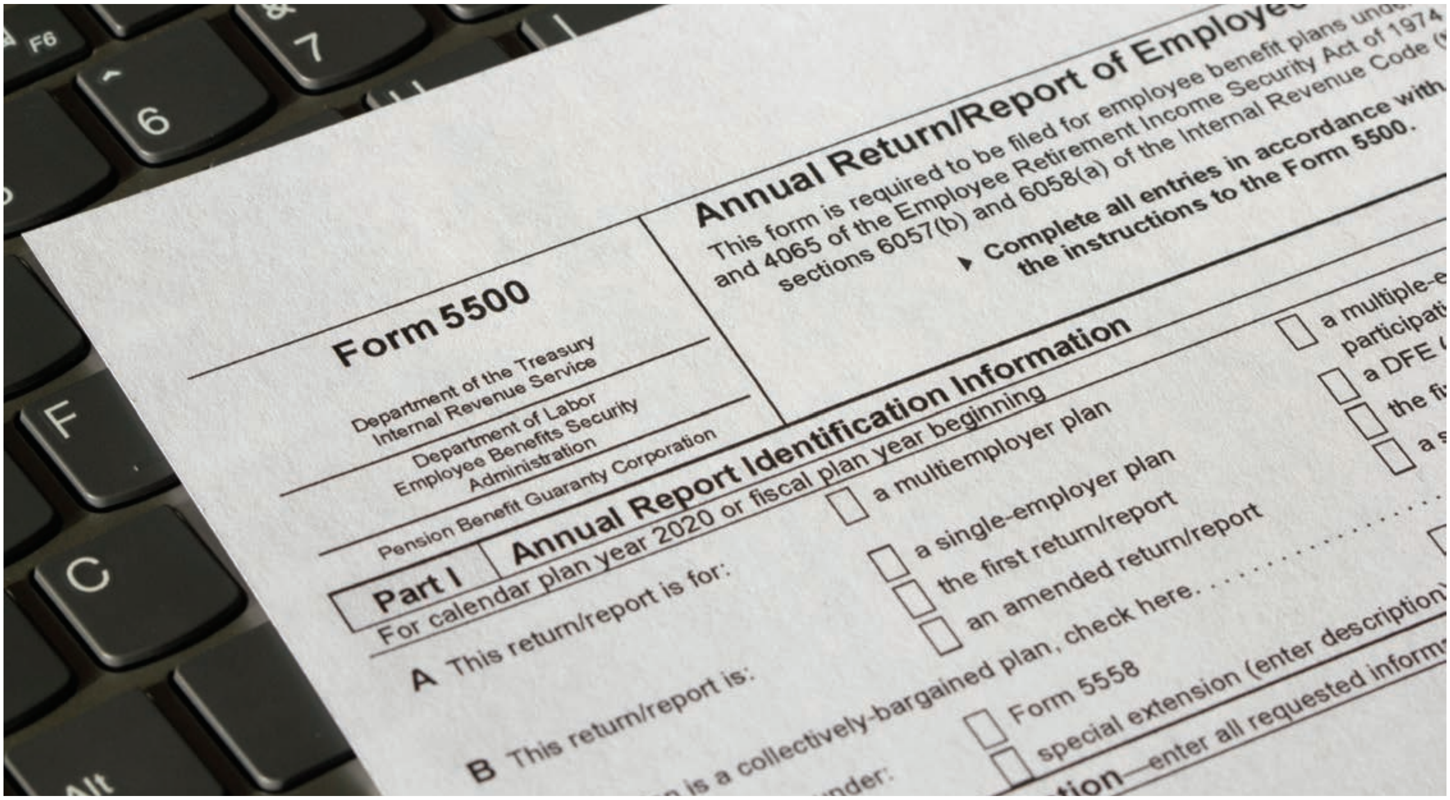
As with assets and registrations, withdrawals by employees generally have consistently grown as the pool of employers and employees participating has. Employees may opt out; they have been doing so at a roughly steady rate of close to 33%.

VIRGINIA

In April, Gov. Ralph Northam (D) signed into law legislation creating VirginiaSaves, a state-facilitated IRA savings program. Eligible employers are to facilitate a payroll deposit retirement savings agreement for their eligible employees. Employees may elect to not participate.

An employer still may set up any type of employer-provided retirement plan; if it does, it will no longer be considered an eligible employer and can stop contributing to the program. Any employer which is not an eligible employer nonetheless may facilitate the participation of its eligible employees in the program. In addition, self-employed individuals and eligible employees whose employers do not enroll in the program may participate.

Enrollment is to begin on July 1, 2023, or as soon as practicable thereafter. PC



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ARA WEIGHS IN ON FORM 5500 REVISIONS

The goals of the changes include modernization and SECURE Act changes. Here's the ARA's take.

By Kelsey Mayo

In response to a request for comments on revisions to the Form 5500 Series, the American Retirement Association has provided suggestions to remedy some concerns expressed by our members.

The Department of Labor (DOL), IRS, and Pension Benefit Guaranty Corporation (PBGC) issued proposed revisions to the Form 5500 series on Sept. 14. The proposed changes implement certain provisions of the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 and make additional "modernizations" to the Form 5500 series. The most notable changes proposed were:

- revising the small plan audit waiver to count only participants with account balances (instead of all eligible participants);
- updating Schedule H to include additional information on plan investments;
- revising Schedule R to include additional compliance questions and plan detail; and
- implementing new consolidated reporting, including the Group of Plans reporting.

The proposed revisions garnered a significant amount of attention, with more than 100 comments submitted. On Nov. 1, ARA provided the agencies with our comments.

SMALL PLAN AUDIT WAIVER

The proposed change that garnered the most attention was undoubtedly the agencies' proposal to revise the small plan audit waiver. The revised rule would base the small plan audit waiver on the number of participants with account balances, rather than the current rule that is based on those eligible to participate (even if they are not actually participating). This change was also proposed by the agencies in a 2016 proposal that wasn't finalized. ARA again expressed strong support for this change and commended the agencies for the proposal.

A significant number of commenters, mostly CPAs and CPA organizations, wrote in to oppose this change, arguing

"THE REVISED RULE WOULD BASE THE SMALL PLAN AUDIT WAIVER ON THE NUMBER OF PARTICIPANTS WITH ACCOUNT BALANCES, RATHER THAN THE CURRENT RULE THAT IS BASED ON THOSE ELIGIBLE TO PARTICIPATE."

that small plans were not being operated correctly and needed the oversight of an independent audit. On the other hand, a number of small employers, as well as the U.S. Chamber of Commerce, expressed their support for the change, noting the significant cost impact on small plans.

The ARA expressed strong support for the change—acknowledging that independent audits do provide value, but noting that that value must be balanced with the cost of the audit. ARA noted that the cost of plan audits has increased and is expected to continue increasing, and that cost can have a significant and staggering impact on plan fees for participants in plans with very few account balances. Furthermore, ARA noted, the number of plans that will be subject to audit under the current standard will increase dramatically when long-term, part-time employees become eligible to participate. This only furthers the need for the proposal to ensure that the retirement outcomes of participants are not negatively impacted by the increased coverage of their part-time colleagues.

INVESTMENT INFORMATION

The agencies also proposed changing Schedule H to provide additional breakdown and detail of plan expenses and investment expense ratios, performance and other information. A stated purpose of this change is to increase transparency and make the data more easily mineable.

The ARA expressed several significant concerns with having this specific data be so broadly available. Most notably, we expressed concerns that public reporting could significantly and unnecessarily heighten the risk of frivolous litigation, which unnecessarily increases the cost of maintaining retirement plans. In addition, there will be significant costs for modification of systems to comply with this detail. While ARA favors transparency of fees and expenses to participants, Form 5500 is not where participants find this information and therefore this change is only reasonably seen as a tool for enforcement. ARA expressed concern that the cost of modifying systems, together with the certain increase in costs that will come from making information publicly available, significantly outweighs any marginal benefit in enforcement.

PLAN INFORMATION

The proposal also added several questions for IRS-related compliance gathering—including questions on coverage testing, safe harbor status, pre-approved plan provider and opinion letter, and plan trust information. The ARA recommended that these questions be revised, or in some cases made optional or eliminated, to reflect the practical realties of how plans are designed and operated.

GROUPS OF PLANS

The proposal would implement the SECURE Act's new consolidated Form 5500 for Groups of Plans. The proposal creates a new Defined Contribution Group reporting arrangement (DCG) and adds a new Schedule DCG (Individual Plan Information) that such reporting groups must file for each participating plan, in addition to meeting more generally applicable Form 5500 requirements. Notably, the proposal would subject the DCG to a trust-level audit (regardless of the size of the DCG or the participating plans) in addition to plan-level audits for each large plan in the group.

The ARA noted that this proposal would increase the filing burden for small plans that may have benefitted from Groups of Plans, contrary to the intent of the SECURE Act. Most notably, the ARA argued that the addition of a trust-level audit was unnecessary and contrary to the statute and its intent. Furthermore, ARA encouraged the agencies to revise the guidance with respect to eligibility for DCGs to eliminate the same trust requirement, allow 403(b) plans to form groups of plans, and clarify the "same investments" requirement.

OTHER SUGGESTIONS

The ARA provided a variety of other comments on the proposal, including encouraging the agencies to permit electronic filing for a Form 5558 (on a consolidated basis for a group of plans), revising instructions to reflect certain nuances applicable to 403(b) plans, and updating the Schedule H to reflect transactions specific to 403(b) plans (such as plan-to-plan transfers, for example).

TIMING

The ARA advocated for delaying implementation of changes other than the audit change and the SECURE Act changes until the 2024 plan year, noting that the data necessary to respond to many of the new line items includes information that service providers are not immediately poised to provide. Therefore, additional time is needed to update systems and collect data to ensure the quality and accuracy of reporting. PC

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TIMING OF BENEFIT FORMULA AMENDMENTS

Understanding an amendment's effect on funding and testing is vital. Here's why. **By Charity Westphal**

Benefit formula amendments affect funding and testing; there is no question about that. But just because an amendment is effective for a given year, doesn't guarantee that it will affect funding or testing that specific year. When determining funding and testing, timing is everything!

Generally, there are three types of amendments to consider: amendments that lower future benefit accruals, amendments that increase benefit accruals, and corrective 11g amendments used to pass testing. In any particular year, each has specific timing requirements that determine if they will affect the plan's funding, testing, both funding and testing, or neither.

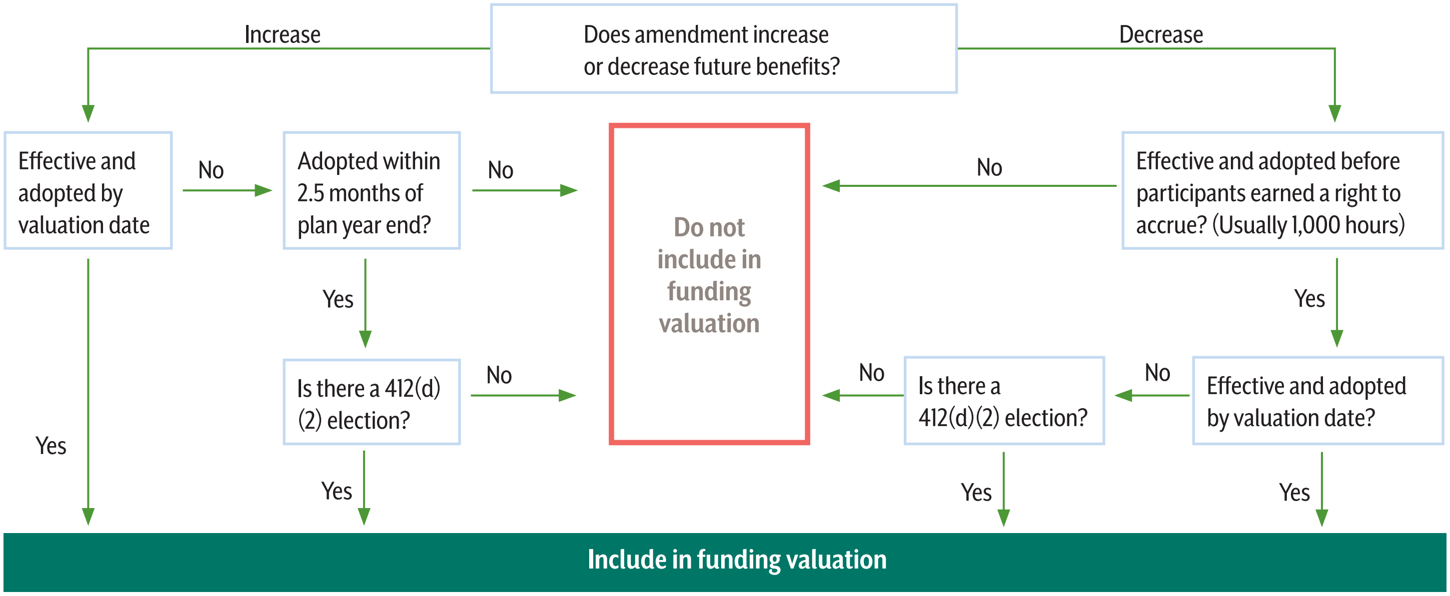
In most instances, testing is performed as of the last day of the plan year. This makes it very simple to determine if an amendment that lowers future accruals will be recognized. The only consideration is if the amendment was in effect *and* adopted before anyone earned a right to accrue a benefit that year.

If a defined benefit plan has the standard 1,000 hours accrual requirement, an amendment to decrease future accruals adopted and effective in May generally will be recognized for testing. If the plan has a more lenient accrual requirement, the amendment would need to be adopted/effective earlier in the year, before participants meet the more lenient requirement. If the amendment is adopted *or* effective after participants have met the accrual requirement, they have earned the right to the benefit due had the amendment not existed, and this is the benefit you will test. And yes, there may be instances where your tests show some participants earning the old benefit accrual, while others earn the amended benefit accrual, based on when that amendment was adopted and each participant's individual work history that year.

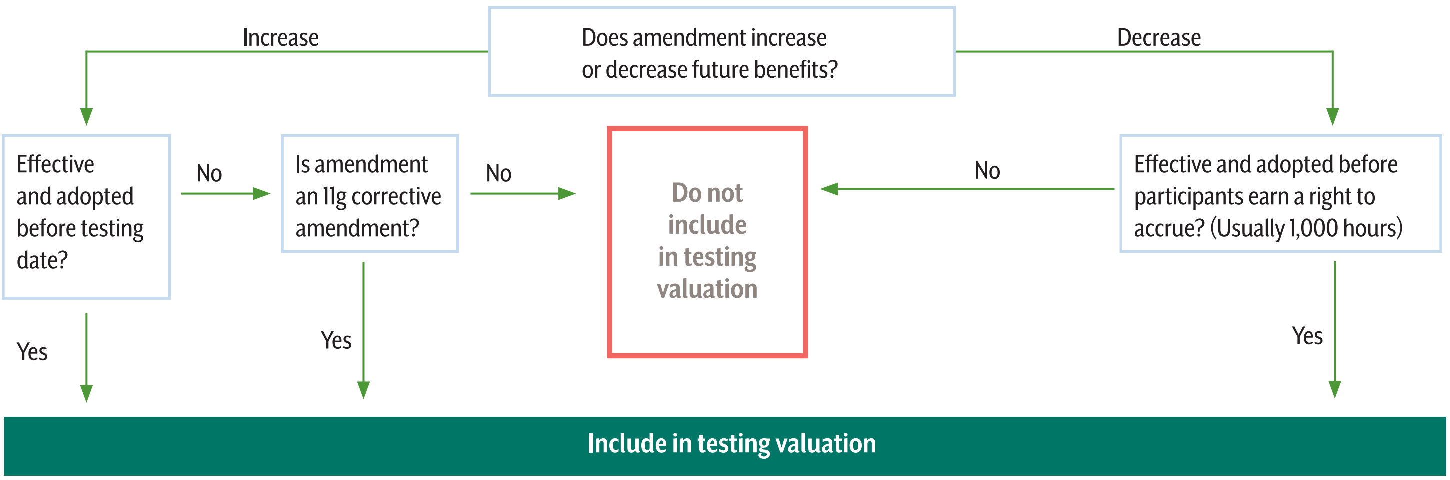
Since funding can be valued at either the beginning of the year (BOY) or the end of the year (EOY), there may be an extra step to determine if an amendment to decrease future benefits affects the funding calculations the effective year. For EOY valuations, funding date and testing date are the exact same, so the accruals used for testing will also be used to determine the funding liabilities for participants that year.

But BOY valuations take a snapshot of the plan as of the first day of the year and ignore anything that happens after that date. Does this mean that if an amendment to decrease future accruals were effective and adopted before anyone earned the right to a benefit, but after the first day of the plan year, you would have to fund for a higher benefit than

Funding Flowchart



Testing Flowchart



"WHEN DETERMINING FUNDING AND TESTING, TIMING IS EVERYTHING!"

participants are entitled to? Maybe not. For BOY valuations, there are two questions to consider:

- Was the amendment in effect *and* adopted before anyone earned a right to accrue a benefit that year?
- Is there a 412d2 election to recognize that amendment as of the first day of the effective year?

If both answers are yes, then you recognize the decrease amendment for the BOY funding valuation. If not, then you will ignore the amendment and base funding on the benefit formula in place as of your funding valuation date.

A similar approach would be used for amendments that increase benefits. If the amendment is adopted and effective before your funding valuation date, it is included in your funding calculations. Assuming §436 permits, if it is signed after your funding date, you again ask yourself two questions

Is it adopted within 2.5 months of the funding plan pear end (PYE)?

Is there a 412(d)2 election to recognize it on the first day of the effective year?

As before, if both answers are "yes," then regardless of BOY vs EOY valuation dates, the increase amendment will be recognized in your funding valuation. If either of those answers are "no," then funding must be based on the latest benefit formula adopted and effective as of the funding valuation date.

So now that we know if the amendment to increase benefits will be included in our funding valuations, we are done, right? Not quite. In small plans (100 or fewer participants), if an amendment increases the funding target of HCEs, then for up to 2 years following the year the amendment is adopted, the funding target *cushion* for affected HCEs must be adjusted to what it would have been had the amendment never been in place. This is why it is important to consider the history of a DB plan and take into account not just the amendments currently in place, but also what came before.

With amendments to decrease benefits, if the amendment was recognized for funding, then it, by the nature of timing requirements, was recognized for testing. But the reverse was not always true. Do amendments that increase benefits work the same? That is, if the increase amendment is recognized for funding, does that mean it will always be recognized for testing? Not necessarily. Non-discrimination testing does not recognize 412d2 elections. If an amendment to increase (or decrease) benefits was not adopted and effective by the testing date, it will not be considered in that year's testing, *with one exception: corrective 11g amendments*. These are amendments generally adopted to correct a failed coverage or non-discrimination test for a given plan year and must increase benefits and be able to pass non-discrimination testing on their own to be valid. They are unique because they can be adopted up until 9.5 months *after* the PYE it is effective for testing (10/15 of the following year for calendar year plans).

Corrective amendments can also be recognized for that plan year's funding as well, but would have to meet the same funding timing requirements as other amendments to increase benefits (i.e., it is adopted within 2.5 months of the funding PYE and is there a 412d2 election to recognize it the first day of the effective year).

So in order to understand an amendment's effect on funding and testing, you not only have to know the type of amendment you are working with, but also the different timing requirements between funding and testing. And while the rules themselves are straightforward and established, future changes in the industry could add further nuances that we may have to consider. For example, with the passing of the SECURE Act, is the retroactive adoption of a new plan for a prior plan year considered an amendment? How will funding and testing be affected if it is? As of right now, the general consensus seems to be they are not treated like amendments, but future guidance could change this stance, leading to a fourth type of "amendment" we must address. PC

QUALIFIED PLAN CONSULTING WITH HNW CLIENTS

High net worth clients are looking for strategies for a plan design that achieves their goals. By taking a solutions-oriented approach, you can become more than just their TPA—a trusted partner. **By Jason Brown**

I think we can all agree on a fundamental basis that regardless of a plan sponsor's size, strategic and customized plan design is one of the primary foundational elements of a retirement plan. However, plan design is not a one-size-fits-all approach. A proper plan design consultant will take the time to understand what a plan sponsor wants to accomplish and then formulate a design that best achieves those goals by leveraging their intellectual capital, which is the real value in what is being purchased by a plan sponsor.

One subset of plan sponsor types is professional or high net worth (HNW) individuals, who come with their own set of unique variables. This article will share some of the questions, thoughts and opportunities in working with HNWs.

WHAT DO YOU WANT TO ACCOMPLISH?

The first question I always ask regardless of the opportunity's scale is, "What do you want to accomplish?" This question may seem superfluous when working with HNWs, since generally they want to maximize their deferral and employer contribution capabilities while limiting obligations to their staff. However, I have experienced HNWs wishing to provide higher employer contribution than required for a particular plan design and others that have had no interest in actively participating in the company plan. Taking the time to have this conversation is essential to learn their goals.

After determining their primary objectives on a macro level, it is time to investigate further to delineate the variables with which you will be working.

- **Deferrals**—How much do the HNWs want to target?
- **Employer Contributions**—How much are the HNWs wanting to provide themselves and the staff?
- **Demographics**—What is the age and income composition of the HNWs and staff?
- **Compensation**—How much will/do the HNWs show for plan contribution purposes?

The answers provided to these questions will lead the TPA down the road to developing a thought process (much like a mental flow chart) on what plan design structure will best suit the needs of the HNWs.

THE COMPENSATION DISCUSSION

One would think that the conversation about compensation would be a very straightforward discussion; however, that is not always the case. When a TPA asks an HNW to provide information about their compensation, they are referring to compensation that can be considered for retirement plan purposes. Meanwhile, the HNW is thinking about how much they make in total, which can be a completely different amount.

For example, let's assume an HNW is a shareholder in an S-Corp. In that scenario, they are most likely receiving W2 income and distributions, so when asked the compensation question, they typically provide a total that incorporates both buckets of income. While they are not incorrect on how much they make, the TPA can only utilize the W2 portion for plan contribution purposes.

The mix of these income sources can significantly impact the plan design strategy. Many HNWs are directed to limit their W2 pay and leverage distributions more to help mitigate payroll taxes associated with W2 income. They are required to show a reasonable amount of W2 per the IRS, but if the amount targeted is on the lower end of what is considered reasonable, then trying to incorporate concepts like New Comparability and Cash Balance combination concepts most likely won't be as efficient as desired. In this situation, it would take a more significant percentage of employer contributions to maximize their accounts, which would lead to a higher contribution requirement to the staff in most circumstances.

The discussion of compensation boils down to the value of tax-deductible retirement plan contributions and the efficiency of those dollars within the plan design allocation versus the additional taxes associated with increasing W2 pay. So if an HNW does not want to show a level of W2 needed to have advanced plan design concepts make a meaningful impact, they are typically best suited for a Safe Harbor Match plan (for example) to maximize their deferral capabilities. This design also works well if they have a spouse working at the company, as they can also maximize their deferrals and benefit from tax-deductible contributions.

LEVERAGING TAX EFFICIENT PLAN DESIGNS

So now that we have had the compensation discussion, it is time to evaluate the company's employee demographics to see what we

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are working with for plan design variables. In an optimal situation, you want to see the HNWs older than staff (10+ years) and compensation higher than the staff. If these metrics are in place, then incorporating strategies like New Comparability and Cash Balance Combination plans can show as effective options to maximize HNW contributions. If the HNW is comfortable providing 5% to the staff in employer contributions to maximize their account to the Section 415 limit, then New Comparability is a good solution.

Also, keep in mind that this arrangement does not always have to be a max scenario, and the profit-sharing contribution amount can vary from year to year. I have seen numerous HNWs go to what I refer to as a "min scenario" where they get 6% (plus the 3% SHNE) in profit-sharing while only providing the 3% Safe Harbor non-elective contribution to the staff. Also, when selecting Safe Harbor options, the 3% SHNE should be used in most cases since it counts toward satisfying the gateway minimum for cross-testing.

If an HNW is looking to increase contributions above and beyond what a 401(k) alone allows, it is time to analyze the benefits of adding a Cash Balance plan. This design works on principles similar to New Comparability plans, so if New Comp works, Cash Balance will too.

A combo design's ideal target contribution threshold is 7.5% in total employer contributions (between both plans) to the staff. The trade-off for this additional cost is that contribution thresholds for the HNWs can be increased significantly. The evaluation of the effectiveness of these designs always comes down to the net cost of the tax-deductible employer contributions versus the total percentage of plan contributions that go to the HNWs. A general rule of thumb is if 70%+ is going to the HNWs, then the design makes sense, and if it is at 80%+, it should be a "no brainer."

In either of these designs, it is recommended to carve out the HCEs from receiving the 3% SHNE to build maximum flexibility for the HNWs.

AFTER-TAX/VOLUNTARY CONTRIBUTIONS

This contribution source has gotten a lot of attention over the past few years and subsequently has begun to draw the scrutiny of the federal government. This money source has limited application in most cases since it is treated as match money for ACP compliance testing. Even if the plan provides Safe Harbor contributions, it can still fail testing, resulting in the money being refunded to participants.

However, this can be a powerful tool for an HNW who wants to further diversify their income tax liability at retirement in the right circumstances. In most cases, the adjusted gross income of HNWs is higher than the income phase-out level permitted ($208,000 AGI if married and filing jointly, or $140,000 if single in 2021) for them to contribute to a Roth IRA. However, after-tax/voluntary contributions can be distributed from a retirement plan and utilized to fund a Roth IRA (often referred to as a backdoor Roth IRA). This strategy can work exceedingly well for owner-only and Solo-K plan arrangements. This strategy also gives the business owner the option (if needed) to either gross up their W2 compensation and pay more payroll taxes to maximize tax-deductible profit-sharing contributions or maintain a lower W2 and contribute money on an after-tax/voluntary basis.

SUMMARY

HNWs are looking for strategies to help build a plan design that meets their objectives, and they want to partner with firms that can provide intellectual capital and consulting. If you take a solutions-oriented approach, you will become more than simply their TPA and be considered a trusted partner. PC

ASPPA Annual: Reconnect!

Back together again after a 2-year in-person hiatus.

By John Iekel & John Ortman

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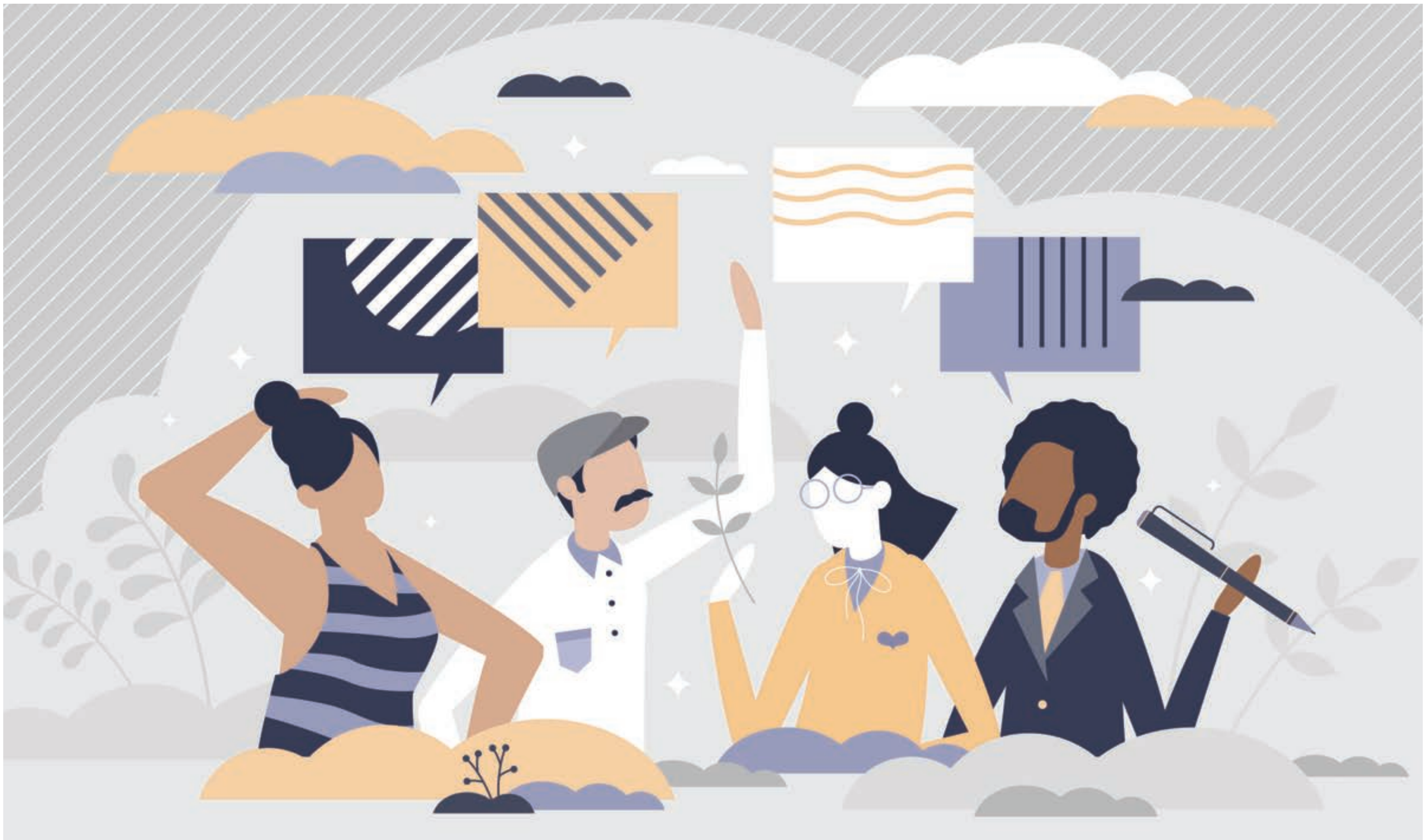

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The 2021 ASPPA Annual Conference—back as an

in-person event after last year's virtual conference—was a welcome opportunity for members to reestablish the friendships and closeness that has always characterized the annual event. Here's a look at some of the highlights.

Graff Highlights Industry Challenges and Hopes

The retirement industry currently faces challenges—but there is opportunity and good news as well, Brian Graff pointed out in the Washington Update session on Day 1 of this year's conference.

There is plenty of work to do, Graff suggested. The ASPPA Executive Director/ARA CEO noted that retirement readiness was the top financial concerns of 59% of Americans in a 2020 Gallup survey, and that and "an alarming number" say it "it will be a miracle for me to retire comfortably." He also observed that 20% of working Americans don't even have a bank account.

Graff warned that there is still a systemic part of the population that "has no savings at all," observing that there is a racial disparity, with minority families even more likely to not have retirement savings. He emphasized that the situation must be addressed, and warned that if the private sector does not do something in the next 10 years, government could intervene in a way that would feature a public-sector solution rather than the private systems currently in place.

Proliferation of Proposals

The state of retirement saving has captured Washington's attention, Graff indicated. "It's kind of extraordinary how much more focus there is on retirement policy now than there was ever before," he remarked. It's "great and exciting," Graff said—but also scary, given the nature of some of the proposals—how much more engaged senators are and how many proposals there are.

There are "countless numbers" of proposals, he said, including new 401(k) safe harbors, new efforts to promote saving, SECURE 2.0, and more. These probably won't enacted this year, he said, but they could be next year.

Hope and Opportunity

Even amid the challenges facing the industry and savers, Graff indicated that there is much room for optimism.

For one thing, the Automatic Retirement Plan Act introduced by House Ways and Means Committee Chairman Rep. Richie Neal (D-MA) could have far-reaching effects, Graff indicated. More than 82 million American workers would be eligible, and he noted that research shows that it could result in $7 trillion in additional incremental retirement savings over 10 years. “This is a big number,” he noted, adding that it also could result in more than 62 million new retirement savers. And, he indicated, this proposal would also help address savings rates among those who are not high earners—he noted that research suggests that 98% of those new savers would be making less than $100,000 per year, and that tens of millions of them would be members of minority groups.

Auto-enrollment is another ray of sunshine in addressing not only savings rates, but also racial disparities in retirement preparation. “The very good news,” Graff told attendees, is that there are no such disparities with auto-enrollment. “You all save the same when you have access,” he remarked.

Hoffman Voices Concerns About LTPT Rule

The new long-time, part-time employee classification created by the SECURE Act was the focus of a workshop session led by ERISA Attorney Craig Hoffman.

As part of an effort to help long-time, part-time employees save for retirement, the SECURE Act included a provision requiring 401(k) plans to adopt a new, dual-eligibility requirement under which an employee must complete either one year of service subject to the 1,000-hour rule or three consecutive years of service with at least 500 hours of service. The plan sponsor may choose to exclude employees who are eligible solely on the basis of this new three-year rule from the top-heavy, coverage and nondiscrimination rules.

It appears that 2024 is the earliest that employees will gain eligibility under the three-year rule, so plan sponsors and their recordkeepers need to begin tracking LTPT employee data this year. What are the ramifications for TPAs in 2021 and beyond? Hoffman, an Attorney/Senior Consultant at Nova 401(k) Associates, addressed several concerns about the new rule and warned of possible legislative changes to it in the future.

Lack of Guidance

While IRS Notice 2020-68 provides very limited guidance on the new LTPT requirements, much more guidance is needed. “We need guidance very badly dealing with a lot of the issues” in the LTPT rules, Hoffman observed.

For example, existing regulations permit the use of a “periods of employment” equivalency method for crediting service for vesting and eligibility purposes. “Will plans be able to use this method for vesting service for periods before 2021 if it’s not already in the plan document?” Hoffman asked. “Will the equivalency amounts be reduced by 50% since they are being applied under a 500-hour standard?”

Form 5500 Reporting

Are LTPT employees going to have to count for purposes of whether a plan can qualify for the small plan audit waiver that’s generally available to plans with 100 or fewer participants? “I don’t see any way around the fact that these long-term part-time employees will go into your 5500 cap, and that will be based upon the active participants under the

Wyatt Welcomed as 2022 President

The American Society of Pension Professionals & Actuaries welcomed Natalie Wyatt, QPA, QPFC, as the new president of the organization during the Oct. 17 Business Meeting that kicked off the 2021 ASPPA Annual Conference.

Wyatt succeeds 2020 ASPPA President Frank Porter, QPA, QKA.

Wyatt is a Senior Account Executive at SS&C Technologies in Versailles, KY with more than 30 years of experience in the retirement plan industry. Her experience includes roles as Vice President of Administration at Unified Trust Company, N.A., Sales Consultant with SunGard (now FIS) for Relius Administration, and Vice President of Business Development and Vice President of Relationship Management at Innovest Systems. Following the May 2020 SS&C acquisition of Innovest Systems, Wyatt took on the role of Senior Account Executive in January 2021.

Wyatt has spoken at numerous conferences and events, including the ASPPA Annual Conference, and authored articles on market timing regulations as well as blogs on the evolution of the 403(b) plan.

She is a member of NAPA, NTSA and ASPPA, and served for 6 years as a member of the ASPPA Annual Conference Committee and as the Annual Conference Co-Chair in 2017 and 2018. Currently she serves as an ASPPA Senatorial member on the ARA Board of Directors.

Joining Wyatt as ASPPA Officers for 2022 are:

- **President-Elect:**
  Justin Bonestroo, MSEA, CPC, QPA, QKA, CPFA
- **Vice President:**
  Amanda Iverson, APM
- **Immediate Past President:**
  Frank Porter, QPA, QKA

In addition, five ASPPA members were elected to open at-large seats on the ASPPA Leadership Council:

- **Genelle Brakefield**
- **Mike Finch**
- **Manny Marques**
- **Amy Ouellette**
- **Tianna Schulz**

"It's kind of extraordinary how much more focus there is on retirement policy now than there was ever before. It's great and exciting." — *Brian Graff, ASPPA/ARA*

current rules for 5500s—those who have an account balance, or are currently eligible," Hoffman said.

Noting that the DOL interprets "currently eligible" to include anybody who's eligible to make an election contribution irrespective of whether they have ever made one, Hoffman observed that "you may find plans going over the 100-employee threshold and finding themselves subject to a $10,000 or $15,000 audit—not a good idea."

However, "we actually do have some good news from the Department of Labor," he added. "About four weeks ago, they proposed some modifications to the Form 5500. Those rules include a provision to change the rules for determining who is an active participant for the 5500 small plan audit waiver, so that if you're eligible but do not have an account balance, you will not count toward the 100-lives threshold. Now, if you're a long-term part-time employee and you've put money in the plan, you're going to count, but for those who don't put anything in, you will not have to count them."

To their credit, Hoffman noted, the DOL proposed related changes back in 2016. "They had a very detailed slate of changes to modernize the Form 5500. But that initiative was in a deep freeze during the last administration." But now, based upon the preamble to the proposed Form 5500 changes, "the IRS, DOL and PBGC are planning to come back to that proposal. In the meantime they made this change," he said. "The DOL specifically acknowledged in the preamble that they were doing this because of the upcoming increase in participants with no account balance as a result of the LTPT employee rule." Look for the DOL to issue the final revision next spring, Hoffman advised.

ASPPA Honors Hoffman, Griffin with 2021 Industry Awards

The American Society of Pension Professionals & Actuaries honored 2002 ASPPA President Craig Hoffman with the prestigious Harry T. Eidson Founders Award during the opening session of the 2021 ASPPA Annual Conference.

Hoffman is an Attorney/Senior Consultant with Nova 401(k) Associates in Houston. For more than 35 years, his practice has focused exclusively on federal tax and ERISA matters relating to the design, implementation and operation of tax-qualified retirement plans. He most recently served for one year as Counsel to the Trucker Huss law firm in San Francisco.

Before joining Trucker Huss, Hoffman served 10 years as General Counsel and Director of Regulatory Policy for the American Retirement Association. Prior to joining ARA, he served for more than 19 years as General Counsel to the Relius division of SunGard, which is now part of Fidelity National Information Services, Inc. Hoffman was an expert speaker at the National Summit on Retirement Savings, served as a charter member of the first IRS Advisory Committee on Tax Exempt and Governmental Entities, was the 2008 recipient of the NIPA's Lifetime Achievement Award, and is a Fellow in the American College of Employee Benefits Counsel. He is a frequent speaker at industry meetings.

Educator's Award

The 2021 Educator's Award was presented to ERISA attorney and long-time ASPPA member John Griffin. Griffin has spoken at ASPPA events for nearly 40 years, teaching thousands of retirement plan professionals. He has become known for his patient, easy-to-understand and thorough style of teaching. He has been a frequent speaker and educator, providing webcasts, live seminars, newsletters and on-site teaching. In addition, Griffin has been very involved with ASPPA, serving on the Government Affairs Committee—most often representing plan document issues.

Lower or No Service Requirement

As an alternative to following the LTPT rules (and assuming the plan is not top-heavy or likely to become so), plan administrators "may want to also consider a design change letting people in right now to avoid the rules entirely," Hoffman noted. "If you let everyone in on 1/1/2024 irrespective of long-term part-time status, that would satisfy that rule, that you don't have anybody in there solely by virtue of that." The IRS needs to address this issue, he added.

Notwithstanding all the uncertainty and dearth of guidance, for the moment, plan administrators still need to operate with the SECURE Act's new LTPT rules in mind, Hoffman noted, and plans must be amended to reflect the rules by the end of the 2022 plan year.

Restatements Today and Tomorrow

An Oct. 19 session took a look at what's going on with restatements and what the future may hold.

Under Revenue Procedure (Rev. Proc.) 2020-10, said Brian Furgala, Director of ERISA Services of Wolters Kluwer, the Cycle 3 restatement period began May 1, 2020 and will end on Jan. 31, 2025. Defined benefit document vendors, he said, have already submitted documents for review and many have been assigned IRS reviewers.

Furgala said that he is "guessing that Feb. 1, 2023 will be when the two-year restatement window opens" for DB restatements, but added that there has been no official word on that yet.

SECURE Act and CARES Act

Furgala noted that the CARES Act contain a variety of provisions relevant to restatements and plan amendments that take place before them. For instance, under both measures, amendments must be completed by the last day of the plan year beginning after Dec. 31, 2021. For calendar plan years, the deadline under both is Dec. 31, 2022.

In addition, the provisions of both laws are not included in Cycle 3 defined contribution restatement documents. Those documents will not be included in Cycle 3 DB restatement documents. Instead, said Furgala, Cycle 3 DC restatement documents are going to be add-ons.

Vendors are likely to combine SECURE Act and CARES Act amendments into one amendment, with the same signing deadline.

Amendment Timing

Furgala noted that the timing for amendments of pre-approved DB plan documents, individually drafted DB plan documents and DC plan documents and 403(b) documents is the same—the last day of the plan year beginning after Dec. 31, 2021.

And if SECURE 2.0 is passed soon, Furgala added, that may delay the deadline under the original SECURE Act to match potential a SECURE 2.0 deadline of the last day of the plan year beginning after Dec. 31, 2022. For calendar plan years, it would be Dec. 31, 2023. "The best-case scenario is that there is a consistent deadline in the new law," he remarked. PC

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MEPS AND PEPS VS. THE SINGLE-EMPLOYER PLAN

WITH THE INTRODUCTION OF SEVERAL NEW RETIREMENT PLAN ARRANGEMENTS BY THE SECURE ACT, KNOWLEDGEABLE TPAS AND RECORDKEEPERS THAT CAN EVALUATE AND RECOMMEND THE BEST APPROACH WILL BE IN HIGH DEMAND.

By Theresa Conti, Jim Racine & David Witz

WHILE GOVERNMENT OFFICIALS DEBATE THE RETIREMENT COVERAGE GAP, SMALL EMPLOYERS ARE STRUGGLING TO OFFER A RETIREMENT PLAN AT A COST THEY CAN AFFORD. BESIDES THE OBVIOUS COST CONSIDERATIONS IN TERMS OF DOLLARS AND CENTS, THERE ALSO IS A COST IN TERMS OF TIME, LIABILITY AND CAPACITY.

State-run plans have been heralded as a low-cost solution worth considering, but Multiple Employer Plans (MEPs), Pooled Employer Plans (PEPs), Professional Employer Organizations (PEOs) and Defined Contribution Groups (DCGs)—often referred to as Groups of Plans (GoPs)—are the arrangements capturing most headlines.

For our purposes, this article will not reference state-run plans but will instead focus on the solutions capturing broad market attention and how these solutions compare to each other.

Employers of all sizes recognize that the benefit of offering a retirement plan is the ability to attract and retain employees. However, unlike larger employers that have dedicated Human Resources departments to handle the burden of managing an employee benefits program, small and most medium sized employers do not have dedicated internal staff to support the administrative responsibilities associated with sponsoring a retirement plan. Herein lies the reason why cost is such a high inhibitor to broader adoption of retirement plans by small employers. In fact, a 2019 survey by the LIMRA Secure Retirement Institute shows that all plan sponsors want lower plan costs and reduced administrative burdens, as well as a solution that reduces or eliminates the oversight burden, fiduciary liability and legal liability associated with offering a retirement plan.

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While the majority of retirement plan sponsors "go it alone" and fully assume the role of plan administrator, many are now either considering or have already selected an outsourcing solution.

MEPS VS. SINGLE-EMPLOYER

The first outsourcing solution we'll discuss is the MEP. By and large, employers adopt a MEP, or an iteration of a MEP such as a PEP or PEO, to outsource some or most of their fiduciary responsibility. Through these arrangements, the plan administrator fiduciary role is also outsourced to a party that is not an employee of the adopting employer. In addition, the MEP sponsor will select and monitor the fund lineup, typically with the assistance of a third party that is retained as an ERISA section 3(38) discretionary fiduciary investment manager. And finally, the MEP will probably limit plan design flexibility around eligibility, employer match, discretionary contributions, vesting and other features that may be important to meet an individual employer's objectives.

Alternatively, sponsors of single-employer plans have complete control over plan design decisions and the selection of service providers. They can retain a 3(16) plan administrator and/or 3(38) discretionary investment manager if they wish, or retain that responsibility in-house. Their fiduciary outsourcing options reflect an à la carte approach, with varying levels of support and cost.

For example, an employer could outsource some or all of the 3(16) plan administrator responsibilities. Additionally, the responsibility for selecting and monitoring the fund lineup can be partially outsourced to a 3(21) fiduciary advisor or completely to a 3(38) discretionary investment manager.

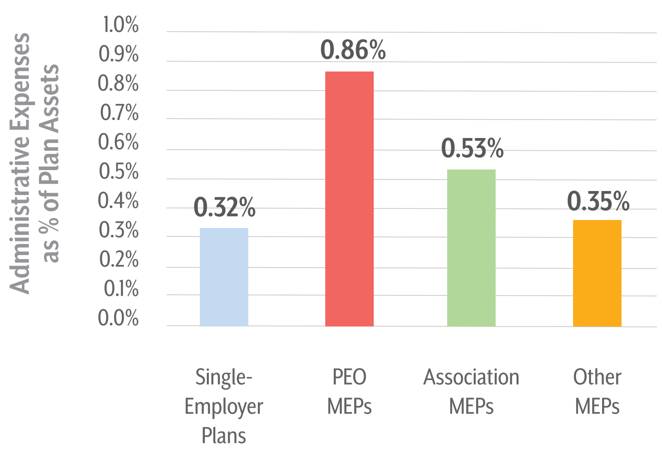
Plan sponsors should be aware of what is included in the 3(16) service option selected, as the fees and level of support services vary from provider to provider, according to Bob Toth, an ERISA attorney with more than 35 years of expertise. "Each one of these arrangements has a different kind of agreement and each agreement will have some sort of obligations that remain with the employer," he notes. "Regardless of what anybody tells you, you're always going to have some residual employer obligations. So make sure the employer understands what they're committing to and what their obligations are under the MEP arrangement they adopt."

Of course, a plan sponsor retaining a professional expert for any of these solutions should also expect to pay a higher cost for this level of service. However, that does not free the employer from its obligations to review the provider's performance and fees periodically. As Toth reminds: "These things are designed to be a simple on their face in operation to the employer. They need the help of professional to actually help sort through. What they're going to be paying for is professional planning administration. They must know what's happening in each arrangement and what the costs are for each one and who's getting paid what before they can decide whether it's worth it."

In short, a MEP is a packaged solution at a set cost that provides less plan design flexibility than a single-employer

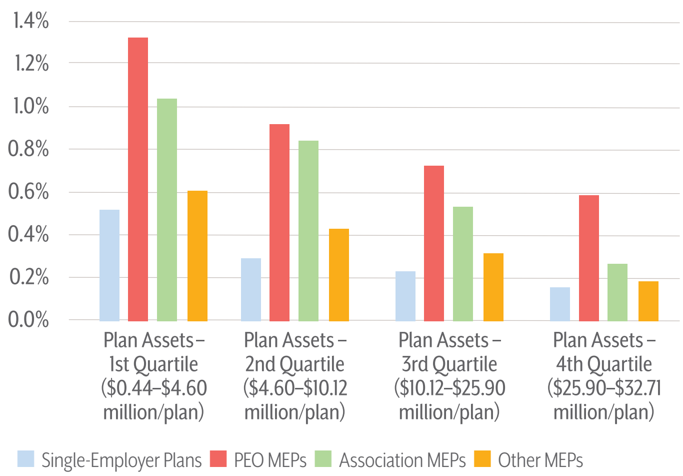
Average Cost of a 401(k) by Plan Type

Historically, single-employer plans have lower expenses (as a percentage of plan assets) compared to MEPs. In fact, their administrative expenses are less than half those of MEPs run by professional employer organizations (PEOs)—0.32% vs. 0.86%. Will single-employer plans be less costly than PEPs run by PPPs, too?[1]



Cost Comparison by Plan Size

As this graph shows, the cost for even the smallest single-employer plan is lower than the cost of the largest PEO MEP.[1]



[1] Shnitser, N. "Are Two Employers Better Than One? An Empirical Assessment of Multiple Employer Retirement Plans." Boston College Law School. May 1. 2020.

plan that is an à la carte service platform. This difference complicates the comparison between MEPs and single-employer plans. In order to properly compare the cost of the two alternatives, a single-employer plan would have to obtain pricing for outsourcing the 3(16) and 3(38) services that are included in the MEP.

THE ADVISOR'S ROLE

So which solution would an advisor recommend? According to MEP expert Pete Swisher, the founder of Waypoint Fiduciary, the more appropriate question is: Why are advisors recommending a MEP to their clients over a single-employer plan? Swisher notes that "advisors recommend what they believe in." Overall, advisors have embraced their fiduciary status, he explains, and they understand there is more to their consulting than just investments. "Advisors are recognizing that a rigorous process not only applies to the investments, but also to operational responsibilities."

"Not only are plan sponsors in large part unprepared to fulfill their fiduciary responsibilities for investment selection and monitoring, they also lack the skill, experience, education and expertise to handle all the operational responsibilities that are assigned to them by a legal plan document," Swisher observes. "Advisors understand that MEPs are a tool that takes responsibilities and liability for many of the operational issues that they are ill equipped to handle. If the goal is to remove as much of the fiduciary responsibility from the plan sponsor as possible, it is hard to beat a MEP. That said, employers are beginning to become better educated about the benefits of group plans, so I expect that more employers will start asking for info about MEPs going forward."

The goal is to remove as much of the fiduciary responsibility from the plan sponsor as possible, Swisher believes, which can be done with a MEP or similar grouping of plans or by adding 3(16) and 3(38) services to a single-employer plan.

Either way, there is an increasing trend of advisors, TPAs and recordkeepers encouraging plan sponsors to outsource their fiduciary duties and liability.

However, while many advisors promote MEPs as a less expensive solution that is an efficient means of outsourcing administrative responsibility and liability, empirical evidence suggests that may not actually be the case. As illustrated by the nearby charts from research published by the Boston College School of Law in May 2020,[1] a single-employer plan has lower expenses as a percentage of plan assets than a MEP. In fact, the chart showing costs by plan size shows that even the largest MEP plans (in term of assets) are more expensive than the smallest single-employer plans (in term of assets). This contradicts the generally held belief that as a MEP's assets grow, the MEP becomes more cost effective.

These two charts bode well for an advisor who favors the single-employer plan approach, but most single-employer plans currently do not have 3(16) support and frequently lack

3(38) support. Thus, the cost comparison lacks reliability if the services offered are not identical.

"It's going to be harder for a small plan to actually choose between different plan arrangements without help from a financial advisor," Toth reminds. "Assuming they are well versed in different plan arrangements, the parties to each arrangement, and everyone's compensation, their advice and guidance can be invaluable. Granted, from what I've seen, all these arrangements are doing a pretty good job of disclosing all the costs that are involved. But the typical employer is not able to assess the reasonableness of those costs without professional help."

THE TPA'S AND RECORDKEEPER'S ROLE

Besides plan advisors, some retirement plan consultants that believe MEPs are a solution for small plans, including recordkeepers, TPAs and large financial organizations. The numbers of new MEPs and PEP filings have grown considerably, and many are offering a robust platform of services that include 3(16) and 3(38) fiduciary services. As Toth observes, "There are a lot of people seeing this as an opportunity to open up plans to the smaller plan markets." Small plans—including startups—have long been ignored by elite advisors and even some service providers. So, this is good news for the largest segment of employees who have no structured retirement savings plan; yet Toth cautions that professionals and plan sponsors should thoroughly investigate the merits of these arrangements before adopting one.

The need for a professional consultant's help to navigate the various retirement structures available cannot be overstated, especially for the vast majority of employers that are ill equipped to understand the complexity of the different available arrangements. "Each one of these solutions is a little bit different. The cost structures are a little bit different. The liabilities are a little bit different. The options they have to choose from will serve their purposes a little bit differently. Not one arrangement will actually be a one-size-fits-all," Toth points out. "And so, they need to choose which one works for them. And that's where TPAs come into play. That's where advisors come into play. They're going to need help to figure it out."

NAVIGATION CHALLENGES

At ASPPA's 2021 Annual Conference in October, Karen Smith, Nova 401(k) Associates President, and Linda Kurz, Transamerica VP & National MEP Practice Leader, led a discussion among retirement plan professionals and providers entitled, "Navigating the MEP and PEP World." During their session, several great insights and concerns were shared with the audience that emphasized just how complex the industry has become and enumerated the challenges an employer faces in selecting the best structure for their retirement plan.

"EMPLOYERS ARE BEGINNING TO BECOME BETTER EDUCATED ABOUT THE BENEFITS OF GROUP PLANS, SO I EXPECT THAT MORE EMPLOYERS WILL START ASKING FOR INFO ABOUT MEPS GOING FORWARD."

— PETE SWISHER, WAYPOINT FIDUCIARY, LLC

Following is a summary of their comments and the concerns expressed directly to retirement plan providers.

- Concerning PEPs:
  - If you don't already have a strong 3(16) operation, jumping directly into being a Pooled Plan Provider (PPP) for a PEP is a big leap. Think before you jump.
  - Due to increased scrutiny of MEPs, a number of larger PEOs are looking to move from a MEP to a PEP structure.
  - Probably the best candidate for a MEP or PEP is the client that is looking to buy their 401(k) online or at Costco.
- While very few of the attendees at the packed session raised their hands saying they are looking to start a MEP/PEP, no one raised their hand saying they were afraid they would lose clients or market share by *not* offering a MEP or PEP.
- Answering a question about the opportunity that GoPs present, Smith observed, "We find it just as easy to file 50 Form 5500s for individual plans as it is to pull the information from 50 employers into one plan."
- Realize that in a GoP, requirements may include both a plan audit and individual audits for large employers in the arrangement.
- Know that an audit cost for a plan with multiple employers will be more expensive, and be prepared to work with the auditor on providing details from both large and small employers in the plan.
- Smith and Kurz both see a place for MEPs, PEPs and GoPs. But there is a learning curve—for your operations, putting together the advisor and recordkeeper partnerships, and having your sales team ready—that should be considered before starting down the path of building your capabilities.

RESHAPING THE INDUSTRY

For most employers, running the retirement plan is just one of many responsibilities—and not the most important one. Granted, employers express a high desire to offer a retirement plan, but once they become overwhelmed with the responsibilities of administrating the plan, many start looking for a way out. That exit door leads to one of three options:

1. terminate the plan, which is an option that has its own negative consequences with employees;
2. outsource fiduciary responsibilities to an independent 3(16) and 3(38) solutions; or
3. become an adopting employer of a MEP-type structure.

Regardless of which arrangement a plan sponsor selects, it is important to remember that the plan sponsor or adopting employer retains fiduciary responsibility for:

- selecting and monitoring the arrangement;
- supporting census verification and participant eligibility;
- forwarding required contributions; and
- determining if fees are reasonable for the arrangement selected.

Of course, as Swisher reminds, it's the retirement consultants that sell the plan sponsor on the best arrangement for their needs. "Clients basically do what they're told, so if advisors tell them to adopt a given group arrangement, they tend to listen," he says. "And given that many clients will likely adopt arrangements where they have fewer responsibilities and chores, they will be very reluctant to move back to arrangements where they have to shoulder those burdens again. This alone will reshape the industry over time."

With the introduction of several new retirement plan arrangements by the SECURE Act, knowledgeable retirement plan consultants that can advise plan sponsors will be in high demand. TPAs and recordkeepers will be relied upon by advisors to help with evaluating and recommending the best approach for their clients, and each arrangement has its place. So, the future belongs to those that are best prepared to guide advisors and their plan sponsor clients through this complex maze of retirement plan arrangements. PC

Footnotes

[1] Shnitser, N. "Are Two Employers Better Than One? An Empirical Assessment of Multiple-Employer Retirement Plans," Boston College Law School faculty paper, May 1 2020. Online at: *https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=2284&context=lsfp*.

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EMPLOYEE OR **INDEPENDENT** CONTRACTOR?

THE CURRENT STATE OF AN EVER-CHANGING LAW AND ITS IMPACT ON RETIREMENT PLANS.

BY GARY D. BLACHMAN, SAKSHI JAIN & AUSTIN ANDERSON

WHETHER OR NOT A WORKER IS CLASSIFIED AS AN EMPLOYEE IS ONE OF THE MOST CONTENTIOUS AND FREQUENTLY LITIGATED QUESTIONS IN LABOR AND EMPLOYMENT LAW.

This is partially because of the incredibly high stakes of the determination. As opposed to independent contractors, employees are entitled to various statutory benefits and protections including antidiscrimination laws, access to unemployment insurance and workers' compensation funds, family and medical leave protections, and wage and hour protections. It is easy to see why workers would want to be covered by these protections, and why business organizations are equally motivated to avoid the costs that come along with actually employing people. For retirement plan sponsors, the financial and administrative costs of worker misclassification can become significant, especially if mistakes are made over a period of multiple years.

Another reason why this is such a difficult question is the wide variety of tests proposed to make this determination. Different courts and government agencies make use of different tests, and the tests themselves differ in the factors to be considered and the weight given to each factor, leading to still greater confusion about who is and is not an employee.

In recent years, the definition of an independent contractor has tended to shift depending on who occupies the White House. This article examines recent attempts to define independent contractors and the implications for employees, plan sponsors and their recordkeepers.

HISTORICAL DEFINITION OF INDEPENDENT CONTRACTORS

Historically, the U.S. Supreme Court and Department of Labor have relied on a multi-factor "economic realities" test to determine whether a worker is an independent contractor or an employee under the Fair Labor Standards Act (FLSA). It is determined on the totality of the circumstances. Under the economic realities test, independent contractor status is based on the following factors:

1. The extent to which the services rendered are an integral part of the employer's business
2. The permanency of the relationship between the worker and business
3. The amount of the alleged contractor's investment in facilities and equipment
4. The nature and degree of control by the employer
5. The alleged contractor's opportunities for profit and loss
6. The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor
7. The degree of independent business organization and operation

INDEPENDENT CONTRACTORS DURING THE TRUMP ADMINISTRATION

In January 2021, the Trump administration released a new rule that would have made it easier to classify a worker as an independent contractor by focusing on five distinct factors in the "economic realities" test:

1. ***The nature and degree of control over the work.*** This factor weighs towards the individual being an independent contractor to the extent that the individual, as opposed to the employer, exercises substantial control over key aspects of the performance of the work (e.g., the individual's ability to set his or her own schedule, select his or her projects, and work for others).
2. ***The individual's opportunity for profit or loss.*** This factor weighs towards the individual being an independent contractor to the extent that the individual has an opportunity to earn profits or incur losses based on his or her exercise of personal initiative, skill or business acumen, and through the ability to manage investment in or capital expenditure on help, equipment, or material to further his or her work.
3. ***The amount of skill required for the work.*** This factor weighs towards the individual being an independent contractor to the extent that the work requires specialized training or skill. Conversely, this factor weighs towards employment to the extent that the work at issue requires no specialized training or skill, and/or the individual is dependent on the potential employer to provide specialized training or skills.
4. ***The degree of permanence of the working relationship between the worker and the potential employer.*** This factor weighs towards the individual being an independent contractor to the extent that the work relationship is definite in duration or sporadic, rather than when it is indefinite, no specific duration or continuous in the case of an employee.
5. ***Whether the work is part of an integrated unit of production.*** This factor weighs towards the individual being an employee to the extent that the individual's work is a component of the potential employer's integrated production process for a good or services, versus when the individual's work is segregable from the potential employer's production process in the case of an independent contractor.

A WORKER MISCLASSIFICATION CAN RESULT IN A WORLD OF UNNECESSARY RETIREMENT PLAN COMPLIANCE AND LEGAL TROUBLE.

Probative Value of First Two Factors
The new rule provided that no single factor is dispositive. However, the rule did specify that the first two factors are "the most probative" as to whether an individual is an economically dependent employee.

Additional Factors
The rule also stated that the core factors are not exhaustive, and that additional factors may be relevant in the independent contractor status inquiry, but only if the factors indicate that the individual is in business for him- or herself.

BIDEN ADMINISTRATION REVERSES COURSE

Under President Biden, the DOL announced the withdrawal of the previous administration's independent contractor rule, effective May 6, 2021, and reverted to the prior "economic realities" standard. The DOL reasoned the previous administration's rule was inconsistent with the FLSA's text and purpose and would be confusing and disruptive to businesses because it departed from longstanding judicial precedent. Specifically, the DOL explained:

1. The rule improperly emphasized the level of control and opportunity for profit or loss as the core factors in determining employee status and departed from the multi-factor "economic realities" test that courts have used for decades.
2. The rule impermissibly narrowed several factors from the "economic realities" test, and the downplaying of these factors would have led to more workers being classified as independent contractors and not entitled to the FLSA's protections.
3. The rule complicated rather than simplified the analysis for determining whether a worker is an employee or independent contractor under the FLSA because the test failed to align with the FLSA's broad scope and had never been applied by any court.

WHICH RULE APPLIES NOW?

The uncertainty that loomed over the independent contractor rule due to the change in administrations has ended. Employers now know that the analysis of worker classification under the FLSA has reverted to its prior iteration, effectively reestablishing the status quo.

In the FLSA context, courts will continue to rely on the multi-factor "economic realities" test, which focuses on whether, as a practical matter, the worker is economically dependent upon the employer.
In addition, employers should look to applicable state law when analyzing whether a worker is an independent contractor. Some states have employee-friendly worker classification tests that make it challenging for employers to classify workers as independent contractors under state law.

WHAT'S NEXT FOR WORKER CLASSIFICATION?

During the 2020 campaign, the Biden administration expressed support for the Protect the Right to Organize (PRO) Act, which would federalize portions of California's AB 5 rule (CA-AB 5) and establish a federal "ABC test" for worker classification for all labor, employment and tax laws. The test assumes a worker is an employee rather than an independent contractor unless three requirements are met:

1. the worker is free to perform services without the control or direction of the company;
2. the worker is performing work tasks outside of the usual course of the company's business activities; and
3. the worker is engaged in an independently established trade. The test makes it more difficult for companies to classify workers as independent contractors.

By enacting the PRO Act, many independent contractors would be reclassified as employees. The PRO Act was passed in the House of Representatives on March 9, 2021, by a bipartisan vote. However, with challenges to passage in the Senate, the Biden administration is now focused on incorporating certain PRO Act provisions in the budget reconciliation bill currently in Congress, which creates new uncertainty.

THE QUESTION FOR PLAN SPONSORS

Many plan sponsors have independent contractors performing services for them. The important question is whether these independent contractors can or should be covered by the plan sponsor's retirement plan. Typically, the answer can be boiled down to two critical points:

1. Independent contractors are not employees and so there is no need to cover them in the plan sponsor's retirement plan.
2. However, many workers that plan sponsors think are independent contractors or would like to be independent contractors are not. They are common-law employees instead.

Generally, a qualified plan document will define "employee" to mean "any person who is employed by the employer." In most cases, this is not terribly helpful.

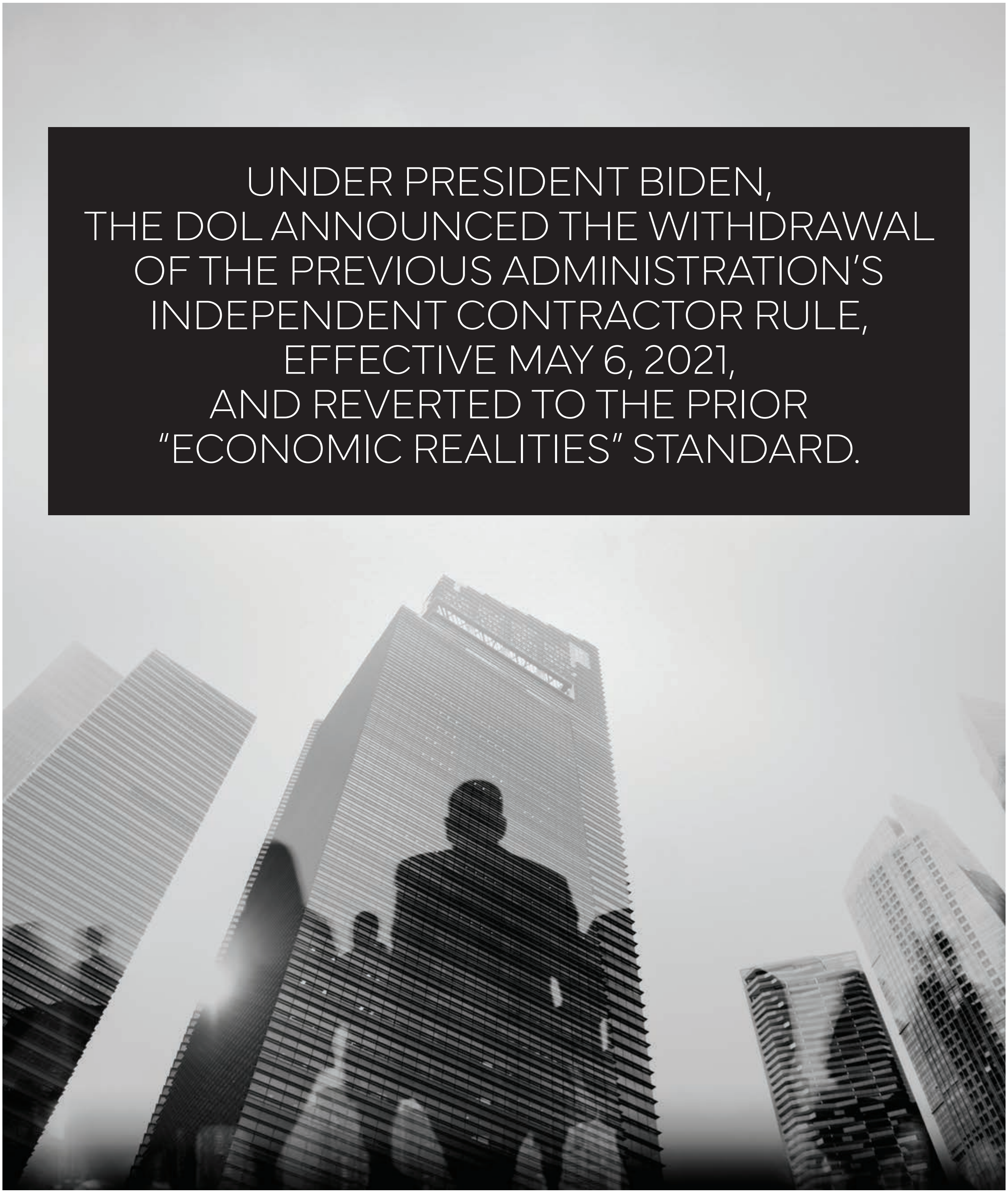
EXAMPLES OF EMPLOYEES VS. INDEPENDENT CONTRACTORS

The following examples will help analyze a common scenario:

- *Independent Contractor*—ABC Company has no one on staff with accounting expertise. Jeff is hired to set up the accounting system and come in and provide support when there are problems. Jeff provides these same accounting services for other companies. Jeff is probably an independent contractor.
- *Employee*—ABC Company manufactures unique and sophisticated pieces of engineering equipment. Adelaide comes into the office two days a week, sits by herself in a separate room, and makes a single part for ABC's equipment that very few engineers know how to make. She does not work for any other company. ABC Company expects that she will continue in this role for a long time. Adelaide regularly attends company meetings, takes lunch breaks in the cafeteria, and is expected to follow ABC Company rules. Adelaide is probably an employee.

WHAT THIS ALL MEANS FOR PENSION PLANS

The most common compliance error occurs in a retirement plan when an employee is misclassified as an independent contractor. It is a rare occurrence when the opposite occurs



UNDER PRESIDENT BIDEN,
THE DOL ANNOUNCED THE WITHDRAWAL
OF THE PREVIOUS ADMINISTRATION'S
INDEPENDENT CONTRACTOR RULE,
EFFECTIVE MAY 6, 2021,
AND REVERTED TO THE PRIOR
"ECONOMIC REALITIES" STANDARD.

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and workers who are classified as employees are determined to be independent contractors.

For instance, the ABC Company in the example above has been treating Adelaide as an independent contractor. The incorrect classification could have occurred for any number of reasons. It is possible the ABC Company thought Adelaide was an independent contractor because she possesses a unique skillset; or they may have received inaccurate advice.

For whatever reason, Adelaide was excluded from the ABC Company 401(k) plan because the company believed she was not an employee. However, Adelaide actually is an employee. How should the ABC Company address this compliance error?

Many retirement plan documents contain language that states, “If an employee is thought to be an independent contractor but is later determined by a court, the IRS or another governmental agency to be an employee, that employee shall not be eligible for the plan.” This language started to appear in plan documents after the *Vizcaino v. Microsoft* case, in which the court determined that those believed to be independent contractors were common law employees and entitled to retirement and other fringe benefits for multiple prior years.

Based on this language, Adelaide would not become eligible for the ABC Company 401(k) plan even after being reclassified as an employee. However, this is only half of the necessary inquiry. A plan sponsor is generally able to exclude an employee from its retirement plans by job title, location, or some other reasonable classification. What ABC needs to be concerned about is passing coverage and nondiscrimination testing.

ANNUAL COVERAGE TESTING

The coverage testing rules are found Code 410(b) and its regulations. For example, let’s assume that ABC Company has 120 employees. Of those, 20 are considered highly compensated employees (HCEs) and 100 are non-highly compensated employees (NHCEs). To satisfy the ratio percentage test of Section 410(b), the percentage of NHCEs benefitting under the plan must be at least 70% of the percentage of benefitting HCEs.

If all the employees benefited under the ABC Company 401k plan, then 20 out of 20 HCEs and 100 out of 100 NHCEs (100%) are benefitting. Dividing 100% by 100% gives us 100%. Since 100% is greater than 70%, the ratio percentage test is passed, and Section 410(b) is satisfied. The test would also pass if half the HCEs and half the NHCEs benefit, since 50% divided by 50% equals 100%.

To demonstrate the impact of misclassified employees, let’s instead assume the following:

- Adelaide is one of the 100 NHCEs at ABC Company
- When Adelaide was considered an independent contractor, it was believed there were 99 NHCEs
- Adelaide will be excluded from the 401(k) plan because of language that excludes any independent contractors later determined to be employees

Since ABC Company now knows Adelaide is a common-law employee, but still excluded from the 401(k) plan, the ratio percentage is 99%. That is, 99 out of 100 NHCEs (99%) and 20 out of 20 HCEs (100%) are covered under the plan; and 99% divided by 100% is 99%. This is still significantly greater than the 70% required to pass coverage testing. And, there has been no negative impact to the coverage testing by continuing to exclude Adelaide from the 401(k) plan after her reclassification.

However, what if we change the facts such that the ABC Company thought that 50 of those 100 workers were independent contractors, but they were actually all employees and still excluded from the 401(k) plan? This could be a problem. The NHCE benefitting ratio would drop down to 50%. The ratio percentage would also be 50%, which is not a passing result under Section 410(b).

At that point, ABC Company must either pass coverage testing by some other permitted method or open up the 401(k) plan to include some or all of the independent contractors who are actually employees. Providing an extra 25 to 50 employees with additional contributions could quickly become an expensive proposition for the ABC Company.

Not only would it be expensive for ABC Company to include more employees than anticipated going forward, but if the problem has existed for multiple years, there could be many years of coverage testing failures that must be corrected. In many situations, retroactively paying years of prior retirement benefits is often much worse than if the employees were properly classified from the beginning.

WHAT SHOULD A PLAN SPONSOR DO?

It is difficult to take any immediate action to modify a plan sponsor’s workforce or retirement plan testing until the future definition of an independent contractor is more certain. However, many companies are beginning to pursue alternative business models that utilize contractors to carry out tasks for a portion of their workforce. In those situations, it may be possible to slice off unique segments of the business to be staffed by gig-economy-like workers.

Classifying a worker as an employee or independent contractor is a highly fact-specific inquiry. In light of the current administration’s employee-friendly directives and ever-changing state laws, employers should strongly consider revisiting their worker classifications and consult with their service providers to confirm best practices. A worker misclassification can result in a world of unnecessary retirement plan compliance and legal trouble. PC

Gary D. Blachman is a partner in the Chicago office of Ice Miller LLP. Sakshi Jain and Austin Anderson are associates with the firm.

WARNING SIGNS

Advice on terminating a client relationship. **By Theresa Conti**

We all know that some clients just should not be our clients. As professional service firms, there are reasons why we should terminate a relationship with a client. Nonetheless, it is always a difficult decision to make.

When we bring in a new client, we always hope that they will be a great client and pay their bills on time, listen to our advice and appreciate the services that we provide. But what happens when those hopes are not met? Let's look at each of these three areas in the context of figuring out when would be the correct time to terminate that relationship.

TIMELY PAYMENT

Most TPA firms charge a reasonable fee for services. In fact, I often feel that we are one of the retirement plan service providers that in some cases don't charge enough for the services we provide. I always worry when we get a new client and right off the bat, we have to follow up to receive payment on our invoices. To me that is a first sign that they might be a difficult client and collections may become a problem.

Our service agreement (and yours too, I'm sure) says that we can take fees from the plan if the client doesn't pay. That is difficult, however, and typically we don't have the authority to take those payments—so we spend a lot of time figuring out how to get paid.

We often talk about how it is the same clients each quarter that don't pay the invoices timely. Should those be the clients we terminate? Are they causing us more work following up for payment (and probably following up for other information we need)? Note that this argument just pertains to not paying invoices; it doesn't even consider whether the client is really profitable if we have to do all this extra work just to collect payment for our services.

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ADVICE, IGNORED

To me, a bigger issue is our exposure for clients who do not follow our advice. We always make every effort to ensure that a client understands what their responsibilities are in relation to their retirement plan. We all know that in our complicated business, a client cannot know everything, nor do we want them to! But when they ask us for advice about something or we tell them that something needs to be corrected, we should also expect that they trust us and will correct what is wrong.

What do we do if they *don't* correct what is wrong as per our advice? We have all had those clients that are top heavy, and they just refuse to deposit the top heavy minimum or have continual late deposits to the plan or any other number of things that can go wrong. What is our responsibility? What type of exposure do we have?

I also find myself continually giving clients "time" to correct what went wrong instead of telling them outright that if they don't correct it by the required timeframe, we can no longer provide service to their plan. This type of client constitutes a risk to our business in many ways. Also, they are the type that is more likely file a lawsuit. Thankfully, I don't think most of our client concerns get to that point—and if they did, we would probably think that we should have terminated them long beforehand.

It is always interesting when I talk to my friends who also run TPA businesses and we compare notes. I got a call from a friend a few weeks ago who told me she was going to terminate a client because they were out of compliance (for many reasons) and the financial advisor was looking to her to refer that client to another TPA. She asked me if I wanted the referral, and my response was "I thought we were friends"! It was difficult because those clients do need service and advice—but we both knew they weren't going to listen to me either.

So how do we handle those? Who do we refer them to, or do we just refuse to refer them and make them figure it out on their own? We are often in the middle because of our relationships with financial advisors, who look to us for help with difficult clients. How do we turn those away, especially when we know they will be a difficult client?

APPRECIATION

The final area of concern is when a client doesn't appreciate the services we provide. This is a hard one to quantify, but there are definitely warning signs of this concern as well. Several years ago, for example, we had a client who was mean and used foul language with one of my employees as she was questioning him about the census information he had provided. She was a "steady" employee and when she came into my office upset and with tears in her eyes, I knew that something was really wrong.

"WHEN WE BRING IN A NEW CLIENT, WE ALWAYS HOPE THAT THEY WILL BE A GREAT CLIENT AND PAY THEIR BILLS ON TIME, LISTEN TO OUR ADVICE AND APPRECIATE THE SERVICES THAT WE PROVIDE. BUT WHAT HAPPENS WHEN THOSE HOPES ARE NOT MET?"

I ended up calling the client with her to see what the real issue was, and he started using foul language with me. I informed him that if he continued to use that language, I would hang up, that we were a professional firm, and I did not appreciate him talking to me or my employee that way. He proceeded to tell me that this is how everyone talked, and I was making too big of a deal about it. I told him that was not how I did business and I would hang up if he continued to talk to us that way… which he did. I hung up.

We found out a few months later that he was forging documents for his employees, and the reason he was upset with us is that we were questioning the census and he knew what he was doing was wrong. He ended up being arrested and charged!

So, I think my final piece of advice is to always go with your gut. Trust your instincts. If you think right off the bat that the client will be difficult, create stress for you and your employees, and may not fit your business model, that is the best time to turn them away… before they cost you time and effort for no reward. PC

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THE PEP CHOICE

Welcome to PEP World. Here are some tips on how to discuss them with your plan sponsor clients.

By R.L. "Dick" Billings

Being a "wise" 401(k) plan fiduciary has always been hard and complicated. If a fiduciary is a small business owner who would rather be working on expanding their business than running their 401(k), it may very well be impossible—not from a physical standpoint, but from a prudent and best practices point of view.

Recall what Jesus said in the Book of Matthew (6:24): *"No one can serve two masters. Either you will hate the one and love the other, or you will be devoted to one and despise the other."* It's doubtful Matthew had 401(k) plans in mind when he wrote this down some 2,000 years ago, but after 40-plus years in retirement plan administration, I find this quote quite apropos!

Effective Jan. 1, 2021, plan sponsors were given one more retirement plan option: running their plan through a Pooled Employer Plan (PEP).[1]

Should *every* employer consider the PEP route for their new or existing 401(k) plan? Absolutely! Should *every* employer with a 401(k) plan run it through a PEP? Absolutely *not*!

Let's look at the advantages and disadvantages of a PEP. (In some cases, the same issue can be both an advantage and a disadvantage, depending upon circumstances.)

ADVANTAGES OF A PEP

- Reduces the plan sponsor's fiduciary risk
- Reduces the plan sponsor's time working on the plan
- May be less expensive than having an individual plan
- The plan sponsor's role as the ERISA Section 402 named fiduciary is taken over by the PEP's manager, the Pooled Plan Provider (PPP)[2]
- Plan issues will probably be better addressed since a professional other than the fiduciary (i.e., the PPP) will be in charge
- The plan sponsor no longer has to:
  - sign (under penalties of perjury) or file the Form 5500
  - monitor the plan's vendors, such as the TPA, investment advisor, outside auditor, recordkeeper or others
  - obtain and maintain the ERISA bond

- be responsible for any participant communications
- serve as the plan's Trustee
- determine the plan's reasonableness of fees

DISADVANTAGES OF A PEP

- Moving to a PEP requires the existing plan to be terminated, not just moved
- May be more expensive that having an individual plan
- The PEP may be more likely be sued by "activist" plaintiffs' attorneys
- Plan design options such as eligibility, vesting, contribution rates, etc. will probably be restricted
- If an individual plan has participation or discrimination testing issues, the PEP will not solve them
- The plan sponsor has no voice in choosing any PEP-related vendor, such as the TPA, Trustee, investment advisor, outside auditor or recordkeeper.

3 QUESTIONS

The table below lists the fiduciary or administrative responsibilities when a plan's assets are transferred or moved to a PEP.

As you can see, the PEP provides some very powerful benefits. But even with the ability for plan sponsors to transfer much of their fiduciary and administrative risks, it's doubtful

Plan Administrative Responsibilities

Title/Office	Responsible Party in an Individual 401(k) plan	Responsible Party in a PEP
ERISA §402(a) Named Fiduciary	Employer	Pooled Plan Provider
ERISA §3(16) Plan Administrator	Employer	Pooled Plan Provider
ERISA §3(38) Investment Advisor	Employer	Pooled Plan Provider
Plan Sponsor	Employer	Pooled Plan Provider
Trustee	Employer	Pooled Plan Provider
Plan Administration Committee Chair	Employer	Pooled Plan Provider
Resident ERISA expert	Employer	Pooled Plan Provider
Hires CPA Auditor	Employer	Pooled Plan Provider
Represents before IRS and DOL	Employer	Pooled Plan Provider
Retains all plan-related records	Employer	Pooled Plan Provider
Hires all plan-related vendors	Employer	Pooled Plan Provider
Responsible for all participant disclosures	Employer	Pooled Plan Provider
Maintains ERISA-required bonding	Employer	Pooled Plan Provider
Signs and files Form 5500	Employer	Pooled Plan Provider
Determines fee reasonableness	Employer	Pooled Plan Provider

they will automatically know which way to go—stay with an individual plan or move to a PEP. That's why it's necessary to ask your plan sponsor clients the following questions.

1. **Do you demand maximum flexibility in determining plan design options, investment offerings, and administrative decisions?** If the answer is yes, stay with the individual plan. If not, move to the PEP. Remind your client that when one stays with the individual plan scenario, "with privilege comes responsibility"! Is your client prepared to undertake all the responsibilities listed above? Using outside vendors does not automatically relieve the plan sponsor of its ultimate oversight responsibility of each office.
2. **Do you understand all the responsibilities listed above?** If yes, stay with the individual plan. The less your client knows or understands about the offices listed, go to the PEP.
3. **Do you want to be involved in day-to-day administrative issues and participant interactions?** The less they want to deal with their plan, the more attractive the PEP is.

As in nearly all situations, there is no "perfect" solution. And even if one option is clearly better now, that "best solution" may very well change in the future. If your client choses to move to a PEP program, they are *still* a fiduciary and have the responsibility to review on a periodic basis (say annually) the reasonableness and appropriateness of the PEP's continued use. So, when the PPP sends an individual employer documents about how their plan is doing, as a fiduciary, they will still be required to review and *understand* that information. The use of a PEP lessens an employer's fiduciary responsibilities, but it does not eliminate them.

FACTS YOUR CLIENT MUST KNOW

When Congress created PEPs and PPPs rules in the SECURE Act, it did not dictate to the PPP the following issues:

- How many plan design options must be allowed
- How much a PEP can charge
- When "related" vendors can or cannot be used (i.e., potential conflicts of interest);
- How flexible any changes will be
- How many service options must be included at no additional cost
- How many times the PPP may make changes (e.g., administrative changes or changing the investment lineup) without your client's input or approval
- Investment lineup quality or appropriateness

Every PEP sponsor will have differences, such as imbedded costs, exposed charges, level of service, plan design options and investment choices.

When responsible employers consider all these issues (whether individual plan or PEP), some may just throw up their hands and say, "Forget it. I will just not have a plan at all"! I was a plan sponsor once and asked myself whether I should have a plan more than once.

But what about all those nice tax deductions (and tax *credits*) plan sponsors and participants get? How else will your client accumulate creditor-protected assets that are as efficient? How else will your client be able to help employees save for their retirement? Qualified retirement plans are the best (legal) tax shelter you or your client will ever encounter. It is simply too good to pass up. As my mother told me more than once, "anything worth having is worth fighting for!" PC

"THE USE OF A PEP LESSENS AN EMPLOYER'S FIDUCIARY RESPONSIBILITIES, BUT IT DOES NOT ELIMINATE THEM."

Footnotes

[1] Defined by the SECURE Act as a plan: (i) that is an individual account plan; (ii) that is qualified under ERISA Section 401(a), (iii) in which a Preferred Plan Provider is the named fiduciary, (iv) in which the Trustee is someone other than the employer, and (v) provides that participants and beneficiaries are not subject to reasonable restrictions, fees or penalties.

[2] Defined by the SECURE Act as the person who is designated by the terms of the plan as a named fiduciary (as defined by ERISA Section 402(a)(2)) as the plan administrator and the person responsible to perform all administrative duties necessary to ensure that the plan: (i) meets all ERISA compliance requirements, and (ii) each employer in the plan fulfills its own portion of compliance regulations.

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SPIN CYCLE

The Cycle 3 restatement period is a marketing opportunity for TPAs. Here's how to take advantage of it. **By Rebecca Hourihan**

Is it a bird? Is it a plane? No, it's Cycle 3 restatement time!

As you know, every 6 years, the IRS requires plan sponsors to restate the plan document that governs how the plan can operate, including eligibility, vesting, contribution types, required testing and more. These plan features are what supports the retirement plan with efficiency, effectiveness and customized workplace benefits.

A lot has happened since the last restatement period, and a few important plan design trends have arisen, including:

- Auto-enrollment
- Auto-escalation
- Roth
- In-plan conversions

Yet many plans still do not allow for these provisions. This is due to either an "if it ain't broke, don't fix it" attitude or plan sponsors simply being unaware of new plan design options. However, as we approach the deadline, you can be the hero that educates the plan sponsor and financial advisor about Cycle 3 requirements and this golden opportunity to enhance the company's retirement plan.

GET AHEAD OF THE GAME

Even with the restatement deadline months away, you might be wondering why you should start thinking about it now. Because the early bird gets the worm. TPAs that start broadcasting early about Cycle 3 are going to see their businesses increase since they are offering proactive solutions to employer concerns that can be put into action now. It's better to be talking about and marketing this topic today as opposed to waiting and reacting to advisor and plan sponsor inquiries.

COMMUNICATION IS KEY

Take the first step and educate financial advisors. With 93% of retirement plans working with a financial advisor, they make excellent advocates. Strengthen your relationships by explaining what Cycle 3 is, why it's important and how it's going to affect plan sponsors.

PRESS SEND

The first outreach method for effective communication is through email. Send out three emails to your financial advisor connections explaining:

- What Cycle 3 restatement is
- Why Cycle 3 is important
- How Cycle 3 affects their 401(k) clients

At the bottom of the email, include your contact information and encourage the financial advisor to contact you. Then together, you can review shared clients and come up with an approach strategy.

HOST A WEBINAR

The next idea is to host a webinar and invite all your financial advisors to the virtual event. Create slides that discuss the significance of Cycle 3, then open the floor for questions. With an interactive webinar session, you are providing great knowledge to your financial advisor community while at the same time opening doors for more referrals and an easier Cycle 3 restatement process.

After the event, follow up with each advisor to discuss how Cycle 3 can benefit shared clients and discuss plan design ideas to address together during your next co-hosted plan sponsor meeting.

***PRO TIP:** Record the webinar. For anyone who couldn't attend, send them an email with the recording attached for maximum exposure.*

TIME TO GET SOCIAL

Most TPAs have a LinkedIn profile, but few post regularly. This is your chance to stand out.

The first step is to look at your connections. Are you connected to your clients? Clients could include financial advisors, plan sponsors and anyone else you do regular business with.

Sticking with our Cycle 3 theme, post a weekly update. To streamline the process, use some of the text from the emails you sent to your financial advisor contacts or borrow a slide from your webinar presentation. Post that information on LinkedIn, explaining that now is the ideal time to review a retirement plan.

Your social audience will appreciate your insights, providing opportunities to spark inbound requests for more information.

> "AS WE APPROACH THE DEADLINE, YOU CAN BE THE HERO THAT EDUCATES THE PLAN SPONSOR AND FINANCIAL ADVISOR ABOUT CYCLE 3 REQUIREMENTS."

EXPRESS URGENCY

Even though the deadline isn't until July 31, 2022, you still want to emphasize urgency. No one likes making rushed decisions.

As you talk with your financial advisors, suggest a deadline, such as April 30, 2022. Request that the first conversations with plan sponsors are complete by this date. It will allow everyone time to collect any plan-related information to understand if and how the plan design will change.

Additionally, remember to loop in recordkeepers. They will have their own forms, procedures and policies necessary to update their systems.

By providing ample time to complete the restatement, everyone can breathe easy knowing they are working with a professional and competent team.

APPRECIATE GREAT RELATIONSHIPS

During each financial advisor conversation, ask about their relationship with each client. The majority of plan sponsor clients will have a strong bond and be very responsive. This is good, as it will make joint conversations and information-gathering easier.

EXPECT THE UNEXPECTED

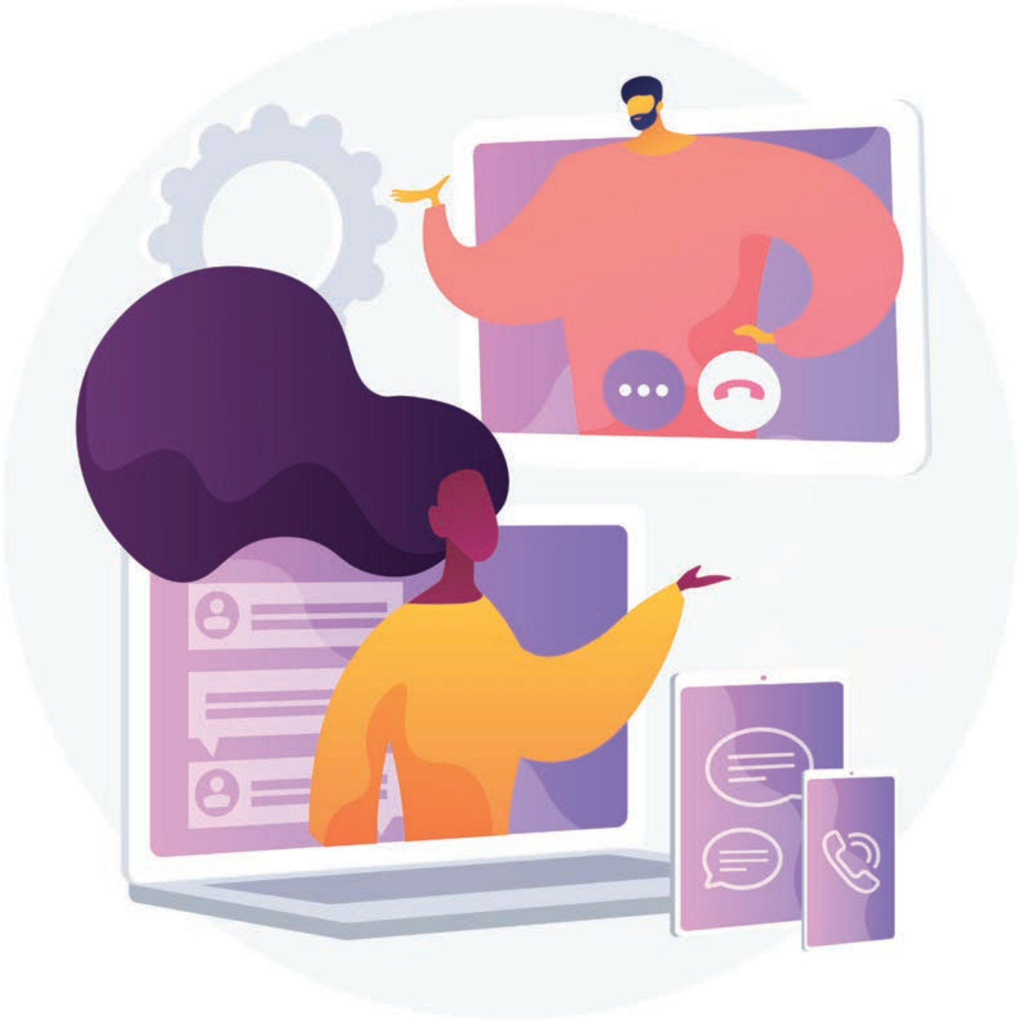
Every once in a while, you will hear an advisor express concern. A nonresponsive plan sponsor is a liability and source of stress. Discuss with the advisor how you can approach the sponsor in an effective manner.

You might learn that while the advisor cannot reach the employer, you have no issues. In this instance, you could share this knowledge with the advisor to rekindle the relationship. You could suggest a new advisor introduction, or maybe it's just not a good fit. Either way, it's better to understand the relationship ahead of crunch time to avoid a rushed restatement.

BE THE PLAN HERO

Cycle 3 is a time to celebrate. It's a chance to tailor the plan design to align with a plan sponsor client's corporate goals. Whether that is maximizing contributions, reducing tax liability or retaining top talent, Cycle 3 is your ticket to demonstrating the incredible value of a great TPA partner. By actively communicating about this upcoming restatement, you can enhance your advisor relationships to deepen value and trust. When you work together to approach clients, your value is seen, heard and greatly appreciated.

Use this Cycle 3 restatement period as a marketing opportunity to grow your business, deepen relationships and stand out as the expert TPA in your community. PC



PROFESSIONALISM AUDIT: HOW WELL DO YOU COMMUNICATE?

Being thoughtful about how information is communicated can prevent misunderstandings that could harm the client's interest. **By Lauren Bloom**

This article continues our series on professionalism audits. The last article focused on what an employee benefit plan professional can do to avoid communicating something that should be kept confidential. This article focuses on what an employee benefit plan professional might consider when communicating professional advice and opinions to clients and third parties on the client's behalf.

Communications almost always involve some uncertainty, because language is inherently inexact. Unlike mathematics, which can be precise to an infinite number of figures below the decimal point, language is nuanced—its meanings shaded by individual understanding and varied usage. Language differs by culture and nation. (For example, comparing two news articles on the same topic, one from *The Wall Street Journal* and one from *Financial Times*, can illustrate how American and British English differ even within the financial services community, which might be expected to have a shared vocabulary.) Professionals use terms of art that can be incomprehensible to laypeople. The more complex information is, the more challenging it can be to communicate that information to someone who lacks the expertise to comprehend it.

The ARA *Code of Professional Conduct* offers this advice on communications: "A Member who issues a Professional Communication shall take appropriate

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"THE MORE COMPLEX INFORMATION IS, THE MORE CHALLENGING IT CAN BE TO COMMUNICATE THAT INFORMATION TO SOMEONE WHO LACKS THE EXPERTISE TO COMPREHEND IT."

steps to ensure that the Professional Communication is appropriate to the circumstances and its intended audience." "Professional Communication" is "a written, electronic or oral communication issued by a Member with respect to Professional Services," and "Professional Services" are "services provided to a Principal by a Member, including the rendering of advice, recommendations, findings, or opinions related to a retirement or other employee benefit plan." A Principal is "any present or prospective client of a Member or the employer of a Member where the Member provides retirement plan services for their employer's plan." Taken together, the *Code* does not require the employee benefit plan professional to communicate perfectly with everyone all the time. However, it encourages the professional to *think*, identifying the communication's intended audience and taking relevant circumstances into account, before communicating.

The *Code* recognizes that professional communications are not only conveyed on paper but can also involve speech and electronic media. In fact, mixing media can be an excellent way to make a communication appropriate. Delivering a report to a client in person, discussing it and answering questions before leaving a paper copy behind, can be an appropriate way to communicate. Sending the same report by email and discussing it with the client by telephone or in a virtual meeting can also be appropriate, as can following up on the same report by email.

As a rule of thumb, the more complex the information being communicated is, and the less expert the individuals receiving the communication are, the more careful the employee benefit plan professional will want to be to communicate that information appropriately. However, even the most sophisticated audiences can misunderstand a communication, so the employee benefit plan professional is normally wise to follow up on important communications to verify that they were received and understood correctly. If the client is an organization—a corporate sponsor of a plan, perhaps—the professional is also prudent to consider who within that organization should receive the communication, and deliver it accordingly.

The *Code's* requirements are not limited to client communications. Depending on the circumstances, an employee benefit plan professional can be called upon to communicate with regulators, other professionals who work for the client and others on the client's behalf. In those situations, the employee benefit plan professional is, again, wise to think before communicating. Taking time to identify the intended audience and relevant circumstances can help the professional craft an appropriate communication. Perfection is not required, but being thoughtful about how information is communicated can prevent misunderstandings that could harm the client's interest. Copying or briefing the client on third party communications is almost always a good idea.

In this age of instantaneous electronic transmission, it can be difficult to restrict a communication to its intended audience. An employee benefit plan professional's carefully crafted communication, intended for the client's eyes only, can be forwarded to third parties with the click of a computer key. The employee benefit plan professional cannot fairly be expected to prevent inappropriate transmission to third parties who might misunderstand or misuse his or her communications, but it is usually wise to recognize the risk of unauthorized transmission or use.

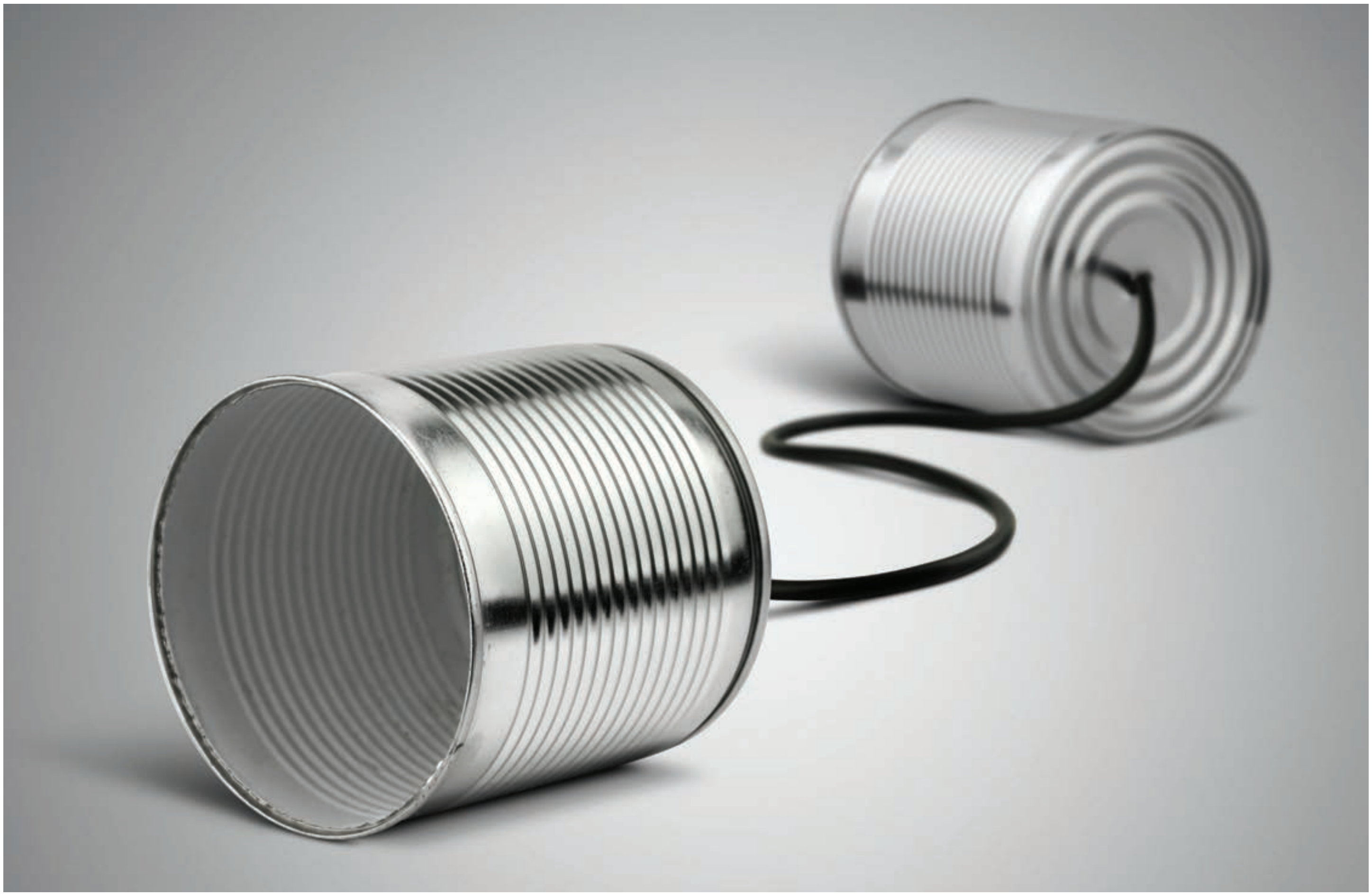
One way to address that concern is to include in a written or electronic communication a statement describing its intended audience and appropriate use. Warnings against other uses by other parties can also be helpful, especially if the information being communicated is sensitive or easily misunderstood. It is also usually wise to educate clients about use of professional communications at the beginning of the professional relationships, and to remind them periodically not to share communications with third parties or use them for purposes beyond what was intended.

There are many ways to audit professional communications. One simple way is to pull sample communications some months after they were issued and review them for completeness and clarity. It can be especially effective to have someone less expert than the employee benefit plan professional conduct the review, to better identify obscure technical language that might benefit from clarification. Continued attention to how findings, recommendations and opinions are communicated can help the employee benefit plan professional communicate well and satisfy the *Code*. PC

COMMUNICATION: THE KEY TO COMPLIANCE

A case study illustrates how communication is a key to helping clients resolve operational failures.

By Kizzy Gaul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One of our colleagues recently asked for advice regarding a plan operational failure. While the failure was specific to one plan, we believe that it provides the perfect opportunity to educate others on how to take advantage of the IRS's Employee Plans Compliance Resolution System (EPCRS). The rest of this article describes how the failure occurred and offers insight on some possible solutions.

THE ISSUE

While completing the 2021 nondiscrimination testing for a plan, our colleague (the current provider) discovered that participants did not receive the safe harbor matching contributions on a plan year basis as required by the plan document due to a change in the definition of eligible compensation. The plan provides for a traditional safe harbor matching contribution of 100% up to 3% of deferrals and 50% on the next 2%. Employees are eligible for elective deferrals immediately and for safe harbor contributions after one year of elapsed time service. Based on the current plan document, there are no compensation exclusions and full year compensation was elected.

When the former provider restated the plan document before the 2019 plan year, the "while eligible" compensation plan provision was not carried over to the new plan document. The plan sponsor did not intend to change this provision and was not aware of the issue. It is estimated that it could cost the plan sponsor nearly $70,000 to make up the matching contributions. Due to the cost involved, our colleague was trying to determine the best way to inform the plan sponsor about the issue and whether there were any alternative options.

We immediately understood the stress felt by our colleague. They needed to inform the plan sponsor without taking blame for something outside their control. But we knew that with a careful, well-thought-out communication plan, they could find a way to educate the plan sponsor, help them understand which options are available, and assist them in finding a resolution that they were comfortable with.

HOW TO SOLVE THE ISSUE

Contact the Plan Sponsor

First, you need to talk to the plan sponsor. While emails and formal memoranda are great for documentation purposes, these aren't necessarily the best way to build rapport and understanding with a plan sponsor and probably shouldn't be the first step in the process. Instead, consider scheduling a call or an in-person meeting, depending on the sponsor, location and correction. The connection built by calling or meeting with the plan sponsor will go a long way to making the correction process that much smoother. It will also show the plan sponsor that you're trying to help resolve the issue rather than just being the bearer of bad news.

During the initial call with the client, explain what happened and provide some options that the plan sponsor can choose from. You want the plan sponsor to understand that they have options for correcting the failure. And while there shouldn't be a significant delay in communicating the error once you find it, you will want to have as much information as possible about the failure and correction options before contacting the plan sponsor.

Send the Right Message

When it comes to the messaging, remember that hearing the term "plan failure" or "operational error" may cause some stress to the plan sponsor. It can be helpful to remind the plan sponsor that the IRS created EPCRS for situations just like this (i.e., remind the sponsor that they're not alone in having a plan failure). As you dive into the potential corrections, help the plan sponsor determine whether the EPCRS' Self Correction Program (SCP) is an option. The changes in Revenue Procedure 2021-30 extend the self-correction period to the end of the third plan year following the year the failure occurred and make the evaluation of whether this is a significant defect unnecessary.

Do Your Homework

When speaking with the plan sponsor, you'll want to gather additional information to help evaluate whether a Voluntary Compliance Program (VCP) filing may be successful. To keep the sponsor from feeling overwhelmed, you may want to explain that even when there is a self-correction option available, VCP can sometimes offer a less expensive and less burdensome alternative that is worth exploring.

For example, the IRS may approve a retroactive amendment through the VCP that decreases accrued benefits if there is clear and convincing evidence establishing employer intent and employee expectations for the way the plan was administered. Before proposing this option, you should review current and prior plan documents, summary plan descriptions, safe harbor notices, and restatement documentation for language regarding the plan year/while eligible compensation provision. If you find evidence supporting the plan sponsor's intent and expectations, then explain the cost differences between using the VCP (filing fee of $1,500 to $3,500; depending on plan size, plus the costs for attorney or consulting fees) and making the corrective contribution under the SCP ($70,000 plus earnings, plus calculation preparation fees) and the differences in correction timing.

Since IRS approval of a retroactive amendment under the VCP is not a guaranteed outcome, it's important to outline best and worst-case scenarios. You should also explain that making the corrective contribution may be required if the IRS does not approve the retroactive amendment.

Document the Decision-Making Process

Once you contact the plan sponsor, create a written recap that documents the plan failure with all relevant details, including an outline of the various correction options, a note about the pros and cons, the associated risks and costs for each option, and the plan sponsor's decision, if applicable. When preparing the recap, it may be necessary to refer to EPCRS and to excerpts from the plan document in order to accurately describe the failure and the correction. When creating the recap, make sure that it is written in a way so that the plan sponsor can reasonably understand both the failure and the possible corrections. Remember, the plan sponsor must decide how to correct the error. Your job is to provide them with enough information so they can understand what has occurred and what their options are for bringing the plan into compliance.

OUTCOME

Our colleague took our advice and worked with the plan sponsor; a review of documents and notices found that the safe harbor notices and new employee education provided clear support for the "while eligible" compensation provision as evidence of employer intent and employee understanding of how the plan was administered. The plan sponsor has decided to pursue a VCP filing after weighing the pros and cons and is hopeful for a successful outcome.

KEY TAKEAWAYS

While the solution may vary based on your particular fact pattern, there are a few takeaways to keep in mind:

- Take the time to have a conversation with your client.
- Create follow-up documentation that is meaningful and easy to understand.
- Ensure the client understands that there are options for bringing the plan into compliance.
- Discuss how the plan can be amended or administration changed prospectively to avoid future errors. PC

TRUST NO ONE

Cybersecurity best practices for TPAs. By Matt Rosenthal

As a TPA, you're responsible for handling numerous administrative duties for other organizations. In addition to the timely distribution of payouts to participants and their beneficiaries, day-to-day management of funds, and compliance with all IRS regulations, the collection and safeguarding of sensitive participant information are your responsibilities.

What's more, you are a target for cybercriminals. Despite having sophisticated security systems, large companies such as Target and Sony, and even Equifax and the IRS, have not been immune to cyber attacks. And it's not just the large plans that have to be diligent, but smaller ones too.

As of 2018, DOL's Employee Benefits Security Administration (EBSA) estimates, there were 34 million DB plan participants in private pension plans and 106 million DC plan participants with estimated assets of $9.3 trillion. Without sufficient protection, these participants and assets may be at risk for both internal and external cybersecurity threats.

CYBERSECURITY BREACHES IN 2021

We saw significant ransomware activity during the first half of 2021, including hefty ransom demands, major disruptions, and leaked data. For example, CNA Financial Corp, one of the largest insurance companies in the country, paid $40 million in March to regain control of its network after a ransomware attack. After company data was stolen and CNA officials were locked out of their network, the Chicago-based firm took immediate action by proactively disconnecting its systems. CNA said it "did not believe systems of record, claims systems, or underwriting systems, where the majority of policyholder data—including policy terms and coverage limits—is stored, were impacted." Restoration was not fully complete until May 12.

According to the latest data breach report from IBM and the Ponemon Institute, the average cost of a data breach in 2021 was $4.24 million—a 10% increase from 2019. The global average cost of cybercrime is expected to peak at $6 trillion annually by the end of 2021, due to the proliferation of ransomware attacks. Ransomware payouts have risen massively in the past few years, but the real costs go far beyond what's paid to the attackers.

Intermedia says 32% of victims go five days or longer without access to their files. TPAs are no exception. You have responsibility for a lot of participant data—including names, social security numbers, dates of birth, and addresses—as well

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as account balances. A cybersecurity breach could easily wipe out a participant's entire balance, not to mention putting your system at risk.

ZERO TRUST MINDSET

Zero Trust security is going mainstream, and for good reason. As cyberattacks become more advanced and businesses move to hybrid cloud and remote work, cybersecurity is more important than ever. Created in 2010 by Forrester Research principal analyst John Kindervag, Zero Trust ensures verification and authorization for every device, application, and user gaining access to the network.

In the old "castle-and-moat" model, implicit trust was the norm and networks were protected by firewalls, VPNs, and gateways. Today's IT departments require a new way of thinking because, for the most part, the "castle" no longer exists in isolation as it once did. Organizations no longer have their data in just one place; information is often spread across multiple locations and devices using the cloud. The Zero Trust mindset reduces the role of the perimeter, driving companies to replace legacy systems and implement a holistic approach to security. Trust no one and nothing.

DOL GUIDELINES AND TPAS

The EBSA issued guidance in April 2021 for plan sponsors, plan fiduciaries, recordkeepers, and plan participants on best practices for maintaining cyber security. The guidance came in three areas: cybersecurity best practices for recordkeepers and other service providers, tips for plan sponsors on selecting a service provider, and general online security tips. To assist plan fiduciaries, recordkeepers, and other service providers responsible for plan-related IT systems and data, the EBSA recommended the following:

- Have a formal, well-documented cybersecurity program.
- Conduct prudent annual risk assessments.
- Have a reliable annual third-party audit of security controls.
- Clearly define and assign information security roles and responsibilities.
- Have strong access control procedures.
- Ensure that any assets or data stored in a cloud or managed by a third-party service provider are subject to appropriate security reviews and independent security assessments.
- Conduct periodic cybersecurity awareness training.
- Implement and manage a secure system development life cycle (SDLC) program.
- Have an effective business resiliency program addressing business continuity, disaster recovery, and incident response.
- Encrypt sensitive data, stored and in transit.
- Implement strong technical controls in accordance with best security practices.
- Appropriately respond to any past cybersecurity incidents.

What does this mean for TPAs? As a TPA, you are a fiduciary for the plans you administer. As such, you must act with a high standard of care to the plan participants and your plan sponsor client. Following these guidelines ensures that all participant data you manage, along with your systems, are well protected 24/7.

> "AS CYBERATTACKS INCREASE IN VOLUME AND CREATIVITY, THE RISK FOOTPRINT WILL EXPAND. IF YOU WANT TO BE RESILIENT, THE FOUNDATION COMES FROM THE BASICS."

BEST PRACTICES

Every organization is unique in terms of the impact of a breach, depending on the timing and duration and the industry in which it operates. For example, a data breach may have more pronounced consequences for your TPA firm than, say, a manufacturing company. As cyberattacks increase in volume and creativity, the risk footprint will expand. If you want to be resilient, the foundation comes from the basics. Here's what you need to know.

1. **Enhance Your Password Safety.** Passwords are essential to protecting your sensitive information, and they aren't going anywhere. Many businesses fail to consider password safety as part of their cybersecurity awareness and training, resulting in a breach. Enforce a strict password policy, including multi-factor authentication and regular password changes. Encourage users to log out of systems after each use, especially in public settings.
2. **Fight off Phishing Attacks.** Phishing is one of cybercrime's oldest threats, and it's still going strong. The Anti-Phishing Working Group (APWG) reported more than 245,771 phishing attacks in one month. Many attacks are more sophisticated, harder to detect, and easier to create and deploy at scale. Train users on how to identify and not respond to phishing emails, and keep your systems patched.
3. **Secure Your Remote Work Practices.** Remote work is no longer a perk or an arrangement that moves business processes during a disruption—it's the norm. While working from home is convenient and has many benefits, it exposes companies to a new set of cybersecurity risks. To combat threats, limit or remove personal device use, mandate VPNs across your organization, and limit access to what users can see and do. PC

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GET ENGAGED!

A look at the ARA's involvement in the EngageWomen.org initiative. **By Shannon Edwards with Nicole Corning**

I played soccer for 12 years. My father coached my team through eighth grade. Once, after a disappointing loss, he sat us down and asked us a question that would shape my life. The question was, "What's the difference between boys' soccer and girls' soccer?" We shrugged our shoulders in confusion. His answer: "*Nothing*! There is *no* difference between boys' soccer and girls' soccer."

At that moment I came to believe there was no difference between boys and girls or men and women. I could accomplish anything. Unfortunately, reality slapped me in the face when I had my first adult job working for a difficult man. When I had finally had enough, I remembered the lesson I had learned many years before. I marched into my boss' office and jumped off a cliff, handing in my notice and an offer to buy my clients from him. A month later, I started my own TPA firm, and I "kicked glass," as Dr. Jen Welter, the first female NFL coach, would say.

I was lucky to have come from a home where financial literacy was taught. Because of my parents' hard work, I was able to attend college. I earned my Bachelor of Science in accounting. I had been given the knowledge and skills I needed to succeed. I had good credit due to my lessons in financial literacy, which allowed me to get the funding I needed to start my business. I had family who cared for my young children while I worked. I had the support of a husband who believed I could accomplish anything. I was raised by parents who taught me there was no difference between a man and a woman. Finally, like many women, I was driven by a fear of financial insecurity that would not allow me to fail.

WHAT IS ENGAGEWOMEN.ORG?

The "Butterfly Effect" theorizes that small actions (like a butterfly flapping its wings) can have huge consequences (like affecting the severity of a tornado). An example of this would be the question my father asked his soccer players and the effect it had on my future.

Being a retirement professional can feel like a very specific and siloed endeavor. Because of the ARA's partnership with EngageWomen.org, the effect of our efforts to secure and strengthen retirement for working Americans was shown to be as interconnected and crucial to the financial lives of the participants we serve—in particular, women. We are the butterflies that change lives with the flapping of our wings.

EngageWomen.org is a non-partisan organization dedicated to organizing and amplifying women's voices around issues that research has shown matters to them the most: their economic security. The mission of Engage is "to provide all American women, regardless of race, religion or gender identity with the keys to lifelong economic security." Engage was founded on the belief that "women outnumber, outvote and outlive men." However, "challenges such as the high cost of healthcare and education, gender equality in the workplace and the marketplace, working while raising children, the burden of caregiving, the future of jobs in the new economy, preparedness for retirement, and access to capital for small businesses are not being adequately addressed. Engage promotes key pillars of women's economic security: women's health and family health; women at work; women and technology; and the 50+ woman. Engage is guided by the principles of inclusion, innovation and inquiry."

AT THE ENGAGE SUMMIT

Engage held their annual summit in Washington DC in October and invited members of the American Retirement Association, which sponsors Engage, to be part of their conference and economic roundtable with staff from the President's National Economic Council and members of Congress along with organizations that advocate for women's financial security like the ACLI, WISER, BlackRock and Moody's. Nicole Corning, Shannon Edwards, Kirsten Curry, Mickie Murphy, Lisa Showalter, Theresa Conti and Erika Goodwin attended the summit as ARA's Engage Ambassadors. They had a chance to educate decision makers on the importance of expanding retirement plan coverage and encouraging better plan design features. Research shows that these design features drive higher retirement savings and better participation in retirement plans. Additionally, they can be even more beneficial in moving the retirement security needle for women.

Engage uses the metaphor of a thread when discussing a woman's economic life. From grade school through retirement there are factors at play that can get in the way of women obtaining financial parity, as the conference presenters demonstrated. Noted Curry, "From the STEM panel to women with disabilities, to working moms and more, all of these women are our clients. Whether they are business owners or employees, we have a tremendous opportunity to be part of helping all women get to a financially secure retirement."

> "WE ARE THE BUTTERFLIES THAT CHANGE LIVES WITH THE FLAPPING OF OUR WINGS."

Being part of this powerful conference gave the ARA the opportunity, as Showalter stated, to use our "role today to be the voice of common-sense solutions that make a difference in people's future financial security. Ideas and solutions that are affordable, uncomplicated to administer, and allow for flexibility."

The work we do as members of the ARA reverberates far beyond just getting participants to retirement. As Murphy put it so eloquently, "Economic security for women and families affects everything that goes on around us from stabilization of the entire U.S. workforce and the economic situation in the U.S. to our national security because military families have difficulty making ends meet. The thread is life to death. Women's economic security issues truly belong to all of us, male or female. Anything that we can do within the retirement industry to strengthen economic security along that thread of life, we should support where we can. That thread is winding its way to retirement security. The stronger the thread along the way, the better the retirement years will be for everyone."

CALL TO ACTION

The American Retirement Association and all of us who work in the retirement plan industry have the power to change the lives of millions of Americans. As originally noted by Voltaire, "with great power comes great responsibility." As members of this community, we have the responsibility to use our power any way we can to effect change that will improve the lives of those that we serve. As Engage Ambassadors, we would like to issue a call to action. It's a simple one: Get involved in advocacy. Advocate for what you believe in through the ARA's Government Affairs Committee or the PAC. You can change the lives of millions and help provide financial security to those who do not have it. Become a part of the thread. PC

WHAT CAN WE EXPECT IN 2022?

Here's a look at the priorities of the congressional committees with jurisdiction over ERISA and the tax code. **By Will Hansen**

In the last issue of *Plan Consultant*, I focused on SECURE Act 2.0 in 2022. When I wrote that column, a lot of my thinking was simply guessing that we would see a lot of activity on retirement policy based on "whispers" and other intelligence gathering efforts. Fast forward a few months, and I can say with certainty that 2022 will be a busy year for retirement policy.

Back in December 2019, after several years of negotiating, the SECURE Act was finally signed into law. SECURE contained a number of provisions to enhance the workplace retirement system, and it was done in a bipartisan manner.

Then in May 2021, the House Ways & Means Committee approved the bill nicknamed "SECURE Act 2.0." That legislation was negotiated between Chairman Richie Neal (D-MA) and Ranking Member Kevin Brady (R-TX) and ultimately included more than 40 bipartisan provisions. If history were to repeat itself and a path similar to SECURE's is utilized, the Senate Finance Committee would act next, marking up a bill that would ultimately be negotiated between the leaders of the House Ways & Means and Senate Finance Committees.

However, a wrench has been tossed into the middle of this process, with the two committees that have jurisdiction over ERISA deciding that they would like to be involved in any process that involves a large-scale retirement bill. (As I indicated in my prior article, I had a hunch that other committees would get involved in the retirement legislation sausage-making.)

Some background: If a bill would amend the Internal Revenue Code, it is referred to either House Ways & Means or Senate Finance, depending on in which body the legislation is introduced. Similarly, if a bill would amend ERISA, it is referred to either the House Education & Labor Committee or the Senate Health, Education, Labor, and Pensions (HELP) Committee. During the SECURE Act legislative process, however, House Education & Labor and Senate HELP were left on the sidelines, even though several provisions that amended ERISA fell clearly within their jurisdiction.

Now we have seen the priorities of those two committees with respect to how they would like to be involved in the legislative process. They will focus largely on items in SECURE 2.0 that fall within their jurisdiction, such as:

- The Retirement Lost & Found Act, which creates a database for participants to locate retirement funds at prior employers
- Enabling 403(b) plans to participate in Pooled Employer Plans (PEP)s
- Lowering the eligibility threshold for long time part-time (LTPT) employees from three years and 500 hours of service to two years, 500 hours of service
- Decreasing required disclosures to unenrolled eligible participants

In addition, it is possible that the two committees will focus on:

- Revising the paper statement mandate in SECURE 2.0 (which requires one paper statement per year be mailed to a participant)
- Requiring spousal consent on certain distributions from DC plans (notarized consent)
- Clarifying the SECURE Act's Pooled Employer Plan provisions
- Examining the effectiveness of certain reporting and disclosure rules and pension risk transfer activities

Will Hansen is the American Retirement Association's Chief Government Affairs Officer.

Ultimately, the four congressional committees may approve legislation that will then be negotiated by the leaders of those committees—and hopefully completing those negotiations in 2022.

From an ARA perspective, we are mostly comfortable with the provisions in SECURE 2.0, except for the paper statement mandate. The fact that House Education & Labor and Senate HELP want to be involved in the process provides an opening to alter the provision to decrease the disclosure burdens imposed on plan sponsors while at the same time improving the effectiveness of retirement plan disclosures. The reason why an opening has occurred is because technically, it's these two committees that have jurisdiction over most disclosure rules—not the House Ways & Means Committee.

Besides working on the paper statement provision, we will continue to advocate on your behalf to ensure that the final legislation improves the workplace retirement system. Stay tuned and buckle up—2022 will be a wild ride. PC

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