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# Employee Benefits Update

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# SECURE Act 101

*New law changes plan policies, creates design options*

Defined contribution plan sponsors have some important decisions to make and opportunities to consider in the wake of enactment of the Setting Every Community Up for Retirement Enhancement (SECURE) Act at the end of last year. The act is intended to boost retirement financial security on several fronts.

## Offering safe harbor for annuities

The SECURE Act creates a safe harbor for sponsors that choose to offer life insurance company annuity products to plan participants. The purpose is to limit plan sponsors' fiduciary liability should an annuity provider go bust long after the sponsor offered its products to employees.

To begin, employers must undertake "an objective, thorough, and analytical search for the purpose of identifying insurers from which to purchase" annuity contracts. Then, employers will be exempt from liability if they select an annuity provider that for the preceding seven years:

1. Operated under a certificate of authority from the insurance commissioner of its state that hasn't been revoked or suspended,
2. Filed audited financial statements in accordance with the laws of its state under applicable statutory accounting principles,
3. Maintained reserves that satisfy the statutory requirements of states where the insurer does business, and
4. Isn't operating under an order of supervision, rehabilitation or liquidation.

A fiduciary that satisfies the requirements under the act won't be liable "following the distribution of any benefit, or the investment by or on behalf of a participant or beneficiary pursuant to the selected guaranteed retirement income contract, for any losses that may result to the participant or beneficiary due to an insurer's inability to satisfy its financial obligations under the terms of such contract." This safe harbor provision was effective on the date of enactment.

## Promoting lifetime income

The act contains interrelated provisions that deal with lifetime income options for plan participants. Important changes include:

**Transfers to IRAs.** The SECURE Act streamlines procedures for participants to transfer their plan assets, including annuity contracts, to an IRA without triggering an immediate tax liability. The provision applies if the particular investment is no longer an authorized plan investment option. It's effective for plan years beginning after December 31, 2019.

**Annual disclosure of projected income.** The act requires sponsors to furnish participants with generalized lifetime income "disclosure" statements annually projecting regular income that their plan assets could generate. Its effective date is one year after the Department of Labor issues regulations spelling out how those projections need to be made.

## Including part-time employees

One key component of the Setting Every Community Up for Retirement Enhancement (SECURE) Act includes allowing certain part-time employees to participate in defined contribution (DC) plans if they so choose. It applies to employees who have worked at least 500 hours annually during the prior three-year period. (Currently employees who have worked at least 1,000 hours in the previous year must be covered.) The employee must also be 21 years of age or older.

Employers won't be required to contribute to the DC plan accounts of part-time employees who take advantage of their eligibility, even if they do make contributions for full-time employees. Nor will employers need to count them in their participant census for discrimination testing purposes.

This provision of the SECURE Act doesn't take effect until plan years beginning in 2021. However, the three-year clock on prior employment isn't retroactive, so employers could defer granting eligibility to these part-timers for another three years.

The lifetime income disclosure provision drew immediate fire from benefits lobbying groups. Generally, most sponsors already give participants access to flexible online forecasting tools that can generate projections based on various scenarios. Many industry groups believe the mandated disclosure could lead to confusion among participants by giving them data that doesn't reflect participants' actual reality.

### Providing even more

Additional provisions of the SECURE Act:

- Provide for the creation of "Pooled Employer Plans" (PEPs), easing restrictions on multiple employer plans by allowing them to be sponsored by financial institutions and offered to employers without any common geography or industry category,
- Raise the safe harbor cap on auto-enrollment deferrals from 10% to 15%,
- Allow participants to take penalty-free distributions for expenses related to the birth or adoption of a child,
- Raise the daily penalty for filing a Form 5500 late from $25 to $250, with a maximum penalty of $150,000 (up from $15,000),
- Ban distribution of plan loans through savings plan credit cards, to discourage use of plan loans for routine purchases,
- Raise the age for required minimum distributions from 70½ to 72 for those individuals who were born on or after July 1, 1949,
- Eliminate "stretch IRAs," which can create estate planning issues for those relying on the old rules,
- Eliminate the annual notice requirement for non-elective 401(k) safe harbor plans, and
- Allow participants to make IRA contributions after age 70½.

The SECURE Act gives sponsors some breathing room regarding adopting plan amendments to reflect the new law. Most plans will have until the end of 2022 to do so, though effective dates for its many provisions vary.

### Time to take advantage

Additional, more narrowly applicable provisions of the SECURE Act aren't included in this summary. Consult an ERISA attorney for a more complete briefing on all of the law's provisions that may affect your plan. ◻

# Stopping cybertheft of plan assets before it happens

Cybertheft of participant accounts always happens to some other plan sponsor — until it doesn't and you're on the hook. Whether or not you're liable, it's a disaster waiting to happen. A recent lawsuit in its initial phase, *Berman v. Estee Lauder Inc.*, highlights a position you don't want to be in (assuming the plaintiff's allegations hold up) — and what you can do to minimize the chances that you ever will.

## The allegations

The case involves a plan participant who discovered three unauthorized distributions from her 401(k) account, sent to three separate banks, over a three-week period. The three transfers totaled $99,000 and virtually wiped out her account balance.

She learned of the distributions from mailed transaction confirmations and her quarterly account statement. All three fraudulent distributions had occurred by the time she received the first mailed transaction confirmation statement.

*Plan sponsors should have a clear understanding of their own plan management function.*

The plaintiff claims that her employer (Estee Lauder, Inc.) never reached out to her about the fraudulent distributions after she sounded the alarm. She also claims that neither the plan's recordkeeper nor the plan's custodian was responsive to her efforts to recover the lost funds, and that many of her efforts to contact them were ignored.

She says she wasn't kept apprised of any efforts to recover the funds, and was eventually informed that the investigation was unsuccessful and closed. At the time of the court filing, none of the parties had accepted responsibility for making the plaintiff whole.

The plaintiff had reported the fraudulent distributions not only to Estee Lauder and the service providers, but also local police and the FBI. She did, as requested by the plan custodian, promptly provide affidavits of forgery.

## A checklist

Her allegations against each defendant — the employer (but for unknown reasons not the retirement plan itself), recordkeeper and custodian — read like a checklist of steps plan sponsors and service providers should satisfy. They begin with a general charge of breach of "fiduciary duty of loyalty and prudence" — a breach that resulted in the Lauder plan making unauthorized distributions of the plaintiff's plan assets.

The allegations themselves set out what can be any employer's or plan sponsor's steps to protect both themselves and their participants. This includes:

- Confirming authorization for distributions with the plan participant before making distributions,
- Providing timely notice of distributions to the participant by telephone or email,

- Identifying and halting suspicious distribution requests (suspicions might have been raised by the fact that each distribution went to different banks in short order),
- Establishing distribution processes to safeguard plan assets against unauthorized withdrawals, and
- Monitoring other fiduciaries' distribution processes, protocols and activities to remain educated about the state of the art of participant protection.

As noted, the case is ongoing. The court could conclude that the recordkeeper isn't a fiduciary, depending on the extent of its discretionary authority over the plan. Regardless, plan sponsors should clearly understand their own plan management function.

### Protect your plan and participants

For plan sponsors, the goal isn't to evade liability but to prevent fraud through proactive scrutiny of your own processes and those of your service providers. Prioritizing speed of transactions (such as loans and distributions) above prudence in the name of exceeding participant expectations could be asking for trouble.

Be sure to complete your due diligence regarding your service providers' accounting safeguards such as segregation of duties and personnel background checks. Also, buying cybertheft insurance can help make a victimized plan participant whole and dissuade him or her from resorting to litigation to seek restitution. □

## Which plan documents must you surrender if you're sued?

When participants believe they've been mistreated by your retirement plan and take their complaints to court, be prepared for requests for plan documents. Although under ERISA you're obligated to produce relevant materials, you aren't required to indulge a document fishing expedition. A recent court case, *Theriot v. Building Trades United Pension Trust Fund*, offers insights on just how far you need to go, and where to draw the line.

### ERISA requirements

ERISA requires administrators, on a participant's or beneficiary's written request, to furnish a copy of:

- The latest summary plan description,
- The most recent annual report,
- Any terminal report, and
- The bargaining agreement, trust agreement, contract or "other instruments under which the plan is established and operated."

Plans must furnish these documents within 30 days or face a maximum $110 per day fine for the amount of days elapsed after the 30-day deadline passes.

## The case

The underlying dispute centered on the plan's rejection of a request by the daughter of a pension beneficiary to receive a lump sum distribution of a pension benefit following the death of her mother. Her mother had met a deadline for requesting a lump sum distribution but died before the distribution date promised by the pension administrator. The pension determined that the daughter was ineligible to receive that benefit because her mother had died before the lump-sum distribution date.

Among other things, the plaintiff was looking for any documents that would justify the administrator's denial of that benefit — or not. In response, the plan narrowly interpreted the documents it was obligated to produce, including the then-current (2017) plan document. It didn't, however, produce a copy of the plan's original 1990 document. Its failure to do so was one of the issues in the case. The plan should've known that it was being asked to produce that document, argued the plaintiff.

Referencing prior cases, the judge noted that claimants don't have to request a document using its precise name if the request is sufficiently clear to give the plan administrator notice of the information the claimant seeks. In this case, however, the court found that the plaintiff's request for documents didn't give clear notice "such that a reasonable plan administrator would have known" the plaintiff was also requesting the 1990 plan document and other documents which the administrator didn't provide.

Furthermore, even if the plaintiff had requested the 1990 plan document specifically, the plan wouldn't have been obligated to produce it. This is because the plan administrator used the 2017 plan document to administer the plan during the period relevant to this case, not the original 1990 one.

*Claimants don't have to request a document using its precise name if the request is sufficiently clear to give the plan administrator notice of the information the claimant seeks.*

The plaintiff also had requested — and didn't receive — copies of "any errors and omissions policies issued to the [pension]," presumably with hopes that the pension could file a claim with such a policy to generate cash to settle the claim. But the court ruled that the fund wasn't obligated to produce these policies because they didn't qualify as "instruments under which the plan is established or operated."

## Moving forward

In the end, the pension plan stood its ground on document production and successfully rebuffed the plaintiff's multiple wide-ranging document requests. If you're unsure on where to draw the line in supplying requested plan documents, consult your ERISA attorney. ☐

## Compliance Alert

Upcoming compliance deadlines:

**4/1** Initial required minimum distribution for participants who attained age 70½ in 2019 (applies to qualified plans where the participant is at least a 5% owner and to IRAs)

**4/15** Deadline for corrective distribution of 2019 excess 402(g) deferral limit

**4/15** Deadline for filing of 2019 individual tax returns and making contributions eligible for deductibility

**5/15** Deadline for filing 2019 Form 990, "Return of Organization Exempt From Income Tax"

**5/15** Deadline for first quarter benefit statements for participant directed accounts

# The evolution of the target date fund selection process

Are you sure you have the best target date funds (TDFs) on your plan's investment menu? You should regularly review all of your plan's investment options — especially when most participant deferrals are earmarked for TDFs.

## Questions to ask

In the early days of TDFs, the primary focus of performance and suitability review was on their glide paths: either the "to" or "through" glidepath models. In a "to" TDF, the fund's asset allocation would become ultraconservative at the target date. In a "through" TDF, the glide path's shift from balanced to no equity exposure occurs decades after the target date.

However, TDFs with similar glide paths can vary dramatically in their portfolio composition, risk exposure and performance. When examining a TDF series, focus on how a TDF management company makes decisions about its funds' design to ask:

**How do TDFs select asset managers to oversee investment selection of underlying funds?** The TDF provider may use only in-house personnel, or it may tap best-in-breed managers from throughout the industry.

**How do managers make the choices they have the authority to make?** It's common for TDFs to consist of a fund of funds, some with sub-funds that can be index-based. Be sure you're clear on whether managers must adhere to a particular set of guidelines (and if so, what they are), or if they have free rein in their decision making.

**What decisions have asset managers made?** Broad similarities between TDF portfolios can mask important differences on closer examination. Look at the asset category breakdown at the subcategory level. For example, within domestic equities, determine the mix of growth, value and small cap stock sectors. For international equities, examine the split between emerging market and developed country corporate stocks.

**How aggressive is the underlying investment strategy?** This looks beyond the basic "to" or "through" framework. Side-by-side comparisons of TDFs having the same general glidepath philosophy will often reveal substantial differences in the timing of the transition between an equities-dominated asset mix to fixed income.

Such variations may reflect varying levels of emphasis on participants' risk of outliving their assets, and their risk of underfunding their retirement portfolios. A more aggressive investment posture heading toward the finish line (whether that's retirement or life expectancy) before the downshift to a more conservative posture indicates a focus on underfunding risk.

## Ask the right questions

As TDF assets have grown, so too has the sophistication of quality and suitability analysis for a given workforce. Make sure your plan advisors are up to the task. Your outside advisors can assist you with the process. □

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