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SUMMER 2020

THE SECURE ACT ISSUE

Contents

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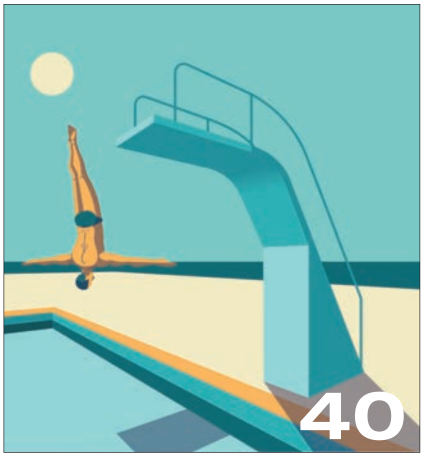

COLUMNS

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Seeking SECURE-ity

Now, in the midst of a global pandemic, is the time to plan for the future of your business.

Years from now, when you look back at 2020, what will you remember? Living through a global pandemic? Sure. What else? Keeping your business afloat during the "COVID-19 depression"? Finding new ways to connect with prospects and clients? The strangest Presidential campaign year *ever*? Learning how to be virtual? The CARES Act? Murder hornets?

Oh yeah, and the SECURE Act.

Yes, things are crazy right now. But as ASPPA President Missy Matrangola notes in her "From the President" column in this issue, she found that the hallmarks of ASPPA members during the COVID-19 crisis have been knowledge, hard work, and good humor in the face of adversity. ASPPA members persevere and find ways to thrive.

In that spirit of thriving, the goal of this special "SECURE Act Issue" is two-fold: to help you make sense of how the SECURE Act's rule changes and new provisions will affect your business, and to formulate a plan to take advantage of opportunities for growth and new business in the law. Because now, in the midst of a global pandemic, is the time to plan for the future of your business.

As Pete Swisher notes in his cover story on page 24, the SECURE Act is a "forced response" law with significant long-term strategic implications for everyone in the retirement industry. And planning for 2021 means starting *now*, beginning with the first wave of implementation efforts that SECURE's 28 provisions necessitate. As Pete notes, *it all starts with strategy*.

In addition to Swisher's guidance on long-term strategy and short-term action steps, in this special issue you'll find the insight of these industry thought leaders:

- John Markley on SECURE's relief for frozen plans (page 18)
- Fred Reish and Bruce Ashton on the law's guaranteed income options (page 34)
- ERISA attorney Geoff Strunk on how to handle long-term, part-time employees (page 10)
- Fiduciary Wise's Dick Billings on weighing the Pooled Plan Provider decision (page 40)
- American Retirement Association Chief Government Affairs Officer Will Hansen on ARA's advocacy efforts as the pandemic affected plan sponsors and participants (page 64)
- DWC's Adam Pozek on managing technology and contingency planning (page 48)
- Milliman's Zorast Wadia on mitigating DB risks during and after the pandemic (page 52)
- Lauren Bloom on the challenges inherent in maintaining a high standard of professionalism during the pandemic (page 58)

> "The hallmarks of ASPPA members during the COVID-19 crisis have been knowledge, hard work, and good humor in the face of adversity."

- July Business Services cofounder John Humphrey on new product development (page 54)

In addition to that wealth of SECURE Act content, you'll find that the editorial deadline gods smiled on us, allowing us to fit in some commentary on conducting business during the COVID-19 pandemic:

- ASPPA President Missy Matrangola on lessons learned from the pandemic (page 6)

Look for more on how we changed, and what we learned, during The Great Hunkering in our next issue.

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

JOHN ORTMAN
EDITOR-IN-CHIEF

BY MIRIAM "MISSY" MATRANGOLA

ASPPA 1, CARES Act 0

A challenge met, as always.

In the spring issue of *Plan Consultant* I wrote about embracing change—not knowing that when that issue was published the country would be in the middle of a pandemic that was uprooting people's lives.

The cover story in that issue focused on the SECURE Act, a law that took months to get passed and made major changes to retirement law. Now, after just days (although for many businesses in desperate need of cash it felt like year), there was a new law in town: the Coronavirus, Aid, Relief and Economic Security (CARES) Act.

My version of the CARES Act was 335 pages, with only six pages related to retirement plans, but you know what those pages did to your life. The SECURE Act was forgotten and the CARES Act with its provisions took over. Many felt like they lived this law as they learned what it meant and how it was going to be put into operation.

Normally, a new law is something the industry digests in small bites. The law passes. Then there are articles, webinars, more articles, sessions at ASPPA conferences, etc. In other words, we have time to learn, understand and implement the law. In the case of the CARES Act, it was signed on a Friday night, and there was pressure to understand and have systems in place so participants could access their money under the new CARES rules quickly, in some instances as little as a week.

I was impressed with how we responded to this challenge as a group. Many of our businesses had now become virtual even if that was not how we normally operated. For my firm, that meant we had to get about half of our employees converted to VPNs after we were declared a non-essential business with a day's notice. We now had to communicate as a company to try and stay on the same page. As I am sure everyone knows, this is quite different on Microsoft Teams or by text than it is in person. I did learn that it is not a good idea to call someone through Microsoft Teams unless they are expecting your call (or have their camera covered up). Apparently, not everyone likes to be seen.

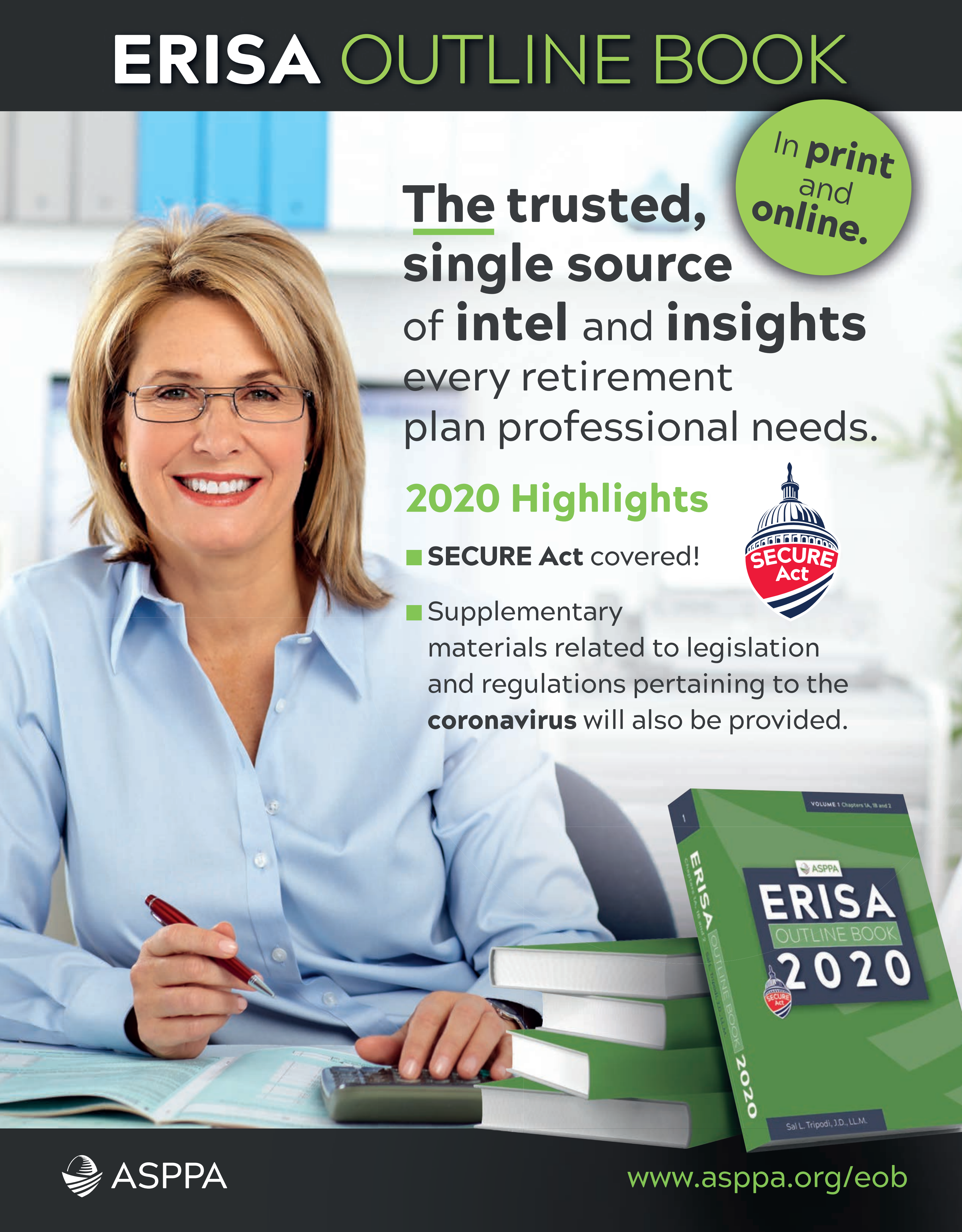
And this was not the only challenge we were facing. There were other distractions as we focused on the immediate task at hand: learning and applying the CARES Act. And dealing with clients concerned about the state or future state of their business, this year's plan contribution, last year's plan contribution, the safe harbor, employees working from home with their new "co-workers" (spouses, partners, children, parents, animals)—all while trying to contact clients who were not working and financial advisors who were busy trying to talk clients off the ledge. And there were still clients that were business as usual—and that meant testing to be done, 5500s to be prepared and audits to be finalized.

During this pandemic I have had the opportunity to converse with many of you and I am truly impressed with the amount of knowledge held by this group. I am also impressed with how hard this group works. And not only that, you also have a good sense of humor. I have found that a good sense of humor can help make rough situations a little easier to deal with.

I know I don't want to go through something like this again, but I also know that I am better prepared than I was before. In the meantime, I am looking forward to meeting my ASPPA friends and those I haven't yet met in Chicago at ASPPA Annual and the TPA Growth Summit. Come learn and have some fun! PC

> "I know I don't want to go through something like this again, but I also know that I am better prepared than I was before."

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.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The trusted, single source of intel and insights every retirement plan professional needs.
2020 Highlights
SECURE Act covered!
Supplementary materials related to legislation and regulations pertaining to the coronavirus will also be provided.
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BY BRIAN H. GRAFF

Trying Times

Times like these provide a unique opportunity to prove not only your mettle, but your worth as well.

How are you? Without question, the past couple of months have been extraordinarily stressful and challenging for us all, both in our professional capacities and for the nation—and world—at large.

Like many of you, we had only just begun to get our arms around the nuances of the SECURE Act, the culmination of months of active lobbying, working to make sure that the concerns of our members and the needs of our nation's retirement system were addressed. We hit the ground running in 2020 with our sleeves rolled up, ready to move ahead on the work of 2019: to achieve clarity around the provisions in SECURE, and to start work on e-delivery, PEPs, the fiduciary rule, and even SECURE 2.0.

And then COVID-19 struck.

In short order we—and I'm sure you—were scrambling to move staff and operations offsite, to (re)establish connectivity, to put into action those disaster recovery plans, to try things that hadn't been done before, or at least hadn't been relied upon for an extended period. However, from the outset, it was clear that retirement plan relief—both for individuals impacted by the Coronavirus and the employers who maintain the plans—was critical. There were, of course, models for participant-focused disaster relief, templates dating back to Hurricane Katrina. But the breadth—and depth—of the impact, both economically and physically, was well beyond anything our industry—our nation, and indeed our world—had confronted, certainly in our lifetimes.

Challenging as it can be to coordinate staff activities when everyone is "out of office," connecting with regulators and those on the Hill had its own set of unique obstacles. As we worked (remotely) with lawmakers and regulators to craft effective relief, the participation and engagement of NAPA members was an essential voice, helping shape and refine both the key questions, and eventual answers, to an array of complicated but essential administrative issues, including the crucial ability to include retirement plan contributions in the Paycheck Protection Program.

Critically, as we worked to make the case for safe harbor contribution relief, it was insight from members that helped us quantify both the size and potential monetary impact, and to garner media attention for the issue. As we head to press, that effort remains ongoing—and you can (still) help by going to www.araadvoacy.org and helping us make the case.

We are continuing to lobby on your behalf, and with your participation, to share critical information, and to develop alternatives for conferences that cannot (yet) happen. That includes developing and delivering online training and remote testing alternatives. We appreciate very much your continued engagement and support in these programs—indeed, we depend upon it, this year more than ever.

Opportunity likely lies ahead—messages about the importance of emergency savings and financial wellness that previously met with skepticism will almost certainly warrant fresh eyes and attention in the future. But now is the time to try new approaches, to build and strengthen relationships—not only to share important information, to respond to questions, but also to reach out in empathy, to listen—not just about this business, or even business in general—but life itself.

The conditions of these last several weeks—and those still ahead—aren't what any of us expected. At a critical period in this nation's history, Thomas Paine wrote about the "times that try men's souls"—an apt description in many ways for the challenges that currently surround us. However, times like these also provide a unique opportunity to prove not only your mettle, but your worth.

Stay safe, stay healthy. We're getting through this. PC

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

WELCOME

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Preparing for Long-Term, Part-Time Employees

Implementation of the new LTPTE eligibility exception will create significant recordkeeping and administrative burdens.

BY GEOFFREY M. STRUNK

With the industry's attention focused on the COVID-19 pandemic, forgetting about the Setting Every Community Up for Retirement Enhancement (SECURE) Act and its impact on retirement plans and their employees would be a mistake. Instead, now is the time to prepare for and implement the changes it brings.

One of the SECURE Act's most impactful provisions is its easing of 401(k) eligibility restrictions. Without a detailed understanding of this new rule, plan sponsors and their service providers may inadvertently exclude eligible employees from plan participation. This would needlessly create compliance defects with expensive employer funded corrective contributions. Fortunately, this can be avoided with just a bit of knowledge and preparation.

ABOUT THE NEW RULE

Many are already well versed in the most restrictive eligibility service requirements that may be applied to a retirement plan under the Internal Revenue Code and ERISA. More specifically, a plan sponsor generally can restrict retirement plan participation to only those employees who accrue at least 1,000 hours of service during a 12-month eligibility period in order to attain one year of service. The SECURE Act substantially expanded the group that must become eligible to participate… but only in connection with a 401(k) deferral feature.

Effective for plan years beginning after Dec. 31, 2020, employees with at least 500 hours of service in three consecutive 12-month periods—so-called "long-term, part-time employees" (LTPTEs)—will be deemed to satisfy any service eligibility requirement that might otherwise restrict them from making elective deferrals under a 401(k) plan. However, an age eligibility restriction of the attainment of age 21 continues to be permitted in the "normal" manner. Thus, while an age eligibility restriction of 21 might continue to restrict participation, an employee who satisfies the LTPTE eligibility rule must be allowed to defer to a 401(k) plan.

Again, this new provision *only* extends participation to the elective deferral feature of a 401(k) plan. A plan sponsor forced to allow the participation of LTPTEs for purposes of 401(k) deferrals can continue to exclude the same employees from receiving a match or profit-sharing contribution until such individuals satisfy the one-year-of-service rule. In addition, LTPTEs who defer are excluded from the nondiscrimination, top-heavy and coverage requirements that might otherwise apply. Therefore,

> "Interested parties must be prepared to begin to measure service for purposes of the rule in just a few months."

in general, the ability of LTPTEs to defer under the LTPTE eligibility rule will not hurt the plan sponsor due to otherwise applicable mandatory compliance testing.

Regarding initial implementation, the first 12-month period which must be used to measure the satisfaction of the LTPTE eligibility rule begins no earlier than Jan. 1, 2021. As a result, interested parties must be prepared to begin to measure service for purposes of the rule in just a few months. However, the absolute earliest that an LTPTE could satisfy the eligibility rule and begin to defer into a 401(k) plan would be Jan. 1, 2024. Consequently, even though plan sponsors and their service providers will soon need to begin tracking LTPTE data, quite some time will pass before the first LTPTE account is established within a 401(k) plan.

The SECURE Act also grants more favorable vesting provisions to LTPTEs. Presumably, many plan sponsors forced to allow LTPTEs to defer into their 401(k) plans will choose to exclude LTPTEs from receiving matching or profiting sharing contributions. Even so, surely some plan sponsors will allow LTPTEs to also become eligible for employer contributions. In those circumstances, the SECURE Act requires that LTPTEs be credited with a year of vesting service for each 12-month period during which they accrue at least 500 hours of service. This is a dramatic reduction to "normal" vesting requirements which are to require 1,000 hours of service within a 12-month period to accrue a year of vesting service.

THE RULE'S IMPACT

The obvious and worthwhile intent of allowing LTPTEs to participate in 401(k) plans is to extend retirement plan coverage to individuals who otherwise would not have been eligible to participate in an employer-sponsored retirement plan. At a minimum, this might provide individuals with small retirement account balances access to a less expensive institutional class of mutual fund investments as opposed to the retail shares that otherwise might be their only investment option in an IRA. However, an LTPTE's eligibility to defer far from guarantees that he or she will actually deferring a portion of his or her salary into a 401(k) plan. Thus, it remains to be seen whether the level of participation that will result from the LTPTE eligibility rule warrants the effort necessary to effectuate it.

The implementation of the LTPTE eligibility exception will create significant recordkeeping and administrative burdens. Although certain complexity is immediately evident from the legislation itself, additional guidance is needed from the IRS before we can fully understand its impact. For example, the SECURE Act clearly will require plan sponsors, recordkeepers and plan administrators to develop the ability to track dual eligibility requirements for 401(k) provisions: 1,000 hours of service within a 12-month period for non-LPTEs or three consecutive 12-month periods with at least 500 hours of service for LTPTEs. It will also require the same parties to develop methods of concurrently tracking parallel vesting provisions: one set of vesting rules defining a year of vesting service as 1,000 hours during a 12-month period for non-LTPTEs and another set of vesting rules defining a year of service as 500 hours of service during a 12-month period for LTPTEs.

Some plan sponsors may consider alternate service accrual methodologies in order to ease the impact of concurrently tracking multiple service requirements. In this regard, the SECURE Act discusses the "actual hours" service accrual methodology in connection with LTPTEs. Therefore, it seems reasonable to expect that a plan sponsor will be able to use "equivalencies" to ease the administrative burden associated with tracking hours. For example, a plan sponsor might utilize monthly equivalencies that award an employee who works one hour during a calendar month with an assumed 190 hours of service for such month. However, since most LTPTEs are likely paid on an hourly basis, the tracking of hours may not be as difficult as some might expect.

It is unclear how an elapsed time service accrual methodology might be applied in connection with the LTPTE eligibility rule, if it is to be permitted at all. For example, if an employee who would otherwise qualify as an LTPTE over 3 years instead participates in a plan based on his or her satisfaction of a single elapsed time year of eligibility service, could the plan sponsor then require such employee to accrue 1,000 hours of service during a 12-month period of service for purposes of the accrual of vesting service? Or should only 500 hours of service during a 12-month period of service be required to qualify as a year of vesting service since the individual would have eventually qualified to participate in the plan as an LTPTE? Since the SECURE Act permits plan sponsors to exclude LTPTEs from employer funded money sources in their entirety, it seems possible that the IRS will decide that it is not necessary to protect LTPTEs vesting service accrual in this manner. However, this remains to be seen within future IRS guidance.

Additional uncertainty relates to the impact that LTPTEs will have on the ability of owner-only plans to annually file a Form 5500-EZ. Eligibility to file that form is generally contingent upon the plan benefitting no one other than the owner and his or her spouse. Also, for any reporting period that a Form 5500-EZ eligible plan has an end of year asset value of less than $250,000, it is not necessary to file any Form 5500-EZ at all. Thus, barring additional guidance from the IRS, an owner-only plan sponsor not filing a Form 5500 at all due to a plan asset value of less than $250,000 might suddenly be forced to annually file a more complicated Form 5500-SF, as a result of being forced to extend plan coverage to an LTPTE under the LTPTE eligibility rule.

Though the first LTPTEs will not participate in 401(k) plans any earlier than 2024, it's important for plan sponsors and industry service providers to understand these developments now so that they are immediately prepared to keep track of the data necessary to implement this rule. Everyone must also remain alert for anticipated future IRS guidance on this topic. By doing so, everyone will be prepared for the challenge and can avoid the compliance failures that are certain to occur otherwise. PC

Geoffrey M. Strunk, J.D., is an ERISA attorney who has worked exclusively in the retirement plan industry for over 20 years. He routinely handles contested and procedural employee benefit matters, including representing plan administrators and fiduciaries before the IRS, DOL and PBGC.

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Integrating TPA and Recordkeeping Services

Here's how to get the best of both worlds.

BY JASON BROWN

If there is one constant in business, it's change. Whether it comes naturally from an industry's evolutionary process or is mandated by the marketplace, change is inevitable. However, shifts in business trends tend to provide the push companies need to reevaluate how they are conducting business and reaffirm the *value* they truly offer.

This ongoing state of perpetual change has now caused a shift in retirement plan servicing options for TPA firms and recordkeeping platforms, which we believe will have a positive impact for plan sponsors, participants—and TPAs themselves.

WHERE WE WERE AND WHERE WE'RE HEADING

The initial establishment of the traditional TPA and RK retirement plan servicing model was, as with many things, based on need and function. Traditionally, TPAs' responsibilities have included all administration and processing aspects aside from submitting payroll contributions, while RKs had the duty of allocating and tracking participant investments and contribution sources.

As technological enhancements continued to improve the capabilities of RK platforms, their flexibility to work in various plan servicing capacities with TPAs has increased.

“Alpha TPAs can offer higher levels of consulting, plan design, and market intelligence than bundled at a lower cost—plus, RKs highly value the additional business development channel a TPA can provide.”

One of the most recent service build-outs now available with some RKs is having the platform process loan and distributions electronically (just like a bundled administration arrangement) even when working with TPAs. While many TPA firms may want to retain these processing functions for the revenue, there are some significant benefits of incorporating this new hybrid service model.

WHAT ARE THE ADVANTAGES?

As with any new concept, the question is, “what is the benefit, and what is the upside in adopting this new structure?” This question is reasonable, since TPA firms may feel they are giving up a service that generates revenue and is part of their perceived value proposition. However, there are many benefits to incorporating this new service structure that outweigh those concerns:

- “Alpha” TPAs can focus more on their real value: technical expertise, consulting and plan design
- Typically offers lower participant cost on loans and distributions
- Better delineates roles of TPA and RK for plan sponsors and advisors
- Lessens participant and plan sponsor confusion about whom to contact
- Streamlines processing, reduces fraud and improves turnaround times
- Allows TPAs to better compete against bundled administration—one less obstacle

Incorporating this hybrid model has significant advantages across the board for all parties associated with a retirement plan, and it allows the TPA and RK to focus more on their core service strengths and value. I compare this arrangement to building out positions on a basketball team. Sure, all the players can perform similar functions (dribble, shoot, rebound, etc.) to some extent; however, not all are at the same proficiency. That is why it is critical for each player to be appropriately integrated to maximize their key strengths and to optimize the team’s chances of being successful.

Sure, TPAs can perform loan and distribution processing; however, RKs have built out their systems to handle these duties when working with TPAs, and they can now do so more timely and economically for plan participants.

RISK/REWARD FOR TPAS

There is always an initial uneasiness when relinquishing a service that provides revenue and eliminates another function a TPA can offer to their clients. TPAs are also continually battling to validate their value proposition over bundled, and having the RK process loans and distributions might be perceived as the market moving one step closer to everyone going bundled for administration. However, Alpha TPAs can offer higher levels of consulting, plan design, and market intelligence than bundled at a lower cost—plus, RKs highly value the additional business development channel a TPA can provide. Other considerations are the potential fraud and liability that goes hand in hand with loan and distribution processing. One fraudulent distribution request processed by a TPA could erase an entire year’s worth of a firm’s profitability for that department. So why should a firm take on that level of risk in a low margin service, when an RK is more than willing to take on that responsibility?

CONCLUSION

A TPA’s decision to process loans and distributions is not a black-or-white decision, and some plan sponsors and RKs will still either need or prefer to have a TPA provide that “extra set of eyes.” However, the market is steadily leaning more in favor of the RKs handling those duties for the benefits mentioned above. TPAs should consider this servicing model change to better position the real value they provide to RKs, plan sponsors, and advisors. PC

Jason Brown, APR, CPC, is a principal with Benefit Plans, Plus, LLC in Ft. Wayne, IN. He has more than 20 years of experience in the retirement industry and is a member of the Plan Consultant committee.

ZENZA FLARINI / SHUTTERSTOCK.COM

How Does the New Section 199A Deduction Work?

Here are examples of how the new deduction affects the deductibility of four businesses' retirement contributions.

BY JOHN R. MARKLEY

I am writing this article in the midst of the Coronavirus shutdown. It is challenging to think about the time in the future when the world returns to normal. The Tax Cuts and Jobs Act (TCJA) may seem like it was enacted a long time ago, but it has been less than 3 years—and Section 199A was part of the TCJA.

LATE 2017

Let's take a look back to when the tax structure was about to change.

It was late 2017 and the most pressing item on my to-do list was to follow up on cash balance designs that we had prepared during the year. That year was going to be more complex than most—not only did potential clients have to consider their future economic budget, but a new tax law was on the horizon.

The new law would not be applied for 2017, but there was nothing worse than setting up a plan and then having to amend or terminate it because of different consequences that were not known when the plan was implemented. Details about the new tax law were beginning to be revealed, and a clearer picture of what the new law was going to look like became clear.

SECTION 199A

A new concept would be introduced by the TCJA that became part of the Internal Revenue Code as Section 199A. Generally, a tax deduction would be permitted equal to 20% of the qualified business income with respect to a qualified trade or business as long as 50% of payroll exceeded the credit.

Of course, the devil is in the details.

What is a qualified business? A qualified business is generally a business where capital, such as machinery, is the primary income producer of the business. A qualified trade or business does not include professional service business, such as medical services, law offices, dental offices or financial advisory offices.

What is qualified business income? Qualified business income would generally be the taxable income of a business, but exclusive of reasonable compensation paid to the taxpayer for services rendered with respect to the business. A straightforward example would be an S Corporation profit after reasonable compensation is paid the owners. C Corporations are not eligible for this deduction.

However, if the taxpayer is the owner of a business that is not a qualified trade or business and has income below certain limits, the Section 199A deduction would become available. The limit for 2018 was $157,500 or double that amount for a joint tax return. For 2018, there was a phase-out of the 199A deduction in this situation for income amounts $50,000 over $157,500 for a single return and $100,000 over double that amount for a joint return.

EXAMPLES

Here are four of our 2017 potential clients and illustrations of how the Section 199A deduction would apply and how the 199A deduction impacts the tax deductibility of the retirement contributions of their business.

The first is a dental specialty office with qualified income over $500,000. While the tax rate reductions at the upper limits resulted in some tax savings for this client, he was very aware that his business was not eligible for the Section 199A deduction. His office had significant sophisticated dental equipment, but because his business was as a professional, his business was not a qualified business. He remained very interested and implemented a cash balance plan. His business would receive a tax deduction for employer contribution to qualified retirement plan(s), similar to before the TCJA.

The second potential client was an attorney with no employees. His 1099 income was approximately $400,000 and his wife earned $50,000 at her job. Based on his age, a cash balance contribution of $150,000 was possible and deductible. As an attorney, his business was not a qualified business. Without a contribution to a cash balance plan, the combined taxable income would be $450,000, and their combined income would exceed the limits for a 199A deduction without a qualified business. However, with a contribution of $150,000 to a cash balance plan, the combined taxable income on their joint return would be $300,000, and they would become eligible for the 199A deduction.

The attorney was taxed as an S Corporation. For 2018, he could have earned income from his business of $100,000, make a cash balance contribution of $150,000 and have qualified business income of $150,000. He would be eligible for a 199A deduction of $30,000 (20% of $150,000). To review, the joint return showed income of $450,000 without the cash balance plan and $270,000 with the cash balance plan. Taxable income is reduced by $180,000 with a cash balance contribution of $150,000 that made the joint return eligible for the 199A deduction!

The third client was a doctor with no employees. With his S Corporation, his W-2 compensation was $90,000 with additional profits of over $1 million. The issue here is reasonable compensation. There could be an issue of payroll taxes for this business owner with his W-2 compensation. What if a cash balance plan were implemented with a contribution of $200,000? The cash balance contribution counts toward reasonable compensation, so the issue of reasonable compensation is eliminated or at least greatly reduced. Reasonable compensation is also an issue for a qualified business. Reducing W-2 compensation of a business owner would increase qualified business income and increase the 199A deduction. However, compensation must be reasonable for this purpose.

The fourth example was a business that is a qualified business. The profits of the business that were under consideration for contribution to a profit sharing plan were $100,000. The contribution of $100,000 would reduce the qualified income of the business and eliminate a $20,000 Section 199A deduction for the business. The business decided not to implement the profit sharing plan.

> "Reducing W-2 compensation of a business owner would increase qualified business income and increase the Section 199A deduction."

CONCLUSION

By example, I hope that you now better understand the Section 199A of the TCJA. Now, let's all get back to normalcy! PC

John R. Markley, FSPA, CPC, ASA, FCA, MAAA, founded Markley Actuarial Services in 1985. Markley Actuarial was acquired by The Retirement Advantage in 2018. He has more than 30 years of experience providing services to qualified retirement plans, and is Past President of ACOPA, now ASEA.

The Impact of the SECURE Act on Frozen Pension Plans

By John Markley

Long-sought provisions in the law will result in major relief for nearly all frozen pension plans.

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The Setting Every Community Up for Retirement Enhancement (SECURE) Act, signed into law on Dec. 20, 2019, is the most significant legislation related to retirement plans to be enacted in the last decade. The SECURE Act will have significant impacts on defined contribution plans, but there are also major provisions that affect defined benefit and cash balance plans. This article will address the relief provided in the law from multiple nondiscrimination tests in the context of frozen plans.

Background on Nondiscrimination Testing for Frozen Plans

For at least the last decade, sponsors of traditional defined benefit plans have taken action to minimize risk and reduce future contributions. If the plan sponsor had the resources and the plan no longer met the sponsor's goals, the plan could be terminated.

Other common actions have been "hard" freezing the plan, meaning that not only will no new employees enter the plan, but current participants will earn no future benefits. An alternative action was "soft" freezing the plan, meaning that no new participants will enter the plan but current participants would continue to earn a benefit. Since years have passed from the time these actions were taken, many plans have run afoul of IRS nondiscrimination rules, because new employees were not entering the plan, so the employees actually covered by the plan become older, longer-service employees. These employees were likely to be highly compensated employees (HCEs), and the standard IRS nondiscrimination testing rules would lead the sponsors of these plans to potential consequences that were unfavorable, such as additional contributions to the company's defined contribution plan.

The IRS issued temporary relief in 2013, and plan sponsors hoped and waited for some form of permanent relief in the years that followed. But a permanent solution would have to come from legislation.

Now, at last, permanent relief has arrived! The SECURE Act provides relief from multiple nondiscrimination tests. Following is a description of this relief.

Meet the XYZ Corporation

To start, let's assume that XYZ Corporation has sponsored a defined benefit plan for several decades. In 2008, the plan was soft frozen; therefore, as of Jan. 1, 2009, no employees could enter the plan. At this time, there were 10 HCEs and 200 non-HCEs (NHCEs). All employees were benefiting in the plan, so the ratio of NHCEs covered to HCEs covered was 100%. The plan had a safe harbor benefit formula.

During the next five years, some of the participants covered by the plan terminated employment or retired, and employees were hired to replace them, but the newly hired employees did not enter in the plan. After five years, the pension plan covered 8 out of 10 HCEs of XYZ and 80 out of 200 NHCEs. The ratio percentage is 80/200 divided by 8/10, or 50%. Since this percentage is less than 70%, the Average Benefits Percentage (ABP) test was completed. The employer has a safe harbor match 401(k) plan with good participation, so the ABP test was passed. Similar testing applied for the benefits, rights and features (annuity form of benefits), and Section 401(a)(4) testing passed.

In 2018, 10 years later, the plan had 8 out of 10 HCEs and 50 out of 200 NHCEs. XYZ is concerned about two testing issues. The plan has only 58 participants; if it drops below 50, 401(a)(26) testing will be violated and the plan will have to be frozen and/or terminated, or they could add more participants. The plan is also in danger of dropping below a 20% ratio percentage and requiring rate group testing in combination with a defined contribution plan. Since the 401(k) plan provides only matching employer contributions, testing will fail if the ratio percentage continues to decrease.

Now let's see how the SECURE Act can solve the nondiscrimination testing issues of XYZ Corporation.

Benefits, Rights and Features: Testing Under Section 401(a)(4)

A soft- or hard-frozen plan would still be providing annuity forms of benefits. Potentially, such a plan could run into issues with benefits, rights and features. The SECURE Act addresses this issue by deeming that closed or frozen plans will pass the BRF testing if:

- the plan passes BRF testing during the year in which the closure occurs and the following two plan years;
- there have been no subsequent discriminatory amendments to modify the closed class or changing the BRF to the closed class; and
- the plan cannot have a substantial increase in coverage or value of the BRF in the five years preceding the date on which the class is closed, which could occur through amendment. However, if the freeze occurred before April 5, 2017, this requirement is met.

Minimum Participation Under Section 401(a)(26)

Let's consider a plan with five employees that is soft- or hard-frozen. After several years, the plan sponsor has 13 employees, including the five employees from when the plan was frozen. The plan now covers less than 40% of the employees of the employer, so testing under 401(a)(26) fails. The plan sponsor would have to add a participant to pass 401(a)(26), which would be challenging many years after the plan was frozen. Further, temporary relief had not been provided by the IRS before the SECURE Act for 401(a)(26), so plan sponsors had to devise and implement temporary solutions.

Under the SECURE Act, minimum participation is deemed to pass if:

- the plan is soft-frozen or hard-frozen;
- the plan passed Section 401(a)(26) testing requirements as of the date it was frozen, and
- the plan cannot have had a substantial increase in coverage or benefits in the five years preceding the date on which the class was closed. If the plan was frozen before April 5, 2017, this requirement is deemed to be satisfied.

Let's look at the XYZ Corporation example. The soft-frozen pension plan has 58 participants and in a year or two, it will drop below 50 participants. Before the SECURE Act, the plan would be in violation of the Section 401(a)(26) testing requirements and some significant change would have to be made to it. Thanks to the SECURE Act, assuming that the above requirements are passed, the XYZ Pension Plan can continue to provide benefits to the remaining participants.

The remainder of the relief described below applies only to soft-frozen plans.

Benefits Testing–DB Plans Under Section 401(a)(4)

In the years immediately after a soft freeze, the defined benefit plan will generally continue to pass 401(a)(4) on a benefits basis and without aggregating with another plan. As the years pass after the soft freeze and the percentage of employees in the defined benefit plan decreases and the percentage of employees who are HCEs increases, the benefits testing on a standalone basis fails. Plan sponsors would be continuing the plan either because it is

Matching contributions in 401(k) plans and employer contributions to ESOPs can be included in the nondiscrimination testing, which is welcome relief.

part of their benefit program philosophy or the plan is underfunded and the resources are not available to fund the plan for termination. If the testing fails, a difficult decision has to be made to either increase benefits or include additional employees only because of IRS nondiscrimination rules, which is never a popular reason.

Most employers with a frozen DB plan also have a 401(k) plan with employer contributions. A solution to the failure of the Section 401(a)(4) benefits testing of the frozen DB plan was to combine the plan with the company's 401(k) plan employer contributions and test on a benefits basis. There were two issues with this solution:

- When testing combined plans on a benefits basis, a minimum gateway contribution must be provided. The gateway contribution was expressed on a contributions basis, and ranged up to 7.5% of the compensation of each participant.
- Matching contributions were not included in the Rate Group Testing, and many employers made most or all of their contributions to the DC plan in the form of a match.

The SECURE Act addressed both of these issues. The aggregated DB and DC plans can be tested on a benefits basis, without a gateway requirement, if:

- The DB plan provides benefits to a closed group of employees. (i.e., a soft freeze).
- The DB plan must have passed nondiscrimination testing in the year the plan was closed and the two following plan years.
- After the closure, the DB plan cannot be amended to significantly favor HCEs by modifying the closed group or providing the benefits to the closed class.
- The DB plan cannot have any substantial increase in coverage or the value of benefits for the five-year period preceding the date that the class is closed. A substantial increase in coverage is generally more than a 50% increase in the number of participants. A substantial increase in benefits is generally a 50% increase in the average benefit provided, exclusive of changes due to additional accruals. However, if the closure occurred before April 5, 2017, this requirement is deemed to be satisfied.
- The DC plan must have a matching contribution, provide 403(b) annuity contracts funded by non-elective contributions or a match, or be an ESOP. The ability to use matching contribution or ESOP contributions is breaking new ground for employers with these types of contributions. These employers likely did not expect relief from any permanent relief that would be provided for closed DB plans.

Let's review our previous example for XYZ Corporation. XYZ would likely fail rate group testing before the SECURE Act as the 401(k) plan has only matching contributions. With the SECURE Act, the young employees will have projected benefits (testing on a benefits basis) that will assist in testing and allow the soft-frozen pension plan to continue.

For plans not frozen as of April 5, 2017, the plan could be soft-frozen after five years without benefit increases and be eligible for compliance testing without the gateway contribution. This could be attractive to DB or cash balance plan sponsors in the future.

Benefits Testing in DC Plans

Another option for employers looking to reduce contributions and risk with a DB plan is to provide replacement contributions in a DC plan. Again, this may lead to compliance testing problems. With the SECURE Act, testing on a benefits basis is available without gateway contributions if the following conditions are satisfied:

- There are non-elective contributions to the DC plan for a closed group of participants whose accruals or benefits have

been reduced or eliminated in a DB plan.

- The DC plan must pass the nondiscriminatory classification test of the Section 410(b) regulations for the plan year of closure and the two following years.
- After the closure of the DB plan, there can be no discriminatory amendments to the DC plan that modify the closed group or changes the allocations or BRFs for the closed group.
- The DB plan cannot have a substantial increase in the coverage or the value of benefits for the five-year period preceding the date that the benefits are closed. A substantial increase in coverage would generally be a 50% or more increase in the number of participants as of the closure date. A substantial increase in benefits would be a 50% increase in the average benefit provided to changes in the benefit to the plan, not related to additional contributions. However, if closure occurred before April 5, 2017, this requirement is deemed to be satisfied.

The SECURE Act also provided relief for matching contributions made to a 401(k) plan for older, longer-service employees. The language is vague, and regulations are needed on this and other provisions of the SECURE Act.

Comments Regarding the Nondiscrimination Testing Relief

As a pension actuary who has done significant testing over the years and has numerous clients with frozen plans who were anxiously awaiting relief, I offer the following comments:

- The relief is significant and will result in major relief for nearly all frozen pension plans.
- The relief is broader than the temporary relief that the IRS provided in 2013. Relief under minimum participation, Section 401(a)(26) was not part of the temporary IRS relief and will be a challenge to implement in 2020. Matching contributions in 401(k) plans and employer contributions to ESOPs can be included in the nondiscrimination testing, which is welcome relief.
- The relief requires testing results from when plans were originally frozen. Many plans were frozen quite some time ago, and the testing results may have been prepared by actuaries or service providers that have been changed many years ago. The IRS should provide guidance on testing results that may not be available.

Where applicable, nondiscrimination testing relief in the SECURE Act can be applicable back to 2014.

In-service Distributions from DB Plans

The law that included the SECURE Act included several other Acts as well. Under one of them, the Bipartisan American Miners Act of 2019, in-service withdrawals from pension plans are now permitted as early as age 59½. (Previously they were permitted at age 62.)

For larger employers, this may allow for "phased" retirement for employees in which an employee could work part time and collect his or her pension. For smaller cash balance plans, this could allow business owners and key employees to withdraw their account balance from the plan and invest the money according to their goals and objectives, as opposed to the needs of meeting a specified Interest Crediting Rate of the cash balance plan.

Conclusion

The SECURE Act was intended to encourage employers to implement and maintain their qualified retirement plans. The good news is that the SECURE Act also addressed significant issues affecting defined benefit plans. There are numerous DB plans that will now have guidance on how to continue with minimal additional cost, and thousands of participants who will receive a benefit from their company pension plan courtesy of the SECURE Act. PC

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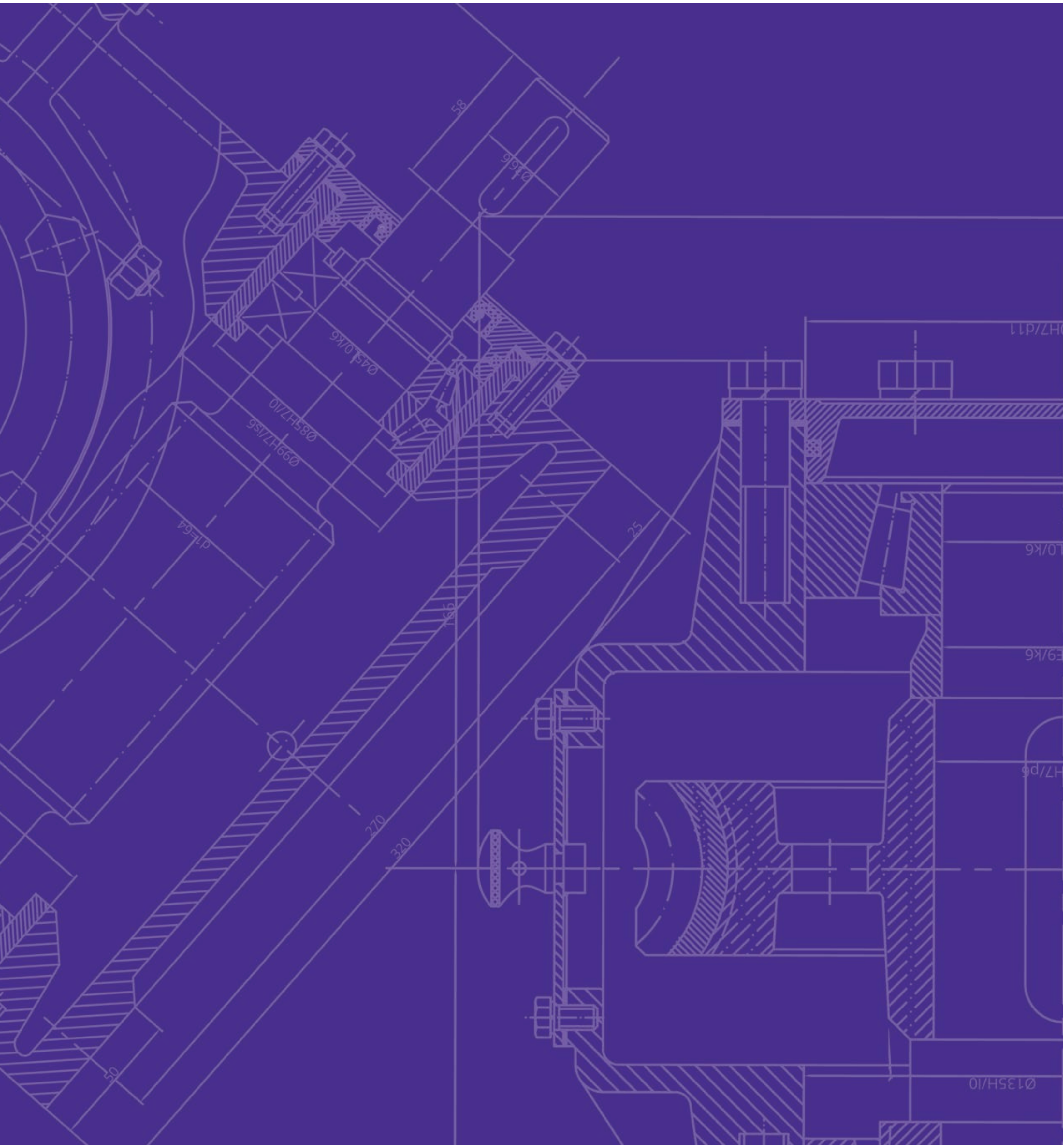
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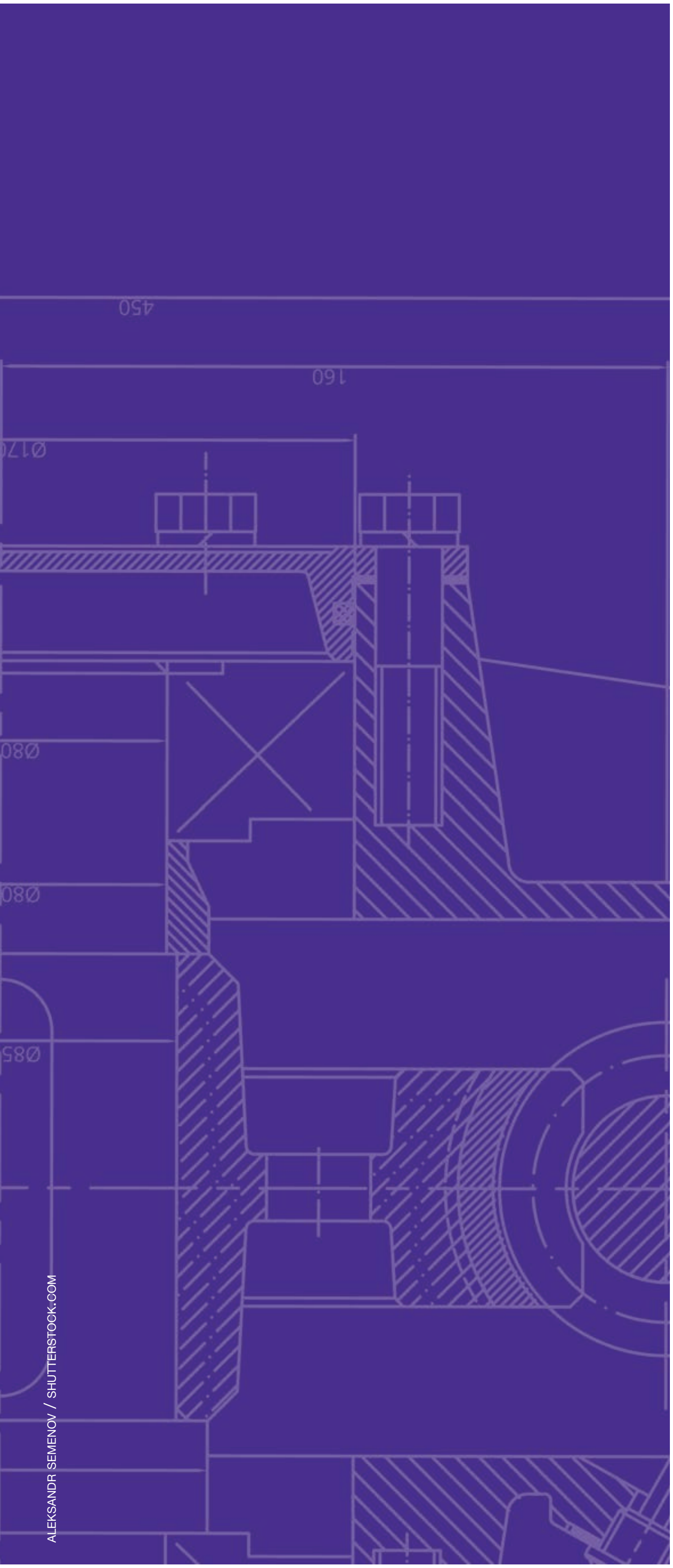

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2021 PLANNING FOR THE SECURE ACT

THIS HAS BEEN A CHAOTIC YEAR. BUT IN CHAOS THERE IS OPPORTUNITY—AND THE NEED TO REDEFINE RETIREMENT STRATEGY IS NOW.

BY PETE SWISHER

NO ONE REALLY EXPECTED THE SECURE ACT TO PASS IN 2019.

And no one expected that, if it passed at the end of 2019, the deadlines would not be adjusted to give the industry more time to prepare. And no one expected that the biggest thing to hit the retirement industry, legislatively, in more than a decade would be kicked to the curb by a global crisis that reads like a script of a scary movie. But here we are.

Major legislation demands a strategic response in any industry, and the SECURE Act is very major legislation for the retirement industry. Even if we skip the two potential game-changers—the PEP/MEP/GOP provisions (pooled employer plan/multiple employer plan/"group of plans") and the lifetime income provisions—SECURE contains 23 other provisions that require legal analysis, product planning, programming, workflow changes, training, implementation, and troubleshooting. This is a heavy lift on its own.

But when we include the need to rethink business strategies around the potential game-changers, and the looming Jan. 1, 2021 grand opening date for the first PEPs, and the Jan. 1, 2020 start date for many other provisions, planning for SECURE in 2021 and beyond is not merely important but urgent. It is priority No. 2, behind coping with the COVID-19 crisis.

This article takes a strategic look at SECURE's provisions in four groups: big changes, smaller changes, lifetime income, and PEP/MEP/GOP. Rather than repeating the details of the provisions themselves, the emphasis is on strategic perspective and high-level implementation. The first step is to explore a framework for viewing SECURE implementation overall.

A FRAMEWORK FOR DEALING WITH THE SECURE ACT

Timing and the Need for Interim Plans

The first element of a rational framework for SECURE planning is simply to understand the timing. Most of SECURE's provisions became effective on Jan. 1, 2020—*only 12 days* after the Act became law. The reason this happened is that legislators simply ran out of time. They had to either include SECURE as it stood or lose the opportunity to pass it as part of the year-end funding bill, and they chose to pass it. Had there been more time, the January 2020 dates would have been moved to 2021 and the PEP launch date to Jan. 1, 2022, and other dates would have been adjusted accordingly. As it happened, the only last-minute change was to add Section 601, which gave us time to amend plan documents, but otherwise left the text of SECURE intact.

Terminology and the Legislative Process

The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 was added to FCA 2020 as Division O late in the legislative process, and became law on Dec. 20, 2019.

The Further Consolidated Appropriations Act, 2020 (FCA 2020) was an "omnibus" funding bill that was "must pass" legislation in order to avoid a government shutdown at the end of 2019. "Must pass" legislation can be an opportunity for lawmakers to throw everything but the kitchen sink into a single bill by tacking on largely agreed-upon bills as amendments. "Omnibus" refers to the fact that the funding bill was for the entire government, versus separate funding bills for different departments and expenditures. In the case of FCA 2020, there were so many amendments that Congress split the omnibus bill into two parts—thus, FCA 2020, as the smaller of the two parts of the "omnibus," is affectionately referred to as the "minibus."

Oh, what havoc. For example, changing the Required Minimum Distribution (RMD) starting age[1] to 72 instead of 70½ is not, on the surface, a major change. But it is quite complex operationally.

Participant notices for RMDs for 2019 went out, in general, in late 2019 or January 2020. For some portion of those receiving such a notice, the new law changed their required beginning date. IRS Notice 2020-6, published on Jan. 24, 2020, therefore required financial institutions that had already sent RMD notices to individual retirement account (IRA) owners to furnish an updated notice by April 15, 2020. Providers had already sent notices before year-end in most cases; the law passed Dec. 20, 2019, changing the rules; IRS published guidance at the end of January; and providers only had until April 15 to get new notices out. The IRS called that whole two months they gave us "relief."

To add to the complexity, provider systems may need to handle two different groups of participants for RMD purposes: those born before or after the July 1, 1949 cutoff date. Those born before that date still have RMDs based on the 70½ rule; those born on or after it use age 72. This exchange between ARA's Brian Graff and Robert Richter in the ASPPA Spring Virtual Conference[2] was instructive:

> Richter noted that plans could technically just stick with 70½ for certain implementation purposes.[3]
> Graff: "But then people would be grumpy."
> Richter: "But they'll be grumpy anyway—look how old they are."

To wrap up the discussion on timing, here is how timing might play out for a service provider with respect to RMDs:

1. Scramble to respond to last-minute change by April 15.
2. Study the rule; get legal counsel involved; get a feel for what systems changes are needed.
3. Realize that the RMD age change is offset in 2020 by the CARES Act[4] suspension of RMDs.
4. Realize that distributions intended to be an RMD for a 70½-year-old may now actually be rollover distributions, and require a IRC Sec. 402(f) notice and withholding.
5. Make decisions.
6. Update the product roadmap.
7. Make the actual changes when resources can be freed.

FOOTNOTES

1. Section 114 of SECURE, which changed the required beginning date (RBD).
2. "A Close Look at the SECURE Act" presentation, May 7, 2020.
3. The requirement is to distribute the minimum starting on the required beginning date; plans could technically keep an age 70½ requirement.
4. Coronavirus Aid, Relief, and Economic Security (CARES) Act.

NO ONE **EXPECTED** THAT THE **BIGGEST** THING TO **HIT** THE **RETIREMENT** INDUSTRY, LEGISLATIVELY, **IN** MORE THAN **A** DECADE WOULD **BE** KICKED TO THE **CURB** BY A GLOBAL **CRISIS** THAT READS LIKE **A** SCRIPT OF A **SCARY** MOVIE.

But what do you do in the meantime, before your systems and procedures are fully updated and people fully trained? You have no choice but to implement an interim plan that addresses things like what to tell your call center staff to say and what sorts of manual workarounds to do while waiting for systems to catch up.

The Basic SECURE Planning Formula: Strategy + Product Roadmap + Interim Plan

The simple answer to the question of how to plan for 2021 and beyond with respect to SECURE is *strategy + product roadmap + interim plan*.

The Product Development and Management Association (PDMA) publishes a "Body of Knowledge"[5] that lays out best practices for product ideation, creation, and management. A product roadmap is a common tool for tracking changes to the product portfolio, and special software exists to facilitate such efforts and manage the needs of all stakeholders. Following these sorts of best practices makes ops people feel warm and happy. Skipping steps and rushing to market, I am told, makes them dyspeptic. Unfortunately, the timing and complexity of SECURE call for a bit of dyspepsia.

The product roadmap is the high level, long-term plan for SECURE implementation. The interim plan is the short-term response.

BIG CHANGES

There are seven provisions I semi-arbitrarily label "big" (other than the potential game-changers).

Long-Term Part-Time ("LTPT") Workers

This is a cool provision that might make a difference for a lot of people who would otherwise not save, but there is broad consensus that the provision[6] is trouble operationally. It has consequences for plan design, creates a need for challenging systems programming, and will increase the difficulty of plan administration for employers. The basic rule is that employees with three consecutive 12-month periods with more than 500 hours of service must be offered the ability to make salary deferral contributions in a 401(k).

Blake Willis, Chief Operating Officer of July Business Services, after rattling off a series of open questions and operational challenges associated with the LTPT rule, painted this picture of what may happen: "Some small business owners will quit… the first time they get a $500 penalty on someone they never thought was eligible." And his team's ability to help the employer is limited by the time they receive the data: "By the time we finish the year-end reports, it's July of the following year before we realize there was a problem." He fears that some employers will give up on the plan as being too much work.

On the surface it looks like we have time to prepare—the provision is technically effective already, but we do not have to count service periods prior to 2021. Because the rule calls for three consecutive years of 501+ hours, the soonest someone could become eligible under this rule is Jan. 1, 2024. But the need for an interim plan is strong—we must be ready to tell employers what new procedures they need to follow *starting Jan. 1, 2021*, so that we can capture the right data. Do not let the 2024 date lull you into a false sense of security.

Safe Harbor 401(k) Notices and Elections

Much has been written about these popular new provisions—the ability to implement a safe harbor provision at year-end without a prior notice, or even implement a safe harbor for the plan year up until the tax filing deadline (i.e., after the plan year-end) if the nonelective contribution is 4% instead of 3%.[7] But there are multiple unanswered questions, so for planning purposes, an interim plan might include these elements:

- Do not stop sending notices in 2020.
- Develop a "crib sheet" of talking points for coaching a client through a year-end change or addition of a safe harbor.

- Integrate the crib sheet with CARES Act changes, such as the ability to suspend a safe harbor mid-year due to the crisis.

The long-term product roadmap might have a complex series of upgrades needed for systems and procedures under the heading, "SECURE Safe Harbor Upgrades."

403(b)(7) Plan Terminations

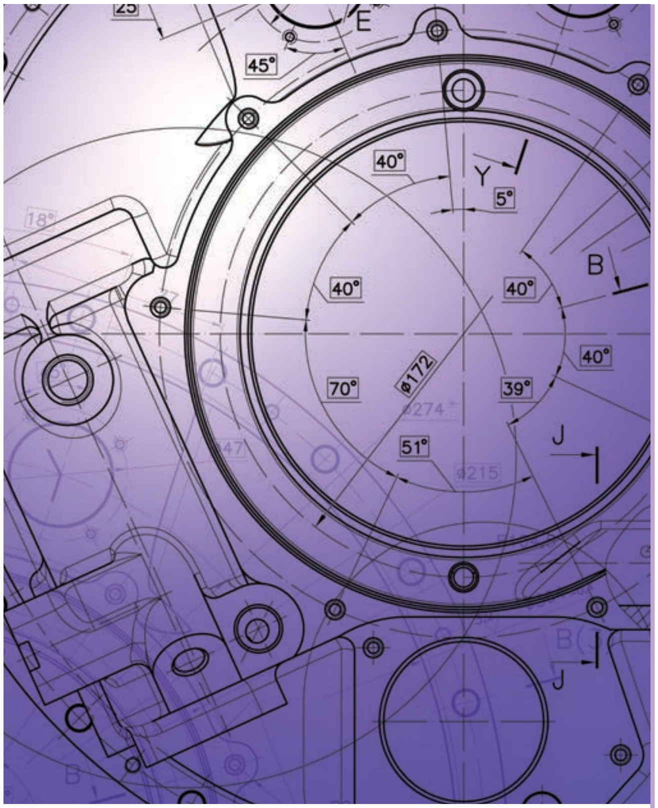
This is a welcome addition[8] to the toolkit, allowing us, finally, to terminate and distribute Section 403(b)(7) custodial account plans. This provision will create a wave of consulting activity once we receive additional guidance from the IRS.

Startup Cost Credit for Small Employers

The credit has been around since the Pension Protection Act of 2006 (PPA), but SECURE dramatically increased the amount of the credit,[9] from a maximum of $500 per year to a maximum of $5,000. My experience with the credit was that it was not big enough to cause retirement industry professionals to memorize and talk about it regularly with clients. That has now changed, and anyone who deals with startup plans should: (a) memorize it and be prepared to spend more time talking about it; and (b) consider integrating credit projections into sales proposals. This is a substantial credit, and product planners will want to consider how much leverage it affords them with their startup plan pricing, and how best to maximize that leverage in the sales process. When you contemplate changes to your sales proposal system for startup credits, also include illustration of the small employer automatic enrollment credit available under Section 105.

Adoption of New Plans Until Tax Filing Deadline

One of the American Retirement Association's big wins, Section 201 allows employers to adopt a new plan up until the tax filing deadline, including extensions, for plan years starting in 2020 and beyond. For planning purposes, consider the business implications for a TPA. November and December historically include a rush of new plan formations before the Dec. 31 cutoff, including the advisor who calls on Dec. 28 to plead that you rush his client a plan document. The employers



driving the year-end rush are those whose advisors are thinking ahead; other employers get to tax time a few months later and it is too late to do anything for the tax year.

The new deadlines will dramatically increase our ability to help small business owners start new plans favorably. The "sweet spot" for plan design, startup, and cash balance conversations and sales is now roughly September through March.

Higher Penalties

Congressional "PAYGO" rules require most legislation to be "paid for" ("pay-as-you go") by adding revenue-raising provisions ("pay fors") to offset any added costs. One of the key "pay fors" in SECURE was a tenfold increase in the penalties[10] for late/incomplete filing of the Form 5500, related forms, and withholding election notices. When you consider that roughly

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FOOTNOTES

5. Based on the 2017 edition of Product Development and Management Body of Knowledge: A Guidebook for Training and Certification, Allan M. Anderson, PDMA.
6. SECURE Act, Section 112.
7. SECURE Act, Section 103.
8. SECURE Act, Section 110.
9. SECURE Act, Section 104.
10. See SECURE Act, Sections 402 and 403.

20,000 employers per year[11] take advantage of the DOL's Delinquent Filer Voluntary Correction Program (DFVCP) for such late filings, the argument in favor of removing this fiduciary duty from employer's plates though some sort of 3(16) or limited-scope administrative fiduciary service just strengthened dramatically.

A Crib Sheet for Sales Consulting

A useful tool for anyone client-facing would be a crib sheet that unifies talking points for multiple law changes: delayed plan adoption, late adoption of safe harbor provisions, the new 15% maximum for QACA safe harbors, increased startup credits, the credit for addition of automatic enrollment, and LTPT workers. All are pertinent to a consulting discussion with a startup plan prospect and plan design overall. This would be a useful training class for salespeople and frontline administrators.

SMALLER CHANGES

The "smaller" changes are not necessarily smaller from an implementation standpoint. In fact, many are quite tricky. The RMD change falls in this category, along with related changes such as Sec. 401, "Modification of required distribution rules for designated beneficiaries."

Another challenging implementation story is that of Section 133, "Penalty-free withdrawals from retirement plans for individuals in case of birth of child or adoption," about which much has been written elsewhere. Also Section 116, "Treating excluded difficulty of care payments as compensation for determining retirement contribution limitations." I still have no idea what that one actually means, but it sounds like an opportunity for a client's reporting of compensation on its year-end census to be even more incorrect than usual.

Some of the smaller provisions are very specific fixes without broad application in the industry, such as the provisions regarding community newspapers,

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firefighters, 529 plans, and using credit cards for plan loans.[12] Other provisions are just for IRAs—the repeal of a maximum age for contributing to a traditional IRA, and special compensation rules for graduate students.[13]

Some provisions will be relatively easy to fix, such as the Section 102 increase in the QACA[14] cap from 10% to 15% after the first plan year. There are complexities, but the programming challenges are not as great as for other provisions.

Some are just for defined benefit plans:

- Section 205, Modification of nondiscrimination rules to protect older, longer service participants. This one is actually a very big deal for frozen DB plans.
- Section 206, Modification of PBGC premiums for CSEC plans.

Lifetime Income[15]

Let's start with what should be obvious but is worth stating anyway: There is more money in insurance than in *everything* else. There has to be—insurance companies offer guarantees, and guarantees are expensive. The typical general account stable value product therefore has a total "spread" of 175 basis points or more (sometimes much more), as does a typical CD (bank certificate of deposit). As a general statement, no retirement plan service provider of any type—TPA, recordkeeper, advisor, whatever—will make as much money as an insurer does on guaranteed products.

A second obvious point worth restating is that we really need more guaranteed products. A quote I have been repeating for years is, "The single premium immediate annuity is the silver bullet of retirement planning."[16]

But the SECURE Act's lifetime income provisions are not, by themselves, game-changing, because they lack one important element: a change to the Qualified Default Investment Alternative (QDIA) rules.[17] The current rules cast doubt on whether QDIAs can include insurance elements. The ERISA Advisory Council's November 2018 report[18] included a good summary of the issues.

But if regulators were to change the rules (or simply clarify them favorably) to make it easier to include insurance elements in QDIAs, the combination of SECURE's lifetime income provisions with updated QDIA rules would absolutely be a game-changer. There is reason to think this could happen eventually, so SECURE's lifetime income provisions might be viewed as the first half of some game-changing enhancements to plans' ability to increase participants' lifetime income—and create new in-plan revenue opportunities—without substantially increasing plan sponsor liabilities.

One final point: if we expect PEPs, MEPs, and GOPs to be a big deal, then we can expect lifetime income solutions to compete for "shelf space" in and around these structures.

PEPs, MEPs, AND GOPs

SECURE is about more than "open MEPs," but, by far, this element of the Act (and RESA[19] before it) *got more attention than all other provisions combined.* SECURE and RESA were effectively synonymous with "open MEPs" from 2016-2019 in the public discourse.

FOOTNOTES

11. The DOL publishes these statistics annually at dol.gov.
12. SECURE Act, Sections 115, 301, 302, and 108.
13. SECURE Act, Sections 107 and 106.
14. The Qualified Automatic Contribution Arrangement safe harbor.
15. SECURE Act, Sections 109, 203, and 204.
16. Stephen Pollan and Mark Levine in *Die Broke.* I may be slightly off on the exact wording—I can't find my copy.
17. Predominantly, the rules in question are the DOL's regulations under 29 CFR 2550.404c-5 establishing the framework for QDIAs, which were created by the Pension Protection Act of 2006.
18. "Lifetime Income Solutions as a Qualified Default Investment Alternative (QDIA)—Focus on Decumulation and Rollovers," available at dol.gov.
119. The Retirement Enhancement and Savings Act (RESA), a predecessor to the SECURE Act.

THE "SWEET **SPOT"** FOR PLAN **DESIGN,** STARTUP, **AND** CASH **BALANCE** CONVERSATIONS AND SALES **IS** NOW **ROUGHLY** SEPTEMBER THROUGH **MARCH.**

What's All the Fuss About?

In case you have been living under a rock, the situation is this:

- Congress has had a 10-year love affair with MEPs; SECURE's PEP/MEP/GOP provisions are the result.
- There are two "group plan" provisions in the Act: Section 101, "Multiple employer plans; pooled employer plans," and Section 202, "Combined annual report for group of plans."
- A PEP is a new type of MEP. All PEPs are MEPs, but not all MEPs are PEPs.
- The two key differences between PEPs and other MEPs are:
    - **No commonality requirement** (any employer can join a PEP; other MEPs require some "nexus" or commonality among adopters, such as being members of the same association). So a PEP is an "open" MEP that is a single plan.
    - **Financial institutions and service providers can sponsor them.** This is a bigger deal than the "open" part, though this is not widely recognized.
- PEPs are sponsored by a "pooled plan provider" (PPP) who is responsible for *"substantially all"*[20] fiduciary functions.
- A "group of plans" (GOP) consists of multiple single-employer plans that have the same fiduciaries, funds, and plan years. A GOP can file a combined Form 5500, thereby taking advantage of one of the advantages of MEPs.

The marketplace impact is that virtually every retirement plan provider in the United States, whether advisor, TPA, recordkeeper, or other, must figure out a strategy. SECURE is a "forced response" law: No one can afford to not respond to the PEP/MEP/GOP provisions, even if the response is to sell against them. For many, the response will be to create one or more new product offerings using one or more of the various group structures. For some, those new products will be central to their branding and distribution strategy.

Timing

The "grand opening" date for the first PEPs is Jan. 1, 2021, but actual product launches will be staggered over time based on several factors. First, there is the simple fact of timing, as well as how the COVID-19 pandemic has delayed all other projects.

Second, there is a need for prohibited transaction exemptions (PTEs) from the DOL with respect to certain business models, such as the inclusion of proprietary products or the methods for charging fees for managed account services. As a general rule, firms with the fewest conflicts of interest who have already begun working on PEP strategy will be first to launch. Proprietary product vendors or those with a more complicated story around conflicts of interest will wait for guidance followed by legal advice before launching.

The Pulse of the Marketplace

"What are you seeing out there?" and "What are other firms doing about PEPs?" are common questions these days. The short answer is that COVID-19 has forced SECURE and group plans onto back burners for most (but not all) of the industry, but the volume of product owners seeking serious answers is growing rapidly. Some firms are waiting to see what others do before forming their own strategy. Others are actively at work on PEP products. And some firms already have a clear idea of the products they intend to build, but are waiting on DOL guidance for a green light.

Imagine a scenario in which any of several brand-name firms announces a PEP launch. All it takes is one. That one firm will announce to employers in national marketing campaigns, "There's this new thing called a PEP and here's why you want one." The simple existence of that message in the marketplace will move the needle. The general sentiment among industry members is that this scenario will eventually take place. Early launches are likely to be from smaller, more nimble firms, but one or more larger players will eventually enter the field with a PEP.

Another common line of discussion is "PEP vs. GOP." GOPs can imitate common MEP structures in several respects—such as having a common 3(16) administrator, trustee, investment fiduciary, and fund lineup. Such structures have existed for years—SECURE simply gives them an awkward name and a new advantage. The single Form 5500 may also mean that there is only one centralized audit, though this is not yet clear. One common question is, "How is a GOP not identical to a MEP or PEP, but with less hassle for the service provider?" The short answer is that there are differences and those differences matter, pro and con. But that is a topic for another article.

Imagine a second scenario in which any of several brand-name firms announces the launch of a GOP (probably branded with a name catchier than "GOP"). The general sentiment among industry members is that this scenario too will eventually take place. The pulse of the marketplace, in other words, is that the PEP and GOP structures will both be used by one or more major players and numerous smaller ones, though planning and implementation have been slowed by the COVID-19 crisis.

Prediction: A Large-Scale Transfer is Underway

Twenty years ago, very few plan sponsors had retained a discretionary investment fiduciary. Today, something like 25% of sponsors have done so,[21] and the number is growing rapidly. Investment fiduciary duties are shifting rapidly from employers to providers.

Ten years ago, no one was talking about 3(16) administrators. In 2017, only three TPAs at a conference of roughly 30 larger TPAs were offering 3(16) services. In 2019, at the same conference, nearly half of TPAs present said they were offering some form of 3(16) service.

The direction seems clear and does not need MEPs, PEPs, or GOPs to make it real. But PEPs introduce a new dynamic: the requirement for the PPP to be a named fiduciary and the plan's 3(16) administrator and to be responsible for "*substantially all*" compliance functions. The retirement industry is used to hiding behind non-fiduciary contract language. The PPP role will not allow this for the most part—it is difficult to hide from language like "*substantially all*."

If a relative handful of industry players launches group programs, including PEPs, the marketplace messaging of the industry will be shifted. The shift may be small at first, but action begets reaction. Over time, SECURE will add thrust to a movement that is already underway: *a large-scale transfer of fiduciary responsibilities from employers to service providers over time*.

It is not possible to get employers further divorced from fiduciary duties than in a MEP or PEP. GOPs, group trusts, and other structures can imitate this to a point, though the actual degree of transfer is a sliding scale depending on the program. But if we simply plot the trend, it is toward genuine transference of duties—and the endpoint of the curve is far up and to the right.

YOUR 2021 SECURE ACT ACTION PLAN

If SECURE compliance is your responsibility, what sorts of tools do you want at your fingertips? The toolkit looks something like this:

- **Interim plans.** Crafted with the help of attorneys, resources at the American Retirement Association, and in the broader retirement plan community.
- **Crib sheets.** Field versions of your interim plans. Your people need to know what to say and do while your firm moves along the project roadmap.
- **Product roadmap.** A method of managing product changes across the organization.
- **SECURE provisions matrix:** A simple list of all the provisions with high level info on what they mean, what the interim plan is, and what changes are implied for the project roadmap.
- **Brainstorming on the game-changers.** Spend special time thinking about the potentially transformational lifetime income and PEP/MEP/GOP provisions.

It all starts with strategy. As noted above, SECURE is a "forced response" law with significant long-term strategic implications for everyone in the retirement business. Planning for 2021 means starting the wave of implementation projects that SECURE's 28 provisions necessitate. But at a higher level it means that now, in 2020, in the midst of the global pandemic, is the time to plan for the future of your business. PC

Pete Swisher is one of the retirement industry's most respected voices. He is the President of Waypoint Fiduciary LLC, a prolific writer and speaker for the financial industry, and an expert in PEPs, MEPs, and other group retirement programs.

FOOTNOTES

20. SECURE Act, Section 101(a)(1)(e)(2)(B).

21. From a presentation at the annual conference of Commonwealth Financial Network in October 2019, citing a 2018 survey of plan sponsors.

GUARANTEED RETIREMENT INCOME:

THE IMPACT OF THE SECURE ACT

THE NEW LAW PROVIDES SOLUTIONS TO SEVERAL FIDUCIARY CONCERNS ABOUT PROVIDING GUARANTEED INCOME OPTIONS IN DC PLANS.

FRED REISH & BRUCE ASHTON


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THE SECURE ACT HAS THREE SECTIONS THAT, TAKEN TOGETHER, SHOULD HAVE A POSITIVE IMPACT ON THE PROVISION OF RETIREMENT INCOME PRODUCTS IN DEFINED CONTRIBUTION PLANS. WHILE THE FOCUS OF THIS ARTICLE IS ON THE ACT'S FIDUCIARY SAFE HARBOR, IT SUMMARIZES THE THREE PROVISIONS AND THEN GOES INTO DETAIL ON THE FIDUCIARY SAFE HARBOR FOR SELECTING AN INSURANCE COMPANY. BUT FIRST, LET'S LOOK AT WHY THIS MATTERS.

RETIREMENT CHALLENGE

Over the last 40 years or so, the retirement landscape has shifted from being focused on defined benefit plans—which guaranteed income for life—to mainly 401(k) plans, which generally provide a lump sum at retirement that workers need to manage for their remaining lifetime. This shift means that retirees and those preparing for retirement are facing a number of issues. They are living longer, so their money needs to last longer. The money needs to be invested, which subjects it to market fluctuations, more specifically "sequence of return risk," which means that the markets can be sharply lower at the very point in time they need to withdraw funds. And as they get older, their ability to make financial decisions diminishes, so they need to have arrangements that protect them from bad advice and decisions.

These are, of course, the same individuals who have struggled with the complexities of saving and investing for retirement—many of whom have, over the past decade and a half, been aided by plan designs that automatically set contribution rates and taken advantage of investment alternatives that establish and systemically rebalance diversified investment portfolios on their behalf.

Unfortunately, many—perhaps most—participants and retirees are not prepared, by education or experience, to invest for long-term retirement security, to withdraw money from their IRAs at a sustainable rate, or to know their likely life expectancies to properly balance their needs and available resources. Retirees, who are essentially creating their own paycheck from their available resources, need the certainty of knowing just how much they have available to spend.

One solution is to invest a portion of their assets in guaranteed retirement income products. This is why the SECURE Act's focus on retirement income is important.

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THREE RETIREMENT INCOME PROVISIONS

The Act has three provisions relevant to retirement income:

- Section 109 dealing with the "Portability of lifetime income options." Generally, it permits special distributions of a "lifetime income investment" when the investment is no longer authorized to be held under the plan. This makes it possible for a participant to keep the investment even if the plan sponsor changes recordkeepers or decides to eliminate the investment from the plan lineup. This provision is effective now. It also addresses the concerns of plan sponsors reluctant to add these options to their plan menu for fear that a change in recordkeepers could be disruptive to participants who had invested in those options.

- Section 203 relates to "Disclosure regarding lifetime income." This section requires plans to give participants projections of their current account balance as a monthly benefit using assumptions prescribed by the Secretary of Labor. This is designed to inform participants about how their accounts translate into income when they retire and to, at least partially, shut the focus from account balance to retirement income. This section goes into effect 12 months after the DOL issues guidance. It is hoped that this will help participants better understand what their projected retirement savings will produce in terms of monthly income in retirement.

- Section 204 provides the fiduciary safe harbor for the selection of a guaranteed retirement income provider, which is effective now.

THE NEW SAFE HARBOR

While there are a number of different retirement income "solutions" (such as managed accounts and mutual funds designed to provide sustainable withdrawals), only insurance companies can offer a guarantee. However, the fiduciaries of some plans have balked at the prospect of selecting an insurance company that needs to be around in 20, 30 or 40 years to make payments to the retirees. The SECURE Act safe harbor addresses that.

In essence, the safe harbor says that, when a plan fiduciary of a defined contribution plan selects a "guaranteed lifetime income contract" to be offered under its plan, the fiduciary will be deemed to have acted prudently if it follows the steps outlined in the law. The Act defines "guaranteed lifetime income contract" as an annuity contract or any other contract that provides guaranteed benefits for at least the remainder of the life of a participant in the plan. The new safe harbor means that the fiduciary will not be liable if the insurance company later defaults on its obligation to participants who invest in the contract. The requirement is that the fiduciary obtain specified representations from insurance companies about their financial soundness (and not have any information that contradicts those representations).

FOUR STEPS

A plan fiduciary needs to follow four steps to obtain the safe harbor protection for selection of a "guaranteed lifetime income contract." It must:

- engage in an objective, thorough and analytical search for the purpose of identifying insurers from which to purchase such contracts;
- consider the financial capability of the insurer to satisfy its obligations under the contract;
- consider the cost (including fees and commissions) of the contract in relation to the benefits and product features of the contract and administrative services to be provided under the contract (a subsection says this need not be the lowest cost, but it cannot exceed a reasonable cost); and
- conclude, on the basis of these factors, that, at the time of the selection, the insurer is financially capable of satisfying its obligations under the contract and the relative cost of the contract is reasonable.

The key to the safe harbor is the process for considering the financial capability of the insurer. The safe harbor requires that the fiduciary obtain specified information from the insurer. If a fiduciary obtains that information, the fiduciary will be deemed to have satisfied the "consider" and "conclusion" requirements relative to financial capability. Specifically the fiduciary must obtain written representation from the insurer that:

- the insurer is licensed to offer guaranteed retirement income contracts;
- the insurer, at the time of selection and for each of the immediately preceding seven plan years meets the following requirements:
  - operates under a certificate of authority from the insurance commissioner of its domiciliary

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THE KEY TO THE SAFE HARBOR IS THE PROCESS FOR CONSIDERING THE FINANCIAL CAPABILITY OF THE INSURER.

state which has not been revoked or suspended;
  - has filed audited financial statements in accordance with the laws of its domiciliary state under applicable statutory accounting principles;
  - maintains (and has maintained) reserves which satisfies all the statutory requirements of all states where the insurer does business; and
  - is not operating under an order of supervision, rehabilitation, or liquidation (an "adverse order");

- the insurer undergoes, at least every five years, a financial examination (within the meaning of the law of its domiciliary state) by the insurance commissioner of that state (or by a representative, designee, or other party approved by such commissioner); and

- the insurer will notify the fiduciary of any change in circumstances occurring after the provision of the representations which would preclude the insurer from making the representations at the time of issuance of the contract.

After receiving these written representations, and before making its decision, the fiduciary must not have received notice of an adverse order affecting the insurer and must not have any other information that would cause it to question the representations.

'REASONABLE COST' REMINDER

Note that a fiduciary is not required to verify any of the information provided by the insurer or to dig deeper into the insurer's financial condition or regulatory status. It is only required to obtain the insurer's *representation* as to these facts and not have any information to the contrary.

There is a limitation in Section 204 that fiduciaries need to be aware of, however. The section (only) protects the fiduciary against liability "due to an insurer's inability to satisfy its financial obligations under the terms of such contract." The fiduciary must still determine if the costs are reasonable. This means that, in selecting a guaranteed retirement income contract, a fiduciary will need to engage in a prudent process to conclude that the costs are reasonable (e.g., obtain and review data about costs for similar products in similarly-situated plans). This requirement—the same standard that applies to the selection of any other investment or service to the plan—should be manageable with assistance from the plan advisor, assuming you have access to industry benchmarking data on costs.

WHAT THIS MEANS

The three provisions in the SECURE Act are intended to facilitate the provision and acceptance of retirement income options in defined contribution plans. (Many recordkeepers currently provide an illustration of an income stream and/or calculators for participants to determine this for themselves.)

Some fiduciaries have been reluctant to offer guaranteed retirement income products because of the difficulty in assessing the financial stability of the insurance company (and also due to a concern that participants would lose their guarantees if the plan switched providers). The SECURE Act provides solutions for both of those fiduciary concerns.

It is likely insurance companies will now provide institutionally priced products to 401(k) plans. To be consistent with existing fiduciary practices, those products should be transparent in their pricing. The next steps will be for recordkeepers to add these products to their platforms. Then plan fiduciaries will need to decide whether to include the products in their lineups in view of the new safe harbor and their plan needs, and, ultimately, participants—perhaps with the assistance of their trusted plan advisor—will need to decide whether to use them. PC

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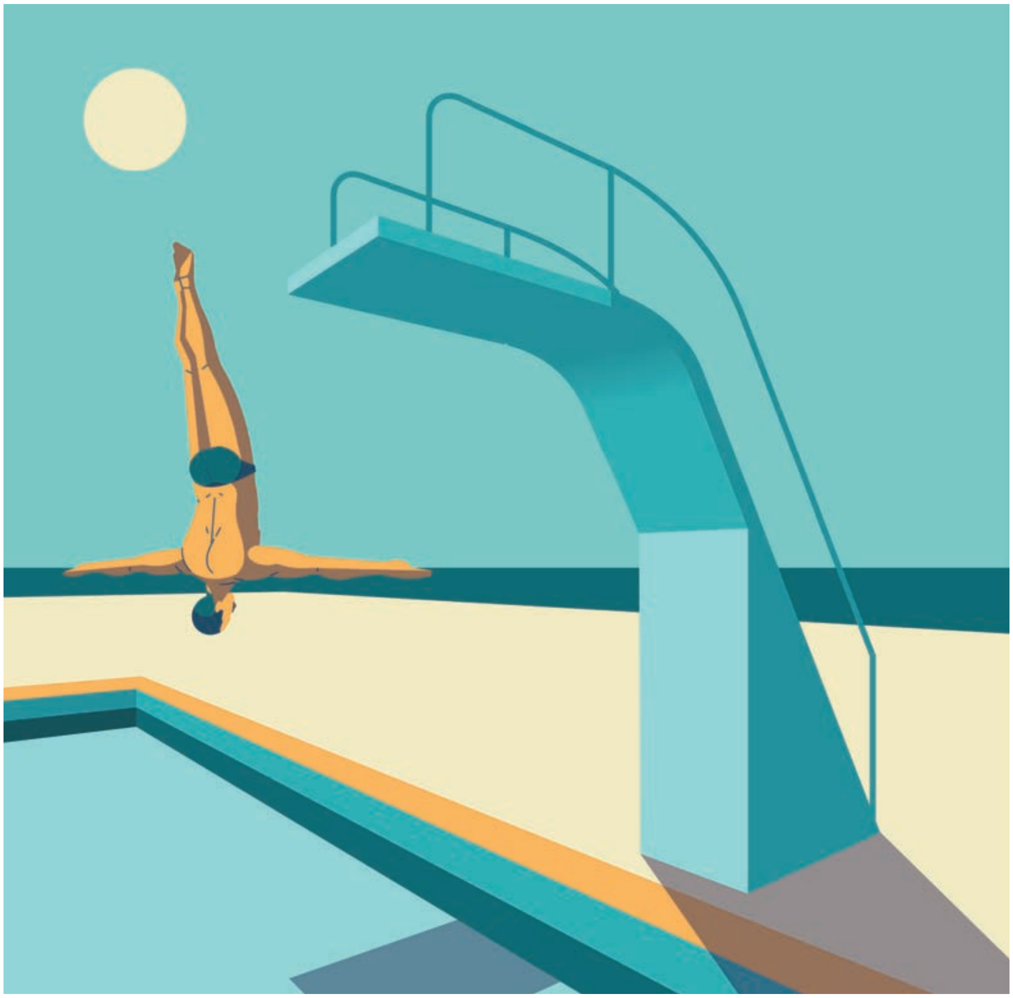

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Enter the Pooled Plan Provider

Thinking about becoming a PPP? Here's a look at how taking the plunge could benefit your firm.

BY DICK BILLINGS

Remember the childhood game called "Hot Potato"? If you have never played it, today's version plays a musical tune while players continually toss the "potato" to someone else. The one holding the "potato" when the music ends is out. Play continues until one person remains—the winner.

If you have been in the retirement plan business for any length of time, you know that if a person is on the Board of Directors, an owner or officer of a company sponsoring a qualified plan under Code Section 401 (typically a 401(k) or ERISA 403(b) plan), these folks are already fiduciaries. Many company officers do not realize this. Even if they do, they probably do not appreciate the gravity of their responsibilities.

Every person I have ever encountered who understands his or her fiduciary risks and responsibilities wants to get rid of them—as fast as possible! No one wants to be a fiduciary. So, if you would like to offer a unique service to your plan sponsor clients by taking on virtually all their fiduciary responsibilities, you should consider becoming a Pooled Plan Provider (PPP).

Since the passage of ERISA in 1974, plan sponsor fiduciaries have always been able to hire outside fiduciaries to reduce their risk. But why, more than

45 years since ERISA was enacted, has the idea of fiduciary outsourcing only now become popular?

Gee… has anything happened in the retirement plan world since 1974? Well, for starters:

1. Section 401(k) was added to the Internal Revenue Code;
2. the internet was created;
3. recent regulations require many more written notices and disclosures to plan participants;
4. virtually all plans now "impose" investment direction upon participants;
5. many thousands of "new" investment vehicles (e.g. ETFs, index funds, TDFs, etc.) have been created; and
6. plan participants are confused by all these options.

Retirement plan fiduciaries handle other people's money; if they do not act in their participants' sole interest they could be fined, and even go to jail. Until recently, most retirement plan fiduciaries gave little thought to this fact. They were busy running their businesses and just hoped their advisors (investment advisor, TPA, record keeper, CPA, attorney, etc.) were acting in their sole interest. As Vince Lombardi once famously said, "Hope is not a strategy!"

Enter the Pooled Plan Provider, created when the SECURE Act was signed into law in December 2019. The law's PPP provisions are set to go into effect on Jan. 1, 2021.[1] (For the balance of this article, I will refer to Pooled Plan Providers as "P3s"; the "plans" that P3s will be offering are called Pooled Employer Plans (PEPs).[2])

As of the writing of this article, the Treasury Department had yet to issue P3 regulations. Nevertheless, we can clearly illustrate how P3s may very well become the standard upon which good fiduciary governance will be measured.

When a qualified plan is established, ERISA requires that the positions listed in the nearby table be filled.

Title/Office	Usual Responsible Party	P3 Now Responsible for Oversight?
ERISA §402(a) "Named Fiduciary"	Employer	Yes
ERISA §402(a) "Named Fiduciary"	Employer	Yes*
Plan Sponsor	Employer	Yes
Trustee	Employer	Yes
ERISA §3(16) "Plan Administrator"	Employer	Yes
ERISA §3(38) "Investment Manager"	Employer	Yes
Plan Administration Committee (PAC) Chair	Employer	Yes
Resident ERISA Expert	Employer	Yes
Hires CPA auditor	Employer	Yes
Represents before IRS and Department of Labor	Employer	Yes
Retains all records	Employer	Yes
Hires all plan-related vendors	Employer	Yes
Ensures all proper participant disclosures are issued correctly and timely	Employer	Yes
Maintains required bonding	Employer	Yes
Signs the Form 5500 under penalties of perjury	Employer	Yes
Determines "fee reasonableness"	Employer	Yes

**The P3 rules require co-fiduciary responsibility be retained by the adopting employer, but only with regard to that adopting employer's underlying participants. The P3 retains sole fiduciary responsibility for the PEP itself [Code Section 413(e)(3)(D)].*

> Employers retain many fiduciary positions when sponsoring an individual plan, while a P3 takes on virtually all the fiduciary risks."

As a P3, you will be able to offer these additional benefits:

- Your clients will know you have been vetted by the federal government.[3] They will be able to easily verify this with a visit to a government-run website.
- Your clients will feel more secure that you will be audited, examined and/or investigated by the federal government on a regular basis.[4]
- You clients will understand you will be taking on the most fiduciary responsibility allowed by law.
- You can tell your clients that PEP participants will be receiving the most efficient investment offerings available, at the lowest cost.

SHOULD YOU BECOME A P3?

Like any service provider, you want to offer your clients value-added services. If you become a P3, clearly you would be adding value. But like adding payroll or any other service, do you have:

- The proper personnel?
- The proper systems?
- The proper insurance?
- Access to sufficient capital?

I see the activities of the retirement plan industry segmented like this: TPA, investment advisor, recordkeeper, payroll provider, and corporate trustee. There are certainly firms that have successfully combined some of these services under the same "brand"—but even those firms tend to use physically separate personnel and systems. If a vendor now adds P3 services, it will overlap *all* of those retirement plan services. Clearly this will benefit the average employer, but will it work for you?

I think it can. However, your P3 people will now be officially and legally in charge of your other respective divisions. And for those services you *don't* offer, it means those services will be provided by companies that you neither own nor control. This will require you to have clear contractual language and system safeguards in place so you can assure your clients, as well as your own shareholders, that your P3 department truly is "in control."

There is also the issue of conflict of interest.[5] If you are the P3 and also offer one of the aforementioned services, how will you assure your clients that you will oversee your own company's services objectively in a way that satisfies ERISA's "highest standards" requirements?

PRICE AND VALUE

Some say PEPs (and existing MEPs) are not less expensive than individual plans. Is this true?

The first response to this would be another question: "Less expensive compared to what?" The ultimate answer is, it depends. If an employer or participant compares the overall cost of a PEP or MEP to an individual plan with assets between $0 and $1MM, the PEP/MEP should be much less expensive.

However, if a client compares the overall cost of a PEP or MEP to an individual plan with say, $10MM or more of assets, then maybe not. But that does not automatically make the individual plan "better." Remember that as listed in the table above, employers retain many fiduciary positions when sponsoring an individual plan, while a P3 takes on virtually all the fiduciary risks. For this risk, the P3 will charge a fee. So, even if

FOOTNOTES

1. Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, enacted Dec. 20, 2019.
2. Code §413(e)(3).
3. Code §413(e)(3)(A)(ii).
4. Code §413(e)(3)(B).
5. "Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters," 29 CFR 2550. Document Number 2016-07928, published April 8, 2016.

the cost of a $10MM plan is less that of the PEP/MEP, the P3 may remain the better deal. Remember, price is only relevant in the absence of value.

PARTICIPATING EMPLOYERS' RISK

Doesn't a participating employer retain some fiduciary risk as the plan sponsor of his/her own employees' portion of the PEP?

Let's assume a client owns a growing company. It has production, sales, human resources and probably other departments. As an entrepreneur, he is probably not well versed in all these areas. Furthermore, he would much rather spend more time running his business and less time overseeing those departments. So he hires a CEO. Does he still have some responsibility? Sure. But if the CEO is empowered with the usual legal responsibilities, the owner's only duty now is to oversee the CEO from time to time. The CEO is legally responsible for almost everything else.

The same could be said of hiring a P3. Federal rules do indeed require a participating employer to keep an eye on the P3. But that will be much easier than managing all those day-to-day responsibilities listed in the chart above. The P3 is legally responsible for all other fiduciary oversight.

If you offer P3 services, you can then ask your employer prospects, "Would you like us to do all the heavy lifting for you? Or would you like to continue playing fiduciary "Hot Potato?" PC

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Turning RFPs into Consulting Opportunities

Here's how your responses to RFP questions can become your template for the development of a new profit center: your procurement department.

BY DAVID WITZ

What mindset do you have when you approach a Request for Proposal (RFP) engagement? Is it the "agony of defeat" or the "thrill of victory"? I suspect your answer may depend on whether you won the engagement to conduct an RFP on behalf of a client or won the engagement after responding to the RFP.

Whether you conduct or respond to RFPs on an occasional or regular basis, there is overwhelming agreement that it is an agonizing process that requires the attention of multiple subject matter experts within extreme time constraints to craft a compelling response or structure a carefully worded question that gives you or them the information you or they need to make the best decision.

If you have participated in responding or requesting an RFP, you are all too familiar with the many common complaints associated with RFP activity, such as:

- They take too much time.
- They are a distraction from other productive work that pays the bills.
- The close ratio is very low.
- It is often a process to fill the file to demonstrate reasonable fees with no intention of making a change
- We never have the time to construct compelling responses.
- It feels like we are always starting over with each new RFP.

- I'm never told why I lost so I have the opportunity to address deficiencies that might help me win opportunities in the future.

Of course, the competitive spirit within all of us compels us to read the RFP, which creates the temptation to respond unless the opportunity is completely outside of your wheelhouse. This approach is often the beginning of the end for the responder because the response is reactive instead of proactive. In other words, never respond to an RFP that you don't intend to win, even if the odds are not in your favor. This requires a concise response—or, as explained in *The Elements of Style* by Strunk and White:

> "Vigorous writing is concise. A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all sentences short or avoid all detail and treat subjects only in outline, but that every word tell."

EDUCATION AND EXPERIENCE

Every RFP is a test of your ability to communicate your elevator pitch. The process should be one of self-discovery, and it should impact future decisions related to the deployment of capital that is designed to improve your competitive posture. More importantly, your responses to RFP questions become your template for the development of a new profit center: your procurement department.

A procurement department functions as a subject matter expert and project manager. Who better to conduct an RFP for a particular service than a party that is deeply engaged in that activity? Suffice to say, the best person to evaluate talent is someone who has that talent. Granted, the common objection by your competitor responding to your RFP is their hesitancy to divulge their trade secrets—but this assumes they actually *have* non-public trade secrets, which is very unlikely.

To address this objection, simply recuse yourself from bidding on the business. Once you recuse yourself you are in a position to capture competitive intel that may help you understand why you lose to a competitor in head-to-head competition. This is information you need to know if you wish to grow your market share.

The lesson here is a simple one: RFP expertise is development through education and experience. To obtain that education and experience, you must conduct and respond to RFPs.

DRIVING FACTORS

There is an important reason for developing a procurement profit center: RFP activity is trending up. The reason we are seeing an increase in RFP activity is due to a hyperactive plaintiff bar that has secured court decisions or settlement agreements that impose an obligation to conduct an RFP. Furthermore, various recent articles written by ERISA counsel and the Department of Labor have encouraged RFP activity on a 3- to 5-year time interval. That means there is a potential that as many as 20% of all plans are engaging in an RFP process every year.

Keep in mind that RFP activity is not limited to recordkeeping and administrative services only. Thanks to COVID-19, there is an increasing trend in items that include cybersecurity, investment products, fiduciary insurance, compensation surveys, HSAs, 3(16) services, 3(38) services, benefit concierge, committee surveys, non-qualified solutions, outsourced CIOs, and even pandemic RFPs. (To access a free COVID-19 RFP created with help from Principal Financial Group and Google, go to www.catapulthq.com.)

Fortunately, most TPAs have the experience in these areas to position themselves as a procurement solution, while at the same time capturing market intelligence that can be reused for other engagements or research papers that are offered for a fee. Additionally, conducting advisor RFPs is a great way to identify new distribution relationships while getting paid for the research.

In fact, a TPA should think outside the box and identify other research topics that would serve the business development needs of the advisors they work with and their clients. If data is king, then this market intelligence derived from the efforts of your procurement department could be used to generate other sources of consulting revenue, position a TPA to remain relevant with their distribution channels, build deeper relationships with clients, and offer a TPA a competitive market advantage. The question becomes how to efficiently acquire, maintain and disperse this market intelligence.

TECHNOLOGY IS KEY

Of course, there is only one way to make your procurement department scalable: technology. The predominant way of conducting RFPs, Requests for Information (RFIs), Due Diligence Questionnaires (DDQs), etc. (hereinafter referred to as "RFx") is through the use of Word, Excel or PDFs. These dinosaurs require painstaking labor to sort through

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“If you are not conducting RFPs, you are losing the opportunity to increase consulting revenues and capture market intelligence that would permit you to expand your market share.”

prior RFx creations or responses to prepare or complete a new RFx.

In addition, as the quarterback of any RFx project, you undoubtedly have to obtain approval from other colleagues in marketing, sales, compliance, legal, company executives and subject matter experts. Oh, the drudgery of working with multiple redlined versions of an RFx to produce a final report with little or no chance of winning! This is the history of past RFx experiences, where the only guaranteed winner is the consultant that was retained to conduct the RFx. But, again, this is the history. To be successful, the future must be different.

Creating a procurement profit center for consulting engagements requires the acquisition of technology that permits you to efficiently manage a content library of many questions and corresponding answers. For maximum efficiency, it requires your RFP technology to support both requestor or responder engagements; otherwise, you have two different solutions to buy, maintain and master.

To handle volume, your RFP technology should include machine learning, so questions are automatically answered to save time and exercise version control. Furthermore, managing version control requires the use of standardized templates with built-in workflows. An RFP technology platform that comes with and supports the development of templates is worth its weight in gold, especially if those templates can be modified and customized.

In addition, your technology solution should support team collaboration and real-time chatting that allows multiple team members to participate at the same time to complete, evaluate or score responses or approve questions.

Also, your technology must provide the analytics that help you monitor activity, the impact that a question or answer has on the decisionmaking process, and close ratios associated with distribution channels. In short, you need a user-friendly, Swiss Army Knife technology platform that you can quickly become proficient in and that maximizes your efficiencies.

While not all solutions are equal, the primary RFP technology solutions for the retirement industry, listed in alphabetical order, include Catapult HQ, CFFM, InHub, Loopio, Qvidian, RFP360, rfpio, and SAP Ariba. These technology solutions vary significantly in sophistication, deliverables and cost, so it pays to do your homework before you adopt any solution referenced.[1]

Bottom line: If you decide to professionalize your RFP approach and build a procurement profit center, you must keep the following four principles in mind to achieve success:

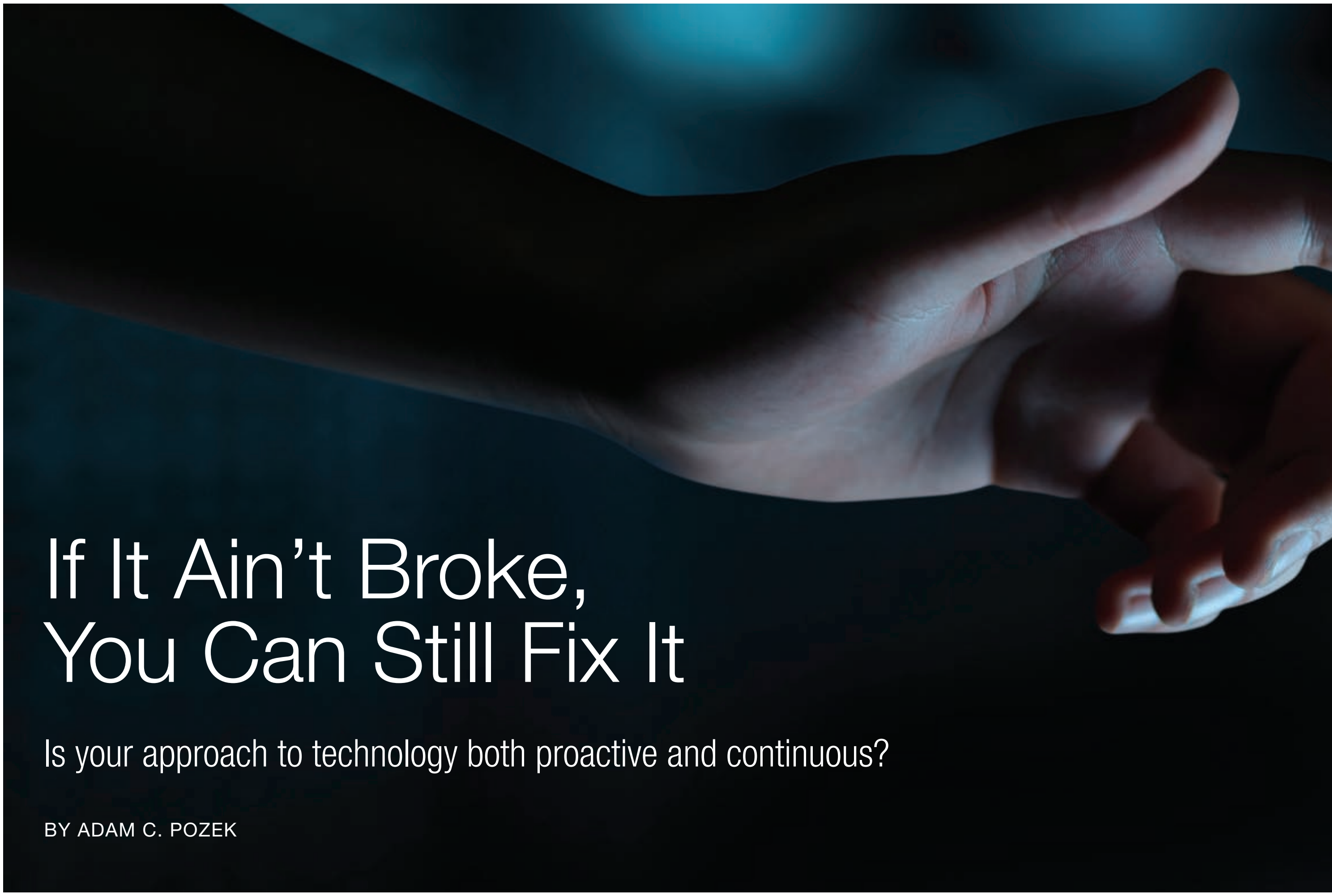
- participate to win;
- engage to build expertise;
- engage to build market intelligence; and
- leverage comprehensive and scalable technology.

RFPs are not going away. They are now a normal part of the fiduciary process that finds support in judicial decisions and settlements. If you are not actively responding to RFPs, you have certainly limited your exposure to opportunities. In the same way, if you are not conducting RFPs, you are losing the opportunity to increase consulting revenues and capture market intelligence that would permit you to expand your market share. In short, RFPs are in your future. It cannot be avoided. PC

David Witz is the CEO of PlanTools and the COO of Catapult, fintech firms that deliver performance reporting, benchmarking, revenue sharing analysis, fiduciary lockbox, RFPs, fiduciary governance and expert witness services. He has more than 36 years of industry experience. He is the co-chair of the Plan Consultant magazine committee.

FOOTNOTE

1. For a breakdown of the different solutions, please email learn@plantools.com and request a copy of our comparative.



If It Ain't Broke, You Can Still Fix It

Is your approach to technology both proactive and continuous?

BY ADAM C. POZEK

As I have given presentations over the years on technology and remote working arrangements, a common refrain I've heard has been akin to the adage, "If it ain't broke, don't fix it."

The reasons behind those comments range from not trusting the cloud to the anticipated cost of anything related to technology and concerns about ensuring quality and employee productivity. However, as the Coronavirus pandemic has demonstrated, the technology we use to run our businesses is something we should continuously try to fix even if it doesn't appear to be broken.

Regardless of particular preferences about remote work arrangements and the technology needs associated with them, many of the systems and processes that make our businesses more portable also make them more efficient… even if/when everyone is back in the office rather than working from their dining room tables. Let's walk through a few examples.

HARDWARE

Deciding when to upgrade hardware is always a challenging conversation. With processing power improving continually and various applications demanding more and more bandwidth, it can be difficult to know the ideal time to purchase that new server or upgrade employees' desktop computers. Doing so will most assuredly lead to some disruption and loss or productivity as machines are configured, software is installed, and user preferences are customized.

Then there is the question of whether you purchase the latest, greatest, fastest thing available or go with last year's model to save some money even though it might mean a shorter obsolescence curve. And let's not forget our road warriors who have laptops that take a beating going from airplane to hotel to room and back again.

While costs are much lower now than they used to be a few years ago, it can still be pretty pricey to keep hardware current. When all is said and done, you still have a lot of expensive hardware sitting in an office that could easily fall prey to some sort of physical damage, e.g., fire, storm, etc.

It wasn't that long ago that working with a large, enterprise-level cloud-based setup was extremely expensive,

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to the point of being cost-prohibitive for small and mid-sized businesses. That may have meant spending a lot of time to find an "off-brand" provider that could offer the needed functionality while still maintaining security, all at an affordable price tag. Not anymore. The big guns—Microsoft, Amazon, Google, etc.—now offer solutions that are effective for small business and are easy on the wallet. Plus, you get the benefit of the armies of cybersecurity professionals that each of these companies employ to keep their systems safe.

This is certainly true with respect to cloud-based servers, but it can also translate into savings and efficiency for individual devices as well. By moving the processing environment off of the desktop (or laptop, tablet, smartphone, etc.) to a virtual desktop hosted in the cloud that employees access via a web browser, it is no longer necessary to ensure that individual devices have any sort of upgraded specs. In essence, any basic off-the-shelf computer will do the trick as long as it has an internet connection. You might still need to upgrade devices every few years, but you can do so using less expensive equipment because all of the heavy computing is now being done in the cloud. New hire deployments can also be shortened from hours to minutes, which frees up your internal resources to focus on other things.

This type of setup (along with licenses for word processors, spreadsheets, etc.) and huge amounts of storage can be had for as little as $50 per employee per month.

BACKUPS/DISASTER RECOVERY

Of course, we should all have backups and disaster recovery plans. But the need to review and update them on a periodic basis might not be so obvious. Where do backups get stored? In the cloud or on some sort of physical media? If physical media, do you hire a service to store it in a secure building or does one of the owners of the company take it home?

Even when there is a solid plan in place, there is a question of how often it is tested to see how quickly that new server can be up and running (after allowing time for it to be built and shipped to you) and to ensure those backups can actually be restored and accessed.

When migrating technology to the cloud, the process of backups and

> "Suddenly being forced out of offices and into working from home has forced an issue that many business owners may have contemplated in the past but have not moved forward."

disaster recovery become much more streamlined. By definition, the backups are already offsite and secure. And since your servers are virtual, you don't have the same risk of loss due to physical damage.

PHONE SYSTEMS

Like computer hardware, telephone hardware can be difficult to maintain. Desktop handsets have become more expensive and less durable, and integration with other communication technologies means those handsets must be updated more often than in the past to avoid obsolescence. While it is possible to forward calls to a mobile device on even some of the oldest office phone hardware, it can still be somewhat cumbersome and means employees have to use their personal devices for company calls.

Voice over IP (VoIP) systems like Vonage and RingCentral make that a thing of the past and do so fairly affordably. Completely internet-based, those systems can work with certain desktop handsets, but they also have apps that can be downloaded to any laptop, desktop computer or mobile device. If employees are going to be working from different locations, no problem. They simply launch the app on their smartphone or computer, and they can make and receive calls just as if they were sitting at their desk in your office. There are no PBX servers to purchase and maintain and no handsets to deal with (unless you just want to). A VoIP system that includes all the bells and whistles (conference call numbers for each user, integration with Microsoft Outlook and/or Teams, mobile app, call recording capabilities, etc.) can be had for less than $40 per person per month.

VIDEO CONFERENCING

While it was hardly an unknown company a few months ago, Zoom is now a household name for video conferencing. They may have become the most ubiquitous, but there are others that are also quite effective. Many of us have had access to video conference for years, but in my travels, I've not really heard of that many people in our industry actually using it. That has certainly changed in an era of stay-at-home orders. While there are plenty of reports of people getting virtual-meeting fatigue, this pandemic has also highlighted how beneficial it can be to still have face-to-face conversations even when not in the same physical location.

Even as stay-at-home orders are relaxed, it is anticipated there may still be some lingering travel limitations. Some employees with underlying health conditions may be concerned about going to larger meetings or getting on airplanes. Some clients may be in a similar situation.

Judicious use of video conferencing tech can be a great solution to address these types of concerns. They get us "in front of" our clients without having to get in the car or on an airplane.

Suddenly being forced out of offices and into working from home has forced an issue that many business owners may have contemplated in the past but have not moved forward. After all, existing onsite tech has worked just fine. As we move into a post-Coronavirus environment, we will return to whatever will pass for normal going forward. For some, that could mean continuing to give this whole work from home thing a shot. For many, however, it will mean employees returning the office.

Regardless of what your workplace looks like in the new normal, it may be time to consider fixing your technology even though it isn't broken. Doing so can certainly save you money, increase efficiency and improve security.

Hopefully, we will not see a repeat of anything like the last few months any time soon, but if we do, you will also be well situated to adapt quickly so that you can continue serving your clients without missing a beat. PC

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Responding to the COVID-19 Crisis

Plan sponsors have time to take strategic steps to help mitigate some of the risk inherent in these unprecedented circumstances.

BY ZORAST WADIA

As of this writing in late March 2020, we are in the midst of a crisis unlike any other in our history. The COVID-19 pandemic has caused economies worldwide to shut down voluntarily. At present, the severity and duration of the disease are unknown; the same is true of the impact on the economies of the U.S. and our global partners. The effect on pension plans will certainly be negative.

However, Congress responded quickly by passing the CARES Act, which provides a record-shattering $2 trillion in stimulus—including some immediate relief for plan sponsors.

Despite the continued uncertainty, we can offer helpful guidelines for corporate pension plan sponsors based on past experience and the market data that is already in the books through the first quarter of 2020. Specifically, we will address the likely impacts on pension expense and funded status. We will also discuss the impact of the CARES Act on required cash contributions in calendar year 2020. Moreover, we'll also point out some red flags to watch for over the next few years. Finally, we'll detail strategic steps plan sponsors can begin taking now to help mitigate some of the risks in these unprecedented circumstances.

GOOD NEWS: 2020 OBLIGATIONS BASED ON 2019'S NUMBERS

The first quarter of 2020 has been grim for financial markets, with the S&P 500 Index declining nearly 20% and the yield on 10-year Treasury bills falling below 1%. Fortunately, this has absolutely no impact on pension plan obligations or reporting in 2020 for calendar year plan and fiscal years.

Cash requirements for underfunded plans with calendar year plan years are based on the valuation results as of Jan. 1, 2019. They are paid as quarterly installments that the IRS views as a safe harbor amount. So plan sponsors can rest assured that cash projections for the current year will not be affected by recent market events. Furthermore, with the enactment of the CARES Act, all cash contribution requirements for the 2020 calendar year have been delayed to Jan. 1, 2021. This gives plan sponsors the ability to voluntarily make cash contributions during 2020 should they have free cash flow on hand.

Now let's look at the impact on the plan sponsor's P&L. These calculations are based on the full calendar year 2019—a period of mixed results but, again, excluding the current market decline.

Investment returns were strong in 2019, with assets increasing on average 15.7% as measured by the Milliman 100 Pension Funding Index (PFI). At the same time, discount rates fell around 110 basis points to historic lows, resulting in liabilities increasing by 17.4% across the PFI.

These key inputs interact in different ways when calculating the four principal components of pension expense. Generally speaking, service cost would have increased due to the lower discount rate. Counterintuitively, interest expense could actually have decreased, particularly for plans with low duration in the 7-to-10-year range. Expected return on assets would be higher due to market appreciation during the year—though tempered perhaps by lower capital market expectations for 2020. Finally, most plans have loss amortizations on their books, and these losses would have likely increased relative to 2019 P&L due to the discount rate declines.

The net result is that pension expense would likely have increased for most plans, except those with very short duration, which might actually have experienced an improvement. Funded status declined in 2019 as the increase in liabilities outpaced asset growth. All told, these changes are moderate and well within the normal range of experience. Thus, the backward-looking nature of pension accounting buys plan sponsors valuable time to prepare for obligations that will begin to come due in 2021.

POTENTIAL PROBLEMS IN 2021 AND BEYOND

With the passage of the CARES Act, including $2 trillion in stimulus plus $4 trillion in liquidity available from the Fed, it's reasonable to expect that the U.S. economy will make it through this crisis. But will asset prices regain the levels of Jan. 1, 2020? And will the discount rate rise enough to take some pressure off of liability valuations? Right now, it appears likely that pension expense and funded ratios will take a hit in 2020.

To make matters worse, additional difficulties are lurking several years ahead as the interest rate smoothing relief, which was introduced in the 2012 MAP-21 bill and extended in the 2014 HATFA bill, is scheduled to phase out between 2021 and 2024. Currently, smoothing effectively mutes the impact of discount rate declines on the calculation of required cash contributions. Starting in 2021, the phase-out would increase the cost of cash contributions significantly each year, possibly even doubling required cash contributions by 2024.

This implies that the losses occurring in 2020, should they persist through the end of the year, will impact the cash contribution calculation in 2022—at the exact time that half the benefit of the discount rate smoothing corridor is set to expire. This is a serious concern. In fact, industry associations are already discussing with Congress the need for further pension reform beyond the CARES Act provisions related to defined benefit plans. Proposals under discussion include extending the current interest rate smoothing provision, deferring extraordinary losses, and freezing PBGC premiums.

WHAT PLAN SPONSORS CAN DO TODAY

A proactive approach for plan sponsors would start with a review of funding projections over the next 5 years, or longer if possible. This would reflect the full widening of the interest rate smoothing corridor, revealing the full extent of changes to the cash contribution from 2019 to 2024. In addition, plan sponsors could also address optimal contribution deferral and funding strategies in light of the passage of the CARES Act. The plan review should also include best- and worst-case scenarios for market returns so you can model potential impacts on the P&L. And it may be necessary to consider how retirement plans can be better leveraged to deal with demographic changes resulting from the COVID-19 pandemic.

Addressing an increase in the cash requirement is straightforward: The sooner you can put in additional contributions the better. However, with the economic downturn experienced in the first quarter of 2020, many plan sponsors' organizations may be planning other uses of cash. All this could signal consideration of future plan de-risking strategies once the immediate crisis is under control.

> "The key point is not to panic, because you have plenty of time to plan."

In conclusion, the key point is not to panic, *because you have plenty of time to plan*. Under existing rules, cash contributions based on this year's market results would not be affected until 2022. Now, the CARES Act provides relief from any contributions due this year. It is essential to use this window to make workable plans to fund your contributions requirements over the next 5 years—at a minimum. Based on recent history and comments from key legislators, a second wave of relief from the current, historically low interest rate scenario could already be in the works. Nevertheless, it's best to be prepared for the possibility of challenging times for pension plans over the next several years. PC

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Creating SECURE Act Solutions

Change is afoot—and with change comes both opportunity and risk.

BY JOHN HUMPHREY

While the future is never certain, the SECURE Act[1] could end up being one of the most significant pieces of legislation to shape the U.S. retirement plan landscape over the next decade. The full weight of the retirement plan industry is hard at work studying the legislation, awaiting regulations, and deciding how to go to market with SECURE Act solutions.

Over the next few years, providers will create or participate in varying flavors of multiple employer plan (MEP) products. These new solutions will have several goals, including reducing the retirement coverage and savings gaps, simplifying processes, lowering costs and fees, and, just maybe, shifting true fiduciary responsibility from the employer to the provider.

Now is the time for providers to seek answers, create solutions, take risks and define how they will participate in this changing retirement plan landscape.

JUST ANOTHER PLAN DESIGN?

In some ways, the emergence of MEPs is just a new plan design—like cross-tested plans back in the early 1990s. Under this premise, providers need to know the rules and be ready to handle their specialties.

TPAs must be able to provide consulting and administration, recordkeepers need to retool systems and be ready to efficiently manage recordkeeping for MEPs, and advisory firms and asset managers must identify and align with vendors and platforms to take advantage of the new rules.

If a provider sees MEPs as just another new plan design, they simply need to learn the rules and align with other providers to assist them.

...OR A RETIREMENT PLAN MARKET MAKEOVER?

Looking through another lens, however, one can see a more disruptive picture. It is quite possible that MEPs could result in wholesale changes to both sales and servicing models for the qualified plan market. Through this lens, we might see a significant acceleration of trends from the past decade where providers began accepting some responsibility (i.e., 3(16) fiduciary, 3(38) fiduciary, etc.) to a marketplace where firms across the industry accept top-level fiduciary responsibility, and finally shift the real risk and administrative burden from employers who lack both the knowledge and resources to fulfill their roles.

While there are some vendors that were pioneers in offering fiduciary-centric service models, most still operate under a "third party" model designed in the early 1980s to shield providers from liability (and real responsibility).

While a solid argument can be made that 401(k) plans really are the responsibility of employers offering them, a different chorus seems to be growing. If more vendors embrace true fiduciary responsibility, a complete makeover of the retirement plan marketplace could occur.

Through this lens, providers would be advised to take a more aggressive, proactive approach to creating SECURE Act strategies to remain relevant and be positioned for future success.

WHO OWNS THE CLIENT?

An interesting question gaining momentum that could add fuel to the market makeover theory is: Who owns the client under these new arrangements? Will it be advisors, recordkeepers, TPAs, or asset managers? While this issue has been around for years, the SECURE Act is bringing it to the forefront.

Firms seeking to strengthen their positions may become sponsoring organizations of MEP products, including serving as creators of group programs under the Association Retirement Plan rules[2] or "group of plans" (GOP) rules,[3] or as Pooled Plan Providers (PPPs) of PEPs.

Pete Swisher, President of Waypoint Fiduciary, LLC, an industry expert on MEPs, provides consulting services to firms building SECURE Act solutions. In his practice, Pete confirms seeing product development work across the industry to allow providers to gain

> "Now is the time for providers to seek answers, create solutions, take risks and define how they will participate in this changing retirement plan landscape."

better control over client relationships. He states, "Most of the retirement industry is focused on helping clients and co-workers through the COVID-19 crisis, but the first movers on group solutions are still moving, innovators both inside and outside the U.S. are crafting responses, and the first PEPs are likely to launch, on schedule, on Jan. 1, 2021. After that you can expect a rolling series of announcements as an increasing number of vendors introduce SECURE-influenced changes to their product lineups."

WHAT STEPS SHOULD PROVIDERS TAKE?

Here's a look at how some organizations may be approaching SECURE Act product development and steps other firms may need to consider as they look ahead.

Advisors

Advisors are the driving force for retirement plan sales. They play vital roles in relationship management, building investment lineups, and enrolling and educating participants. Some advisory firms are studying the SECURE Act with a keen eye and see the opportunity as a final step toward finishing the "who-owns-the-client" debate.

These firms may create solutions where they serve as top-level fiduciary by becoming the sponsoring organization of multiple employer programs. In these "advisor first" solutions, firms may create or enhance in-house platforms, or look to recordkeepers and TPAs to assist them in building and managing their solutions.

Other advisory firms may seek "off-the-shelf" options or get help from other vendors in creating their own SECURE Act products to allow advisors to adapt and compete. In either scenario, advisory firms will be a driving force for the creation of SECURE Act solutions.

Recordkeepers

Recordkeepers are the technology hubs that bring together the retirement plan parties (participants, employers, advisors, TPAs, and asset managers). They provide sales support to advisors, offer broad-based payroll integration critical to fulfilling fiduciary responsibilities, and offer bundled plan administration and 3(16) fiduciary services or partner with outside TPAs for these functions.

Some recordkeepers may decide to create their own SECURE Act solutions, including serving as top-level fiduciaries and distributing their products as off-the-shelf options through advisory firms who decide not to create their own products. Others may seek to enhance their technology and capabilities to help other providers create and manage white-labeled solutions.

Regardless of their strategy, recordkeepers may need to expand their capabilities to be fully prepared, including offering in-house 3(38) investment fiduciary services or enhancing partnerships with outside vendors, expanding payroll integration solutions, and partnering with TPAs or creating their own 3(16) fiduciary capabilities.

Third Party Administrators

TPAs are compliance experts. They are critical to designing plans and providing plan administration. They play vital roles in sales and servicing, and TPAs willing to take some risks could have interesting opportunities for SECURE Act solutions.

One obvious approach TPAs firms may consider is serving as delegated 3(16) plan administrators in vendors' SECURE Act solutions. A growing number of TPAs now offer 3(16) services, and it is likely others are considering doing so.

Some TPAs may take a more proactive approach in creating their own MEP and pooled employer plan (PEP) products. This approach may be well-suited to larger TPAs with regional sales teams, in-house technology and product development capabilities, and solid distribution networks. These TPAs will need to identify product partners, including recordkeepers and 3(38) investment fiduciaries to help them round out services.

Asset Managers

Asset managers have played a significant role in spurring growth and capitalizing on the 401(k) opportunity over the past four decades, starting with the creation of bundled mutual fund and insurance company group annuity products in the mid-1990s. According to the Investment Company Institute,

total assets in 401(k) plans were $6.2 trillion as of Dec. 31, 2019, and about 65% of these assets were in mutual funds.

Because of the significant stake asset managers have in the 401(k) market, many are studying the SECURE Act and see it as an opportunity for furthering assets under management.

If forthcoming regulations are favorable and include the necessary fiduciary exceptions for including their products in investment lineups, asset managers could reinvent their bundled 401(k) platforms and create products serving as top-level fiduciaries. Because many of these firms already have national distribution networks, they could play a key role in disrupting the market. Some firms may offer advisor-friendly solutions, and others may expand their "direct-to-sponsor" approach.

CONCLUSION

The SECURE Act is a significant piece of legislation that clears the way for broader use of MEPs, but it could also be the catalyst for significant market disruption over the next decade. It is quite possible that the SECURE Act could turn the current "third party" service model into a "first party" model, in which vendors across the industry embrace being true fiduciaries to reduce employers' liability and administrative burdens.

Vendors should take notice, study the legislation and upcoming regulations carefully, and begin modifying their service models and capabilities to remain relevant.

And as for the question of "who owns the client"—while the issue is clearly being brought to the forefront, given the complexity of our market and the need to make strides in improving the overall retirement system, now is the time for our industry to work together, leverage vendor strengths, and build the retirement system of tomorrow. PC

John Humphrey cofounded July Business Services in 1994, where he now serves as President and CEO. Previously he was a CPA with several national accounting firms, including Ernst & Young in Dallas.

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FOOTNOTES

1. "Setting Every Community Up for Retirement Enhancement," Division O, Further Consolidated Appropriations Act, 2020.
2. 29 CFR 2510.3-55.
3. SECURE Act, section 202.

Professionalism in the Time of COVID-19

These difficult times present unique professionalism challenges.

BY LAUREN BLOOM

As the world has been more or less shut down by the COVID-19 virus, "business as usual" has become a thing of the past. For those whose work demands their presence in a (currently closed) restaurant or shop, the unoccupied hours can loom long. For those who can work from home, in-person meetings and conferences have moved online, kitchen tables have become offices, and information moves from laptop to laptop, often appearing on home printers or even as handwritten notes.

Employee benefit plan professionals may be better equipped than many to adapt to our new working environment. Most already had home offices, and nearly all are accustomed to navigating the digital world. However, these difficult times present unique professionalism challenges, and employee benefit plan professionals are wise to attend to those challenges as they work.

To begin with, it is important to remember that professional standards have not changed just because the work environment is different. Employee benefit plan professionals are still expected to do quality work and to satisfy the requirements of their professional codes of ethics, including the ARA's Code of Professional Conduct. An employee benefit plan professional whose work during this difficult time is challenged in the future may be able to elicit some sympathy, but substandard work is still substandard. Better to do quality work now than to have to defend it later.

Communications with clients may be more difficult now, especially if those clients are accustomed to meeting in person. Video conferencing can be a good substitute, but only if everyone on the line is prepared and engaged. To avoid miscommunications, it may be especially helpful to "bookend" video conferences with a preparatory email that includes

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> Employee benefit plan professionals may be better equipped than many to adapt to our new working environment."

materials to be discussed and an informal agenda, and a follow-up email that documents the conference, highlighting any decisions taken and outstanding matters to be resolved. And if a client seems confused, distracted or simply fatigued, making a phone call a day or two after a video conference may save the client and the employee benefit plan professional a world of trouble and misunderstanding.

When it comes to client materials, confidentiality may be especially difficult to preserve. Employee benefit plan professionals who are sequestered at home with loved ones may have to share their workspace, printers or even laptops. It is especially important to set up systems to prevent accidental disclosure of confidential client information to family members and housemates. This includes finding a secluded space for confidential calls and video conferences. Even if loved ones appear to have no interest in client matters, careless disclosure of confidential client information could create serious problems.

Control of work product can also be an issue, because digital documents are so easily copied, edited, forwarded and posted online. A communication or work product intended for one audience or purpose can all too easily be misused. This is a good time for employee benefit plan professionals to look at the standard disclaimers on their emails and work products, strengthening them if necessary to reduce the risk of mishandling or improper use.

Maintaining professional courtesy and cooperating with other professionals in the client's interest may be more difficult now. The added strain of navigating a COVID-infected world has many of us anxious and short-tempered. Other professionals may also struggle with working while caring for family members or without needed resources. Patience, kindness and good humor will go a long way toward avoiding arguments that could poison future professional relationships.

It may be difficult for employee benefit plan professionals to get accurate data in this time of widespread layoffs (both temporary and permanent), projected death rate increases and rollercoaster investment markets. Projecting plans' future obligations and assets, rarely an easy task, may be particularly tricky. Depending on the work involved, employee benefit plan professionals may be wise to emphasize to clients that their work is dependent on the accuracy and completeness of plan data, and that projections are not promises.

It is probably also a good idea to build extra time into projects. For many of us, chronic anxiety, fatigue and stress from working under unfamiliar circumstances may well translate into a higher error rate. Even those who continue to work at their optimal level may find that clients, colleagues and service providers like postal and overnight delivery workers are not at their best. Rather than compound the stresses of finishing work on time with last-minute problems, a wise employee benefit plan professional will move deadlines forward, creating a cushion of extra time to deal with unforeseen difficulties large and small.

Finally, an employee benefit plan professional cannot provide work with honesty, integrity, skill and care unless he or she is physically, mentally and emotionally able to do so. It is all too common for professionals to push themselves beyond comfortable limits for their clients, especially when deadlines loom. That may be more difficult now, when people are working under such varied and challenging conditions. To the extent practicable, now may be the time for an employee benefits plan to professional to cut back on stresses, and focus on maintaining his or her own well-being, the better to be able to serve in the longer term.

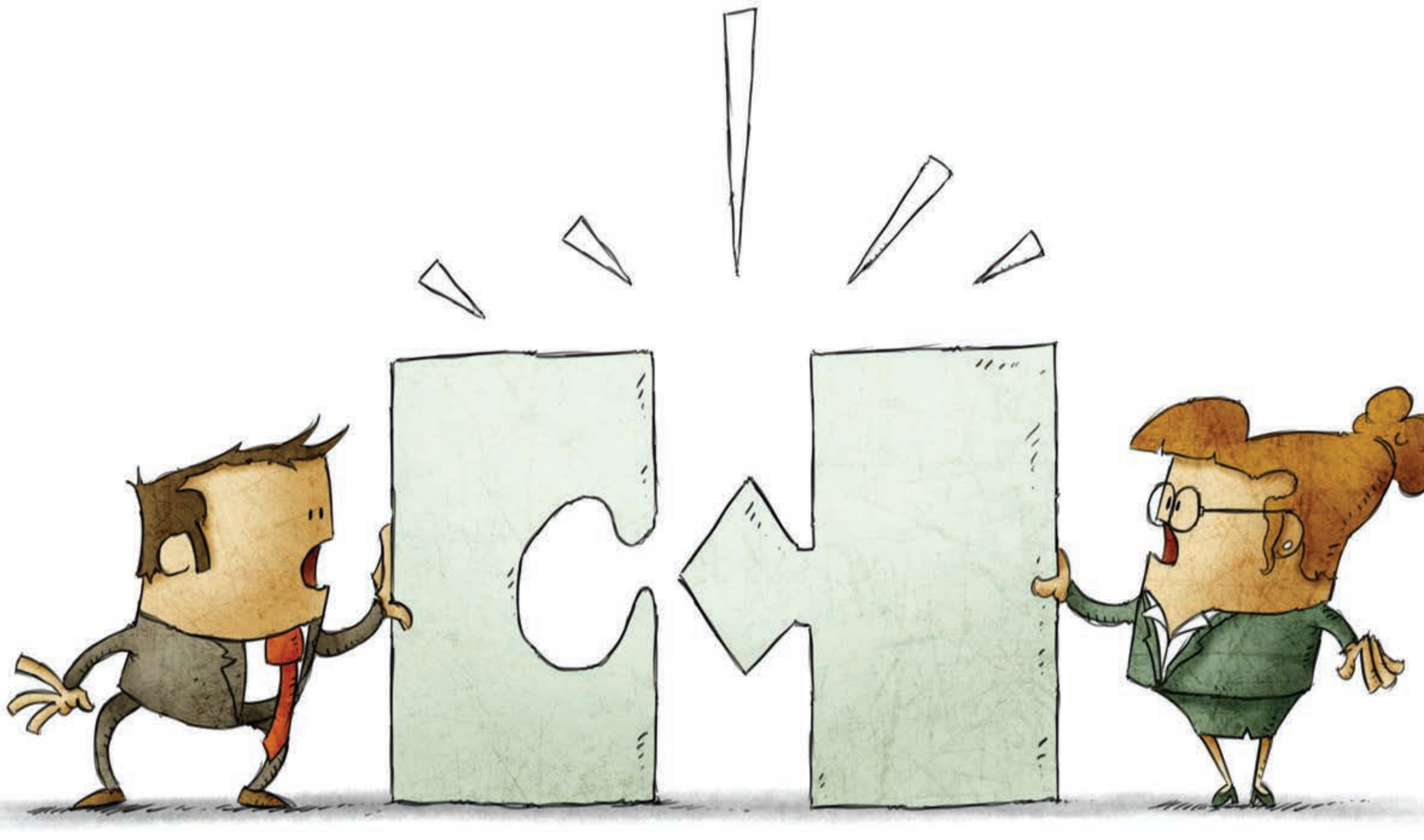
The COVID-19 lockdown will not go on forever, but it is probably too soon to predict how business practices will evolve in the foreseeable future. Thoughtful attention to professionalism now may help make the future that much brighter. PC

Lauren Bloom is an attorney who speaks, writes and consults on business ethics and litigation and risk management.

Payroll and Recordkeeping Systems

The two don't always play nicely together.

BY SUSAN PERRY



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As a 3(16), the interaction of payroll systems and recordkeeping systems becomes much more important than it was when we were acting only as TPA. Getting employee deductions and contribution remittances correct each pay period can become a part of the 3(16)'s burden. After all, if the employee deductions and loan repayments aren't correct to start with, everything in the plan after that will have problems.

Along the way, we have learned a few things that I thought I'd share. If you are a TPA, maybe this article will provide you with a better insight of why some plan administrative errors occur.

CATCH-UP CONTRIBUTION ELECTIONS

Many of you are probably think, "What issues could be there between payroll systems and recordkeeping systems with regarding to catch-up elections. It isn't that hard. Participants under 50 have a lower deferral limit than those 50 or older."

Imagine that a recordkeeper, RK Inc., can only accept a single deferral election. RK assumes that every payroll system in the U.S. has the ability to create a deduction code with a variable limit based on age. That is an incorrect assumption. There are some payroll systems that can have a variable limit… and there are some that cannot. Some payroll systems force the plan sponsor to create two deduction codes, one for deferrals and one for catch-ups.

When the payroll system forces two deductions, here's what happens:

Bob, a participant, logs into RK's recordkeeping system and elects a 10% deferral election on his Feb. 1 entry date. RK sends the plan sponsor a notification to update their payroll system to a 10% deduction for Bob. The sponsor codes the 10% deduction into the 401k deduction code and 10% starts coming out of Bob's checks. Bob is 62 years old and makes about $400,000 per year. Bob hits the $19,000 current deferral limit on his first paycheck in October. He is likely expecting his catch-up contributions to start as soon as he hits that limit. However, the recordkeeper doesn't send another notification to the plan sponsor to change Bob's deferral election so that instead of 10% in the 401k deduction code there now needs to be 10% in the 401kc (i.e., 401(k) catch-up) deduction code. How does Bob's catch-up deduction get started in payroll? After Bob complains, someone goes into the payroll system and manually turns on the catch-up deduction. You get asked why this is all messed up; the client is unhappy; the CPA auditor notes it as an issue, etc.

And don't forget: Someone needs to go into payroll on Jan. 1 and reset Bob's 401kc (catch-up) deduction to 0% or Bob will have 10% of his check withheld for 401k and 10% of his check withheld for catch-up.

Keep in mind that there are instances when the recordkeeping system allows for two different deductions, deferrals and catch-up, but the payroll system only has one age adjusted limit. In this case, imagine Bob elected 10% deferrals plus a $250 per check catch-up. How would that get coded into the payroll system?

What can you do about this issue? It is a consulting opportunity to make sure the client has procedures to take this issue into account. You can also help the client understand what options are available on the recordkeeping and payroll systems in an effort to align the deduction elections at the recordkeeper to the available deduction codes on the payroll system.

MULTIPLE BENEFIT SYSTEMS

Small plans tend to have sponsors that use payroll systems specific for payroll. However, as the client size increases, so does the sophistication of their payroll system. Many payroll systems for mid-size employers are really human capital management systems (HCMS) that include a payroll function. An HCMS can do everything from tracking recruiting processes, to hiring processes, to compensation planning, to benefit management, to payroll… and more. The problem for us occurs when the HCMS offers benefits.

The most common configuration is that the employees get a portal through the HCMS. The portal is where they enroll for benefits, download documentation about the benefits (like an on-demand copy of the SPD), make their beneficiary elections, etc. Sound a lot like what they can do on a recordkeeping system? It should, because there is definitely overlap.

When a client includes the 401(k) plan on the HCMS benefit system, things get complicated. There are now two places where employees can enroll in the plan and change how much they are saving.

Let's imagine that Jane's employer has the 401(k) benefits module turned on in the company's HCMS. Shortly after she is hired, Jane logs into the payroll portal and completes her benefit enrollment. She signs up for medical, dental and the 401(k) plan. Two weeks later, she gets her enrollment materials for the recordkeeper, so she logs into the recordkeeper's site and enrolls again. She has a moment of brilliance 15 minutes later and realizes that the deferral percentage she put into the recordkeeper's enrollment system isn't the same as what she enrolled for on the HCMS. She logs into the HCMS to make sure she is still correct there, knowing that's the main benefit portal, and sees she is still good, but decides to pick a higher percentage, because she really could save a bit more. She makes the change in the payroll system benefit portal but not at the recordkeeper.

We now have a situation where the recordkeeping system doesn't know that Jane made an election after the election she make on the recordkeeping system. So, the next payday, the recordkeeping system sends a request to change Jane's

> "If the employee deductions and loan repayments aren't correct to start with, everything in the plan after that will have problems.

deferrals based on her election in the recordkeeping system, potentially overwriting Jane's final election on the payroll system.

Yes, this really does happen—especially in a 360-degree payroll integration situation.

What can you do about this issue? First, you should know that some HCMS will let the plan sponsor turn benefits on or off, by the particular benefit, so you can shut down the HCMS side of the problem. Some HCMS systems are all benefits or none. Also, some plan sponsors insist on using the HCMS benefits portal since all benefits are managed there.

Okay, you say, turn off deferral tracking at the recordkeeper. This is impossible if the plan is automatically enrolled or automatically increasing unless the HCMS has all of that functionality built in, which is a plan design question you can ask. Turning off deferral tracking also tends to affect other services offered by recordkeepers, like some of the retirement projection and planning tools, which may upset the client. In the end, this is another opportunity to consult with your plan sponsors to ensure they understand the issues of running two enrollment systems for the same benefit.

FINAL LOAN REPAYMENTS

Most recordkeeping systems provide the plan sponsor with a report when someone takes out a new loan, which includes the amount borrowed, the repayment amount, the number of payments due, and the total of the principal and interest expected (a.k.a. the goal amount). The plan sponsor logs into payroll, enters the deduction (i.e., the repayment amount) and in more sophisticated payroll systems the goal amount. The next time the recordkeeper is likely to provide any additional information on the loan through the payroll feedback files is when they indicate the loan repayment should be set to $0 because the loan is paid off.

Of course, the final payment of a loan is rarely exactly the same as the other payments—certainly if the participant decided to pay a bit extra somewhere along the way toward the loan.

Imagine that Sam takes a 5-year loan with semi-monthly repayments of $46.42, but the final repayment should be $46.26. The recordkeeper sends the information to start up the $46.42 deduction and the plan sponsor gets it set up in payroll. 119 pay periods later, if all goes well, the recordkeeper is expecting to receive a final payment of $46.26 while the payroll system has the deduction at $46.42. For most recordkeepers, there is nothing sent out to tell the plan sponsor to adjust payroll, so the loan gets overpaid and then the whole process starts of getting the extra money returned to the participant.

There is at least one recordkeeper at which, if the deduction is different enough from the expected final payment amount, it causes the entire contribution upload file to fail. The plan sponsor must remove the loan repayment amount from the contribution file—even though that is what actually came out of payroll—contact the recordkeeper to get the correct final payoff amount, adjust and resubmit the contribution file, and then issue a paycheck to the participant to give them back the excess amount. Please note that there is also at least one recordkeeper at which the final loan repayment amount is provided prior to the final repayment period—which is the ideal situation.

What can you do about this issue? You might want to consult with your client on how to handle these final loan repayments. After all, if the final loan repayments don't get made, you could end up defaulting loans that should not be defaulted (if the final payment gets rejected at the recordkeeper) or you could end up having to process refunds for excess final loan repayments at the recordkeeper. Consider consulting with the client to develop an appropriate process to handle final loan repayments. Or use a recordkeeper that gives the client the information to handle the final loan payments timely. Or tell the plans sponsor to get rid of loans (like that's going to happen).

FINAL ANALYSIS

There is no easy remedy to any of the three issues above. These issues do create consulting opportunities to help make clients happier with their plans… or pain points for clients who don't get enough information to plan appropriately. PC

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BY WILL HANSEN

GA Team Shifts to Virtual Advocacy

In the wake of the pandemic, the team pushed successfully for regulatory and legislative relief on behalf of plan sponsors and participants.

Since mid-March, the American Retirement Association's Government Affairs team has been active in protecting the private retirement system against the economic events that have unfolded due to the COVID-19 pandemic. The focus has been two-fold: (1) enable employers the means to reduce costs (if necessary to keep their business open) while maintaining their retirement plan; and (2) ensure that participants have access to funds if needed to provide for themselves and their family.

Our efforts have been at the agency level (IRS, DOL, etc.) and on Capitol Hill. Over the course of several months, we have drafted and submitted several letters to federal agencies and conducted hundreds of meetings with Capitol Hill staff and federal agencies.

While we adapted on a personal level to the "work from home" life, we also adjusted how we advocate on behalf of ARA members. Many industries and professions are used to utilizing virtual means to accomplish a task, but in Washington, DC it is customary for a significant portion of business to be conducted in person. No longer were there in-person political fundraisers, Capitol Hill meetings, networking coffees to gather intelligence, or strategy sessions at the office. All of that changed in March when we shifted our advocacy efforts to 100% virtual.

REGULATORY ACTIVITY

First we focused on regulatory relief, with the issuance of several letters to the Internal Revenue Service and Department of Labor. On March 16, ARA requested relief from certain filing deadlines that were imminent. Ultimately, we were successful with some of those requests. This was followed by a March 24 letter to the IRS in which ARA put forward seven proposals to provide relief to sponsors of retirement plans.

Following enactment of the CARES Act, we submitted a letter to the DOL requesting a delay of all deadlines for notices and other documents required under ERISA. The DOL responded weeks later with a favorable notice that provided broad relief for sponsors of retirement plans in providing ERISA required notices.

LEGISLATIVE ACTIVITY

On Capitol Hill, we began virtual meetings to address the need for Congress to provide relief to retirement plan sponsors who were suffering economic hardship due to COVID-19, as well as participants who may need access to funds to provide for themselves and their families under the terms of the CARES Act. In addition, although the CARES Act provided billions in relief to businesses to maintain their financial footing, in the retirement space, more relief was needed to help businesses avoid terminating their retirement plans.

The ARA put forward a proposal to ensure that retirement plan sponsors could reduce costs (if necessary) and avoid certain non-discrimination measures in the interest of avoiding plan termination. In addition, the proposal relaxed the partial plan termination rules.

While it is difficult to advocate for a proposal that could decrease retirement savings in the short term, it was important to raise these proposals to ensure that in the long term, employers with retirement plans could retain them. Without a retirement plan, individuals would be severely hindered in saving for a secure retirement.

I want to personally thank the many ARA members who raised issues with the Government Affairs team on how COVID-19 was affecting the retirement industry. We aren't out of the woods yet, and your valuable feedback is necessary in ensuring that we advocate effectively on your behalf.

Please stay safe and healthy during this difficult time. PC

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


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