



Pension & Benefits Quarterly

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June 2021

Qualified Retirement Plans Updates

Ami Givon | GCA Law Partners LLP

American Rescue Plan Act of 2021 (ARPA) Provisions: ARPA, the \$1.9 trillion economic package signed into law on March 11, 2021, contained funding relief provisions for both single-employer and multiemployer defined benefit plans.

For single employer plans:

- The shortfall amortization base for underfunded plans is reset to \$0, with the 15-year payment period replacing the current seven-year repayment period. This change is effective for plan years beginning in 2022, with the option to select an effective date for the plan year beginning 2019, 2020 or 2021 instead.

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“ We are currently looking for leaders and members for our Committees. Our most high profile opportunity is the Chair of the Membership Committee. If you are interested, please email Robert Gower: rgower@truckerhuss.com ”

Karen Mack,
Gallagher

President’s Letter - Pg 2

President's Letter

Happy Spring 2021!

I am writing this President's letter with a touch of nostalgia, since this is my final newsletter I will write as President. My two-year term ends on June 30, 2021, I have to admit that the time really seemed to fly by. It has been an honor to serve the organization in this leadership capacity. Being President of an in-person educational and networking organization during a global pandemic has certainly been a challenging and rewarding experience. I am joining the entire country in a solid dose of optimism that we can see the light at the end of the tunnel. I am very proud of how our organization adapted our membership, programs, and sponsor model to continue to provide networking and educational opportunities for our membership.

I am honored to hand the President's role to **Victoria Fung** of **T. Rowe Price** as of July 1, 2021 and will continue to support her in my future role as immediate past President. Victoria will bring excitement and fresh ideas to help lead our organization into its next chapter. Join me in wishing Victoria success and supporting her efforts and leadership. Welcome Victoria!

Please get involved in helping lead and grow this organization so we continue to be a leader in the future! We are currently looking for leaders and members for our committees. Our most high profile opportunity is the **Chair of the Membership Committee**. This important role offers an exciting opportunity to help take the groundwork we laid over the past year and springboard into expanding and energizing our membership. You would get to work hand-in-hand with **Robert Gower** of **Trucker Huss**, the Membership Board liaison and enthusiastic supporter of innovative ideas to grow membership. If you are interested in the leadership role or being a member of the committee, please reach out to any Board member.

Our Board and hard-working committees (chairs and members alike) have been hard at work to make sure that we are delivering a fulfilling calendar of educational events since the last newsletter.

On February 26th, we held a program session featuring a panel discussion on how human resource professionals are promoting diversity, equality and inclusion through training and benefits. The speakers were **Sharawn Connors** of **Micron Technology**, **Carrie Lewis** of **Amy's Kitchen** and **Lisa Phelps** of **American Homes 4 Rent**.

On March 25th, we hosted a program session featuring how to help essential workers during COVID. **Brodie Wood** and **Nicole Starks**, of **Voya** shared research and best practice approaches to helping diverse communities, which have suffered greater negative impacts due to COVID-19.

On April 21st, we hosted an economic update from JP Morgan through the presentation of J.P. Morgan's award-winning Guide to Retirement. **Katherine Roy** of **J.P. Morgan** provided an overview of their research covering learnings in areas of the retirement landscape from investor behaviors to income placement needs to healthcare costs.

On May 4th, we hosted a Brown Bag lunchtime webinar on the American Rescue Plan Act. **Alex Willson** of **Horizon Actuarial Services** and **Bob Schwartz** of **Trucker Huss** covered the legislative history and current implications of ARPA for multiemployer plans.

We are working on the following upcoming events and more information will be sent out soon!

June 15th Brown Bag on Single Employer ARPA DB Funding Relief

July (TBD) We are looking to plan an exciting summer event focused around **"Women in Investing"** – this hot topic has many facets, which we will tackle in an expanded format. More details to come.

Program Year 2021/2022 – It is not too early to be thinking about next program year! Please renew your membership. If know someone that is considering becoming a member, please encourage them to join. If your organization is

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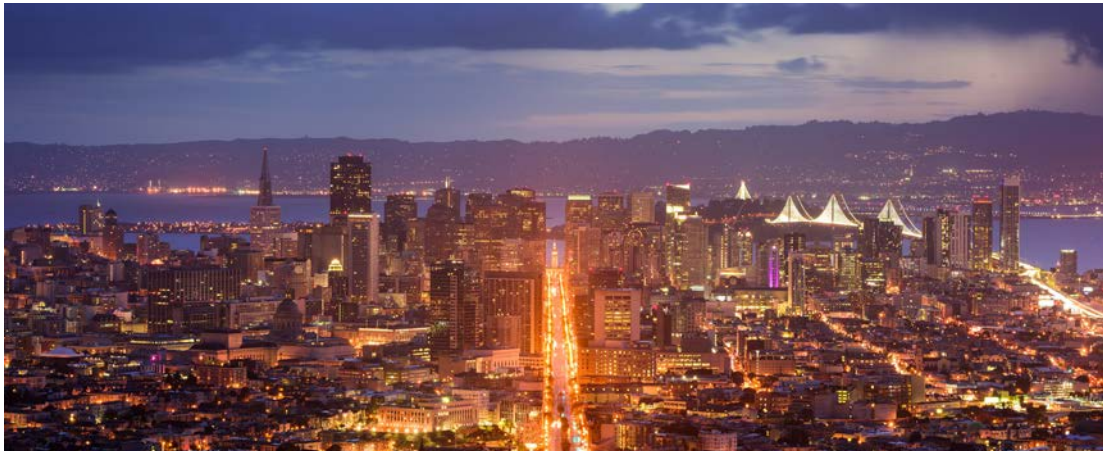
looking to be a sponsor and you missed the 2020/2021 year, please keep us in mind for 2021/2022 as you are setting budgets. Through the generosity of our sponsors, we are able to continue delivering valuable programming and networking opportunities for our benefits community.

I hope to see you at our upcoming events!

Karen Mack, FSA, EA, MAAA
Gallagher

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PRESIDENT'S LETTER

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Gallagher - Thought Leadership

Reviewing and Reprioritizing Your Retirement Plans

Keeping on top of retirement plan compliance requires constant diligence. In addition to the ongoing administrative and fiduciary compliance, it is essential to stay apprised of changes coming from multiple directions, including statutory changes under ERISA and the Internal Revenue Code, regulatory guidance from the Department of Labor (DOL) and the Internal Revenue Service (IRS) and litigation. In the article in the attached link. We have highlighted 10 significant developments below:

1. Review your process for finding missing participants and uncashed checks from both defined contribution and defined benefit plans.
2. Remember that Required Minimum Distributions (RMDs) must be made in 2021.
3. Follow Investment Duties according to the DOL's final regulations.
4. Attend to Proxy Voting to ensure prudent monitoring and selection of the specific fiduciaries responsible for voting proxies or exercising other types of shareholder rights.
5. Provide Lifetime Income Disclosures as required under SECURE and ensure that your organization will comply with DOL's interim final rules.
6. Understand the required disclosures in Prohibited Transaction Exemption 2020-02 and as a plan administrator ensure you are documenting receipt of a fiduciary's disclosure and ensuring understanding.
7. Track the latest extension for Student Loan Debt Benefits.
8. Take note of the extended waiver of the physical presence requirement.
9. Know the impact of the DOL ending support for the CalSavers challenge lawsuit.
10. Set expectations regarding RMDs about the new life expectancy tables.

Following is an informational article exploring each of these 10 areas in further detail:

<https://ajg.adobeconnect.com/ccaprretirement/>

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Join us!
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by serving on a Committee!

To learn more - email us:
terri@wpbcfsf.org



Selecting, Evaluating, and Monitoring Investments in DC Plans: A Legal Perspective

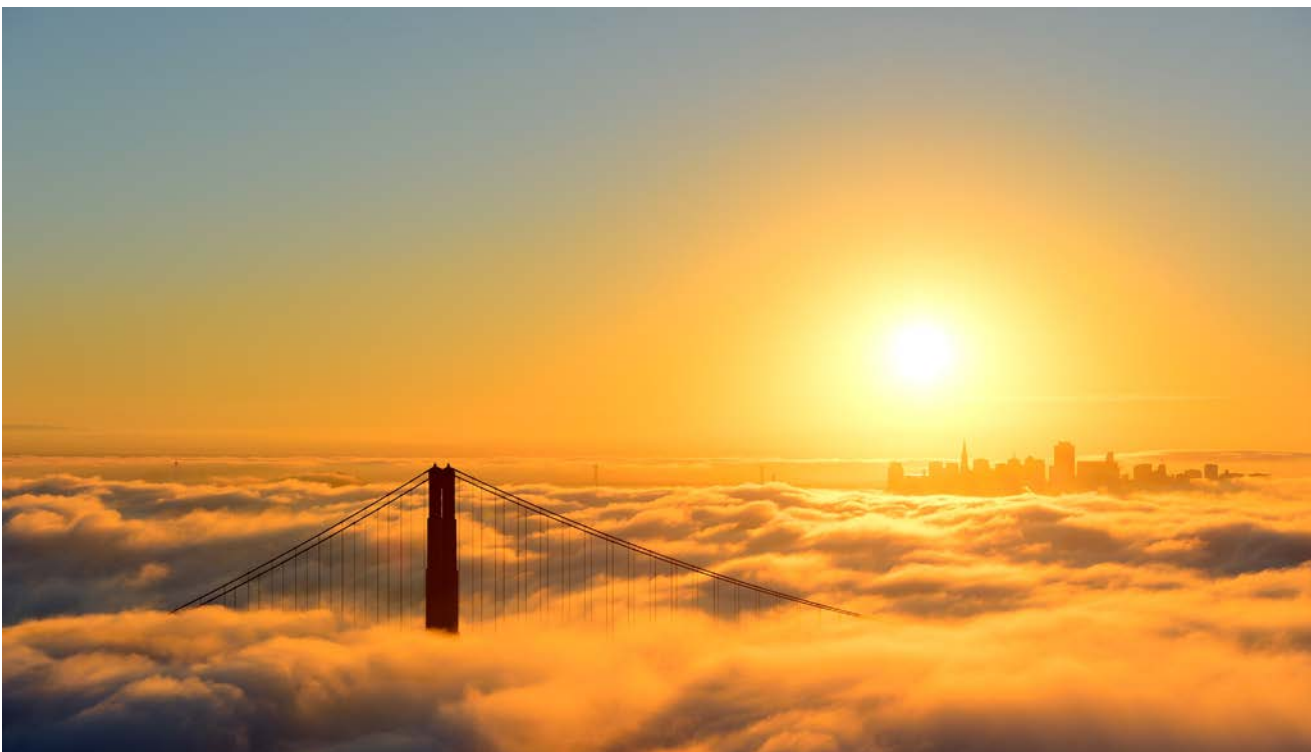
By T. Rowe Price

DC plan sponsors are often focused on driving more successful retirement outcomes, but they also face understanding complex fiduciary requirements. Further complicating their decisions, trends in litigation shift over time and recent cases may provide valuable insights to assist decision making. Contrary to a commonly held belief, there is no “right” investment selection, but it is necessary to build an appropriate process to assess plan investment options. A recent paper sponsored by T. Rowe Price is designed to help sponsors gain clarity on recent litigation cases and offer principles to help sponsors make key investment decisions. ERISA Litigation experts of Goodwin LLP provide guiding principles and action items to aid fiduciaries in evaluating, selecting, and monitoring DC plan investment options.

In the complex and litigation-prone world, it is important to underline what the real focal points for fiduciaries should be. Here are three key takeaways derived from the body of legal decisions that have been rendered that can aid fiduciaries in monitoring investment options and assessing active strategies within their plan lineup:

- It's about the process
- Fiduciaries should focus on the value-for-cost proposition
- Range of choice and strategies can be appropriate

The takeaways highlighted above help clarify that there is not an investment lineup or singular approach that is deemed a mandate. There are core principles that sponsors can use to inform their investment choices and oversight. Link to read more: <https://www.troweprice.com/institutional/us/en/insights/articles/2021/q1/selecting-evaluating-monitoring-investments-dc-plans-legal-perspective-na.html>



Member Profile: Lia L. Lundgren, C(k)P

Company: Wells Fargo Asset Management

Title: DCIO Regional Director – West

Education: Colby College, Waterville, Maine

Years in the industry: 25 years

Please tell us about your first “real” job: I moved to Boston after graduating from college and started working for Fidelity on the retirement side. After a couple of years, there was a call for enrollers. I auditioned in front of Bob Reynolds and hit the road for the next few years standing on assembly line floors, lunch breakrooms, hospital rooms, company auditoriums and wherever else we could hold a 401(k) meeting for employees.



BUSINESS BACKGROUND

Nature of your work: I work with retirement plan-centric advisors in the nine western states to pull through strategies managed by Wells Fargo Asset Management onto 401(k), 403(b) and 457 plan platform menus.

How you got into the field: Fidelity was an outstanding firm to learn the DC ropes.

What you like about the field: Having a specialty in our industry is invigorating to me. I appreciate being sought out for my opinion on plan design, platform providers, TPAs and the like.

PERSONAL

Ways you spend free time: Road cycling, snow skiing and outside exercise of almost any type, as well as a major Pilates devotee.

Guiding philosophy: Always try to learn something even when in a place where you don't want to be. Always be curious.

Favorite charities: Wounded Warriors and Blessings in a Backpack.

Last book read: “Shoe Dog” by Phil Knight.

Restaurant recommendation: Jackson Fillmore in San Francisco!

What will you do when you retire: Travel!

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Protecting Yourself As A Fiduciary

By Hanson Bridgett

Given the increased level of IRS and DOL audits and litigation against retirement plan fiduciaries, what can you do to lessen the risk of cost (and adverse reputational risk) associated with audits and litigation? Consider working with plan counsel to do the following:

- Provide fiduciary training about evolving regulatory and case law guidance in areas such as cybersecurity and fraud, oversight of plan vendors, and developments in the investment area (e.g., excessive fee cases).
- Complete an annual review of the plan document to verify it reflects current operational practices, any required law changes (including the annual IRS remedial amendment guidelines and Operational Compliance Lists), and any discretionary changes implemented during the year.
- Periodically review compliance with administrative processes often challenged in regulatory audits, such as deposit deadlines for contributions, loan and hardship withdrawal requirements, Form 5500 filings (including audit requirements), and maintaining necessary records to allow use of self-correction of errors under IRS rules.
- Establish records of investment deliberations, including consideration of reports from qualified professional advisors.
- Conduct periodic prudent reviews of plan vendors.
- Finally, review the plan's fiduciary liability insurance arrangements to be sure the coverage is appropriate for your needs.

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**WELCOME
NEW MEMBERS!**



Bishop Bastien, *Voya Financial*

Renee Brewer, *Empower Retirement*

Toni Brown, *Capital Group*

Daniel Carr, *Voya Financial*

Nicolas Deguines, *Trucker Huss, APC*

Cathleen DeOrnelas, *Apple, Inc.*

Soohuen Ham, *Orrick, Herrington & Sutcliffe*

Megan Hart, *Wells Fargo Asset Management*

Lia Lundgren, *Wells Fargo Asset Management*

Yuli Mihaylov, *Yulishana*

Louis Schichnes, *LIS Pensions & Actuaries*

Jason Waltonen, *Empower Retirement*

Jennifer Wong, *Trucker Huss, APC*

Pension Plan Information For The Am Law 200 Firms

Author: Pierre Couture, Head of Retirement Plan Solutions, Law Firm Group
Citi Private Bank

Citi Private Bank Law Firm Group collected information about the pension plans sponsored by the largest 200 law firms for their employees using data from the Form 5500 for the 2019 plan year (most recent available) for each of their pension plans as posted on the U.S. Department of Labor Employees Benefits Security Administration's website (<https://www.efast.dol.gov/portal/app/disseminatePublic?execution=e1s1>)

Key Findings:

1. About 76% (143 of 189) of pension plans sponsored by the AM Law 200 firms in 2019 are for partners only.
2. About 61% (116 of 189) of pension plans sponsored by the AM Law 200 firms have a cash balance-type formula.
3. The total amount of pension plan assets was \$17.1 billion as of 12/31/2019 for the AM Law 200 firms.
4. Close to 60% (47 of 79) of the pension plans sponsored by the AM Law 1-50 firms have at least \$75 million in assets as of 12/31/2019.
5. About 89% (103 of 116) of the cash balance pension plans sponsored by the AM Law 200 firms have an interest crediting formula based on the market rate of the return of plans' assets.
6. The AM Law 1-50 firms with cash balance pension plans have a more aggressive asset allocation, in average, than the AM Law 51-200 firms.

Sources: AM Law 200 firms' Form 5500 filings with US Department of Labor for the 2019 plan year; Retirement Plan Solutions Team as of 11/24/2020

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Voya releases whitepaper providing plan design changes for employers during challenging times

7 actionable insights from Behavioral Finance

The [Voya Behavioral Finance Institute for Innovation](#) has released a whitepaper that provides employers with actionable insights to help individuals get back on track with retirement savings in light of the COVID-19 pandemic and associated economic crisis.

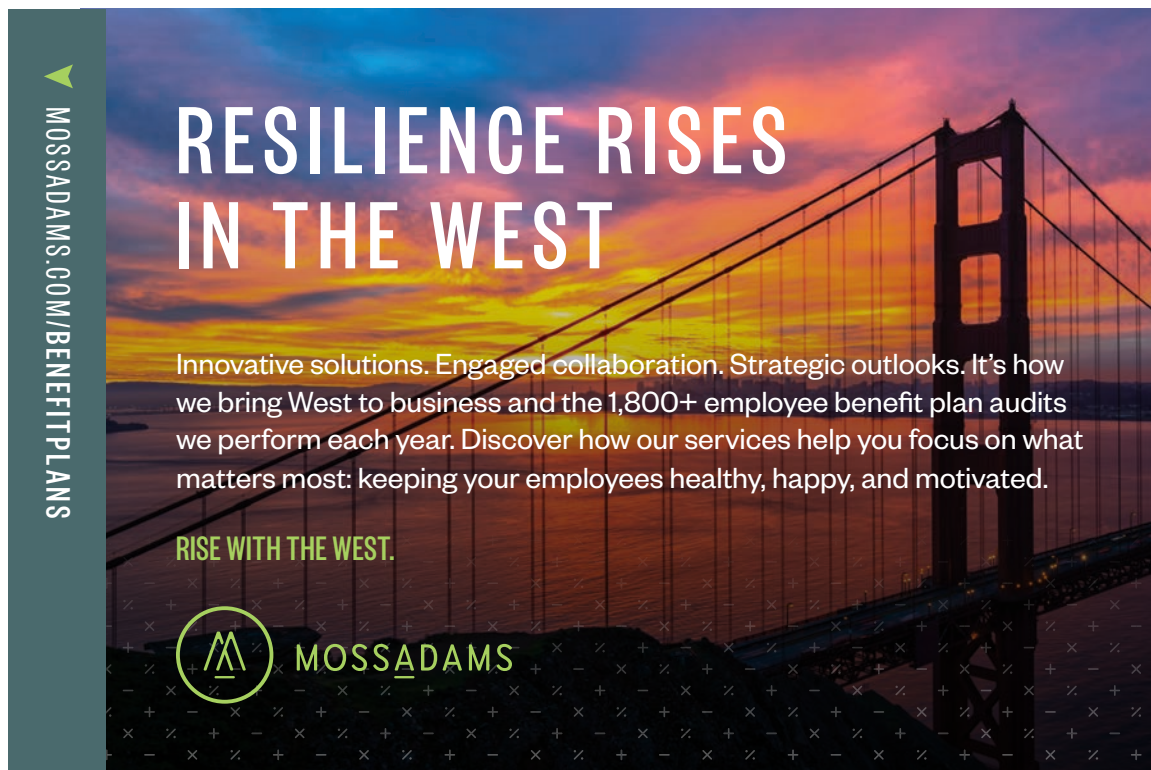
In the new paper titled "[Plan design during challenging times: 7 Actionable Insights from Behavioral Finance](#)," Dr. Shlomo Benartzi, UCLA Anderson School of Management professor emeritus and a senior academic advisor to the Voya Behavioral Finance Institute for Innovation, examines several retirement plan design considerations for employers that can significantly help improve the financial security of American workers today.

While the good news is that retirement outlook has since improved — Voya's latest data shows 76% of participants reported a positive retirement sentiment in December — it is becoming increasingly clear that the pandemic may have a lasting impact on retirement outcomes for many individuals.

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Member Pet Profile:

Name: Dublin McDonald

Breed: 118 pound mutt-mix (we think Wolfhound and Labrador, although the Shelter thought I'd be 35-45 pounds when full grown)

My human is: Jenifer McDonald and McDonald Association Management Company, Inc., the management company for the San Francisco Chapter of the Western Pension and Benefits Council.

How did I find my human: Jenifer's sons, Sean and Frank McDonald adopted me from the Front Street Animal Shelter in Sacramento on Christmas Eve 2011.

How I help my human do their job: I'm the Chief Morale Officer and Good Boy of McDonald Association Management Company, Inc. Experienced in belly rubs and long afternoon naps, I'm highly proficient at both "sit" and "shake" and go into the office whenever McDonaldAMC staff needs a morale boost.

Favorite part of my human working from home: Belly rubs all day.

Least favorite part of my human working from home: I like my alone time. Whenever too many people are in the house for too long, I take long naps under the dining room table.

Favorite place to visit outside of the house: Doggy Day Camp at Best Friends Pet Resort where I get to run around with my dog friends.

What I learned about my human working from home: I don't understand why my human would rather keep their hands on a computer keyboard when they could be petting me all day. I sometime nudge their elbow to remind them to take a break to hang out with me.

Favorite human food: Warm oatmeal topped with a pat of butter and a pinch of brown sugar.



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Qualified Retirement Updates, continued

- Interest-rate stabilization for ERISA funding calculations provided under previous legislation is extended. As extended:
- The 10% interest rate corridor is reduced to 5% for the 2020 through 2025 plan years;
- The gradual 5% per year expansion to 30% is delayed to the 2026 plan year; and
- A 5% interest rate floor is established for 25-year average historical segment rates.

These extended provisions are effective for the 2020 plan year, with the option to defer them to the 2021 or 2022 plan year.

For multiemployer plans:

- Asset losses applicable to COVID-19 as well as other losses may be amortized over a 30-year (instead of 15-year) period for the first two plan years ending after February 29, 2020;
- The plan may elect to retain, for the first plan year beginning during the period beginning on March 1, 2020, and ending on February 28, 2021, or for the next succeeding plan year (as designated by the plan) the same funding zone status as that of the plan year preceding the designated plan year;
- A plan which is in endangered or critical status for a plan year beginning in 2020 or 2021 may elect to have its improvement period or rehabilitation period, whichever is applicable, extended by five years;
- A special program is established through which the Pension Benefit Guaranty Corporation (PBGC) will provide financial assistance to eligible financially-troubled plans to enable them to pay benefits and expenses through the plan year ending in 2051; and
- Beginning in 2031, the PBGC participant premium rate will increase from \$26 to \$52.

Updated Guidance on Coronavirus-related Relief and Partial Plan Terminations: In a set of questions and answers, the Internal Revenue Service (IRS) has provided updated guidance on section 2202 of the Coronavirus Aid, Relief and Economic Security Act (CARES Act), which allows for special distribution options and rollover rules for retirement plans and individual retirement accounts (IRAs), and expanded loan terms for certain retirement plans. The updated guidance also addresses the partial termination provisions in section 209 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Disaster Act).

The CARES Act guidance:

- Defines who is a “qualified individual” eligible for relief under section 2202;
- Defines a “coronavirus-related distribution” (CRD);
- Explains the tax rules and repayment options applicable to CRDs;
- Explains the plan loan relief under Section 2202;
- States that it is optional for employers to adopt the distribution and loan rules of section 2202;
- States that a CRD is treated as satisfying a plan’s distribution restrictions (although a CRD from a money purchase plan still must comply with the qualified joint and survivor annuity and spousal consent rules);
- Explains that a plan administrator may rely on an individual’s certification that the individual is eligible to receive a CRD, unless the administrator has knowledge to the contrary. The individual may treat the distribution as a CRD on the individual’s federal income tax return only if the individual actually meets the eligibility requirements;

Continued pg 14

Qualified Retirement Updates, continued

- States that an eligible retirement plan is not required to accept repayment of a participant's CRD; and
- Explains that, generally, employees who participated in a business's qualified retirement plan who were laid off because of COVID-19 and rehired by the end of 2020 are not treated as having an employer-initiated severance from employment for purposes of determining whether a partial termination of the plan occurred during the 2020 plan year.

The CARES Act guidance also states that the Treasury Department and the IRS are formulating further guidance on Section 2202 and anticipate releasing it in the near future. It is expected that the further guidance will apply the principles followed in IRS Notice 2005-92, which provided guidance on the tax-favored treatment of distributions and plan loans for victims of Hurricane Katrina under sections 101 and 103 of the Katrina Emergency Tax Relief Act of 2005.

The Relief Act Guidance:

- Provides that the determination of "active participant covered by the plan" for purposes of applying the partial termination rules of section 209 are to be based on a reasonable, good-faith interpretation of the term applied in a consistent manner;
- Explains that if any part of the plan year falls within the period beginning on March 13, 2020, and ending on March 31, 2021, section 209 applies to any partial termination determination for that entire plan year;
- Explains that the 80% test is not applied by identifying the pool of active participants covered by a plan on March 31, 2021, and determining whether at least 80% of those same individuals were active participants covered by the plan on March 13, 2020. Instead, the test is applied by counting the number of active participants covered by a plan on each of those dates. The number of active participants covered by a plan who are counted on March 31, 2021, includes all individuals who are active participants covered by the plan on that date, regardless of whether those same individuals were active participants covered by the plan on March 13, 2020; and
- States that the section 209 provisions are not limited to reductions in the number of active participants that are related to the COVID-19 national emergency.

Guidance on Continuation of Agency Relief in Response to COVID-19 Outbreak: In Employee Benefits Security Administration (EBSA) Disaster Relief Notice 2021-01 (Notice 2021-01), the Department of Labor (DOL), in coordination with Treasury, the IRS and the Department of Health and Human Services, provided guidance on the duration of COVID-19-related relief that had been provided by the DOL in EBSA Disaster Relief Notice 2020-01 and the Notice of Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak (Joint Notice) issued in 2020 by the DOL, Treasury and the IRS (the Notice 2020-01 and the Joint Notice, collectively, the Notices). Notice 2021-01 states,

[i]ndividuals and plans with timeframes that are subject to the relief under the Notices will have the applicable periods under the Notices disregarded until the earlier of (a) 1 year from the date they were first eligible for relief, or (b) 60 days after the announced end" of the COVID-19 national emergency. In no case will a disregarded period exceed 1 year.

DOL FAQs on Investment Advice Prohibited Transaction Exemption: On April 13, 2021, the DOL issued frequently asked questions (FAQs) on the final version of Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees (PTE 2020-02), which permits investment advice fiduciaries of

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Qualified Retirement Updates, continued

ERISA plans and IRAs to receive compensation and engage in certain transactions that would otherwise constitute ERISA or Internal Revenue Code prohibited transactions, provided certain conditions are met. The FAQs:

- Confirm that the exemption became effective February 16, 2021, and that the DOL/IRS enforcement policy announced in Field Assistance Bulletin 2018-02 will continue until December 20, 2021;
- State the DOL's anticipation that it will take more actions, such as regulatory and subregulatory guidance and amending the investment advice regulation and PTE 2020-02, addressing fiduciary investment advice;
- Restate the ERISA definition of investment advice, and address the application of the definition's "regular basis" prong of the definition in relation to rollover recommendations and the application of the "mutual agreement" and "primary basis" prongs to the use of fine print disclaimers;
- Explain the PTE 2020-02 compliance requirements, including adherence to the Impartial Conduct Standards; disclosure of conflicts of interest; necessary documentation; use of payout grids by financial institutions to implement the exemption's policies and procedures requirement; exemption compliance by insurance industry financial institutions; and the retrospective review requirement; and
- Explain how violations of the exemption may be corrected and how the DOL will enforce compliance with the exemption.

DOL Cybersecurity Guidance: On April 14, 2021, the DOL announced new guidance for plan sponsors, fiduciaries, recordkeepers and participants for maintaining cybersecurity, including tips to protect retirement benefits. The guidance comes in three forms:

- Tips for hiring a service provider with strong cybersecurity practices, which include (1) asking the provider about its security standards; practices and policies; audit results; track record in the industry; past security breaches; and insurance policies to cover losses caused by cybersecurity and identity theft breaches; and (2) requiring service provider contracts to provide for terms on information security reporting; use and sharing of private and confidential information; notification of cybersecurity breaches, compliance with record retention and destruction; privacy and information security laws; and insurance coverage;
- Cybersecurity program best practices, including maintaining a formal, well-documented cybersecurity program; conducting prudent annual risk assessments; having a reliable annual third-party audit of security controls; defining and assigning security roles and responsibilities; maintaining strong access control procedures; ensuring that cloud-stored or third-party-managed assets or data are subject to appropriate reviews and assessments; conducting periodic cybersecurity awareness training; implementing a secure system development life cycle program; maintaining an effective business resiliency program; encrypting sensitive data; implementing strong technical controls; and appropriately responding to past cybersecurity incidents; and
- Online security tips for participants and beneficiaries, such as routinely monitoring online accounts; using strong and unique passwords and multi-factor authentication; keeping personal information current and closing unused accounts; being wary of free wi-fi and aware of phishing attacks; using and keeping current antivirus software; and knowing how to report identity theft and cybersecurity incidents.

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Qualified Retirement Updates, continued

Rescission of PBGC Rule on Guidance: On and effective as of April 1, 2021, the PBGC rescinded its August 26, 2020 final rule on guidance implementing an executive order entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents," and providing policy and requirements for issuing, modifying, withdrawing, and using guidance; making guidance available to the public; a notice and comment process for significant guidance; and taking and responding to petitions about guidance.

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Health and Welfare Regulatory Update

Soohuen Ham

Orrick, Herrington & Sutcliffe LLP

The Tri-Agencies' Attempt to Clarify Mental Health Parity and Addiction Equity Act Requirements

The Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) generally requires that financial requirements (e.g., coinsurance and copays) and treatment limitations (e.g., number of visits) imposed on mental health or substance use disorder (MH/SUD) be no more restrictive than the financial requirement and treatment limitations that are also imposed upon medical/surgical benefits in any of six classifications. In addition, the MHPAEA final regulations require that a group health plan or health insurance issuer may not impose a non-quantitative treatment limitation (NQTL) with respect to MH/SUD benefits in any classification unless, such limitations of a plan or health insurance coverage are applied no more stringently than the limitation to medical/surgical benefits in the same classification.

The Consolidated Appropriations Act, 2021 amended the MHPAEA, in part, by requiring group health plans and health insurance issuers offering group or individual health insurance coverage, that offer both medical/surgical benefits and MH/SUD benefits and that impose NQTLs on MH/SUD benefits, to perform and document their comparative analyses of the design and application of NQTLs. Beginning February 10, 2021, these plans and issuers must make the comparative analyses available to various federal agencies – i.e., the Department of Labor, Health and Human Services, and Treasury (collectively, the “Departments”) – for review upon request. The analyses must include certain types of information relating to each NQTLs, which is discussed further below.

On April 2, 2021, the Departments jointly issued nine frequently asked questions (FAQs) in an attempt to further clarify the CAA's requirements. The takeaways include the following:

- (i) With respect to the required information that must be reflected in the NQTL analyses, the Departments requires, at a minimum: (A) a clear description of the specific NQTL, plan terms, and policies at issue; (B) identification of specific MH/SUD and medical/surgical benefits to which the NQTL applies (within each benefit classification), and a clear statement as to which benefits are treated as MH/SUD and medical/surgical; (C) identification of factors, evidentiary standards or sources, or strategies or processes considered in the design or application of the NQTL and whether any factor was given more weight, and if so, the reason for doing so; (D) the precise definitions and any supporting sources to the extent the plan or issuer defined as factors, evidentiary standards, strategies, or processes in a quantitative manner; (E) any variation in the application of a guideline or standard used in the analyses and description of the process and factors used for establishing that variation; (F) if the application of the NQTL depends on a specific decision in benefit administration, the decision maker(s), the timing of the decisions, and the qualification of the decision maker(s); (G) if the plan's or issuer's analyses relies on any expert, an assessment of each expert's qualifications and the extent to which the plan or issuer relied on the expert(s) in setting recommendations regarding both MH/SUD and medical/surgical benefits; (H) a reasoned discussion of the plan's or issuer's findings and conclusions as to the comparability of the processes, strategies, evidentiary standards, factors, and sources identified above, citations to any evidence considered, and whether any results of analyses show compliance with MHPAEA; (I) the date of the analyses and the name, title, and position of the person or persons who performed or participated in the comparative analyses.
- (ii) The FAQs explain that the Departments may conclude that documentation of comparative analyses of NQTLs is insufficiently specific and detailed based on the following instances: (A) production of a large volume

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of documents without a clear explanation of how and why each document is relevant to the comparative analysis; (B) conclusory or generalized statements, including recitations of the legal standard without offering specific evidence and detailed explanations; (C) identification of processes, strategies, sources, and factors without the required or clear and detailed comparative analysis; (D) identification of factors, evidentiary standards, and strategies without a clear explanation or application in practice; (E) reference to factors and evidentiary standards without the precise definitions, data, and information necessary to assess their development or application; or (F) outdated analysis, a plan structure change, and other reasons too many to list.

- (iii) The FAQs recommend that, in addition to documentation of the comparative analyses, plans and issuers be prepared to make available to the Departments the following documentation to support the analysis and conclusions in their NQTL comparative analyses:
 - a. Records documenting NQTL processes and detailing how the NQTLs are being applied to both medical/surgical and MH/SUD benefits in compliance with the law;
 - b. Any documentation, including any guideline, claims processing policies and procedures, or other standards that the plan or issuer has relied upon to determine that the NQTLs apply no more stringently to MH/SUD benefits than to medical/surgical benefits (any further details to support the plan or issuer's rationale is encouraged);
 - c. Samples of covered and denied MH/SUD and medical/surgical benefit claims; and
 - d. Documents relating to service providers' MHPAEA compliance if a plan delegates management of some or all MH/SUD benefit administration.
- (iv) If the Departments conclude that a plan or issuer has not provided sufficient information to review the comparative analyses, the Departments must specify to the plan or issuer what information the plan or issuer must submit to be responsive to their request. If the Departments reviewed the comparative analyses and determined that the plan or issuer is not in compliance with MHPAEA, the plan or issuer is given 45 days to specify to the Departments what actions the plan or issuer will take to come into compliance. This means the plan or issuer must submit additional comparative analyses within those 45 days. If the Departments make a final determination that the plan or issuer is still not in compliance, within seven (7) days of the final determination, the plan or issuer must notify all individuals enrolled in the plan or coverage that the plan or coverage is noncompliant with MHPAEA. Further, the Departments will share their findings of compliance and noncompliance with the State where the group health plan is located or where the issuer is licensed to do business for further action.
- (v) The CAA also requires plans and issuers to provide their NQTL comparative analyses to the applicable State authority upon request. The term "applicable State authority" refers to a health insurance issuer in a State, the State insurance commissioner or an official of officials designated by the State to enforce Title 27 of the Public Service Act, which sets forth requirements relating to health insurance coverage. Moreover, plans and issuers subject to Employee Retirement Income Security Act of 1974 (ERISA), must provide the comparative analyses and other applicable information required by the amendment to participants, beneficiaries, enrollees, and a patient's authorized representative upon their request. Furthermore, with respect to non-grandfathered group health plans and non-grandfathered group or individual health insurance coverage, claimants or their authorized representative have the right, upon appeal of an adverse benefit determination,

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to access documents with information on medical necessity criteria for both medical/surgical benefits and MH/SUD benefits, as well as documents reflecting the processes, strategies, evidentiary standards, and other factors used to apply an NQTL with respect to medical/surgical benefits and MH/SUD benefits under the plan.

- (vi) The Departments describe which areas of NQTL the Department of Labor will concentrate its efforts in enforcement in the near future: (A) prior authorization requirements for in-network (IN) and out-of-network (OON) inpatient services; (B) concurrent review for IN and OON inpatient and outpatient services; (C) standards for provider admission to participate in a network, including reimbursement rates; and (D) OON reimbursement rates, specifically plan methods for determining usual, customary, and reasonable charges.

The Departments stated that more FAQs are in the works, which will address several discrete NQTL issues. This indicates that their efforts to enforce the MHPAEA is only getting started.

The American Rescue Plan Act of 2021 and Its Impact on COBRA

Under the Consolidated Omnibus Budget Reconciliation Act (COBRA), an individual who was covered by a group health plan on the day before the occurrence of a qualifying event (such as termination of employment or reduction in hours that causes loss of coverage under the plan) may be able to elect COBRA continuation coverage. Such eligible individuals are referred to as qualified beneficiaries. Under COBRA, group health plans must provide covered employees and their families with certain notices explaining their COBRA rights.

On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021 (the ARP), which, among other things, amended COBRA to provide COBRA premium assistance to help "Assistance Eligible Individuals" (defined below), so that they will not be required to pay their COBRA continuation coverage premiums. The premium assistance applies to periods of health coverage on or after April 1, 2021 through September 30, 2021. The ARP will not only help those Assistance Eligible Individuals with their COBRA continuation premium payments, but also employers or plans to whom COBRA premiums are payable by providing tax credit for the amount of the COBRA premium.

Only days after the COBRA continuation premium assistance went into effect, the Department of Labor (DOL) issued its first set of FAQs in an effort to provide guidance and explanations as to the newly amended COBRA rules. The FAQs state that the IRS and Department of Treasury had reviewed the FAQs and concur in the application of the laws under their jurisdiction. Below is a summary of the FAQs.

Generally, individuals may be eligible for premium assistance if they are eligible to elect COBRA continuation coverage because of their own or their family member's reduction in hours or involuntary separation from employment. This premium assistance is available for continuation coverage under federal COBRA provisions, as well as for group health insurance coverage under comparable state continuation coverage (known as "mini-COBRA") laws. If an individual was (A) offered federal COBRA continuation (as a result of reduction in hours or an involuntary termination) and the individual declined continuation coverage, or (B) elected federal COBRA continuation and later discontinued it, the individual may still have another opportunity to elect COBRA continuation coverage and receive the premium assistance, as long as the maximum period he/she would have been eligible for COBRA continuation coverage has not yet expired (generally 18 months from the employee's reduction in hours or involuntary termination).

The ARP states that an Assistance Eligible Individual is a COBRA qualified beneficiary who meets the following requirements from April 1, 2021 through September 30, 2021:

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- (i) Eligible for COBRA continuation coverage due to a qualifying event that is a reduction in hours (as a result of, for example, a change in a business's hours of operation, a change from full-time to part-time status, taking of a temporary leave of absence, an individual's participation in a lawful labor strike, or an involuntary termination) not including voluntary termination; and
- (ii) Elects COBRA continuation coverage.

However, the ARP carves out some exceptions to the definition above. For example, individuals would not be eligible if they are eligible for other group health coverage, such as through a new employer's plan or a spouse's plan (except for excepted benefits, qualified small employer health reimbursement arrangement (QSEHRA), or a health flexible spending arrangement (FSA), or if the individual is eligible for Medicare. It is important to note that an individual will not be eligible for premium tax credit, advance payments of the premium tax credit, or the health insurance tax credit for health coverage during this period when they are receiving subsidized COBRA coverage. Further, under normal COBRA rules, if an employee's termination of employment was due to gross misconduct, the neither the employee nor the dependent(s) would qualify for COBRA continuation coverage or the premium assistance.

Even if an individual qualifies for premium assistance during the premium assistance period, it may end earlier if the individual becomes eligible for another group health plan; Medicare, or the individual reaches the end of the maximum COBRA continuation coverage period. The FAQs emphasize that such an individual must notify his/her plan upon becoming eligible for coverage under another group health plan or Medicare because failure to do so can result in a tax penalty.

The ARP also amends COBRA to require various types of notices to be provided. Individuals eligible for this additional COBRA election period must receive a "notice of extended COBRA election" informing them of this opportunity. This notice must be provided "within 60 days of the first day of the first month beginning after the date of the enactment of the ARP," (i.e., May 31, 2021). Upon receipt of such a notice, the eligible individuals have 60 days to elect COBRA. Individuals can begin their coverage prospectively from the date of their election, or, if an individual has a qualifying event on or before April 1, 2021, choose to start their coverage as of April 1, 2021, even if the individual receives an election notice and makes such election at a later date.

An individual who was covered by an employment-based group health plan on the last day of employment or a family member's employment, the plan or issuer should provide them with a notice of eligibility to elect COBRA continuation coverage and to receive the premium assistance. The notice should include any forms necessary for enrollment, including forms to indicate that the individual(s) is an Assistance Eligible Individual and that the individual is not eligible for another group health plan. If such an individual or those who believe they are Assistance Eligible Individuals have not received a notice from their employers, they may notify their employer. Under the ARP, Assistance Eligible Individuals are treated as having paid in full the amount of COBRA continuation premium from April 1, 2021 through September 30, 2021. As a result, plans and issuers should not collect premium payments or administration fees from Assistance Eligible Individuals.

For those individuals who are currently enrolled in COBRA, but would like to switch to a different coverage option offered by the same employer, group health plans can choose to allow qualified beneficiaries to enroll in a new coverage option without causing the individuals to be ineligible for the COBRA premium assistance. However, following conditions that must be satisfied:

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- (i) The COBRA premium charged for the different coverage is the same or lower than for the coverage the individuals had at the time of the qualifying event;
- (ii) The different coverage is also offered to similarly situated active employees; and
- (iii) The different coverage is not limited to only excepted benefits, QSEHRA, or a health FSA.

If the plan permits individuals to change coverage options, the plan must provide the individuals with a notice of their opportunity to do so and the individuals will have 90 days to elect to change their coverage after the notice is provided.

In cases where only part of a family elected COBRA continuation coverage while each member of the family was eligible, each COBRA qualified beneficiary may independently elect COBRA continuation coverage. Even when a family member did not elect COBRA continuation coverage when first eligible and that individual would have been an Assistance Eligible Individual, that individual has an additional opportunity to enroll and qualify for the premium assistance. However, as discussed above, this extended election period does not extend the maximum period of COBRA continuation coverage had COBRA continuation coverage been originally elected.

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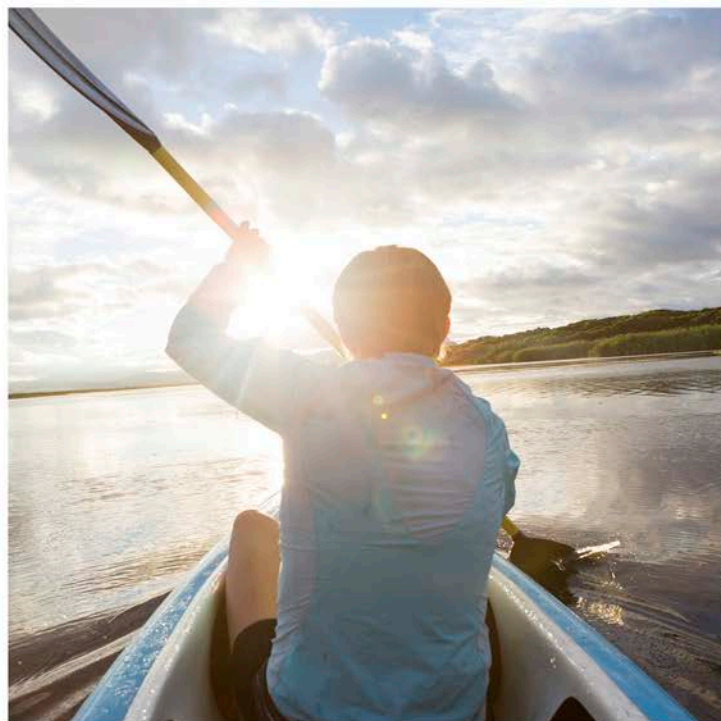
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