

Legal Developments Impacting Retirement Plans

2022 Year-End Update

1. Congress passed the **SECURE 2.0 Act of 2022**, which has far-reaching impacts on retirement plans. See our separate article for additional information.
2. Some investment houses now include bitcoin in their fund offerings for retirement plans. However, in 2022 the DOL issued guidance expressing serious concerns about the prudence of making **cryptocurrency investments** available to 401(k) plan participants. The DOL pointed to several factors which make cryptocurrency investments particularly troubling as a plan investment, including extreme price volatility, valuation difficulties, uninformed participants, security vulnerabilities, and an evolving regulatory landscape that could limit liquidity. The DOL stated it intends to investigate plans that offer cryptocurrency investments and take enforcement action. The collapse of the FTX cryptocurrency exchange in November, and pending litigation, is likely to be impactful.
3. In 2020, the DOL issued final regulations discouraging plan fiduciaries from considering **environmental, social, or governmental (ESG) factors** when selecting plan investments. Under the new administration, the regulations were amended in 2022 to take effect January 30, 2023, and are friendlier to ESG considerations but retain the basic ERISA principle that a plan fiduciary must focus on relevant risk-return factors and cannot subordinate investment returns to or take on additional investment risk for objectives unrelated to the provision of benefits under the plan. Out of concern that the 2020 regulations discouraged **proxy voting**, the amendments also eliminated burdensome recordkeeping requirements and the DOL reiterated that proxy voting is a key piece of managing investments. In January 2023, 25 states sued to stop the 2022 regulations from taking effect.
4. The IRS extended the plan amendment deadlines for the **SECURE Act of 2019** and **CARES Act** changes, generally to December 31, 2025 (a different extended deadline applies to governmental plans¹). This amendment deadline was subsequently further extended by the SECURE 2.0 Act of 2022, as detailed in our separate article on that act.
5. In February, the IRS issued proposed regulations regarding the **required minimum distribution (RMD)** rules under Section 401(a)(9) of the Code, with a primary focus on the RMD rule changes made by the SECURE Act of 2019. The proposed regulations included certain controversial provisions regarding the RMD rules that apply when a participant dies after their required beginning date. Yielding to public frustration, the IRS in November provided transition relief and stated that the regulations, once finalized, would be effective no earlier than 2023.
6. Courts continue to struggle with the validity of plan terms requiring **individual arbitration** of ERISA claims, with several decisions questioning the extent a plan can restrict a participant from seeking plan-wide relief, such as removal of a fiduciary or recoupment of

plan-wide losses.² In a case on appeal in the Tenth Circuit, the DOL has argued a Plan's arbitration term cannot waive plan-wide relief. Separately, there have been several unsuccessful bills in Congress attempting to restrict plans from requiring individual arbitration.

7. Courts continue to find it improper for multiemployer pension plans to calculate **withdrawal liability** using an interest rate assumption that differs from the assumption used for minimum funding purposes. Both the District of Columbia and Ninth Circuits held that use of the PBGC interest rate to calculate withdrawal liability violated the requirement that the assumption be based on the actuary's "best estimate" of anticipated experience under the plan.³ In a related development, the PBGC issued proposed regulations that specifically authorize use of certain interest rate assumptions to calculate withdrawal liability that differ from the plan's assumption for minimum funding purposes, including the PBGC rate and the Segal Blend.
8. The IRS made several changes to its **determination letter application program**: individually-designed 403(b) plans meeting certain criteria can now file for a determination letter; the remedial amendment period that applies to disqualifying provisions in new qualified plans was extended; eligibility to apply for a determination letter was expanded for plans with a prior determination letter from a Form 5307 (related to a volume submitter plan) filing; and the scope of the IRS's review was modified. In separate guidance, the IRS announced that beginning July 1, 2022, determination letter applications (Form 5300s) must be filed electronically at www.Pay.gov.
9. In June, the IRS launched a 90-day **pre-examination compliance pilot program** that gives retirement plan sponsors whose plan has been selected for audit a 90-day period to review plan documents and operation and to engage in self-correction (if eligible under the IRS' correction program, EPCRS) with respect to any qualification failures that are self-identified. The goals of the program are to reduce taxpayer burden and the amount of time spent on retirement plan examinations.
10. Cases in the Sixth, Seventh, and Eighth Circuits confirmed that to survive a motion to dismiss for failure to state a claim, a plaintiff claiming a fiduciary breached its **duty of prudence** by paying excessive fees must plausibly allege the fees were excessive relative to the services rendered.⁴
11. The Seventh Circuit confirmed the DOL's broad power to subpoena documents in connection with a **cybersecurity breach** of a plan recordkeeper. While not a surprising decision, it's a reminder that plans should review their service providers' cybersecurity practices, consistent with the DOL's cybersecurity guidance issued in 2021.⁵
12. The IRS issued proposed regulations implementing the SECURE Act of 2019's changes to the "**unified plan**" rule for multiple employer retirement plans (MEPs). The proposed regulations address what MEPs must do to avoid disqualification of the entire MEP when one participating employer has a qualification failure.

13. The IRS announced compensation and **benefits limits for 2023** as follows:

- The maximum elective deferral to a §401(k) or §403(b) plan increased to \$22,500, with annual limit catch-up contributions for over-age 50 participants increasing to \$7,500.
- The maximum compensation that can be taken into account under a qualified retirement plan increased to \$330,000.
- The threshold for determining who is a highly compensated employee (HCE) in 2023 is \$135,000 (compensation earned in 2022). For determining who is an HCE in 2024, the threshold will be \$150,000 (compensation earned in 2023).

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

Not intended as legal advice.

¹ For governmental plans, the extended deadline is 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after December 31, 2023.

² *Harrison v. Envision Management Holding, Inc. Board of Directors*, 593 F. Supp. 3d 1078 (D. Colo.), *appeal filed*, No. 22-1098 (10th Cir. 2022); *Holmes v. Baptist Health South Florida, Inc.*, No. 21-22986-CIV, 2022 WL 180638 (S.D. Fla. Jan. 20, 2022).

³ *GCIU-Employer Retirement Fund v. MNG Enterprises, Inc.*, 51 F.4th 1092 (9th Cir. 2022); *United Mine Workers of America 1974 Pension Plan v. Energy West Mining Co.*, 39 F.4th 730 (D.C. Cir. 2022).

⁴ *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274 (8th Cir. 2022); *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. 2022); *Smith v. CommonSpirit Health*, 37 F.4th 1160 (6th Cir. 2022).

⁵ *Walsh v. Alight Solutions LLC*, 44 F.4th 716 (7th Cir. 2022).