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PLANCONSULTANT

FALL 2020

THE PATH FORWARD

What did COVID-19 teach us about the future of the industry?

10 WAYS TO PROTECT PARTICIPANTS AND PLAN SPONSORS DURING THE PANDEMIC

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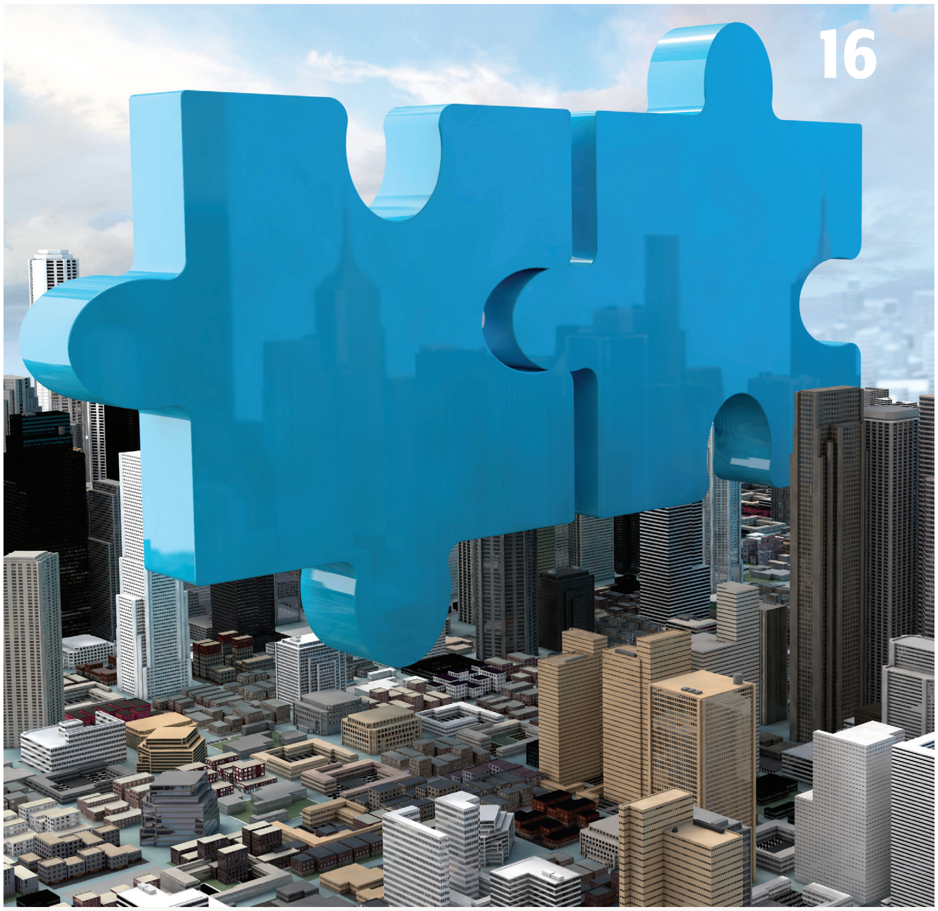

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Plan Consultant is Published by

ASPPA
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Plan Consultant is published quarterly by the American Society of Pension Professionals & Actuaries, 4401 N. Fairfax Dr., Ste 600, Arlington, VA 22203. For subscription information, advertising, and customer service contact ASPPA at the address above or 800.308.6714, customerservice@USAretirement.org.

Postmaster: Please send change-of-address notices for *Plan Consultant* to ASPPA, 4401 N. Fairfax Dr., Ste 600, Arlington, VA 22203.


AUSTIN ANDERSON


DICK BILLINGS


GARY BLACHMAN


LINDA SEGAL BLINN


JASON BROWN


ALISON J. COHEN


PETER GUILIA


BRIAN KALLBACK


SUE PERRY


DAVID WITZ

Austin Anderson, Esq., is an associate with Ice Miller LLP in Chicago in the firm's national employee benefits and executive compensation group. He advises private and public employers in all aspects of design and maintenance of health and retirement plans.

R.L. "Dick" Billings, CPC, CEBS, ERPA, is principal and Director of Communications at Fiduciary Wise, LLC in Phoenix, AZ, a professional 402 and 3(16) fiduciary. He is a member of the *Plan Consultant* committee.

Gary Blachman, Esq., is a partner with Ice Miller LLP in Chicago. His practice focuses on retirement plans, exec comp and ERISA. He is a member of the *Plan Consultant* committee.

Linda Segal Blinn is Vice President of Technical Services for Tax Exempt Markets at Voya Financial® (she is not a practicing attorney for Voya Financial).

Jason Brown is a retirement plan consultant, plan design strategist and subject matter expert with more than 20 years of industry experience. He is a member of the *Plan Consultant* committee.

Alison J. Cohen, Esq., APR, APA, is a partner at Ferenczy Benefits Law Center in Atlanta.

Peter Gulia is the shareholder of Fiduciary Guidance Counsel, a law firm focused on advising retirement plans' fiduciaries, investment advisers, recordkeepers, TPAs and other service providers.

Brian Kallback, QPA, CFP® , CLU® , CTFA, is an Assistant Professor of Finance at Loras College in Dubuque, IA and the owner of Vine & Fig Tree Wealth Planning, LLC, an employee education group. He is a member of the *Plan Consultant* committee.

Sue Perry is the owner of Edberg Perry, LLC, a TPA firm in Phoenix, AZ. She also owns Fiduciary Outsourcing, LLC , a 3(16) company.

Jeff Thornton, FSA, EA, MAAA, is an actuary at The Retirement Advantage, Inc. He has 16 years of experience in the retirement field, with a focus on plan design and compliance testing issues.

David Witz is CEO of PlanTools, a fintech company, and COO of Catapult, a provider of RFP technologies. He is the co-chair of the *Plan Consultant* committee.

RIDING THE DANGEROUS WIND

'Crisis is an opportunity riding the dangerous wind.'—*Chinese proverb*

By John Ortman

How is The Great Hunkering of 2020 going for you? How did your business change? For that matter, how did your life change? What did you learn, both about your business and about yourself?

Following up on the start we made in the summer issue of the magazine, this issue of *Plan Consultant* includes two articles that focus on The Great Hunkering's impact on the retirement industry.

"WHAT DID YOU LEARN, BOTH ABOUT YOUR BUSINESS AND ABOUT YOURSELF?"

In our cover story on page 32, industry thought leaders relate how their firms adjusted to the shutdown and shared their vision, however murky, for what the future may hold. In early July 2020, a little more than three months into the COVID-19 pandemic, we spoke with eight business owners and executives from the major sectors of the retirement industry. They included TPAs, recordkeepers both large and small, an advisor, a 3(16) administrator, an actuary, an advisor and a wholesaler. They recalled their experiences and explained how they reacted and adapted. They shared what they learned. And they talked about how the retirement industry, and their businesses, may have changed forever.

And in "Survival Mode" on page 26, attorneys Gary Blachman and Austin Anderson provide an overview of the more common retirement plan issues facing plan sponsors during the COVID-19 pandemic, along with some practical suggestions for helping them address those challenges.

OUR NEW LOOK

Notice anything different about this issue *of Plan Consultant*? We've refreshed the design of the magazine, with a new cover nameplate and new formats and typefaces for columns, departments and feature articles. Hats off to art director Ethan Duran (who also serves as chef, cook and bottle washer) for our attractive new look. We hope you like it as much as we do.

That's not all that's new around here. This summer we doubled the size of the PC Magazine Committee, adding an even dozen new members. The committee is the engine that powers the magazine—suggesting topics to write about, developing and refining those ideas, recruiting and coaching contributing authors, and writing a good bit themselves. You'll find the new roster of committee members on page 4. I'll bet you know at least one of them, if only by reputation. Also on that page you'll find a new section profiling the contributors in each issue.

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

Editor

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[1]Source: Lincoln Alliance® program Book of Business as of March 31, 2019. Percentage shows participants who increased their contributions.
[2]Source: Lincoln *WellnessPATH®* plans launched from September 2018 through August 2019. Percentage shows participants who increased their contributions.
[3]Source: Lincoln Financial Client Satisfaction Study, 2019.
[4]Source: Lincoln Financial Group Plan Data, 2019.

STORIES OF OTHERS

If we listen to others people' stories and we tell ours, we can connect, learn from each other, and come to trust each other. **By Miriam "Missy" Matrangola**

We have made it to October of the year 2020, a year like no other I have lived through. In March, when the novel coronavirus first appeared, Kindra Hall, a professional storyteller who spoke at the 2019 ASPPA TPA Growth Summit, suggested keeping a journal of what was happening in your life because of COVID-19—that years in the future these events would be stories that would be unique to us. At the time, it seemed an interesting idea but not one I planned to do since I expected this to end in two or three months.

Was this you? Did you ever expect to experience so many different events in such a short time? CARES, PPP, electronic disclosure regulations… there was so much information to learn in such a short time. Did you feel like you were drinking from a firehose? At one point in the summer, I was afraid to go to the ASPPA website for fear there would be another new Revenue Ruling or regulation. While normally we want guidance, I was not sure my brain had the capacity to expand enough for one more new idea.

Now that we have made it to October, we should feel good about ourselves. We have made it three quarters of the way through a year that none of us was expecting in January. Many of us have conquered working from home, learning Zoom, Teams or WebEx (dressed or in your workout wear), a working knowledge of COVID-19, and many laws and regulations. Thank goodness there were some of you who already worked from home and used Zoom, etc. so you could provide tips for us newbies! I found that there was a sense of community created among us and a willingness to help each other through this tough time.

"WE HAVE MADE IT THREE QUARTERS OF THE WAY THROUGH A YEAR THAT NONE OF US WAS EXPECTING IN JANUARY."

As President of ASPPA, I have the pleasure of attending conferences and meeting great ASPPA members. In January, I attended the Women in Retirement Conference (WiRC) sponsored by ASPPA and NAPA. This is always a phenomenal conference and this one did not disappoint. Kelly McDonald, an author and speaker, spoke about working with people who are not like you. She intentionally used the phrase "people not like you" instead of diversity as we helped come up with some of those differences: different racial and ethnic groups, different religious groups, men and women, different ages and generations, introverts and extroverts, football or soccer, beer or wine, etc. We learned, as we probably all know, that the United States and the world are growing more diverse. Some of us don't want to change and resent it. Others of us welcome the change and think it is too slow and too long coming. As a result, many are uncomfortable and don't know what to say to someone different than them or how to say it.

A point she made has really stuck with me: that you may say something that is just wrong, totally politically incorrect. And that we should forgive people if they make an innocent mistake as we all try to grow together.

Another point she made is that the change is going to keep on happening so if I don't like it, all I can do is adjust my attitude (or just be miserable, which while always a choice, isn't much fun). I think if we listen to others tell their stories and we tell ours, we can connect, learn from each other, and come to trust each other. Not only that, we grow to understand another person's life, viewpoints and obstacles. This can also help us see something we might not have otherwise seen and help solve a problem.

The events of this summer have shown me that as a nation we have some work to do to all get along. These events have caused me to look inward to see what I need to do to improve. I started by listening to people I respect give their views. But taking from Kendra and Kelly, I began having honest conversations with people I knew were open to telling me their stories; this way I could see what change I needed to make in my attitude. I challenge you to look inward and to strike up a conversation with someone "not like you." PC

Miriam "Missy" Matrangola, Esq., QKA, QPA, is the President of Atlantic Pension Services, Inc., an independent, non-producing TPA in Kennett Square, PA which she founded in 1992. She serves as ASPPA's President in 2020.

'RAZING' THE BAR

The best interests of plan participants are best served by providing plan fiduciaries the opportunity to consider the impact that factors such as ESG could have on long-term performance. **By Brian H. Graff**

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

In late June, the Labor Department issued a proposed rule innocuously titled "Financial Factors in Selecting Plan Investments."

While the proposed rule itself was relatively short and largely uncontroversial, the preamble and supporting analysis of costs left little doubt that the authors saw a problem looming on the horizon, and wanted to "nip it in the bud."

The preamble cited a concern "that the growing emphasis on ESG investing may be prompting ERISA plan fiduciaries to make investment decisions for purposes distinct from providing benefits to participants and beneficiaries and defraying reasonable expenses of administering the plan."

If ever there was a solution in search of a problem…

The reality today is that ESG investments—those that incorporate environmental, social, governance (ESG) factors—have struggled to find a toehold in defined contribution plans despite numerous industry surveys suggesting that participants are interested in such alternatives. Fewer than 3% of DC plans offer an ESG option, according to the 62nd annual Plan Sponsor Council of America survey, and less than 0.2% of plan assets have been invested in those options.

That hesitancy on the part of plan fiduciaries has almost certainly been fueled, if not fanned, by previous pronouncements from the Labor Department, most recently a 2018 Field Assistance Bulletin which laid out the "all things equal" standard seen by many as a pull back from the position articulated during the Obama administration. It hasn't helped that these options were typically more expensive, tended to underperform more traditional options, and were subject to the whims of investment professionals as to what investments and practices satisfied their sense of ESG.

> "TODAY THERE'S PLENTY OF EVIDENCE TO SUGGEST THAT MANY ESG-THEMED INVESTMENTS PERFORM JUST AS WELL AS, IF NOT BETTER THAN, THOSE WITH A MORE 'TRADITIONAL' FOCUS."

Well that, as they say, was then.

Today there's plenty of evidence to suggest that many ESG-themed investments perform just as well as, if not better than, those with a more "traditional" focus. In fact, a growing number of investment managers are incorporating that focus—notably the "governance" aspect—as part of their regular screens, viewing consideration of ESG risk exposure as a baseline consideration.

Ultimately, we believe—as we commented to the Labor Department in late July—that ERISA requirements for fiduciaries selecting plan investments should neither promote the sacrifice of investment returns or assumption of greater investment risks as a means of promoting collateral social policy goals—nor should they preclude consideration of benefits other than investment return. The concern expressed by many of our members was that this proposal not only opens the door to complex interpretations of how to regard ESG factors—but that it could ultimately stifle investment selection, decrease participant savings rates and even diminish portfolio diversification.

Not that there isn't room for improvement and clarity in ESG labelling. Many factors today compete for that label, and those who blindly embrace options simply because of a marketer's branding will surely come to regret that myopia. But the Labor Department's proposal provides no more nuance than the blunt affixation of an ESG label—largely, if not nearly completely, constraining a fiduciary from considering ESG factors as part of a prudent process even those deemed to have a substantive impact on long-term investment returns.

ARA members have long applied ERISA's fiduciary principles in carrying out their fiduciary duties when selecting plan investments and investing plan assets, regardless of the type of investment. As always, we believe the best interests of plan participants and beneficiaries are best served by providing plan fiduciaries—and those who support them—the opportunity to consider the impact that factors such as ESG could have on long-term performance. PC

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DEJA-VU! DIDN'T WE JUST FINISH RESTATEMENTS?

8 tips for the upcoming 'tricyle' restatements. **By Alison J. Cohen**

The IRS issued Announcement 2020-07 in June to inform the retirement community that it anticipates completing its review and issuing opinion letters for defined contribution preapproved plans on June 30, 2020. This means that all DC plans must be restated no later than July 31, 2022. For many of us, this third cycle of restatements (charmingly nicknamed the "tricycle") somehow snuck up on us in the midst of the SECURE Act, the CARES Act, and the pandemic.

While the vast majority of service providers won't be ready to kick off the tricycle until the end of the fourth quarter of 2020, or even the first quarter of 2021, the intervening time should be used wisely to prepare both its own staff and its clients. Following are some considerations you may want to implement.

LOOK AT THE NUMBERS

Take a quick inventory of all clients for which you provide document services. Add in the estimated new clients between now and when your restatement process is expected to begin. Subtract the usual attrition numbers. That's your base. Now go back to your records from the Pension Protection Act (PPA) restatement and see if you have a substantial difference.

If your business has grown in the past six years, the amount of time and staff you're going to need to accomplish this task will be greater

> "THIS THIRD CYCLE OF RESTATEMENTS SOMEHOW SNUCK UP ON US IN THE MIDST OF THE SECURE ACT, THE CARES ACT, AND THE PANDEMIC."

than before. It seems intuitive, but folks often forget about the impact of the growth rate. If you're going to have to find and bring on temporary staff, the sooner you get started the better.

COMMUNICATIONS

When you put together your 2020 annual plan data request package, it's a good idea to plant the seed and let your clients know that you will be reaching out to them in the coming 12 to 18 months to initiate their restatement. There should also be a communication plan for when you're ready to actually start the restatements. Are you going to notify clients before drafting? Should this be done in batches? Are you going to elicit input from your clients about changes they might want to make to their plans at the same time? Will you preemptively restate a plan if the sponsor happens to request an amendment for another reason in the interim?

TRAINING

Don't underestimate the amount of training that you will need to give your staff on the new document and its nuances. Focus on new options that are available and possible language changes that may mean you have a different approach for certain document issues. (For example, what used to be a default to exclude some type of compensation may instead now be an election to include.) You somehow have to squeeze this in amongst your usual workload (as modified for the pandemic and quarantine issues you are already facing). As attorneys who often help clients repair problem documentation, we also encourage you to ensure that someone in the restatement processing group actually understands plan documentation and can review plans critically for accuracy.

PRIORITIZATION

What is your strategy going to be for which client goes first? Who goes second? Thought should be given to what makes the most sense given your client base. Do you want to start with the largest clients or wait until you feel more comfortable with the restated document? What about taking plan year into consideration? Many clients coincide amendments with their plan year, implementing changes as of the plan anniversary. So, it might make sense to track the off-calendar year folks and draft the restatement just prior to their plan anniversary. It will seem less overwhelming if you have a project plan.

HOW MUCH TO CHARGE?

Smaller service providers often feel uncomfortable discussing fees. Check your current service agreement (or multiple agreements, if you've changed them up over the years) to see what is said about restatements. Ideally, your firm left room for flexibility on restatement fees. *Before* you start restatements, it is important to disclose the fees to clients. This is something that should be included in your communication right before you're ready to start the specific restatement.

There is no reason why you have to charge the same amount as you did for the PPA restatement. Try actually doing a restatement (the whole thing from start to finish) and see how long it takes you. I think many of you will be surprised at how long it takes. Consider this in your fee proposal. Fees for restatements are considered administrative fees and can be paid for by plan assets. That's something to mention if your client uses forfeitures or ERISA accounts to pay for expenses.

SAFE HARBOR PLAN CONUNDRUM

Can you do a restatement of a safe harbor plan without violating the mid-year amendment restriction? Based on the guidance provided in Notice 2016-16, it appears that as long as no provisions that impact the safe harbor contribution are changed, a restatement won't cause a plan to lose safe harbor status. However, changes that modify information in the notice may require the mid-year provision of an updated notice to participants. Conservative practitioners may prefer to coordinate the safe harbor plans restatements with the plan anniversary.

PARTICIPANT COMMUNICATIONS

With a restatement usually comes a Summary Plan Description (SPD). Providing plan sponsors with clear instructions on how and when they are required to distribute the new SPD is important. Many plan sponsors may want to take advantage of the electronic disclosure rules to lessen the cost of the distribution. Including a summary of the requirements to do so with the client communication will add value and it's easy to do.

GET STARTED

For those of us who have lived through several restatements, we know that it can become overwhelming very quickly. Add into the mix several mandatory interim amendments due during this period of time, and you realize that this could start looking like a blur of paperwork. The key to a successful restatement period is planning, and it's never too early to start! PC

SCHEDULING 403(B) PLAN DOCUMENT DATE NIGHTS

Here's a helpful overview of the IRS due dates—both past and future—for keeping 403(b) plan documents in compliance. **By Linda Segal Blinn**

June 30, 2020—the deadline for employers to adopt an IRS pre-approved 403(b) plan document for the first time—has passed. That date also marked the deadline for 403(b) sponsors to retroactively correct defects in their 403(b) plan documents (whether pre-approved or individually designed) under the first-ever 403(b) remedial amendment period.

However, a 403(b) plan still requires ongoing maintenance to comply with plan design modifications and federal legislative and regulatory changes. The following overview is intended to help employers understand the IRS due dates—both past and future—to keep their 403(b) plan documents in compliance.

When was an employer first obligated to have a 403(b) plan document?

Under the final IRS 403(b) regulations, an employer (other than certain church plan sponsors) was required for the first time to establish and maintain a 403(b) plan document, regardless of whether that 403(b) plan was subject to ERISA.

In Notice 2009-3, the IRS noted that a 403(b) plan would be considered to meet the "written plan" requirement of the 403(b) regulations if the employer adopted a 403(b) plan document by Dec. 31, 2009 and the employer operated the 403(b) plan in accordance with a reasonable interpretation of Code Section 403(b) and related guidance. The employer was also responsible for making best efforts to retroactively correct any 2009 operational defects to comply with the terms of the written 403(b) plan document.

If an employer adopted a 403(b) plan by Dec. 31, 2009, what was the purpose of restating that 403(b) plan document again by June 30, 2020?

In conjunction with the 2017 issuance of favorable IRS advisory and opinion letters to pre-approved 403(b) plan documents, IRS guidance permitted an employer which had already adopted a 403(b) plan in 2009 to adopt an IRS pre-approved 403(b) plan document with a Jan. 1, 2010 retroactive effective date.

That retroactive effective date provided the employer with a remedial amendment period to correct any defective plan document provisions and to align plan operation with the terms of the plan document. An employer adopting an IRS pre-approved 403(b) plan document by the June 30, 2020 remedial amendment date could rely on the favorable IRS advisory or opinion letter accompanying the pre-approved plan document that defects in the prior 403(b) plan document had been automatically corrected.

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"THE IRS EXPECTS TO REQUIRE A 6-YEAR CYCLE OF REGULARLY SCHEDULED RESTATEMENT PERIODS FOR 403(B) PLANS."

In September 2019, the IRS issued Revenue Procedure 2019-39, which extended the remedial amendment period to individually designed 403(b) plans. As a result, an individually designed plan adopted in 2009 was also able to resolve plan document defects retroactively to Jan. 1, 2010. However, since the IRS does not have a determination letter program for individually designed 403(b) plans, the employer will not have a favorable IRS letter indicating that the plan document, as adopted, meets the "written plan" regulatory requirements.

Will there be additional remedial amendment periods for 403(b) plans, now that June 30, 2020 has passed?

Yes, the IRS expects to require a 6-year cycle of regularly scheduled restatement periods for 403(b) plans. This schedule will enable an employer to resolve plan document issues and to update its 403(b) plan document (whether IRS pre-approved or individually designed) with a retroactive effective date to the beginning of that cycle's restatement period.

When must a 403(b) plan document be amended for federal legislative and IRS regulatory changes?

With the publication of Notice 2019-64, the IRS began issuing an annual Required Amendments List that included federal statutory and administrative changes applicable to 403(b) plans. That notice established Dec. 31, 2021 as the deadline to amend 403(b) plans permitting hardship withdrawals on or after Jan. 1, 2020 for the final IRS hardship guidance.

The IRS notes that, in general, changes will not appear on a Required Amendment List until IRS guidance (including any model amendment) has been issued with respect to those changes. For example, both the Setting Every Community Up for Retirement Enhancement (SECURE) Act and the Coronavirus Aid, Relief, and Economic Security (CARES) Act provide that 403(b) plans be amended by the end of the 2022 plan year (if the employer is a 501(c)(3) organization) or by the end of the 2024 plan year (if the employer is a public school) unless the Secretary of the Treasury prescribes a later date.

When must a 403(b) plan be amended for plan design changes initiated by the employer?

The IRS' Required Amendment List does not apply to modification of optional plan design features. The deadline for adopting an amendment modifying 403(b) plan design depends on whether the employer is governmental or nongovernmental:

- If the employer is a 501(c)(3) organization, the amendment must be adopted by the last day of the plan year in which that amendment is effective.
- If the employer is a public school, the amendment must be adopted by the later of either the last day of the plan year in which the amendment is effective, or 90 days after the close of the second regular legislative session of the legislative body with the authority to amend the plan that begins on or after the date on which the amendment is effective.

In Rev. Proc. 2020-40, issued Sept. 2, the IRS provides an exception to this general rule, noting that a statutory provision, or regulations or other guidance published in the Internal Revenue Bulletin may provide for a different deadline to timely adopt a discretionary amendment.

What else should an employer know about maintaining its 403(b) plan document?

Employers should keep in their permanent plan records:

- signed 403(b) plan documents (including completed adoption agreements);
- favorable IRS letter (if a pre-approved 403(b) plan document);
- signed plan amendments; and
- board resolution approving the adoption, restatement, and amendment (as appropriate) of the 403(b) plan document.

If the IRS audits the 403(b) plan, the employer may need to provide proof that the plan document was timely and effectively adopted, including that the plan or amendment was signed by an authorized individual if the employer. PC

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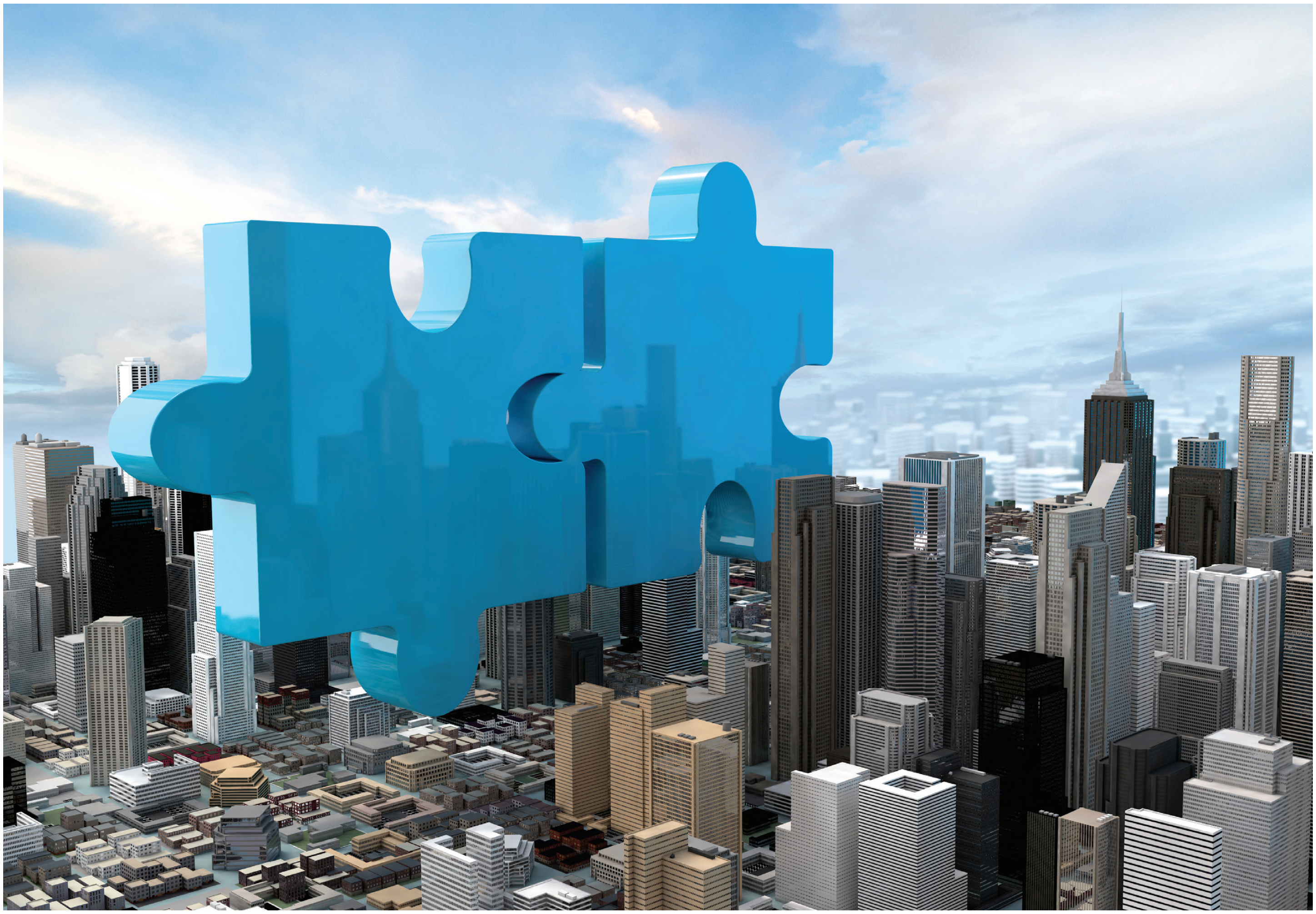

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CONSOLIDATION LESSONS

FuturePlan exec Bob Zamary shares what the acquisition process looks like from the inside.

Bob Zamary, who currently serves as VP of Operations at FuturePlan by Ascensus, joined the firm in June 2019 as part of the United Retirement Plan Consultants acquisition. Recently he spoke with *Plan Consultant* about what the consolidation process was like—and what he learned.

PC: We've all heard about continued acquisition activity in the retirement plan administration sector. Beyond the press releases, what can you share that may be helpful to TPAs, plan sponsors and advisors?

ZAMARY: As in other industries, the retirement plan administration sector has been undergoing substantial consolidation. While I believe that there is still a place for small- and medium-sized TPA firms, we know that thoughtful consolidation can create efficiencies, expand market reach, and increase service capabilities. While there are pitfalls and past consolidation efforts have a mixed record of success, there is great potential to create more value and better experiences for both clients and employees.

PC: Your firm recently went through the acquisition process. Can you describe your experience and what you learned?
ZAMARY: It was an exciting and positive transformation for our firm. However, there were challenges along the way—which is to be expected with any large-scale change that affects so many aspects of the business. For us, the foundation was having a cultural fit with the acquiring organization and a strong sense of engagement at the highest level of leadership. Thoughtful planning was critical at each stage, from the initial announcement day communications through the intricacies of financial and IT integrations. Our plans had to be flexible and responsive to the environment

of rapid change, to market response, and to the needs of our employees.

PC: As we all know, mergers and acquisitions can create turmoil and uncertainty on both sides of the transaction. Were there specific processes or approaches that seemed to work well—and perhaps some that you would adjust in the future?

ZAMARY: There's often a feeling of enormous uncertainty any time a business changes hands—both by the entity acquiring the business and by the entity being acquired. For most of us, change can be hard. But we also know that constant change is one of the only certainties in business—as in life. What helped most was empathy and continuous, tailored communications to each impacted group. Specifically, any company acquiring another firm must work hard to acknowledge employee concerns and communicate as transparently as possible. In my experience, clear, early communication with our transition team and with my co-workers helped alleviate a lot of worry.

One thing that I truly appreciated about our transition was knowing that we weren't being brought into the fold merely to add revenue or service metrics to the bottom line. Instead, we're part of a strategic plan to create a more robust organization that will be able to respond to our ever-changing industry.

I'm also grateful that we were able to effectively work through some unexpected challenges *before* we got too close to the transaction announcement. As you can imagine, something always seems to crop up at the 11th hour. But having an experienced team to work through important details—even under tight time constraints—helped reduce our stress levels.

"WHILE THERE ARE PITFALLS AND PAST CONSOLIDATION EFFORTS HAVE A MIXED RECORD OF SUCCESS, THERE IS GREAT POTENTIAL TO CREATE MORE VALUE AND BETTER EXPERIENCES FOR BOTH CLIENTS AND EMPLOYEES."

PC: You mention empathy and communication as important to the acquisition process. But were there specific areas of concern where you saw these concepts or approaches applied?

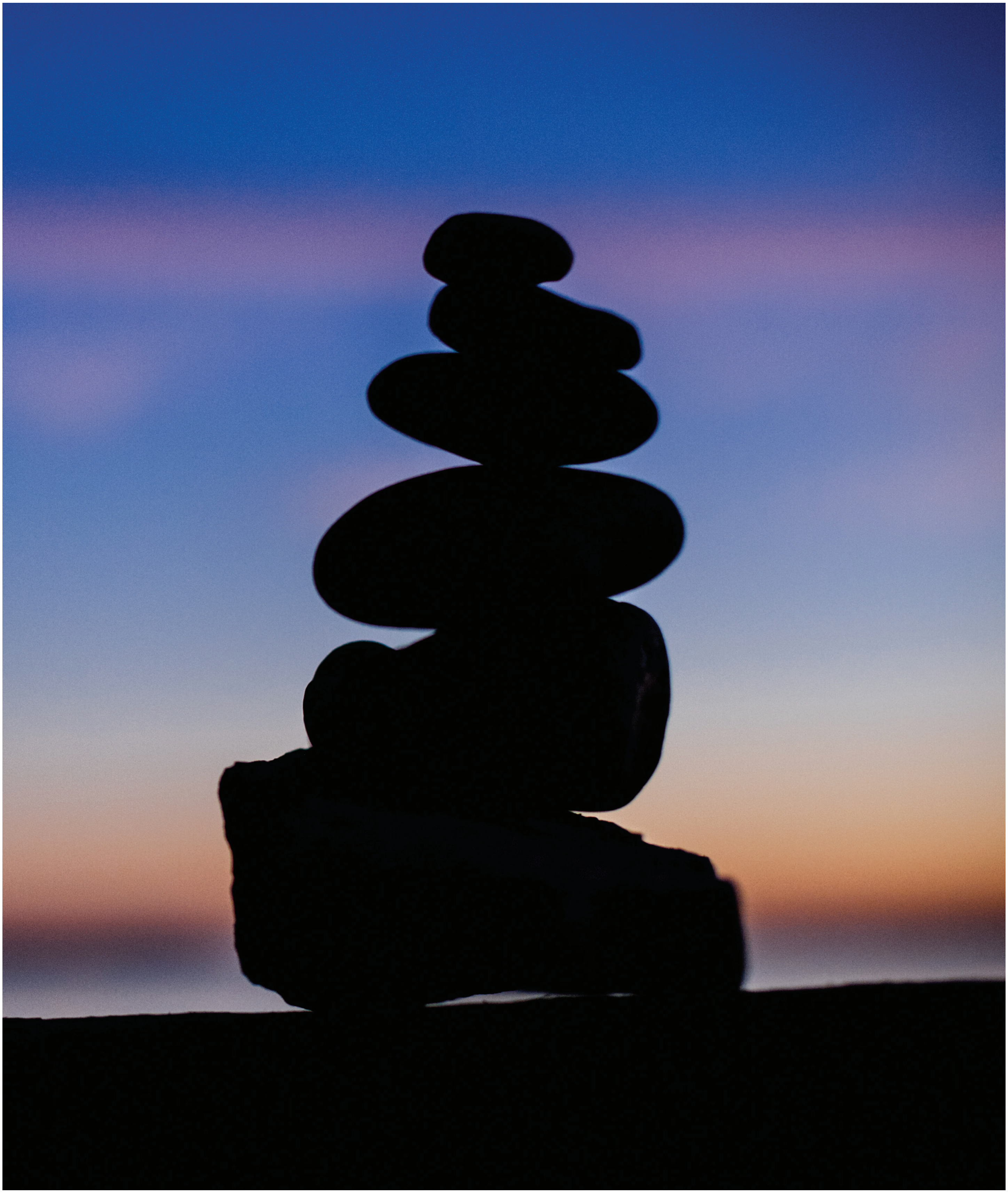
ZAMARY: A few come to mind immediately. First, and most important, is: "How does this acquisition affect our clients and associates?" We understood that no matter the size and structure of a firm, it's important to put the right infrastructure in place and add enhancements in a thoughtful manner. We maintained a sharp focus on the benefits we were creating for our financial professional partners and clients while looking to make the transition as smooth as possible for them. When we announced the transaction, we let them know that they were gaining access to the broad experience and deep knowledge of our new coworkers, as well as to an ERISA department with more than 50 attorneys, CPAs and other experts with retirement industry certifications. We could also honestly tell them that little would change in terms of their regular interactions with us. Internally, we worked to keep associate engagement at a high level via strong communication about access to new resources, enhanced workplace benefits, and educational opportunities, among other things.

Second, as you might expect, we were concerned about how our business would integrate into the larger organization. There were dozens of systems and operations integrations that needed to be addressed, such as IT, legal and finance. Perhaps most important, however, was the HR aspect, which wasn't so much about integration as it was bringing our people into the new organization's culture while maintaining what historically had made us so successful. In the end, I saw that a commitment to our clients and associates—particularly when it came to communicating honestly with them—made the transition process much easier for all involved.

Third, our firm has gained much more than it may have lost in the acquisition process. Our experience has shown that our associates enjoy ample opportunities for growth and advancement as part of a larger organization. Not only are there great avenues for career development and progress, but there are more opportunities for networking and idea sharing with other financial services professionals. The latter is especially valuable when it comes to service and product insights. Another benefit is the availability of additional locations along with the possibility of practical mobility within the company.

PC: Any other lessons learned during the acquisition?

ZAMARY: Acquisitions obviously have a lot of moving parts. Nevertheless, we made certain to always keep our core purpose at the forefront: to serve plan sponsors and their participants. Beyond that, we learned that it's most important to have a plan that can be delivered upon while displaying strong leadership and constantly maintaining a positive, service-oriented culture. PC



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CASH BALANCE FUNDING ISSUES

How should cash balance assets be invested? That depends on many factors. **By Jeff Thornton**

Cash balance plans have become quite popular in the last few years. Many plan sponsors are adding a cash balance plan on top of their existing 401(k) plan—often assuming that a cash balance plan works just like a 401(k) plan. But there are some key differences between the two—especially when it comes to funding. This article provides a summary of the funding rules that apply to cash balance plans.

ASSETS VS. LIABILITIES

In a cash balance plan, benefits owed to each participant are defined in the plan document and generally are increased for two reasons each year:

1. **Employer Credit:** These are typically defined as a percentage of each participant's pay or as a flat dollar amount.
2. **Interest Crediting Rate:** The plan document specifies an interest rate at which the account is increased each year. These are usually a flat percentage (usually between 3% to 6%) or a nominal rate such as the 30-year Treasury rate.

As an example, let's say the cash balance plan defines the employer credit for John Doe as a $1,000 employer credit per year and the interest crediting rate is 5% per year. At the end of the first year of participating in the plan, John's cash balance account is $1,000. At the end of the second year, it is $1,000 x 1.05 + $1,000 = $2,050.

As for the other side of the ledger, the cash balance plan's assets are comprised of the contributions that are made each year plus the investment earnings on those contributions.

HOW IS THE CONTRIBUTION AMOUNT DETERMINED?

Private sector defined benefit plans (which include cash balance plans) are governed by a set of IRS rules which guarantee that the plan maintains certain funding levels—in other words, not too underfunded or too overfunded.

Each year, the plan's liabilities and assets are assessed by an actuary. The benefits that are expected to accrue over the next year are calculated as well as part of this valuation. Based on the overall plan's funded status and these expected accruals, a *minimum required contribution* and a *maximum deductible contribution* are calculated. Generally speaking, the minimum required contribution is structured to target a 100% funded status over the long term while the maximum deductible contribution calculation's purpose is capping the funded status at 150%.

As mentioned above, there are assets (i.e., contributions plus investment earnings on those contributions) and liabilities (cash balance employer credits plus interest on those employer credits):

1. **Employer Credits.** These are benefits owed to each participant. After the benefit has accrued, you cannot go back and say you want to change it. However, you may generally change the benefits amounts prospectively.
2. **Interest Crediting Rate (ICR).** The employer credits are increased with interest each year. The IRS has a list of permissible ICRs for cash balance plans. There are complex plan design topics regarding plans using the underlying asset return as the ICR and also modifying the ICR, but these situations are rare and beyond the scope of this article. The key point is that both Items #1 and #2 are part of the "defined benefit" nature of the cash balance plan and are, for the purposes of this article, considered inflexible in terms of modifying these retroactively. In the John Doe example above, he will be owed $2,050 at the end of the second year, and the plan sponsor cannot modify that amount after it has accrued.

> "HOW SHOULD CASH BALANCE ASSETS BE INVESTED? THIS QUESTION REALLY DEPENDS ON MANY FACTORS SUCH AS THE PLAN SPONSOR'S RISK TOLERANCE AND STABILITY OF INCOME, AND THE TIME HORIZON OF THE CASH BALANCE PLAN."

3. **Investment Earnings on Contributions.** Clearly, investment earnings can vary from year to year. In an oversimplified/perfect world, the contributions each year equal to the employer credits and the investment earnings equal the interest crediting rate in the plan, thus making the plan 100% funded at all times. But in our imperfect world, asset returns vary. If the investment earnings are less than the ICR, the plan is losing ground for its funded status, and if the investments outperform the ICR, the plan's funded status is increasing, keeping all other factors equal.
4. **Contributions.** This is the all-important "X-factor" that will ensure that the plan's funded status does not get too overfunded or too underfunded. For instance, if investment earnings are dramatically negative, then you should expect for the contribution amounts (both the minimum required and maximum deductible) to go up when the next valuation is performed. Conversely, if the investment earnings are double-digit returns, then the funded status will improve and you should expect the range of contribution amounts to go down in the next year's valuation, keeping all other factors equal.

It should also be noted that it is not all about the investment earnings. If a plan sponsor consistently overfunds or underfunds the plan (by making more or less than the employer credit amounts), the contribution range in *future* years will be adjusted downward or upward, respectively. At the end of the day, it is all about keeping the plan's funded status in check.

In summary, when you are determining the impact on the funded status and the resulting range of contributions, there are two relationships that matter: the contributions in relation to the employer credits and the investment earnings in relation to the interest crediting rate.

WHY CAN'T I JUST CONTRIBUTE THE EMPLOYER CREDIT AMOUNT?

Many plan sponsors want to simply contribute the sum of the employer credits each year. As long as the employer credit amount falls within the minimum to maximum range, this approach works fine. However, if the plan becomes too underfunded or overfunded, the minimum to maximum range may fall outside of the desired contribution amount.

Example 1

For the last 2 years, ABC Corporation's pay credits are $100,000 each year, and the minimum required contribution each year has been $90,000. ABC contributed the minimum required contribution each year. In year 3, the cash balance underlying investments fall 20%.

ABC has been "losing ground" by $10,000 each year in funded status since the minimum is less than the actual pay credits. For the valuation immediately after the 20% loss on assets, the minimum required contribution increases to $150,000 due to the fact that they were losing ground by contributing less than the credits *and* also due to the investments performing dramatically less than the interest crediting rate (i.e., the growth rate of the liabilities).

Example 2

For the last 2 years, XYZ Corporation's pay credits are $100,000 each year, but the maximum deductible contribution each year has been $150,000. XYZ contributes the maximum required contribution each year. In year 3, the cash balance underlying investments increase 20%.

XYZ has been overfunding the plan each year. For the valuation immediately after the 20% gain on assets, the maximum deductible amount decreases to $60,000. As noted above, the plan's funded percentage is generally capped at 150% under the maximum deductible calculation, so the 20% gain on assets will limit how much they can contribute to the plan.

As seen in these examples, excessive investment return volatility can play a big role in causing volatility in the minimum to maximum range of contributions. So how should cash balance assets be invested? This question really depends on many factors such as the plan sponsor's risk tolerance and stability of income, and the time horizon of the cash balance plan. The conventional wisdom is to invest conservatively within the cash balance plan to avoid large swings in the funded status and the range of contributions from year to year. PC


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STATUTE OF NEW LIMITATIONS

In the wake of the *Intel* decision, recordkeepers that provide a cost-effective solution to the "actual knowledge" dilemma will likely see an increase in business activity. **By David Witz**

The U.S. Supreme Court unanimously affirmed the Ninth Circuit's opinion in the 2015 case *Intel Corporation Investment Policy Committee et al. v. Sulyma* in February. Now that the high court has rendered its decision, the case has been remanded back to the district court, where it will proceed on its merits. In the interim, the Supreme Court's decision has an immediate impact on plan sponsors that rely on the 3-year statute of limitations as a pivotal part of their risk mitigation strategy.

Let's look at the claim, review the definition of the statute and its application, review a plan sponsor's options, future expectations, and highlight a potential benefit for defense counsel.

THE CLAIM

Christopher Sulyma, a participant in retirement plans sponsored by Intel from 2010 to 2012, filed suit in 2015. Generally, he claimed the fiduciaries invested excessively in alternative assets, e.g., hedge funds, private equities and commodities, which resulted in the payment of excessive fees and sub-par performance. Intel sought early dismissal under a 3-year statute of limitations by claiming that Sulyma had "actual knowledge" of the investments during the time period in question. Intel's defense was based on factual evidence that Sulyma had actual knowledge because he had received:

1. Fund Fact Sheets from 2010, 2011, and 2012,
2. 2011 Qualified Default Investment Alternative Notice,

3. 2012 Summary Plan Description,
4. 2012 Annual Disclosures, and
5. Access to additional disclosures available on the website which, it was documented, he visited some 68 times.

The district court ruled in Sulyma's favor, but the Ninth Circuit disagreed and the Supreme Court (SCOTUS) affirmed the Ninth Circuit's position that "actual knowledge" means "actual knowledge"—it is not imputed because he received a mailing or had access to disclosures online.

THE STATUTE

ERISA § 413(1) provides for a 6-year statute of limitations and ERISA § 413(2) provides for a 3-year statute of limitations. A plaintiff has up to 3 years to bring a lawsuit against a fiduciary for an alleged fiduciary breach or violation when he or she has "actual knowledge" of the breach (except in the case of fraud or concealment). If the plaintiff has no knowledge of the breach, the period is 6 years.

Unfortunately, there is a long history of debate regarding what constitutes actual knowledge because the determination is inherently subjective. That said, the Second, Third, Fifth, Sixth, Seventh and Eleventh Circuits have issued a plan-sponsor-friendly interpretation regarding actual knowledge. These courts have held that the mere delivery of the appropriate disclosures meets the actual knowledge requirement. Their position no longer holds water since SCOTUS affirmed the Ninth Circuit's position that "actual knowledge" means what it says. According to SCOTUS, ERISA's 3-year limitations provision:

> [R]equires more than evidence of disclosure alone. That all relevant information was disclosed to the plaintiff is no doubt relevant in judging whether he gained knowledge of that information. To meet § 1113(2)'s "actual knowledge" requirement, however, the plaintiff must in fact have become aware of that information.

If actual knowledge cannot be imputed based on timely receipt of various disclosures, then what is the standard a plan sponsor must meet to prove "actual knowledge"? For the plan sponsor relying on the 3-year statute of limitations this is the ultimate question in light of a statute that does not define "actual knowledge."

SCOTUS provided its perspective, but it leaves a plan sponsor with little consolation and much consternation. According to SCOTUS, actual knowledge requires that a plaintiff must be aware of the information, which a plan sponsor can demonstrate by:

1. A plaintiff's admission that he or she recalls reading the disclosure and was therefore aware of the information. Sulyma testified that he did not recall the disclosures and was unaware that the plan invested in alternative assets.
2. Circumstantial evidence which SCOTUS did not define but that is considered to be documented records that prove the plaintiff viewed the electronic information and took some action in response. While the evidence showed Sulyma accessed information 68 times in 2 years, SCOTUS believed this was insufficient to establish actual knowledge.
3. Providing evidence the plaintiff is "willfully blind" to the information—a standard not defined by SCOTUS despite evidence the plaintiff received numerous disclosures and visited the website many times.

Based on these hurdles, a plan sponsor will be subject to a 6-year statute for all future fiduciary breach cases unless the high standard established by SCOTUS can be met.

PLAN SPONSOR OPTIONS

For the conscientious plan sponsor that is focused on meeting the 3-year statute as a risk mitigation strategy, now is the time to reevaluate the reporting and disclosure support provided by their covered service provider. The focus of their inquiry should be on solutions that:

1. Address required sign-ins with a description of the material covered for all participant enrollment, communication and education meetings.

"ON ITS FACE, THE SCOTUS DECISION IS A BIG WIN FOR PLAINTIFFS. HOWEVER, IT DOES PROVIDE A SILVER LINING FOR DEFENDANTS AGAINST PLAINTIFFS SEEKING CLASS CERTIFICATION."

2. Address participant surveys to confirm comprehension of the materials covered.
3. Address required disclosures on enrollment forms that acknowledge receipt of all necessary disclosures and the participant's understanding of the risks associated with the investments selected.
4. Require a participant to accept a "Terms of Use" that acknowledges they read, understand and acknowledge responsibility for their investment decisions before accessing account information electronically.
5. Require that participants attend online education, i.e., a Learning Management System that includes a quiz to confirm comprehension to support actual knowledge before investing.

Absent these solutions, a plan sponsor can mitigate this risk by not offering alternatives as core offerings and prohibiting a target date fund that contains alternatives such as a Qualified Default Investment Alternative (QDIA). While SCOTUS did not address the extent to which a plan sponsor would be protected if the participant is auto-enrolled and auto-allocated to a QDIA that holds alternative investments, it is important to remember that the intent of the QDIA is a reduction in plan sponsor liability for the asset allocation decision made by the participant, not the elimination of fiduciary liability associated with the selection and monitoring of investments—which was the primary basis for Sulyma's claim.

WHAT THE FUTURE HOLDS

Based on past history, recordkeepers will be expected to provide a solution to support the 3-year statute. In fact, I think it is fair to assume that advisors will include questions in their Requests for Proposal (RFPs) to identify recordkeepers that have a solution for the 3-year statute. These questions might include:

1. What support do you provide to secure the 3-year statute of limitations?
   a. Can you provide a legal opinion that supports your claim?
   b. Do you provide indemnification should a court declare your efforts to provide the 3-year statute fail? If Yes, please provide that indemnification.
2. Is your technology mobile ready for participants to access plan information and investments by cellphone?
3. Do you require participants to electronically sign a "Terms of Use" before accessing their account information?
   a. If Yes, please provide a copy of the "Terms of Use."
4. Do your "Terms of Use" include the risks associated with the specific investments offered by the plan?
   a. If Yes, please provide a sample.
   b. If No, are you able to include a description of the risks associated with a plan's investments?
5. Who writes the risk descriptions and what are their credentials?
   a. Will you permit us to edit your descriptions?
6. Do you date stamp, record, and store the participant's acknowledgement to the "Terms of Use"?
   a. If Yes, for how long?
7. What other steps do you take to assist with securing the benefits of the 3-year statute of limitations?

This is just a sampling of potential RFP questions that a recordkeeper may need to answer.

PROS AND CONS FOR DEFENDANT'S COUNSEL

On its face, the SCOTUS decision is a big win for plaintiffs. However, it does provide a silver lining for defendants against plaintiffs seeking class certification in that "actual knowledge" is determined by evidence specific to a particular participant. In the future, to secure class certification, plaintiff's counsel may be forced to prove that every participant had no "actual knowledge." If this cannot be proven, then litigation may need to proceed on a participant-by-participant basis—which would involve significantly more time and expense for the plaintiff's litigator. This risk may be sufficient to dissuade plaintiff's counsel from filing a class-based claim.

On the other hand, the SCOTUS decision imposes on a plan sponsor the obligation to implement what could be time-consuming and costly strategies to secure the 3-year statute.

CONCLUSION

The courts should be watched closely as consultants and plan sponsors consider their risk mitigation strategies. In light of the *Intel* decision, "actual knowledge" will require a coordinated effort with the recordkeeper. Recordkeepers that provide a cost-effective solution will likely see an increase in business activity as risk-adverse plan sponsors seek to implement risk mitigation strategies that intend to make use of the 3-year statute of limitations. PC

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Survival Mode

10 Ways to Protect Participants and Plan Sponsors During the Pandemic

By Gary Blachman, Esq. & Austin Anderson, Esq.

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After the sudden onset of the COVID-19 pandemic, most plan sponsors were forced to respond quickly to a fundamental change in the economy and how their organizations conducted business. Whether it was the initial economic downturn or switching from an office environment to a completely remote workforce, plan sponsors went into survival mode.

Now that plan sponsors have had a few months to adjust to a "new normal," many are asking themselves, "Did we do enough to protect our business and plan participants from the Coronavirus pandemic?" And now that health experts predict there may be a new surge of infections in the fall—which may force many communities to reimpose stay-at-home restrictions and additional lockdowns—plan sponsors want to know if there is even more that they can do with their retirement plan arrangements to protect themselves and plan participants from another economic downturn.

This article provides an overview of the more common retirement plan issues facing plan sponsors, along with suggestions for addressing these challenges during the COVID-19 pandemic.

Suspending Employer Contributions to Retirement Plans

A common method for plan sponsors to preserve cash is to suspend or eliminate entirely the employer contributions to retirement plans. Generally, if the employer contributions are discretionary, the plan sponsor may reduce or eliminate the contributions at any time. If the employer contributions are not discretionary, then a plan amendment is required and plan sponsors must avoid impermissible cutbacks of vested benefits.

For safe harbor plans, there are additional hurdles when suspending employer contributions. Generally, safe harbor contributions are suspended only if the plan sponsor is operating at an economic loss or the safe harbor notice includes language allowing the suspension. Safe harbor plans do require a 30-day advance notice to participants before the mid-year change can be effective. Furthermore, once the change is made the plan must perform annual non-discrimination testing for that same plan year.

Defined Benefit Pension Plans

Defined benefit pension plans promise a benefit to participants upon retirement or termination of employment. If there is a large reduction in the pension plan's assets due to a market downturn, there will be a shortfall in the promised benefits.

This funding shortfall may have to be made up by the plan sponsor if it's significant enough at the time the actuary calculates the annual contribution.

The CARES Act allows plan sponsors to delay making required cash contributions (including quarterly contributions) due in the 2020 calendar year until Jan. 1, 2021. This delay will help plan sponsors with their cash flow and conserve current funds for other needs during the pandemic.

Partial Plan Terminations

Most plan sponsors prefer not to terminate their retirement plans altogether. However, plan sponsors should be mindful that a "partial plan termination" can result when layoffs reduce participant count by at least 20%, or even less in some circumstances. If a partial termination occurs, all affected participants must be fully vested in benefits accrued up to the partial termination date. Affected participants include employees who terminated for any reason during the plan year of the partial termination.

Retirement Plan Relief under the CARES Act

Historically, plan participants have been able to access their retirement accounts during times of financial distress while still employed through in-service plan loans and hardship distributions. Hardship distributions taken before a participant reaches age 59½ are subject to a 10% early withdrawal penalty. Plan loan distributions are required to be repaid on a fixed schedule or the participant becomes subject to a 10% early withdrawal penalty.

Under the CARES Act, plan sponsors have the discretion to adopt several features that provide participants with additional access to retirement savings:

- **Coronavirus-Related Distributions (CRD)**. A plan sponsor may permit "qualifying individuals" to take a distribution of up to $100,000 from their 401(k) plan or IRA. The typical 10% early withdrawal penalty is waived and the tax associated with the CRD can be paid ratably over a three-year period. An individual may instead repay the CRD back into the plan or another plan, tax-free, within three years from the date of withdrawal.
- **Increased Loan Limit.** For qualifying individuals, the CARES Act temporarily increased the plan loan limit from $50,000 and 50% of vested benefits to $100,000 and 100% of vested benefits.
- **Suspended Loan Repayments.** For qualifying individuals, due dates for new and existing loan repayments before Dec. 31, 2020 are extended by one year. The interest will continue to accrue on the delayed payments and the loan term can be extended for the delayed repayments to prevent a financial hardship once payments resume.
- **Relief for Required Minimum Distributions.** The CARES Act also waived the required minimum distribution rules for 2020 in defined contribution plans for all participants.

With additional market volatility during the **COVID-19 crisis**, plan sponsors may need to hold more frequent retirement committee meetings to review investment fund performance and determine if any changes are needed.

To qualify for a CRD or loan limit adjustment, a "qualifying individual" must meet one of the following criteria:

- diagnosed with COVID-19;
- has a spouse or dependent diagnosed with COVID-19; or
- experiences adverse financial consequences from being quarantined, furloughed or laid off; having work hours reduced; being unable to work due to lack of childcare; closing or reducing hours of a business; or from other factors, as determined by the Treasury secretary.

Plan sponsors can help protect participants financially by implementing these changes immediately. Plan amendments may be adopted as late as Dec. 31, 2022.

Fiduciary Considerations for Plan Sponsors

With additional market volatility during the COVID-19 crisis, plan sponsors may need to hold more frequent retirement committee meetings to review investment fund performance and determine if any changes are needed. The reasons for any fund changes should be fully documented and communicated to plan participants.

Plan sponsors should continue to review vendors' fees and expenses and confirm that they are reasonable. Eligible expenses can typically be paid from plan assets. While allocating fees to participants may not seem ideal, it may help the plan sponsor avoid suspending employer contributions to preserve cash.

Plan forfeitures can usually be used to pay certain plan expenses or offset funding of employer contributions. Since forfeitures typically need to be used each plan year, they may be helpful right now if budgets are tight.

Salary and Bonus Reductions to Conserve Cash

During this time of uncertainty and financial distress, plan sponsors looking to preserve cash flow or avoid layoffs may want to consider a temporary salary

Since **forfeitures** typically need to be used each plan year, they may be helpful right now if budgets are tight.

reduction program. For "at will" employees, an employer can unilaterally reduce base compensation, but only on a prospective basis to comply with state wage and hour laws. Any anticipated salary changes should always be viewed with regard to the potential impact on other benefit programs, such as bonus plans or incentive programs. The impact on severance pay, unemployment insurance and health benefits should also be considered before implementing any changes.

For employees with an employment agreement, there are additional considerations when implementing a salary reduction program. For instance, most employment agreements require the employee to consent to any changes. Additionally, many employment agreements contain a "good reason" termination definition, which is triggered by a salary reduction, and this could allow the employee to resign and receive a generous severance package that is costly for a plan sponsor trying to conserve cash.

While it may be tempting to include a promise to pay back any reduced compensation at some point in the future, plan sponsors can protect the employer's cash flow by not including such language, especially when the future of the business is unknown.

Plan sponsors may also consider suspending bonus payments or providing "payment" of annual bonuses into a nonqualified plan. One of the benefits of nonqualified plans is their "unfunded" status. If the employee qualifies for a bonus, then instead of being paid cash, they could receive a "book account" in a nonqualified plan. The book account is not funded from company assets until payment of the benefit, thereby preserving cash. The plan sponsor may even consider adding a vesting schedule for the bonus payment to help with retention.

Furloughs and Layoffs

A layoff typically means a complete termination of employment with no participation in any benefit plans. A furlough generally means an employee is on unpaid, non-active status and therefore, not performing any work duties, although there is an expectation of return to full employment in the future. Due to the pandemic, many plan sponsors are choosing to furlough employees so that they remain eligible for promised benefits unless the applicable plan terms dictate otherwise.

This distinction is critical because if self-insured health plans do not clearly provide coverage for furloughed employees, the plan sponsor may end up self-insuring the promised health insurance benefits. Plan sponsors can protect themselves from potential liability by reviewing and confirming the terms of their health insurance contracts and stop-loss agreements. Currently, most insurers are approving benefit coverage for furloughed employees. Plan sponsors should also consider whether the governing documents require amendments to clarify coverage or eligibility provisions.

Continuing health coverage will also affect a furloughed employee's COBRA rights. To be eligible for federal COBRA coverage, there must be a triggering event and a loss of coverage. A reduction in hours due to furlough is considered a triggering event for COBRA coverage, even without a termination of employment. However, furloughed employees will not be eligible for COBRA unless and until they lose coverage within the 18-month coverage period.

Performance-Based Equity Awards

The pandemic created many challenges for plan sponsors of performance-based compensation programs. For public companies that set their performance targets during the first quarter of 2020, those targets may now be difficult or even unlikely to be achieved and may not provide the intended performance incentives. Plan sponsors may want to consider whether the plan terms provide flexibility to adjust performance goals.

To better protect the employer, plan sponsors may decide to postpone establishing performance goals until later in the plan year or not to grant performance awards in 2020. Plan sponsors at public companies will need to be careful that proxy advisory firms (such as Glass Lewis and Institutional Shareholder Services) do not respond negatively if there is not a formal connection between performance and compensation.

Plan sponsors may also consider using relative performance goals as a preferred metric. With volatile market conditions, it can be difficult to set appropriate performance goals based on the performance of the company itself, but goals that measure performance compared to peer companies may be more appealing to employees.

Repricing of Stock Options or Stock Appreciation Rights (SARs)

Extreme market volatility due to the pandemic has negatively affected the stock price of many private and public companies. A plan sponsor that grants stock options or SARs may consider repricing stock options to protect the original intentions of these programs, especially if the awards are a large portion of an employee's total compensation. Underwater options and SARs will lose their retention value if the employee no longer feels that they will regain value. Generally, repricing is attractive when the exercise price of an outstanding option is higher than the value of the underlying employer stock (i.e., an "underwater" option). Private companies will have more flexibility in determining repricing terms than

public companies, which are likely to require shareholder approvals.

Deferred Compensation Plans

Some plan sponsors may consider changing deferral elections in nonqualified deferred compensation plans to assist their executives with financial obligations. However, cessation of deferral elections made during the current year would be treated as an impermissible acceleration of compensation, which is not permitted under Code Section 409A and would likely create adverse tax consequences to the executive. Due to the pandemic, payments could be accelerated in some cases (such as hardship or an unforeseeable emergency), but any changes should be reviewed closely to avoid any negative tax consequences.

IRS Notice 2020-50 clarified that if a participant receives a CRD, that distribution will be considered a hardship distribution under Code Section 409A, which would allow the participant to cancel a nonqualified plan deferral election at the same time.

What's Next?

Many plan sponsors believe that the economic distress caused by the COVID-19 crisis may continue for months or longer. These circumstances present significant challenges to plan sponsors that want to motivate and retain employees while protecting themselves and the plan participants.

Plan sponsors are facing difficult decisions as a result of the economic impact of the pandemic, including decisions about their benefit plans. Many are being forced to choose between business needs and what is in the long-term best interest of plan participants. They want to provide immediate relief to employees affected by COVID-19, but they are also thoughtfully considering the impact on their employees' long-term health and retirement wellness.

Plan sponsors can protect themselves and plan participants by revisiting programs that are costly or underutilized. Retirement benefits and medical insurance are often the more costly benefits. As for utilization, low participation rates may indicate that employees do not appreciate the offered benefits or are unable to take advantage of them and open the door for plan design improvements.

If budget constraints continue to exist, plan sponsors should seriously consider the options described above to achieve much needed financial relief—and at the end of the day, watch their bottom line! PC

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SUCCESS UNDER DURESS

How did retirement industry players survive—even thrive—during the COVID-19 pandemic? And what did we learn about our future?

BY JOHN ORTMAN

YEARS FROM NOW, WHEN YOU LOOK BACK ON THE YEAR 2020, HOW WILL YOU EXPLAIN TO PEOPLE WHAT IT WAS LIKE?

Will you tell a tale of success? Of overcoming the difficulties associated with coordinating the transition of your office-based business to a remote workforce model—essentially overnight and with little or no warning? Of helping your clients and partners through a near-complete shutdown of their business for weeks on end?

How will your story end? With a smile, as you recall the unexpected opportunities that the pandemic created? Or how your business emerged from the pandemic with new efficiencies, new ways to find clients and communicate with them, or a new outlook on recruiting and managing your workforce?

In early July 2020, a little more than three months into the COVID-19 pandemic, we spoke with business owners and executives from the major sectors of the retirement industry. They included TPAs, recordkeepers both large and small, an advisor, a 3(16) administrator, an actuary, an advisor and a wholesaler.

They related their encounters with all the questions listed above, and how they reacted and adapted. They shared what they learned. And they talked about how the retirement industry, and their businesses, may have changed forever.

Here are their stories.

THE 3(16) ADMINISTRATOR

AT FIDUCIARY OUTSOURCING, A 3(16) ADMINISTRATOR IN PHOENIX, THE FIRM'S STRUCTURE AND TECHNOLOGY HELPED IT TRANSITION QUICKLY AND EASILY WHEN THE PANDEMIC HIT IN MARCH, SAYS FOUNDER AND PRESIDENT SUE PERRY.

"We have to be able to approve a loan or a distribution or process a payroll within hours of getting that request, so we had been structuring the entire company and putting technology in place for years so that we could work anywhere and do anything," says Perry, who is also a founder and majority owner of Edberg Perry, LLC, a Phoenix-based TPA.

With a disaster plan in place as well, "We were quite convinced that we could recover from a disaster. But we also had a plan to deal with how you set up a remote employee," Perry relates. In fact, the actual transition to 100% remote work—getting the two firms' combined workforce of 30 up to speed at home—was easy. "We actually went more towards the 'How do you set up a remote employee' side of our systems and processes, because, really, all we did was go remote," she recalls. "We didn't lose servers. We didn't lose data. We just sent the employees home." Rather, she notes, "Our challenges tended towards, 'How do we expand the tools we've built with our remote employees, to try to teach the employees who were in the office to be more efficient and effective at home?'"

Perry found that she had to distinguish between the three employees who had already been working from home and the employees who were now sheltering in place, since the shelter-in-place employees didn't necessarily have an office with a door that locks or a place where documents can be stored securely. "So we had to create it as two totally separate policies," she explains. "The shelter-at-home employees don't have a choice, while the remote employees are making a conscious decision to be home. We just think of it as being two different groups of people."

A NEW CULTURE?

With so many people at working at home, Perry found that one of her biggest challenges was figuring out how to stay connected to her employees—basically creating a different corporate culture. "It's really hard to do corporate culture and make people want to work for you" during a disruption like this one, she says. "I mean, if you're at home, what difference does it make which employer you work for? Say somebody else will pay you a little bit more. Will you leave?"

Maintaining a connection to each employee is not easy, Perry notes. "The clients are okay with the video stuff—we do a lot of video calls with clients. But to the staff, you're the person they talk to once a day, the one who calls to ask them how they're doing. It doesn't have that personal touch to it anymore."

She continues: "I have a feeling we may be months away from going back still. What will that look like? How do I connect with my employees? How do I make them feel part of the team, other than once a day when they have a call with their manager and once a week when we have a team meeting—a meeting in which nobody can really communicate well anyway, because there's too many of us on the phone. We're starting to lose our connections."

IMPACT ON SALES

Clients who were in the middle of setting up services with Perry's firm, for the most part, put about a six-week hold on the process. "They were too overwhelmed to think about setting up with us," she explains. "Where we've taken a big hit is in sales. The sales have been completely dead. We were adding 7 to 10 plans a week just before the pandemic. We've put on three during the months of April, May and June. Sales starting picking up slowly again only in July."

Fiduciary Outsourcing gets most of their business through recordkeepers, Perry explains. "We plug in to provide 3(16) [administration] when they don't have it. That drives most of our

business. Their sales are down—and when their sales are down, my sales are down."

But the firm's proposal volume is back, which means they're starting to do finals presentations again—all virtual. "We're starting to see attorneys reviewing contracts again," Perry says. "We believe that by September, we'll be back up and running again and that, by the end of the year, sales will be back to normal."

OUTSOURCING OPPORTUNITIES UP

The furloughs and layoffs in March and April also had an impact on Human Resource staff that created "an unexpected little bright spot in all of this," Perry says. As she notes, "when you've laid off all those people, either your HR department is overwhelmed trying to deal with the layoffs, or you've laid off your HR staff too."

This created an opportunity that didn't exist before, Perry explains: since there are fewer staff in HR, it's now much easier to connect with those people about 3(16) administrative services. "There either is no HR person or the HR person is dealing with the layoffs and the rehires and the benefits and everything else," she observes. "It's actually easier to have a conversation now about, 'Oh, come on, you do want to outsource the retirement plan administrative duties that are left on you, right? You don't want to mail that stuff anymore. Do you want me to do it?'"

Perry believes that recordkeepers might be seeing the same dynamic. "I'm seeing more sales come in with the recordkeeper's e-services, those kinds of do-it-for-me services, turned on," she notes. "The reason is that the clients don't have as big an HR staff anymore. And the HR staff that are left are overwhelmed."

Now that employers are starting to decide what the "new normal" is for them, she says, "they're coming back and saying, 'Listen, we've got enough to do without this. I don't want to deal with it anymore. I'm willing to outsource it to you. Oh, and I can pay for it from the plan? Even better.'"

THE ACTUARY

WHAT'S STEP 1 WHEN AN UNFORESEEN BUSINESS DISRUPTION HITS? "Even though it was busy season, when something like this happens, you put the brakes on everything to analyze what's best for the client—and our advisors, who are the heart and soul of building our business," relates Joe Nichols, DWC's Director of Actuarial Services.

"What we did first was stop, analyze everything that was going on, especially in regards to the bills that were coming out of Washington, and then put together communications to plan sponsors that went up within days," Nichols says. "Our website is just packed full of information. So not only is it a resource for our plan sponsors and our advisors, but a resource for us internally as well." DWC had an internal webcast the day before they reached out to the firm's clients to ensure that everybody was on the same page in regards to the new information.

"For our defined benefit clients, we suggested they freeze their plans so that no benefits accrue this year," he says. Nichols estimates that about half of them took that advice. "It was very important for our clients to step back. They had a lot of things to worry about."

Since most plans provide that participants don't earn their benefit until after they work 1,000 hours (typically in June), Nichols and his five-person DB team at DWC had plenty of time to craft amendments, he notes, "and take one thing off their list that they didn't have to worry about as much. We then communicated that we can reassess options this fall to see who wants to unfreeze their plan and go from there."

DWC paused their client acquisition efforts for nearly three months. "One of the decisions that we made right off the bat was that it just wasn't a good time to do marketing. Saying it wasn't appropriate is a little harsh, but it's pretty close. It just felt like it wasn't a good time to be saying, 'Hey, we're great. You need to come work with us.' They've got a thousand other things to worry about." In addition, all of DWC's resources were focused on helping the firm's existing clients.

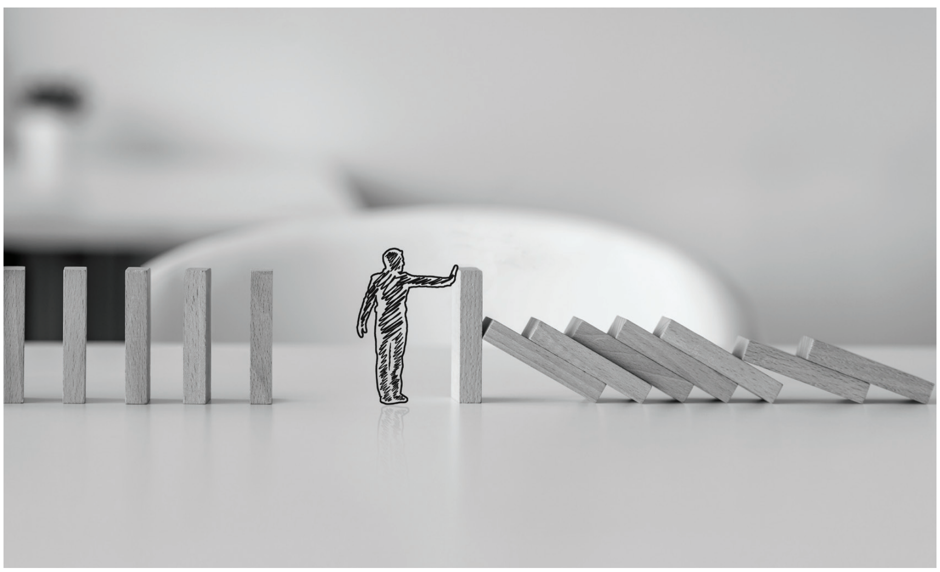
As Nichols notes, "All the events were being canceled. All the meetings that had been set up with advisors were canceled—they can't travel, and we're not traveling. And advisors weren't doing new business anyway, because they were talking to their current clients as well."

OPPORTUNITIES

Nichols does see new opportunities arising in the midst of the pandemic. "Some of the industries that before maybe weren't great cash balance candidates all of a sudden were. I talked to one prospect who does online training for health care professionals. As you can imagine, he is going to be very busy for the next few years."

As we get further into the fall marketing period, Nichols recommends keeping an eye on traditional firms that never had a cash flow issue before this year. "I think most of them are starting to see a recovery, he observes. "Dentists were hit hard. They weren't before. Cardiologists weren't doing surgeries, but they're coming back. We see dentists start to open up again."

Of course, there's the flip side. "We had some travel companies that were doing really well," says Nichols. "I don't see them coming back very soon. But what I think will be more interesting is the number of new industries that might be well suited for a cash balance plan going forward."



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THE ATTORNEY

"ONE OF THE WONDERFUL THINGS ABOUT WORKING IN 'RETIREMENT LAND' IS THAT WHEN THINGS ARE REALLY GOOD, PEOPLE NEED US, AND WHEN THINGS ARE REALLY BAD, PEOPLE STILL NEED US," observes Alison Cohen, a Partner at Ferenczy Benefits Law Center in Atlanta. During the pandemic, "We were probably the busiest that we've been in a very long time," she reports.

The firm's employer clients had questions, of course: What is the impact if I furlough people? What is the impact if we have to shut down? How does that affect our matching contribution? What do we need to do with the plan design? "We have had a lot of very personal contact with our clients" during the pandemic, Cohen says.

> "HALF OF THE FOLKS SAID THEY LOVED THE VIRTUAL FORMAT, AND HALF THE FOLKS SAID THEY CAN'T WAIT TO GET BACK TO FACE-TO-FACE CONFERENCES."

"We've had tremendous opportunities to constantly communicate and educate—to help people understand these very complex and ever-changing rules—publishing newsletters, trying to keep people informed as things progressed," she adds. "We also have found lots of opportunities for people who are looking for webinars, so we have done a lot of speaking work through webinars and reaching out to people that way."

While most of those webinars were focused on the pandemic, Cohen notes that they found demand for another topic: with conferences being canceled, and with them most of the major opportunities for people to get their CE credits, webinars providing ethics credits proved to be popular.

Pursuing those opportunities naturally led to "lots of new ideas that we've had—holes that we've seen that we're going to look at to see how we can help in some of those areas." For example, Cohen says, "fiduciary education seems to be something where folks did not understand their obligations as far as how to communicate with participants, what resources they had. I think any firm that didn't take advantage of this as an opportunity to reach out to clients and educate them really missed an opportunity."

IN-PERSON OR VIRTUAL?

The Ferenczy firm cosponsors a conference in Atlanta every spring, which had to go virtual this year. "We had over four times the number of attendees for the virtual conference than we normally do for the in-person conference," Cohen relates, mainly because attendees didn't have the cost of travel and lodging. But when they asked attendees whether they would prefer in-person or virtual in the future, the result was an even split. "Half of the folks said they loved the virtual format, and half the folks said they can't wait to get back to face-to-face conferences," Cohen reports. One of the advantages of being at a conference is being able to interact with the speakers and network with your colleagues, she points out. "You're not getting that through the virtual. And I think without that exchange of ideas in person, a lot of which happens off of the dais, you're missing out. It's just not the same."

A PARTNER, NOT A VENDOR

Overall, Cohen came to view the pandemic as an opportunity to really show your personal value to clients. "I don't think there's a single one of our active clients that we did not, at some point, get on the phone with, even just to check in and ask, 'Hey, is everything okay? Do you need any help?' It gave us an opportunity to show why we are different in our service model as a law firm, that we're not reactive. And I think by showing your clients that you have that compassion, that proactive stance, I think firms have an opportunity here to really win their clients for life.

"If clients know that you had their hand when they were falling down, when they were troubled, then that speaks volumes. Then they're going to stay with you. They're going to think of you as not just a service vendor, but as a partner. And that's the type of long-term relationship I think folks should be looking for."

THE ADVISOR

AT TAMPA-BASED INDEPENDENT FINANCIAL PARTNERS, THE COVID-19 CLOUD HAD A SILVER LINING. When travel was interrupted, "It was the longest I've not gone anywhere in I can't even tell you how long," recalls Jeff Acheson, the firm's Chief Business Development Officer. "But you know what's funny? It turned out to be the most productive three and a half months that I ever had, because we got caught up on a lot of things we were doing, as well as some planning and organizing for the post-COVID environment we see coming." At the 55-person broker-dealer and RIA back-office, interactions with its client base benefited too, as its 250+ advisors often found it easier to reach clients because they weren't traveling or moving around much either.

With the SECURE Act followed almost immediately by the CARES Act, there was a lot of information to push out to clients. "Everybody was scrambling around," Acheson recalls. "'What do these amendments mean? Should I sign them? What should we do with the PPP?' and so on. So, it was a very, very busy time for all of our advisors and clients."

With all that essential client interaction, Acheson notes, prospecting and marketing took a back seat. But he sees that changing industrywide in the months to come. "I think the opportunity for marketing, prospecting and sales will be the last half of the year," he says. "It's going to come from advisors who did a good job during the pandemic, and are going to be reaching out to prospects to say, 'Hey, just wanted to check in. How responsive was your advisor when the pandemic hit? What kind of service did you get during the first half of the year, and are you happy about it?'

"I think you're going to find those clients who felt their advisor left them adrift, without much guidance or input, or didn't see handholding at the participant level, will say, 'You know what, if that's an example of the service I get when things get tough, I need to find a different relationship.' So, I think there will be winners and losers amongst advisors in the next 12 months."

VIRTUAL MINDSET

"We always thought that we couldn't do our best work unless we were eyeball to eyeball or knee to knee with someone," Acheson observes. But when the pandemic hit, advisors morphed to a virtual mindset. "They had no choice," he notes. "And so, Zoom meetings, GoToMeetings, you name it, became the norm." Acheson recalls one client in particular for which he would run all-day sessions with participants once a month—from 6:00 in the morning until 6:00 at night, and always onsite. "I thought that was the only way to do it," he laughs.

When the pandemic hit, they flipped that client to virtual meetings using an online calendar scheduling system. "People were so appreciative of the fact that we didn't just cancel the meetings," recalls Acheson. "In many cases, in fact, they found them more helpful because they may have been working from home, and their spouse might have had a question. It was easier. Nobody had to travel. We could bring their account up on the computer screen on both ends and look at it together. And they would say, 'I like this. It's really easy. If I ever have a question on my account, can we set up another one of these meetings?' Our response: 'Sure, anytime, we're here for you.'"

Looking back, Acheson asks, "Why was I doing all that traveling before? That was an expense, a time suck and time away from home that is now somewhat unnecessary. I think the world changed in the last six months. The geographic boundaries are gone because of the success of virtual communications. People can be anywhere. Where you or your client is physically located is now irrelevant."

To Acheson, this spells opportunity. "So now your service does not have to be calendar driven, travel driven, even in some cases time driven," he explains. "I think the efficiency opportunities going forward, coming out of COVID, makes for an even better business opportunity than it has been in the past because it's more cost effective; it's more efficient; it's more flexible."

REFOCUS: PEOPLE, NOT PLANS

"I think the COVID experience has hit everybody upside the head," Acheson believes. "In some cases, participants are saying, 'I can't take things for granted. I wasn't prepared and it really, really hurt.' In other cases, it could be the business owner who says, 'I wasn't ready either. But we survived.'

In other words, many people weren't thinking about their retirement, Acheson says. "They were thinking about their financial wellness, their financial survival, their financial confusion. Going forward we will have great opportunity as an industry to demonstrate and enhance our value to those we serve by being a coach,

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advisor and advocate in a financial wellness/financial independence planning model. Bottom line, we can be that holistic, go-to trusted resource."

What's the best way to do that? "First, we've got to start talking more about financial wellness and financial independence, and less about retirement," Acheson believes. "Yes, retirement is the ultimate financial independence, but some people have to get financially healthy before they can become financially independent."

He also believes that as an industry, "We've gotten too focused on being in the retirement plan business, and not focused enough on being in the people business. If we lose sight of the fact we're in the people business, we'll start to get commoditized right out of business—meaning if we lose our respective brand promises and concede our value proposition to technology as the primary driver of value, then we'll all work for Amazon someday.

"So, what I learned during this crisis is that there's a massive opportunity to get back in the people business and to be less focused on making the top-down service model the differentiator. People want to be touched even if it's virtual. The lesson is: still be high touch, even if you're using high tech."

Ultimately, he believes, "What kept our clients was the service that they received. And I think that is what's going to land new clients, in part because of the service others didn't get in their current relationship. When things get scary, people want somebody to talk to.

"It's easy when things are good. It's when things get challenging, like this last year, that the great practitioners are separated from the mediocre practitioners, and clients migrate to where they're taken care of."

THE FUTURE

In Acheson's opinion, the world has changed permanently and will continue to do so at an "unbelievable" pace. "Very rarely do we have these watershed moments in our careers where everything is being reevaluated and reengineered," he says. "When the pandemic hit us, we had to think about everything—technology, service, interaction and the digital experience. All those things that we liked to talk about in meetings for years. 2020 made us figure how to execute in real time, and now the light bulb's really coming on. We're saying, 'You know what? There are some different paths forward here. How can we capitalize on what we learned and bring more value to the people we serve?' What an exciting and satisfying time to be in the people business!"

THE SMALL RECORDKEEPER

FOR MOST SMALLER RECORDKEEPERS, THE KEY ISSUE DURING THE PANDEMIC IS THE PRODUCTIVITY OF THEIR SMALL WORKFORCE. So how did the six newly remote employees at FutureBenefits of America, a 12-employee recordkeeper in Arlington, TN, fare from a productivity standpoint?

"Who has the ability to monitor themselves and motivate themselves? That's really the $64,000 question right there," says Tony Michael, the firm's founder and President. Noting that FBA "is not a micromanaged office," he explains: "Our staff know what their job is and what they're supposed to do. But there is a little bit of pressure when you're together and people are around you, and your supervisor is around, that motivates you to get your job done. Not everybody has that ability."

Nonetheless, FBA fared pretty well, Michael says. The employees who moved offsite—about half the workforce—were able to motivate themselves. "I think a lot of it has to do with the fact that it was mainly the record keeping processing people," most of whom were moms with kids at home, "who were mainly out of the office; the admin people were the ones who were still here."

Michael also sees another part of the equation: the nature of record keeping, with its frequent deadlines during the day. "Theoretically, we let them manage their own pieces of business, and as long as those deadlines are met and the work gets done, they can work at their own pace. It gives them a little bit more flexibility in the process," says Michael.

That's where company culture comes in. "One thing I have learned over the years is how important it is to build a culture within your staff. We really took that to heart more than 10 years ago," he says. "Once you build that culture, when you start hiring, you hire people who fit that culture. They don't necessarily have to have all the other skills; we can train them on record keeping. After all, no one goes to school and says, 'Hey, I want to be a record keeper.'"

With people who fit within that culture, "I think you can start giving them a lot more responsibilities, and you can rely on them that they're going to want to do their best work," Michael explains. "I think that has helped us dramatically" through the process of getting them working at home he says.

"What I sense is that people's motivation, their ability to work, is enhanced by the relationships they have," Michael says. "And we're a close knit group here. We like each other, we enjoy each other's company, we feed off of each other, and that motivates us and helps us to have the energy and all those other things that help you work better."

IMPACT ON SALES AND MARKETING

Building relationships with advisors is how FBA develops new business, says Michael, who handles marketing and sales. "Nationwide, we probably have 150 different advisors who have put one plan on our books, and probably about 15 or 20 that are pretty big sellers," he explains. "My big sellers were completely slowed down in March. I think it depends on where you are in the country. In places like New York, California, Washington state, things came to a complete halt. But even my advisors in Texas were slowed down quite a bit. But now I am seeing a little bit that we have started to generate interest again, and things are picking back up."

How are things looking on a longer-term basis? As a provider of both open and closed MEPs for more than 10 years, FBA is well positioned to take advantage of its presence in the multiple plan market, especially in the wake of the PEP-related provisions of the SECURE Act.

"Interest in MEPs has never really stopped," Michael says. "It did slow down a little bit because of the pandemic, but now we're seeing more interest. I've had quite a few people who want to build platforms that would bring in multiple plans. So I'm not really concerned about what will happen the rest of this year, because that momentum really never stopped."

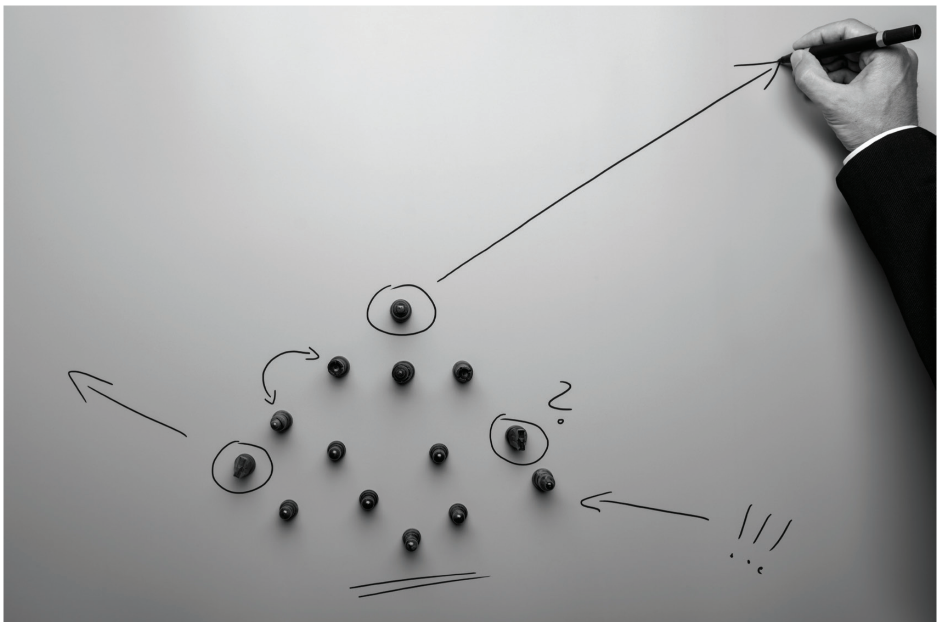
THE WHOLESALER

AT PCS RETIREMENT, ONE OF THE FASTEST GROWING NATIONAL RECORDKEEPING FIRMS IN THE COUNTRY, there's been a silver lining to at least some of the challenges created by the pandemic. "Honestly, from a project management perspective, it's been sort of a blessing," says Chad Azara, the firm's Senior Vice President of strategic sales. "There's a lot more focus, in part because of the remote meetings that we are having as a team. On the technology side, we're able to push out more enhancements and upgrades—I guess because people aren't being pulled away as much in the other meetings and the focus is better."

Azara, who previously directed national sales for PCS, now focuses on strategic relationships, distribution, outsourcing deals, white labeling deals and larger institutional relationships, along with banks and trust companies across the country. "We've struck new distribution deals with firms and partners, we're getting a lot of new referrals and getting introduced to advisors and other institutions that we didn't explore before, and it's been very, very productive," he says. "So that's been a benefit."

Additionally, Azara has been working on a couple of outsourcing deals for new partners that are outsourcing to PCS. "We've had due diligence meetings that were all virtual. We set it up and we still have the same agenda. We can get everybody on the phone, so we're not really traveling too much."

The same dynamic applies to sales finals, he notes. "I think in more formalized meetings, you can have those meetings virtually versus having me fly in in my suit and present face to face. We can do the same things virtually, through web meetings or video calls, that I can do in person, and I can show a demo much easier. That's always my biggest worry when I go in for a sales final—is this technology going to work? Is my laptop is going to sync up with their wifi or their HDMI cord? I know I'm not going to have that issue if I'm doing it from my office and sharing the screen. And they still get to see who I am, they still get to feel me out and see if they believe what I'm saying and I'm a truthful and honest person."



Azara sees that shift becoming standard practice after the pandemic fades. "I think that is going to stay. Some people are going to want to meet you and go to dinner and things of that nature. I think that will never go away because people need that interaction, but I'm not sure if it's all going to go back to the way it was before," he says.

For a "road warrior" like Azara, what's it like adapting to life off the road? "I like being home," Azara admits. "I mean, I feel like I get a lot more done. I feel like I'm having deeper conversations with advisors. They're not as distracted; I'm not as distracted. So I feel like things are a little more productive now.

"I've been doing this for a long time, so I know a lot of people and I have a lot of connections. If I was new or newer to the industry, it probably would be very difficult because you can't have in-person relationships. The personal side of the business and that face-to-face interaction—there is a ton of value to that, in my opinion. But if they already know you and they feel comfortable with you, you can have that same interaction over the computer that you do in person."

THE LARGE RECORDKEEPER

WITH CLIENTS IN ALL 50 STATES, 6,900 PLAN SPONSORS, MORE THAN 360,000 PARTICIPANTS AND ABOUT 300 EMPLOYEES, Alerus Retirement and Benefits ranks among the largest unaffiliated recordkeepers in the United States. It's also a nationally chartered trust company, handling trust and custodial in-house. And as part of its diversified model, its parent company also offers health & welfare administration, payroll, banking, mortgage, and wealth management services.

ALL HANDS ON DECK

What were the early days of the pandemic like at Alerus? For participants, "of course, the pandemic spurred requests for COVID distributions," says Mark Alley, Alerus' National Market President. "How do you determine whether or not this is a COVID distribution? How do you handle spikes in call center volume and make sure that we're getting back to people on a timely basis? How do we help to educate our partners—whether they're TPAs or financial advisors, or plan sponsors or participants—about what the new legislative changes mean to them personally? How do we navigate through all that?"

And so initially the firm devoted a significant amount of effort to understanding the new CARES Act changes, and then relating that information back to participants and channel partners—in very short order, Alley says. "It was certainly challenging, but it was all hands on deck," he recalls.

In addition to creating new participant forms and posting them and other information online, Alerus also created a series of informational webinars targeted at advisors, plan sponsors and participants.

With the vast majority of employees working in Alerus' offices, the firm also faced challenges in getting them up and running at home, but was able to surmount those difficulties fairly quickly. Now Alerus leadership is exploring the pandemic's ramifications longer-term.

"We're not the only organization having this discussion, but we're looking at it and saying, 'Is this going to change the way we work long term? Is it more effective to have employees working from home?' And at the front end, the answer is absolutely yes," says Alley. "Productivity has gone through the roof. Why is that? Is it because there's nothing else for people to do at this point in time?

"I think that may be part of the reason," he acknowledges. "But if we look back to 2008, when there was an initial shift of people working from home because of the financial crisis, over the long term, studies have shown that those employees do tend to be more productive." But he also acknowledges a downside: "I think there are some cultural factors and social learning that go by the wayside a little bit during something like this. But so far, I think many of our employees are happy to be at home—although certainly some are not—but they're more productive, and they're not spending an hour and a half commuting every day."

CLIENT CONTACT

When the shutdowns began, "people froze, the same as they did in 2008, and in 2001 after 9/11,"Alley recalls. So Alerus put together an organized client outreach campaign—"just reaching out to clients to see how they're doing; not to sell anything, but just ask, 'Is there anything we can do to assist you?'" says Alley. "And really, it was wildly successful. It allowed us to gain rapport with our clients, and our advisors, and let them know that we're out there to work with them."

So while COVID-19 proved to be a great client retention tool, it also shut off sales for a period of time, Alley notes. But that began to change in May and June, as Alerus started to see a normalization of the business cycle.

Of course, it's still essentially impossible to do on-site meetings. "There are some challenges to that," Alley acknowledges. "But by and large on the retirement plan side, oftentimes because we work through advisors, we may never see that client anyway, because the advisor is at the point of sale."

VIDEO ENROLLMENT

"We have seen quite a few deals coming through now; I'd say we're reaching a normalization" in terms of new business, says Alley. But "the hard part is the employee education/enrollment side," he adds. So through its video enrollment system, Alerus recently launched virtual one-on-one participant meetings. "So we can assign individual financial advisors at the participant level and offer them one-on-one virtual meetings through WebEx to fill the void," Alley explains. And of course, Alerus continues to do virtual enrollment meetings for groups as well.

Most of these "new things" aren't just responses to the pandemic, he notes—most of them, like YouTube education and video enrollment, the firm had already built and used for years. But Alerus has found that video enrollment works "phenomenally well" as an entry point for people who are using online enrollment, Alley says.

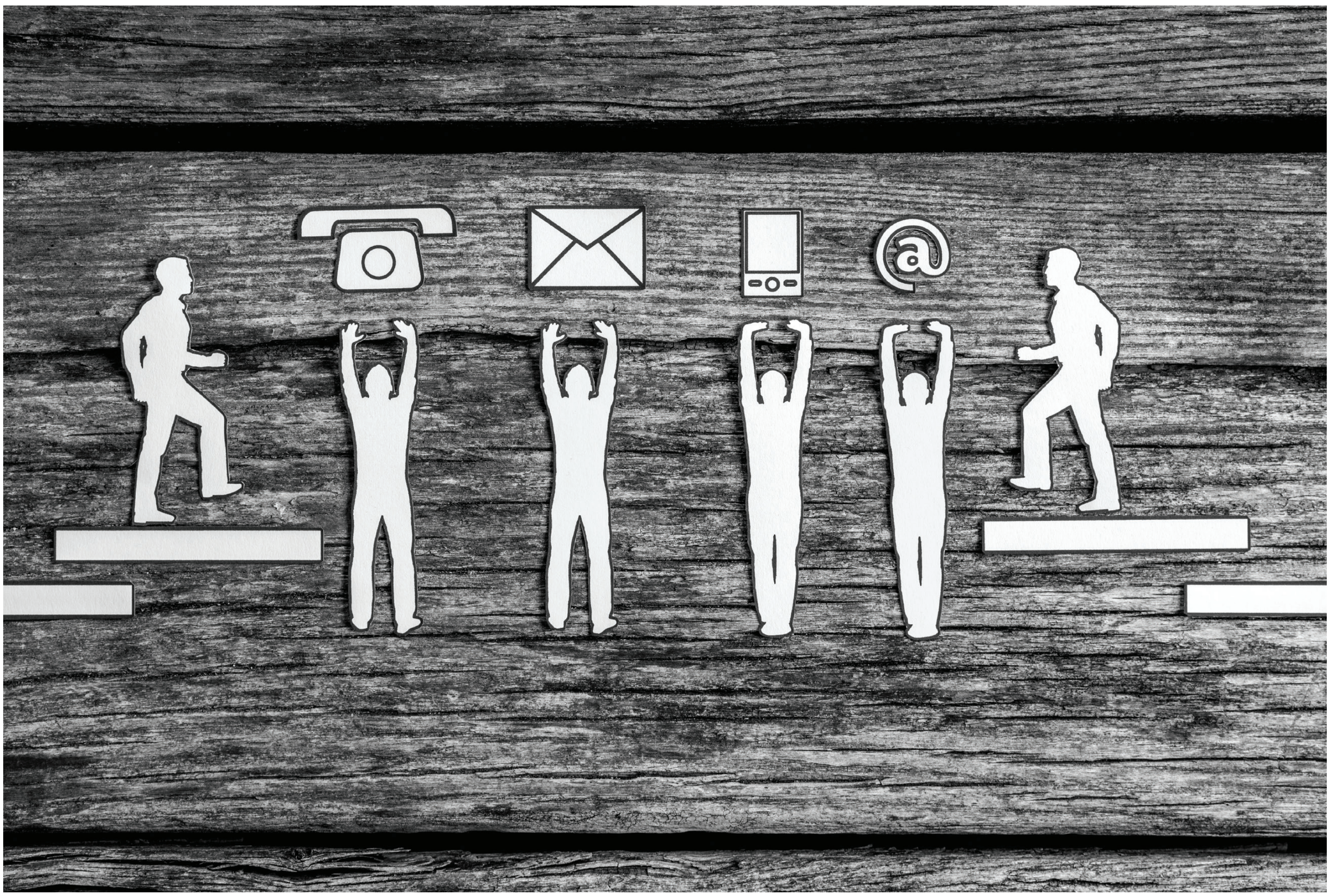
"I think people are finding out how efficient video enrollment is, and I think Zoom or WebEx or whatever you want to use can be very effective as well," he notes. "But it won't completely replace on-site meetings. Rather, it will augment it. There's a lot of value to that one-on-one human interaction."

HUMAN CAPITAL

For Alerus' senior executive team, "It mainly comes down to staffing," Alley emphasizes. "The recordkeeping game really didn't change with COVID-19. As a recordkeeper, people look to us to do certain things. Sometimes that is employee education or interacting with clients. And so as we looked at that, I think the biggest change is the realization that we have much more flexibility with our human capital and workforce. It may be preferable for that workforce—and employees may prefer—to work from home."

That dynamic, Alley notes, is likely to change the way that firms like Alerus recruit talent going forward. "It does allow us to cast a broader net to get talented people that are going to best serve our clients across the country," he says. "We should be able to get our talent from anywhere."

He adds: "It's the same old world, but as we've worked through this, it shifts the paradigm of what we believe. It forced us to take a look at how we should be structured. What is the most effective way to shape our workforce? And I think that's a good thing, not only for our organization, but for all organizations. As long as we're willing to adapt, we'll be better for it."



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THE TPA


Tim Corle

FOR MANY COMPANIES, THE BUSINESS INTERRUPTION CAUSED BY COVID-19 BEGAN ABRUPTLY. "On a Friday they kicked us all out. I had to lock the doors of my 40-year-old company, not knowing when we were coming back," recalls Tim Corle, President and CEO of Tycor Benefit Administrators, a TPA in Berwyn, PA. "But we were all able to work and be productive. On Monday, we were all up running and going."

Some of Corle's 20 employees had been asking him to work from home for years, and were ready to make the transition smoothly, he explains. "But the rest of us were sort of freaked out," he recalls. We need the camaraderie, we need the water cooler chat, we need the face-to-face interaction, to get through the day."

So like many companies, Tycor adopted Zoom. Every morning at 8:45, Corle hosts a daily "huddle" meeting via Zoom. "Everybody sees everybody's face," he says, which gives those people who are lacking interaction with co-workers a sense of connection to the company. "And I wanted to see everybody," he adds. "I wanted to make sure they were all doing okay. And if they had concerns or anything else, there was a platform to voice them." Corle also hosts weekly "town hall" meetings on Zoom, where he provides updates on various aspects of the company.

Helping employees stay connected to each other has become a priority for many firms. At Bloomington, MN-based TPA Goldleaf Partners, part of FuturePlan by Ascensus, the shared adversity brought on by the pandemic has brought the team closer together, observes Wendy Hyre, Goldleaf's President. "It's been inspiring to see people come together while working remotely to support one another through truly one of the most extraordinary times of our lives," she says.

Hyre notes that Goldleaf, which was acquired by Ascensus and became part of its FuturePlan line of business in November 2019, has also benefitted from being covered by FuturePlan's overall national pandemic response strategy. "FuturePlan made sure that our team was prepared to respond immediately when the crisis hit," says Hyre. "We had the training, resources, and technology infrastructure to support not only all of the partners and clients who depend on us, but also our associates."

Looking forward, "I think we'll continue to keep our focus on people during any disruption that we experience in the future, because it's the people that make our business," says Hyre. Whether that means safety and concern for employees and their families, focusing on wellness from home, or stress relief coaching, Hyre says, "The pandemic reinforced that it's the people that matter the most."

IMPACT ON OFFICE SPACE

Before the pandemic hit and Goldleaf went fully remote, a little less than half of their associates were already working remotely, with the rest in three separate offices. In the wake of the pandemic, Goldleaf's approach to maintaining large groups of associates in the offices changed "drastically," says Hyre, noting that a survey of employees found that just 13% of them prefer to work from the office full time. So the firm has already let two of their leases expire, and plans to let the third one expire later this fall. "I think this is going to be a trend across the country," Hyre observes.

When it's safe to return to a physical office space, Goldleaf plans to do so in drastically reduced square footage, reopening in just two smaller spaces. There will be a few essential staffers in each of the offices, and those who really want to be in an office—the 13%—will be accommodated there. "We've communicated all this to our staff so they're all fully aware—and 87% of them are super excited about it," Hyre reports.

CLIENT CONTACT

Like many in the industry, Corle sees the value of live video. "We use Zoom or GoToMeeting for trustee reviews, trustee meeting reviews on the advisory side, plan design reviews on the consulting side, on the TPA side," he says. "I think the meetings have become more efficient, because they are probably lasting half the time that they used to."

For the most part, clients have loved that because it saves everybody time, he reports. "But what also it does is you get a little more intimate with your clients. Since they are working from home too, you just got invited into their house. They might be in their living room and you're talking to them, and their husband or wife might walk by, or their kid might walk by. It provides a different level of relationship building, just by the nature of where they were connecting to have this meeting."

CLIENT ACQUISITION

The same dynamic applies to prospecting, Corle observes. "You're not meeting in a conference room now, or in an office where there are phones and other distractions. People are inviting you, effectively, into their

home or into their private space for these meetings. And it's pretty cool. I didn't really see that coming, but I started to notice it right away."

For financial advisors, prospecting took a back seat to caring for existing clients when COVID-19 first hit in March, Hyre notes, as they switched their focus to helping them manage through the ensuing market volatility. Since Goldleaf is a financial advisor-centric business, naturally they saw a decline in prospecting activity at the outset. But it has improved gradually since then. "Our April numbers were down, and our May numbers were low," she says. "But since then, they've continued to come back up."

Goldleaf is also seeing more activity in the 3(16) space, Hyre reports. "We're seeing some that are up-market a little bit as well—not just the small businesses who've lost their staff or let them go or furloughed them. We're also seeing that up-market activity in some bigger deals as well." That is partly due to Goldleaf now having a national 3(16) through FuturePlan, she observes.

ACQUISITION ORIENTATION

Tycor's Corle highlights another opportunity that he has been pursuing during the pandemic: business acquisition. He is focusing on TPA shops and advisory shops that don't have a succession plan. "There are a lot of smaller shops out there that aren't up on technology, and [the pandemic] may have broken them," he explains. "They may have said, 'Look, I'm done. I'm going to exit this business and retire.' So I'm looking at that as an opportunity to acquire and merge some businesses into ours."

Corle is not alone in this regard—there is a significant amount of consolidation spurred by the big aggregators—but he sees the virtue in finding a niche and building on success. "I pick up the smaller firms that Ascensus doesn't want," he explains. "So, if people aren't thinking about it, honestly, they probably should be, because there are a lot more tiny plan providers out there than we know about. So if you buy three or four tiny ones, now you become a small one. Buy a few more, and now you become mid-sized. Buy a few more, and now, if you want to exit, you can sell to an aggregator because you've got critical mass." PC

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The Retirement Income Stream

There's little evidence of movement in either employers expanding their distribution options or changes in participant behavior.

By John Iekel

A reservoir is a vast resource. But it isn't static, and it must be managed responsibly. And so it is with retirement accounts—they provide a necessary flow, but that income stream must be well-managed. How that flow is handled, and how well the resource is maintained, depends on how the funds are invested and how they are drawn down.

This fact has been brought into sharper relief by increasing concerns about outliving one's nest egg. While factors such as obesity and drug use are exerting downward pressure on the average lifespan in the United States, the overall long-term trend is toward longer lives.

The most recent U.N. World Population Prospects report shows that the current life expectancy in the United States in 2020 is 78.93 years, and the Centers for Disease Control in its 2019 National Vital Statistics Report shows that in the last 40-plus years, the figure has been lengthening steadily:

Period	Average Lifespan	Change in Average Lifespan Since Last Period
1969-71	70.75 years	—
1979-81	73.88 years	+3.13 years
1989-91	75.37 years	+1.49 years
1999-2001	76.86 years	+1.49 years
2017	78.61 years	+1.75 years

With long-term increases in average lifespan, the possibility of outliving one's retirement savings is a legitimate concern. "The risk of running out of money is real and the want for an enjoyable retirement is also real," says the Global Atlantic Financial Group in its 2019 study of retirement spending.

Better Together?

Couples are better positioned to have higher retirement income, according to Global Atlantic's study, which found that they are more likely to have income from savings accounts and defined contribution plans, and twice as likely to have investment portfolios. Couples are also more likely to have pension plans, Global Atlantic said, which they suggest will serve them in good stead—they also found that retirees whose income came from pensions or annuities could handle "significantly more expenses" than retirees whose income came from other sources.

However, other studies warn that couples need to be careful. The Center for Retirement Research at Boston College, for instance, found that for many two-earner households, only one of the couple has a 401(k)—a situation, they argue, exacerbated by the number of private-sector workers whose employers do not offer a retirement plan.

Geoffrey T. Sanzenbacher, associate director of research at the Center, and Wenliang Hou, a senior research advisor there, report that the Center's research found that in such couples the individual with the 401(k) does not have a contribution rate higher than do members of other couples. The Center also found that two-income households with only one person saving for retirement save less of their total household earnings than savers who are part of other couples. Further, Sanzenbacher and Hou write, there is evidence suggesting that the share of individual earnings that members of dual-earner couples contribute to their 401(k)s is similar to that which savers in single-earner couples contribute.

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Income Streams

One of the ways to assuage concerns about lifespan exceeding one's nest egg and the problems occasioned by inadequate saving, especially by couples—and more importantly, increase the likelihood of a financially secure retirement—is to have a reliable retirement income stream.

The benefits of lifetime income strategies "are clear," wrote Mendel A. Melzer, CFA, Chief Investment Officer of The Newport Group and Julie Leinenbach, CFA, FSA, Sr. Investment Research Analyst there, in their paper, "Evolution Scorecard for Retirement Income Products." Such strategies, they write, generally eliminate the risk of a participant outliving his/her savings, protect against the diminished benefits associated with a market downturn and enhance participant-directed retirement plans.

Leinenbach and Melzer note that there are many variations regarding the strategy by which one can work to guarantee that a participant does not outlive his or her retirement income stream; for instance, managed payout funds, guaranteed minimum withdrawal benefit strategies with an annual increase, annual guaranteed increases and non-insurance solutions such as managed payout funds.

Factors to Consider

Leinenbach and Melzer write that new lifetime income options "don't easily fit within existing frameworks" by which more traditional investment options are measured and managed, and offer suggestions regarding factors to consider when evaluating lifetime income strategies and measures by which to assess their suitability:

- Understand the performance of underlying investments compared to appropriate benchmarks.

- Determine the flexibility participants can exercise in choosing the risk entailed in investments.
- Consider insurers' strength; when a retirement income product has multiple insurers, they each are responsible for only part of a guarantee, and any insurer which is at risk will put at least a portion of an investor's funds at risk as well.
- Be aware of the cost of guarantees and the cost of retirement income products.
- Consider operational flexibility, mindful of the need for an available vehicle for retaining a retirement income product's guarantee if a participant leaves the plan and a plan sponsor's flexibility to adopt an alternate platform if it is unhappy with its recordkeeper.

The SECURE Act and Income Streams

The Setting Every Community Up for Retirement Enhancement (SECURE) Act, which President Trump signed into law Dec. 20, 2019, includes three provisions directly relevant to retirement income streams.

Fiduciary Safe Harbor

The SECURE Act creates a fiduciary safe harbor for the selection of lifetime income providers. In a recent Groom Law Group webcast, Chairman Steve Saxon remarked that the fiduciary safe harbor provision makes the definition of what lifetime options can be included within a plan more encompassing.

Portability

The SECURE Act provides for the portability of in-plan lifetime income benefits in connection with changing providers. Presenters in the Groom Law webcast called the provision a "nifty fix" to what had been a difficult issue; however, Thomas Roberts, Principal at Groom Law

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Group, indicated from at least one vantage point, it may not be a panacea. He remarked that lifetime income products may be supported by only one recordkeeper, and that it can become "a big problem" if a plan wants to switch recordkeepers.

Roberts is not alone in skepticism concerning portability. David Morse, Partner at K&L Gates, does not think that this provision will be beneficial regarding retirement income streams. Why? "Retirees don't buy annuities," he says, explaining, "it's the 'annuity puzzle' described by Franco Modigliani in his 1985 Noble Prize acceptance speech. People are hard-wired against exchanging a pot of money for a smaller, steady stream of checks for an unknown period." More continues, "The only way to really change participant behavior is to go back to some form of defined benefit structure."

Disclosures Concerning Lifetime Income

The SECURE Act contains a provision requiring disclosures to plan participants that include lifetime income illustrations. Roberts said that the provision is intended to encourage plan participants to begin thinking about their retirement account balances, and not just as a whole, but also as a stream of income.

Will it succeed? Morse considers it "a question of framing." He continues, "A participant who sees her retirement savings as a lump sum amount is more likely to spend the money in early retirement (or during her career) then if she sees the account as a monthly lifetime income stream. That said, although a positive, I see lifetime income disclosure as moving the needle a tiny fraction toward annuity-type products."

Action Steps

There are steps that a service provider, a plan sponsor, an employer and even an individual can take concerning retirement income vehicles.

In Regulatory Notice 16-12, "Pension Income Stream Products," the Financial Industry Regulatory Authority (FINRA) reminds firms that they must independently assess whether a product is a security, especially when they determine how to treat an associated person's participation in the sale of such a product.

FINRA is aware that when firms assess an associated person's pension income stream activities away from it, some do not treat income stream products as securities, and rather treat them as outside business activities. In the notice, FINRA says that a firm is obliged to evaluate a proposed activity in order to determine whether it has properly characterized it.

Melzer and Leinenbach remind that investment options must be adopted and monitored by plan sponsors that are subject to ERISA, which says that plan sponsors must use a prudent process that would be employed by an expert in the field when selecting and monitoring investment options.

Sanzenbacher and Hou advocate several steps to improve saving by dual earner couples in which only one member saves for retirement:

1. auto-escalation of contributions with time
2. considering an individual's marital status when setting default rates
3. educating spouses about saving for two people
4. ensuring that all workers have access to a workplace retirement plan

"Providers and pundits are talking about" retirement income streams, says Morse, "but I see little movement in employers expanding their distribution options or changes in retiree behavior. The biggest positive is that there's a lot more educational guidance available to near retirees on how to make their savings last. Of course, the pandemic likely will change participant behavior—perhaps by tipping the scales toward savings over spending, but it is way too early to predict the long-term effect," he adds. PC

"The biggest positive is that there's a lot more educational guidance available to near retirees on how to make their savings last."
— DAVID MORSE, K&L GATES

DOL PROPOSES PPP REGISTRATION REQUIREMENTS

With the January 1 "go" date for pooled plan providers approaching, PPPs get some needed clarification on registering and reporting. By John Iekel

In August, the Department of Labor issued proposed regulations that would establish requirements for pooled plan providers (PPPs) to register with the agency.

The rule would establish the requirements for registering with the DOL as a PPP for PEPs under Sections 3(43) and 3(44) of ERISA. The SECURE Act provides that newly permitted PPPs can begin offering PEPs on Jan. 1, 2021, but requires such persons to register with the Secretary of Labor before beginning operations.

The SECURE Act expressly provides that participating employers will retain certain residual fiduciary responsibilities, including the selection and oversight of the PPP and the plan's other named fiduciaries. This, the DOL says, raises concerns that the potential for inadequate employer oversight of the activities of a pooled employer plan (PEP) and its plan fiduciaries and other service providers may be greater than for other plans sponsored by an employer, because the nature of the plan involves participating employers passing along more responsibility to the PPP than they do in other plan arrangements.

The proposed rule would establish a new form—EBSA Form PR (Pooled Plan Provider Registration)—as the required filing format for PPP registrations. Filing the proposed Form PR with the DOL would also satisfy the SECURE Act requirement to register with the Treasury Department.

A prospective PPP would need to file the following information 30 to 90 days before beginning operations as a pooled plan provider:

- Legal business name and any trade name.
- Federal Employer Identification Number (EIN).
- Business telephone number.
- Business mailing address.
- Address of any public website or websites of the PPP or any affiliates to be used to market any such person(s) as a PPP to the public or to provide public information on the PEP operated by the PPP.
- The name, mailing address, telephone number and email address for the primary compliance officer of PPP.
- The agent for service of legal process for the PPP, and the address at which process may be served on such agent, and, in addition, a statement that service of legal process may be made upon the PPP.
- The approximate date when pooled plan operations are expected to commence.
- A description of administrative and investment services that will be offered or provided by the PPP, including identification of any affiliates expected to have a role in the provision of those administrative and investment services, and a description of the roles of such affiliates.
- A statement disclosing any federal or state criminal conviction related to the provisions of services to, operation of, or investments of, any employee benefit plan against the PPP, or any officer, director or employee of a PPP, if the conviction, or related term of imprisonment served, is within 10 years of the date of the registration.
- A statement disclosing any ongoing criminal, civil or administrative proceedings related to the provisions of services to, operation of or investments of any employee benefit plan, in any court or administrative tribunal by the federal or state government or other regulatory authority against the pooled plan provider or any officer, director or employee of the PPP.

"THE PROPOSED RULE WOULD ESTABLISH A NEW FORM—EBSA FORM PR (POOLED PLAN PROVIDER REGISTRATION)—AS THE REQUIRED FILING FORMAT FOR PPP REGISTRATIONS."

REPORTABLE EVENT SUPPLEMENTAL FILINGS

The proposal also requires additional filings for:

- any changes in the previously reported registration information; and
- specified events affecting either the PPP or a plan it sponsors that may signal financial problems or other circumstances that could put the pensions of covered employees at risk.

PPPs would need to disclose, in a supplemental filing within 30 days after the change took place, any change in the registration information previously reported by the PPP as well as any one of the following changes in circumstances of the PPP:

- significant change in the corporate or business structure of the PPP, e.g., merger or acquisition;
- initiation of bankruptcy, receivership or other insolvency proceeding for the PPP or an affiliate, or ceasing all operations as a PPP;
- receiving written notice of the initiation of any administrative or enforcement action in any court or administrative tribunal by any federal or state governmental agency or other regulatory authority against the PPP or any officer, director or employee of the PPP, related to the provision of services to, operation of, or investments of, any PEP;
- receiving written notice of a finding of fraud or dishonesty by federal or state court, or a federal or state governmental agency, related to the provision of services to, operation of, or investments of, any pooled employer plan or other employee benefit plan against the PPP or any officer, director, or employee of the PPP; or
- receiving written notice of the filing of any federal or state criminal charges related to the provision of services to, operation of, or investments of any PEP or other employee benefit plan against the pooled plan provider or any officer, director or employee of the PPP.

AMENDMENT AND CORRECTION OF REGISTRATION INFORMATION

The DOL says that it intends that the filing system for registrations will allow PPPs the ability to file corrections and amendments of their registration and reportable event filings. Under the proposed rules, inadvertent or good faith errors and omissions in a filing's content generally would not be treated as a failure to register, as long as a corrected or amended filing is submitted within a reasonable period after the error or omission is discovered. And if a correction only concerns information previously reported, a person would indicate on the form that the filing is an amended filing, not a supplemental filing.

The proposal also would require a final filing once the last PEP has been terminated and ceased operations. The final Form PR filing would be due within 30 days of the filing of the last final Form 5500 for the last PEP the provider operates.

In addition, the proposed rule includes a provision requiring electronic filing of all PPP registrations. **PC**

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DIY: UPDATING SERVICE AGREEMENTS

10 tips for rewriting your service agreements yourself. **By Peter Gulia**

Smart retirement services providers are using the current disruption of business activities as an opportunity to put in some time and effort on the fundamentals of running a business. One of those is making sure your service agreement protects your business.

These 10 tips can help you rewrite your agreement to get stronger protection. The focus is on methods that don't depend on hiring a law firm to do the work.

1. ORGANIZE YOUR WORD PROCESSING FILE.

In your rewrite, use your word processing software's features to mark text styles, including a hierarchy of headings and subheadings, so you're set up to automate cross-references and a table of contents. If you do this thoroughly as you work on the text, you'll never again worry that adding or deleting text will throw off the document's pagination or any internal cross-reference. Your forms will be ready for changes in your business.

2. GET RID OF LEGALESE; USE PLAIN LANGUAGE.

It's easier to respond to a complaint or dispute if you can show that a reasonable person would have understood what you promised—and, often more importantly, what you *didn't* promise. Judges are people too. If your contract is dense legalese, they'll have empathy for the buyer. But if a judge sees an effort on your part to make the agreement understandable, he or she is more likely to see the fairness in holding a client to the clear expectations you set.

Also, plain language helps you and your coworkers understand what your contract says. That makes it easier to check whether it's what you want.

No matter how skillful a writer you are, use editing software to speed up improvements in your text's usage, grammar and style.

3. DON'T USE THE WORD *CLIENT*.

Many business people use the word *client* to mean nothing more than someone who receives services from one's business. But lawyers and judges understand the word to refer to a relationship in which a lawyer, certified public accountant, enrolled actuary or similar professional has fiduciary duties to the client. This can impose on you responsibility beyond your contract obligations. Even if you think of your service recipient as a client, why take on unnecessary duties?

Furthermore, using the word *client* could negate your warning that you don't provide tax or legal advice.

4. CALL THE SERVICE RECIPIENT *YOU*.

Too many contract forms still use role labels—like "the Client"—to refer to a counterparty. (Despite software that makes it easy to fill in names, business people fear delays and mistakes.) Instead, replace references to your counterparty with *you* and *your*. And if you've used a role label to refer to yourself, replace it with a short business name. This quick fix makes your contract shorter and more readable. It helps you spot opportunities to write plain language. It avoids a clumsy label. And *you* is the simplest way for your reader to see him- or herself in what you hope to communicate.

5. FOCUS ON WHO DOES WHAT.

In a service contract, many provisions are about who does what. While you're rewriting, look for sentences in the form "{task} will be {verb-ed}" and rewrite them as "{actor} will {verb} the {task}." For help in finding those and other passive-voice sentences, use your word processing software's grammar checker. Most sentences should be simple sentences in active voice. But see the next tip about setting conditions that limit an obligation.

6. CONDITION YOUR SERVICE OBLIGATIONS.

Your work often depends on getting information that is not in your control. Compare these promises:

- *ABC will send you a draft of your Form 5500 report at least 30 days before the report's unextended due date.*
- *ABC will send you a draft of your Form 5500 report by 60 days after ABC has received from every financial organization all necessary information.*

If everyone cooperates, both sentences result in about the same deliverable date. But the second version protects you against others' delays.

7. WHEN YOU RELY ON OTHERS, DON'T PROMISE MORE THAN YOU GET.

Sometimes, you provide your services relying on products you licensed from others. Don't promise more than your legal rights against others. For example, if you use software for coverage and nondiscrimination testing, don't promise more than you can get under the software licensor's warranties.

8. SHOW WHAT YOU DON'T DO.

In theory, a contract need specify only the services you promise. But your agreement can defeat expectations (whether real or feigned) about functions for which your service is something less than an uninformed person might imagine. Explain limits on your services carefully. For all these expressions, begin with saying you have no obligation beyond the ones specified in the contract. But then give examples about what you *don't* do. Say that the examples are just illustrations, and don't limit the range of what you don't do.

9. INCLUDE A PART FOR THE EMPLOYER/ADMINISTRATOR'S OBLIGATIONS.

In theory, it's unnecessary to say anything about the plan administrator's duties; public law provides them. But in your agreement, state your counterparty's obligations to administer the retirement plan according to its governing documents and applicable law. Those promises set up your contract law rights to pursue a breach that harms you. You hope you'll never need to use those rights, but it can't hurt to have them. Furthermore, provisions which flag at least some of the plan administrator's duties might help you when the complaint is, "Why didn't anyone tell me?"

> "IF YOU USE SOFTWARE FOR COVERAGE AND NONDISCRIMINATION TESTING, DON'T PROMISE MORE THAN YOU CAN GET UNDER THE SOFTWARE LICENSOR'S WARRANTIES."

10. DON'T USE ANYTHING YOU DON'T UNDERSTAND.

Know your business purpose and the legal effect of every clause, especially those in your agreement's boilerplate provisions. If you're not sure, delete the clause. It's better to have an absence of expression than to have something that might disadvantage you. Or if you worry about omitting something, get your lawyer's explanation of what the provision does, and then consider whether it helps you protect your business. PC

START-UP SURGE

New SECURE Act tax credits could boost the number of start-up 401(k)s. **By Jason Brown**

In an effort to incentivize companies to start a retirement plan, Congress revamped the start-up plan tax credit arrangement as part of the SECURE Act. Business owners who have contemplated starting a retirement plan should definitely find the enhanced tax credits very beneficial, especially considering that over half the plan's service provider expenses could be offset.

Of course, one critical component in getting these tax credits is the plan sponsor paying at least a portion of the plan expenses out of pocket. Some plan sponsors might push back on that concept, indicating that they want the plan and participants to absorb some, if not all, of the service provider expenses. However, there are some significant reasons why plan sponsors should consider reevaluating that position and take advantage of this new credit structure.

Previously, the start-up plan tax credit structure was just a simple and flat $500, which, though helpful, was not perceived as an overwhelming motivating factor in establishing a new plan. However, that is now the minimum amount that a plan sponsor can receive. The new tax credit arrangement is equal to the greater of either $500 or the lesser of: (1) $250 for each employee who is not a highly compensated employee and is eligible to participate in the employer plan, or (2) $5,000.

In addition to the tax credit, new retirement plans which elect an automatic enrollment feature will

Leveraging SECURE Act Start-up Plan Tax Credits

TPA	$3,000	Flat Fee
Advisor	$4,000	Flat Fee
Recordkeeper	$3,000	Flat Fee
Total Service Provider Cost	$10,000	
Start-up Tax Credit	$(5,000)	20 NHCE @ $250
Auto-Enrollment Tax Credit	$ (500)	Auto-Enrollment
Net Cost	$4,500	55% Cost Reduction

401(k) Plans Offer More Benefits Than a SIMPLE IRA

SIMPLE	VS	401 (k)
$13,000	Deferral Contribution Limit	$19,500
$3,000	Catch-up Contribution (Age 50+)	$6,500
$22,050	Maximum Account Contribution	$57,000
Limited	Employer Contribution Design Flexibility	Yes
No	Roth After-Tax Contribution Opton	Yes

- Greater flexibility in employer contributions design strategies
- Higher deferral and total account contribution limits
- Additional tax deductions and lower taxable income for business owners
- Roth feature to diversify taxable and non-taxable retirement income
- Potential for asset protection from creditors

qualify for an additional credit of $500, and both of these credits apply for up to three years. To illustrate the impact that these new tax credits can produce, see the nearby hypothetical example.

As you can see, the new tax credits brought the gross service provider expense of $10,000 all the way down to a net cost of $4,500. Remember, these cost reductions would not apply if plan assets or participant accounts pay these expenses. Here are some other significant benefits in having the plan sponsor pay these expenses out of pocket:

- Plan assets and participant accounts grow at a much faster rate.
- Business owners typically have the most substantial account balances and usually cover more of the plan fees if a variable charge is applied to cover plan expense.
- It mitigates fiduciary fee liability as service providers are not being paid by participants or plan assets.
- It allows the plan sponsor to focus more on using quality providers as they are paying a far smaller net amount for plan services.

This new tax credit arrangement should be a significant motivating factor when evaluating the benefits of starting a retirement plan, and it will undoubtedly tip the scales even more in favor of starting a 401(k) instead of a SIMPLE IRA. The following section provides additional reasons why this is likely to occur.

SIMPLE IRA PLANS COULD NOW BECOME OBSOLETE

Historically plan sponsors and advisors have been somewhat conflicted when trying to determine if they should establish a 401(k) or go the perceived “simplistic” route and open a SIMPLE IRA. The three prominent factors that advisors typically cite (through 2019) when they rationalized going the SIMPLE IRA route were:

- SIMPLE IRAs have little to no administration fees (lower cost)
- Easier to establish
- No ADP/ACP/Top Heavy testing

With these advisor perceptions in mind, for a 401(k) plan to compete against the perceived “cheaper and easier” arrangement, it must offer more value to plan sponsors than a SIMPLE IRA. The above SIMPLE vs. 401(k) chart highlights some of the most significant points of differentiation between these two plan types and the value that a 401(k) can offer. When comparing the two plan types, you will see that 401(k)s can provide greater design flexibility and higher contribution capability, along with the capacity for tax diversification by making Roth after-tax contributions. Also, if the plan sponsor elects to incorporate Safe Harbor contributions (which are only 1% more in the match or non-elective than SIMPLE IRAs), the testing concerns become a non-factor.

There is already tremendous value in establishing a 401(k) over a SIMPLE IRA. However, plan sponsors can now also incorportate the new tax credit offset structure and reduce their service provider costs by up to 50% (or more in some cases). This additional level of cost reduction will undoubtedly tip the “value scales” more decidedly in favor of implementing 401(k)s—and quite possibly could cause the obsolescence of SIMPLE IRAs. PC

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MEPS VS. PEPS

Which will be best for your clients? **By R.L. "Dick" Billings**

In some ways, the SECURE Act included the most sweeping changes to the retirement plan industry since ERISA in 1974. It represents the first time Congress explicitly endorsed Multiple Employer Plans (MEPs) in the retirement industry, even though open MEPs have always been legal. The IRS and DOL have opined on MEPs, but nothing from our federal legislators until now.

Now that Pooled Employer Plans (PEPs) will be available on Jan. 1, 2021, which will be better for *your* retirement plan clients? If you already have participating employers (PEs) in a MEP arrangement, should you force them to move to a PEP? Should you *always* put your new clients into a PEP?

Since the SECURE Act was signed into law, I have lost track of the number of times I have heard, "Effective Jan. 1, 2021, we are moving all our MEP clients into PEPs." My immediate response: "Why?"

First things first. Open MEPs are not, and *have never been*, illegal. Many open MEPs existing today have been in existence for decades. I encounter many players in this business who believe open MEPs were killed by the Department of Labor's Advisory Opinion 2012-04A. Did that letter set guidelines for open MEPs? You bet—but it did *not* make open MEPs illegal. It said that open MEPs now had to file separate 5500s for each PE. Open MEPs continue to be popular and valuable among

TPAs, recordkeepers and investment advisors—but most importantly, with small employers. The SECURE Act did nothing to eliminate open MEPs. In fact, the law made open MEPs *more* popular by eliminating the pesky "one bad apple" rule.

I see good reasons for certain PEs to move from a MEP to a PEP. I see good reasons for PEs already in a MEP to stay there. A PEP is not always going to be cheaper. In fact, since the Preferred Plan Provider (PPP) might be taking on more fiduciary risk than under some current MEPs I see, all other things being equal, the PEP *should* be more expensive!

Many other variables exist beyond the scope of this article. But let me give you one obvious cost that will need to be addressed if you counsel an under-100-participant PE to move from a MEP to a PEP: the audit cost. In the MEP, the PE had no audit cost. But the *entire* PEP must be audited. The Rights, Benefits and Features rules under ERISA §401(a)(4) will essentially mandate that your PE share in this audit cost.

The benefits of the PEP may indeed be greater than those offered under the MEP in question, but this cost issue will still need to be considered. I had one PEP proponent say he would get around this by having his under-100-participant employers pay their audit cost share with company dollars outside the plan. From a discrimination standpoint, that will work. But what if an over-100-participant employer in the MEP always used plan assets to pay for each year's audit? You are now forcing more costs on that employer. Does this still sound like a good idea? It may work for some, but I don't think for many.

The accompanying table provides a comparison of how responsibilities are typically allocated in an open or closed MEP, and how they *must* be allocated within a PEP. Remember, MEPs have great latitude in structuring their program; so individual results will vary.

As you can see, a PEP does indeed bring more value to the table than the typical open or closed MEP. But if a MEP offers many "Outside Professional" (OP) options, the additional benefit of moving to a PEP may be minimal. As noted above, each MEP and PEP will have to be

Title/Office	"Typical" MEP	Pooled Employer Plan (PEP)
ERISA §402(a) "Named Fiduciary"	Employer or OP	PPP*
ERISA §3(16) "Plan Administrator"	Employer or OP	PPP
ERISA §3(38) "Investment Manager"	Employer or OP	PPP
Plan Sponsor	Employer or OP	PPP
Trustee	Employer or OP	PPP
Plan Admin. Committee Chair	Employer or OP	PPP
Resident ERISA Expert	Employer or OP	PPP
Hires CPA Auditor	Employer	PPP
Represents before IRS or DOL	Employer or OP	PPP
Retains all records	Employer	PPP
Hires all plan-related vendors	Employer	PPP
Ensures all notices timely distributed	Employer	PPP
Maintains required bonding	Employer or OP	PPP
Signs IRS Form 5500	Employer or OP	PPP
Determines "fee reasonableness"	Employer or OP	PPP

Note: OP denotes "Outside Professional."
**Regulations require co-fiduciary responsibility be retained by the adopting employer, but only with regard to that adopting employer's underlying participants. The PPP retains sole fiduciary responsibility for the PEP itself [§413(e)(3)(D)].*

compared for each PE in question to determine what will be best.

Closed MEPs, on the other hand, probably should give serious consideration to moving their plan(s) to a PEP. Referring back to the table, it has been my experience to see fewer "OP" offerings in closed MEPs than in open ones. Typically, the association is responsible for almost all the fiduciary risk involved in overseeing a closed MEP. We all have a hard enough time getting a regular private employer to pay attention to their 401(k) when the owner's assets represent more than 50% of their plan. Now you have a MEP Committee of various people being responsible for assets of PEs (and their underlying employee/participants) with whom they have no other connection. Do you think the Committee's actions will satisfy ERISA's "highest standards" requirements under ERISA §404(a)(1)(B)? I doubt it. But whether they do or not, why would any Association *want* to take on all this fiduciary risk if it is not now necessary, if they just moved their plan(s) into a PEP?

CONCLUSION

I recall 1996, the year 501(c)(3) companies could adopt 401(k) plans. I lost count of how many times I heard, "All 403(b) adopters are going to dump their current plan and adopt a 401(k)." Well, nearly 25 years later we still see many, many 403(b) plans. My experience was that if they already had a 403(b) plan, they tended to stay with a 403(b). If they were starting from scratch, they usually went the 401(k) route.

I predict that this will probably go the same with PEs in open MEPs. Depending upon how the open MEP is structured, there will be some PEs to which you will want to show the value of moving to a PEP, since these plans do indeed offer unique advantages. But if the MEP in question provides pretty good fiduciary outsourcing solutions through an Outside Professional, it may be difficult to convince your plan sponsor to move, especially if the cost of the PEP is equal to, or exceeds, that of the MEP. PC

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WHOSE WORK IS IT, ANYWAY?

As in a marriage, benefit plan professionals and their clients may come to loggerheads over who owns what when the relationship ends. **By Lauren Bloom**

Taking on a new client for ongoing employee benefit plan professional services can be a lot like getting married. At the beginning, everyone is on their best behavior. Calls get returned promptly, bills get paid timely, and the cookies and coffee are always fresh at meetings.

Over time, though, professional relationships can sour just as marriages can. Perhaps problems arise from the employee benefit plan professional's work (a financial projection doesn't pan out or a recommendation leads to bad results). Perhaps the client's performance slips: calls go unanswered, essential plan information comes late, fatally flawed or not at all, and invoices go unpaid. Perhaps the employee benefit plan professional's client contact is replaced by someone less agreeable, or the client's leadership decides that it's time to move the employee benefit plan professional's function in-house, seek less expensive services, or otherwise go in a

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"THE BEST WAY TO AVOID CONFLICT, FINGER-POINTING AND EVEN LITIGATION WHEN A CLIENT RELATIONSHIP ENDS IS OFTEN TO AGREE ON TERMS AT THE BEGINNING."

"different direction." The employee benefit plan professional can find him- or herself in the middle of a professional "divorce," and may discover that the client has already chosen another advisor.

It's important not to downplay the emotional toll that the end of a client relationship can take. The employee benefit plan professional isn't just losing a business connection; he or she can be losing an important source of income as well as a valued relationship. As in a marriage, the employee benefit plan professional may be outraged and hurt to discover that the client has been "cheating," i.e., secretly negotiating with or channeling work to another advisor. And, as in a marriage, the employee benefit plan professional and the client may come to loggerheads over who owns what when the relationship ends.

COURTESY AND COOPERATION

Like any fallible human being, the employee benefit plan professional may want to make life miserable for a client who walked away. However, the ARA *Code of Professional Conduct* specifically requires the employee benefit plan professional to behave maturely when a client relationship ends. The employee benefit plan professional is always required by the *Code* to provide professional services with courtesy and cooperate with others in the client's interest—even if that "other" is a professional rival. The employee benefit plan professional should recognize and respect the client's right to choose an advisor (and can serve as a new advisor even if he or she is replacing someone else).

If the client has consented, the employee benefit plan professional is obliged by the *Code* to "cooperate in assembling and transmitting pertinent data and documents" to the new or additional advisor. This obligation is not normally absolute; the employee benefit plan professional can condition his or her cooperation on being reasonably compensated for the work. However, as required by Circular 230, the employee benefit plan professional is required promptly, at the request of the client, to return any and all records of the client that are necessary for the client to comply with federal tax law, regardless of whether the employee benefit plan professional is subject to Circular 230 or not.

WORK PRODUCT

What if the employee benefit plan professional hasn't been paid? Ordinarily, the employee benefit plan professional can't hold requested documents hostage for payment unless applicable state law permits it. (When withholding documents is not allowed, suing the client for unpaid fees becomes the employee benefit plan professional's primary recourse.) The employee benefit plan professional need not provide any work product for which he or she has not been paid, however, nor is he or she required to provide proprietary items for which he or she has not been compensated.

Agreeing on whether a particular work product is proprietary to the employee benefit plan professional can be difficult, especially when a professional relationship is ending and tempers are running hot. Say, for example, that an employee benefit plan professional designed a creative new benefit plan feature for the client and wants to make that feature available to other plans. The client is more likely to agree if its relationship with the employee benefit plan professional is strong. Conversely, if the relationship is in trouble, the client may be more likely to insist that the feature is custom work for the client alone, refusing to allow the employee benefit plan professional to offer it more broadly.

WRITTEN DOCUMENTATION

The best way to avoid conflict, finger-pointing and even litigation when a client relationship ends is often to agree on terms at the beginning. Just as a pre-nuptial agreement can facilitate the division of marital assets in a divorce, an engagement letter, service agreement or other contract signed by both parties at the start of the relationship can smooth over the transition when the relationship ends. (An engagement letter signed only by the employee benefit plan professional and delivered to the client may have less effect under the law, but at least puts the client on notice of the employee benefit plan professional's expectations.) The contract need not address every aspect of the relationship, but it should identify proprietary work items, describe the impact of non-payment of fees, and include a reasonably thorough explanation of who bears what responsibilities when the relationship ends.

Planning for a "divorce" when a professional relationship is just beginning may seem pessimistic, but clients are more likely to agree to terms of separation while they are still in the "honeymoon stage." An engagement agreement that clearly identifies both parties' rights and responsibilities at the end of a relationship can go a long way toward an amicable parting that meets the employee benefit professional's obligations under the *Code*. PC


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QDRO EXPERTISE IS CRITICAL

Your expertise and credibility can help participants experiencing a divorce. **By Brian Kallback**

Divorce can be a contentious process, especially if there is animosity between the separating partners. For many partners, a workplace retirement plan is often the largest asset discussed… and fought over. According to a 2016 American Academy of Matrimonial Lawyers survey of its members, the top three contentious items are alimony (83%), retirement accounts and pensions (62%) and business interests (60%).[1] Also, there's a lot of pressure to divide the retirement plan properly. High taxes, penalties or an undesirable amount of money going to an ex-partner can be consequences of an ill-executed split of retirement assets.

After one of the partners' attorneys contacts the plan administrator to communicate the divorce proceedings, a qualified domestic relations order (QDRO) is prepared based on the specifics of the divorce arrangement. However, QDROs are not a simple template, and may often be returned multiple times to an attorney by a plan administrator for further review and editing.

"Since we live in a litigious world, the reviewing person, committee, or firm will need to be both knowledgeable about QDROs, and as certain as they can be that the language in the QDRO accurately reflects the wishes of the divorcing parties."[2]

A QDRO is issued by a court or other state-authorized body that affords payment of all or a share of a participant's benefits to an alternative payee. A QDRO satisfies the requirements of IRC §414(p) and ERISA §206(d). An alternative payee might be a partner, former partner, child or other dependent who is recognized by a domestic relations order as having a right to a participant's benefits payable under the plan. Anti-assignment rules under IRC §401(a)(13) and ERISA §206(d)(1) do not apply to a QDRO.

WHAT REQUIREMENTS MUST A QDRO SATISFY?

The order must made pursuant to state domestic relations law and is a judgment, decree or order relating to child support, alimony payments or marital property rights.

The order must include certain information:

- Name and last known mailing address for both the participant and the alternate payee
- Name of the plan involved

"FOR MANY PARTNERS, A WORKPLACE RETIREMENT PLAN IS OFTEN THE LARGEST ASSET DISCUSSED... AND FOUGHT OVER."

- Amount or percentage of the participant's benefit to be paid to the alternate payee
- Number of payments or the period to which the order applies

There are certain provisions that a QDRO must *not* contain:

- Must not provide any benefit not otherwise provided under the plan
- Must not provide for increased benefits
- Must not pay benefits to an alternate payee required to be paid to another alternate payee under another QDRO
- Must not pay benefits to an alternate payee in the form of a Qualified Joint and Survivor Annuity (QJSA) for the lives of the alternate payee and his or her subsequent partner
- May not require a form of benefit or option that is not authorized by the plan

In addition to the requirements listed above, a plan must maintain written procedures for determining if the domestic relations order is a QDRO.

Upon receipt of a domestic relations order, the plan administrator must promptly notify the participant, alternate payee(s) and any legal counsel of receipt of the order and provide each a copy of the plan's procedures for QDRO determination.

WHEN BENEFITS ARE AVAILABLE

Benefit payments to the alternate payee can begin with the earliest retirement age under the plan's provisions, even if the participant has not separated from service or begun to receive payments.

The earliest retirement age is the earliest of:

- the earliest date participant is eligible for a distribution; or
- the later of the participant's 50th birthday or the earliest date upon which the participant could begin receiving distributions from the plan if the participant separated from service.

TAXABILITY OF A QDRO

Whether a QDRO distribution is taxable to the alternate payee or the participant is dependent upon the nature of the alternate payee:

- If the alternate payee is a partner or former partner, the distribution is generally includible in the gross income of the alternate payee
- If the alternate payee is someone other than partner or former partner, the distribution is generally includible in the gross income of the participant

Though the specific details of each divorce apply, a direct rollover of distributions received pursuant to a QDRO is generally preferred from a tax standpoint.

DOES A QDRO APPLY TO AN IRA?

The short answer to this question is "no." For an IRA, a divorce decree is required in order to avoid tax on the transfer of assets. Without a divorce decree, there is no authority for the IRA to be divided.

For many plan sponsors, TPAs and consultants, as noted in a Summer 2018 *Plan Consultant* article by Sue Perry, "QDRO" is a four-letter word.[3] Yet, "it is likely that calls for QDRO reviews will only increase, due to the rising divorce rate coupled with the *Windsor* ruling."[4] Knowledge and familiarity with the procedures and compliance associated with a QDRO is imperative. Participants experiencing a divorce may be vulnerable and emotional, and hold a short-term mindset. Your expertise and credibility will positively affect their situation. PC

Footnotes

1. O'Brien, S. (2018, March 7). How to avoid mistakes dividing 401(k) assets in divorce. Retrieved from https://tinyurl.com/y7d6t7xp.
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PAYROLL PAIN POINTS

Basic plan features that cause headaches for payroll staff. **By Sue Perry**

Payroll systems and recordkeeping systems don't always work well together. This creates pain points for clients and administrative headaches—and possible consulting opportunities for TPAs and 3(16)s. Let's take a look at some of these headaches and opportunities.

1 YEAR OF SERVICE WITH 1,000 HOURS ELIGIBILITY REQUIREMENTS

Many plans have a 1-year, 1,000 hour waiting period. The issue for the client's payroll processor is that most payroll systems cannot easily produce anniversary year hours. To get true hours worked in an anniversary year, you have to run a report for an individual for the 12-month period you are looking for… one person at a time, unless you happen to have people hired during the same pay period. While this is not terribly difficult for a plan with four people and one person gets replaced every few years, it is very time-consuming for a plan with 2,000 employees where hiring occurs nearly every day.

Payroll systems generally want to run reports for the same 12-month period for everyone. Year-to-date hours means tax year to date, normally January 1 through today. There are some ACA reports that the client might be able to use that provide anniversary hours, but often that information can't be pulled into the same report as the 401(k) information without customized reporting—often built by the payroll company for a fee.

Some recordkeepers have the ability for anniversary hours to be uploaded as part of the pay period census and contribution file, but others don't. So even if you can get anniversary hours out of a payroll system, often you have no way to get that data to the recordkeeper.

Some items to consider:

- Are there any part-time employees to justify the extra work of the 1,000-hour requirement?
- Is the client small enough so that providing anniversary hours in an employee's initial year of service is feasible?
- Does the client's payroll system have the ability to generate anniversary hours for each employee in a report?
- Can the plan's recordkeeper track anniversary hours if they will be responsible for eligibility determination?
- Is there an opportunity to consult with your client on constructing an eligibility requirement that fits their needs but is also able to be calculated correctly?

COMP FROM DATE OF PLAN ENTRY

401(k) plans generally use compensation from date of plan entry. The issue is that, like anniversary hours, compensation from date of plan entry isn't something that is obtained easily from a payroll system. Most payroll systems don't have a field to store date of plan entry.

Retirement plan reports that come standard in most payroll systems will only show current pay period compensation or year-to-date compensation (compensation from January 1 to current). Payroll registers routinely show compensation for the pay period and year-to-date compensation. Most report writers in payroll systems allow you to get pay period compensation or year-to-date compensation.

To obtain compensation from date of plan entry, which so many of us ask for at year-end census time, the client probably has two choices:

- Run the retirement report for every entry date during the year through year end. Find the folks entering the plan that entry date. Copy over their compensation into the year-end spreadsheet.
- Run a report for each person who entered the plan during the year individually… if your population is small enough.

Each of these processes can be time consuming and lead to errors in year-end census data provided to the TPA or recordkeeper.

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"CAN YOU HELP YOUR CLIENT UNDERSTAND WHAT WILL BE NEEDED FROM THEM AT YEAR END?"

We are not going to change plan designs to use full year compensation. But is there a consulting opportunity here? Can you help your client understand what will be needed from them at year end? Is there any way you can help the client to gather this information in a way that is easier for them? You are more likely to get accurate information if you discuss this issue with your client up front rather than right after year-end when you are asking for last year's data and they are trying to get W-2s out to employees.

EXCLUSION OF TAXABLE FRINGE BENEFITS OR DEEMED 125 CONTRIBUTIONS

If you use this exclusion, do you provide the client with information on which taxable fringe benefits are excluded? Many times, when reviewing client payroll system setups, some of the taxable fringe benefits are excluded and some aren't. Often the payroll system doesn't provide any indication that a particular item is classified as a taxable fringe benefit. The payroll processor at your client's office likely has no idea which types of compensation they should exclude when this election is made.

Is there a consulting opportunity here to better educate your clients? Can you assist them to determine which types of compensation, called earnings codes in payroll systems, should count as taxable fringe benefits?

As for the deemed Section 125 contributions, I have yet to see any payroll system set up with an earnings code for this type of compensation. Most clients don't know what this type of compensation is and so don't have an earnings code for it. If you are going to add this exclusion to your client's plan, is there a consulting opportunity here to make sure that the client is tracking this type of compensation correctly and that the client's payroll processor knows to exclude it?

EXCLUSIONS OF EMPLOYEE GROUPS

Imagine a scenario where you design a plan to make part-timers wait a year with 1,000 hours while full-timers get into the plan after 3 months of service. No problem, right? The design passes nondiscrimination testing so it is perfectly acceptable. But what if the plan sponsor isn't coding full-time and part-time into their payroll system? Or isn't uploading full-time and part-time information each pay period to the recordkeeper?

To make the point clearer, imagine that the plan has automatic enrollment and a match. If the data isn't in the payroll system or isn't uploaded each pay period so the recordkeeper can calculate date of plan entry, how is the determination when the automatic enrollment starts going to get made?

In real life, we design plans to exclude groups of employees because that is what the plan sponsor wants us to do. We assume that some "magic" will happen and whoever determines eligibility will be provided with sufficient information to determine who is and is not eligible. As a 3(16) who oversees eligibility and automatic enrollment, we have learned that we must ask clients:

- Who is going to calculate eligibility?
- Who is going to provide the information to make the eligibility determination?
- Is that information easily available in the payroll system?

In a real-life scenario, we were taking over a large retail client with the above eligibility scenario. The client's primary complaint was that their ADP test looked "odd" but they weren't sure why. The answer was due to an issue in their payroll system.

The client's payroll processors failed to code employees with a full-time or part-time status in the payroll system. Though the payroll reports were set up to transmit each employee's status to the recordkeeper, the field was blank so the recordkeeper's eligibility calculator defaulted all employees to full-time. This included hundreds of part-time retail sales clerks, who never were eligible for the plan. Their inclusion in the ADP testing caused the test to look "odd."

We ended up changing eligibility to 6 months for all employees, since the client didn't think they could get the data updated for all current employees in less than 6 months.

Is there a consulting opportunity here for clients looking to exclude employee groups? You could confirm that the data is available and accurate in the payroll system and can be easily transmitted to the party determining eligibility. PC

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2020 ELECTION'S IMPACT ON RETIREMENT POLICY

The year 2020 has been a wild ride and the election will only add to the drama. By Will Hansen

The 2020 election is right around the corner, and depending on the outcome it could have a significant impact on retirement policy in America. If President Trump is re-elected, the most likely outcome is a divided Congress with Republicans retaining the majority in the Senate and the Democratic party retaining a majority in the House. If former Vice President Biden is elected, it is possible the Senate would change hands and the Democratic party would be in the majority of both the Senate and House of Representatives.

Let's first focus on what could happen in the retirement space if President Trump is re-elected.

We will most likely continue to see the same strategy that Senate Republicans have employed over the past few years—confirm judges and executive branch appointments with the occasional passage of legislation that has been carefully negotiated with the House (controlled by the Democratic party). If the COVID-19 pandemic continues, the next several years will be focused on legislation to assist the economic recovery. The economic-focused legislation will allow for the occasional retirement-related provision to be included, but I wouldn't hope for anything significant, such as follow-up legislation to the SECURE Act. If anything, retirement legislation would need to be linked to helping the country on its path to recovery from the COVID-19 pandemic.

> "RETIREMENT LEGISLATION WOULD NEED TO BE LINKED TO HELPING THE COUNTRY ON ITS PATH TO RECOVERY FROM THE COVID-19 PANDEMIC."

At the regulatory level, the Internal Revenue Service has been focused on releasing guidance related to the COVID-19 pandemic, with limited time or resources focused on implementation of the SECURE Act. At this point, the IRS has nearly exhausted most of its power to provide regulatory relief due to the pandemic, which means it could turn its attention to other guidance. I'd expect the IRS to focus squarely on SECURE Act guidance for the remainder of 2020 and well into 2021. The DOL has already turned its eye toward SECURE Act guidance, and we should expect this trend to continue into the first few years of a second term for President Trump.

If Biden is elected, we may see a flurry of legislative activity, especially if control of the Senate swings to the Democrats. If the two branches of government are in the hands of the Democratic party, a legislative tool called "reconciliation" could be employed to pass major legislation, bypassing the standard 60-vote threshold normally needed to move legislation forward in the Senate. Congress is limited in the number of times it can use 'reconciliation' per year, therefore, they typically load the first reconciliation bill with as many legislative priorities as possible. A reconciliation bill could include retirement proposals that have been introduced by House Ways & Means Committee Chairman Richie Neal (D-MA) over the past several years, including his proposal that would greatly increase the number of employers that are required to provide a retirement plan to their employees.

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

In addition, a Congress that is controlled by the Democratic Party may utilize the Congressional Review Act to revoke certain regulatory actions that the Trump administration implemented in the latter part of 2020. Two DOL proposed rules in particular could be candidates for this process: the fiduciary rule and the rule on ESG investing. However, revoking either rule would eat up precious time on the Senate and House floors, and it could prevent the new administration from issuing its own rule on either topic. I'm sure I'll write more on this topic in a future issue.

Finally, from a regulatory standpoint, it will take time to place the political appointees at the various agencies (e.g., Asst. Secretary of Labor for EBSA at DOL). Career officials will continue to work on guidance related to the SECURE Act and perform other normal duties, but any release of proposed rules would be on hold until the new administration has filled certain positions.

No matter the outcome of the impending election, expect a lot of activity in the retirement policy space in the future. PC

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