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EMPLOYEE BENEFITS LAW

Legal Developments Impacting Retirement Plans

2021 Year-End Update

1. In addition to COVID-19 relief provisions, the **American Rescue Plan Act (ARPA)** enacted in March provided **funding relief for multiemployer and single-employer pension plans**. The multiemployer plan relief includes:

    - Estimated $90+ billion in financial assistance grants to plans projected to become insolvent by 2051 (using specialized actuarial calculations),
    - Optional accounting adjustments to extend the period for recognition of recent investment losses, and
    - Extensions of time for plans to complete legally required funding improvement and rehabilitation plans.

    For single-employer plans, ARPA allows an extension of amortization for unfunded liability from seven years to 15 years and provides relief regarding the interest rate used to calculate plan liabilities. Invoking ARPA funding relief can have significant actuarial consequences, and in some cases will impose ongoing restrictions on a plan's benefits, investments, and operations.

2. In *Hughes v. Northwestern University*, the U.S. Supreme Court ruled that the existence of lower-fee options in a defined contribution plan does not prevent a claim of fiduciary breach when other investment options in the plan are alleged to have **excessive investment management and recordkeeping fees.** The Supreme Court's decision leaves open the question of the particular allegations needed to state a claim of fiduciary breach due to excessive fees.[1]

3. Litigation challenging defined benefit plan **actuarial equivalency** factors continues, with settlements reached in several cases.[2] The main theory of these cases is that plans must use updated mortality tables in calculating participants' benefits.

4. In recent years, several court cases have challenged the **"Segal Blend"** method of calculating withdrawal liability for an employer that ceases participation in a plan. The Segal Blend method has for many years resulted in the use of a significantly lower interest rate (producing *higher* withdrawal liability) than the rate a plan uses for its overall projections of its investment earnings and funding status. In 2021, the Sixth Circuit Court of Appeals invalidated a plan's use of the Segal Blend method.[3]

5. In 2020, the DOL issued final regulations that discouraged plan fiduciaries from considering **climate change and other environmental, social, or governance (ESG) factors** when selecting plan investments. Under the new administration, the DOL announced in March of 2021 that it would not enforce these rules and in October,

announced proposed amendments which state that appropriate consideration of an investment may require an evaluation of ESG factors.

6. The DOL also announced proposed amendments to the investment duties regulations to address its concern that the 2020 regulations might discourage fiduciaries from exercising shareholder rights, such as **voting proxies**. The proposed amendments would delete a statement that fiduciaries do not have to vote every proxy, delete two "safe harbor" examples of allowable proxy voting policies, and where proxy voting has been delegated, delete specific monitoring and recordkeeping requirements. Instead, fiduciaries will be directed to follow generally applicable fiduciary duties of prudence and loyalty.

7. As a reminder, the **SECURE Act** and **CARES Act** give employers until the last day of their first plan year beginning on or after January 1, 2022, to amend their plans for mandatory or optional changes under these acts, such as provisions providing for COVID-related distributions and loans and changes to the age required minimum distributions must begin. Governmental plans (and certain collectively bargained plans with respect to SECURE Act changes) have until the end of their plan year beginning on or after January 1, 2024.

8. The DOL issued guidance for plans sponsors, fiduciaries, record keepers, and participants on **cybersecurity best practices** in order to safeguard retirement benefits and personal information. For example, the guidance recommends plans review service providers' cybersecurity policies and procedures and ensure contracts include terms requiring ongoing compliance with cybersecurity and information security standards.

9. The DOL issued **missing participant best practices** for ensuring retirement plan participants and beneficiaries receive their benefits at retirement age. The DOL stressed that fiduciary obligations to missing participants continue to apply even if an account is conditionally forfeited pursuant to Treasury regulations.

10. The IRS **updated its EPCRS** correction program for retirement plan errors. Highlights include (1) extension of the self-correction period for significant operational errors from two to three years; (2) new correction methods for defined benefit plan overpayment errors; (3) expansion of the circumstances in which self-correction of plan operational failures by retroactive plan amendment is permitted; (4) increase to the de minimis threshold for certain corrections from $100 to $250; (5) extension of previously expired additional safe harbor correction methods related to certain elective deferral failures; and (6) elimination of the anonymous VCP submission program (replaced by a no-fee anonymous VCP pre-submission conference).

11. In 2020, the DOL released a **prohibited transaction exemption** (PTE) giving investment advice fiduciaries more flexibility to provide advice affecting their own compensation. The fiduciary must provide advice in the investor's best interest, disclose conflicts to the benefit plan investor, and document their advice, among other requirements. This year the DOL released FAQs providing more detailed guidance to both investment advice fiduciaries and benefit plan investors on complying with the exemption. The DOL also extended its temporary nonenforcement policy for investment advice fiduciaries who were working

diligently and in good faith to comply with the PTE through January 31, 2022. For certain specific documentation and disclosure requirements for rollovers, the nonenforcement policy is extended through June 30, 2022.

12. In 2020, the DOL issued guidance to sponsors of participant-directed 401(k) plans which cautioned against offering **illiquid private equity** as a stand-alone investment option. They noted private equity might be appropriate as part of a multi-asset fund. In 2021, the DOL cautioned that for a multi-asset fund that includes private equity, expertise, which a fiduciary of a defined benefit pension plan might have and a fiduciary of a small 401(k) plan is less likely to have, is required.

13. Courts continue to grapple with whether employment agreements and/or plan terms can foreclose class actions for plan-wide relief by requiring participants to **arbitrate claims** for fiduciary breach on an individual basis. For one employer, courts in different circuits disagreed about the validity of an arbitration term in an employment agreement, with the result that the employer is facing hundreds of individual arbitrations in the Eighth Circuit and a class action in the Second Circuit.[4] In another matter, the Seventh Circuit Court of Appeals held that plan terms requiring individual arbitration of claims cannot bar an individual from seeking plan-wide relief under ERISA § 502(a)(2).[5]

14. In a revenue procedure, the IRS extended the period during which **pre-approved plans** may timely adopt interim amendments. A pre-approved plan must adopt interim amendments when tax rule changes would cause the plan to have a disqualifying provision, and generally must do so within the plan's remedial amendment period. However, for qualification changes that are effective with respect to a plan after December 31, 2020, the revenue procedure provides for an adoption deadline of the end of the second calendar year following the calendar year in which the change in the rule is effective.

15. Ordinarily, a pension plan that does not permit in-service distributions may only begin distributions to a participant when the individual has a **bona fide retirement**. In its continuing guidance on COVID-19 pandemic relief, the IRS issued an FAQ which provides that if a retiree is rehired due to unforeseen circumstances, that rehire will not cause the retiree's prior retirement to no longer be considered a bona fide retirement.

16. In light of COVID-19's continuation, the DOL will continue to allow participant elections that ordinarily must be **witnessed in the physical presence of a notary or plan representative** to be witnessed remotely via video if permitted under state law, through June 30, 2022.

From all of us here at MMPL, your employee benefits law firm.

Not intended as legal advice.

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[1] *Hughes v. Northwestern University*, No. 19-1401, 2022 WL 199351 (U.S. Jan. 24, 2022).
[2] Most notable is the $59M settlement that was reached this year in *Cruz v. Raytheon Co.*, Docket No. 1:19-cv-11425 (D. Mass.) involving a plan that utilized simplified conversion factors.
[3] *Sofco Erectors, Inc. v. Trustees of the Ohio Operating Engineers Pension Fund*, 15 F.4th 407 (6th Cir. 2021).

[4] *Hursh v. DST Systems., Inc.*, No. 4:21-MC-021-9026, 2021 WL 4526849 (W.D. Mo. Oct. 4, 2021), *appeal filed*; *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173 (2d Cir. 2021).
[5] *Smith v. Board of Directors of Triad Manufacturing, Inc.*, 13 F.4th 613 (7th Cir. 2021).