TCHR CHANGING TIDES

Thompson Coburn's
Annual Labor, Employment and
Employee Benefits Law Seminar

THOMPSON COBURN LLP

Uncharted Waters

The Latest Legislative and Regulatory Information for Retirement Plans

Thompson Coburn's Annual Labor, Employment and Employee Benefits Law Seminar

THOMPSON COBURN LLP

TCHR CHANGING TIDES

SECURE 2.0

THOMPSON COBURN LLP

Legislative Background

- Introduced in House on May 4, 2021
- Amended by Ways and Means Committee on March 29, 2022
- Passed the House on March 29, 2022
  - Significant bipartisan support (414-5)

Goals

TCHR CHANGING TIDES

- Increase retirement savings through automatic enrollment, new incentives, and expanded coverage
- Encourage more flexibility for Americans' retirement options
- Protect Americans' retirement accounts

Automatic Enrollment

- Require 401(k) and 403(b) plans to automatically enroll participants in the plans upon becoming eligible
- 3%-10%, with automatic increase until participant reaches 10%
- All current 401(k) and 403(b) plans are grandfathered
- Exceptions for small/new businesses, church plans, governmental plans

Required Beginning Date

- 73 on 1/1/23
- 74 on 1/1/30
- 75 on 1/1/33

Catch Up Limits

- Increase to $10,000 for participants age 62, 63, and 64
- Increase to $5,000 for SIMPLE plan participants age 62, 63, 64

Treatment of Student Loan Payments

TCHR CHANGING TIDES

- Employer option to make matching contribution for qualified student loan payments
- Separate non-discrimination testing for employees who receive this type of match

Participation Incentives

- Employers can offer de minimus financial incentives (e.g. low-dollar gift cards) to encourage participation in retirement plan

Elective Deferral Corrections

TCHR CHANGING TIDES

- Employers may correct reasonable employee elective deferral failures
- Correction must be completed prior to 9½ months after end of plan year in which mistakes were make

Eligibility

- SECURE: Requires employers to allow eligibility after one year of service (1000 hours) or 3 consecutive years with at least 500 hours
- SECURE 2.0: Adjusts latter to 2 consecutive years

Overpayments

- Retirement plan fiduciaries have option to not recoup overpayments mistakenly made to retirees
- If recouped, limitations and protections apply to safeguard retirees

RMD Penalty

- Reduce penalty to 25%
- If corrected in a timely manner, reduce to 10%

Notices for Unenrolled Participants

TCHR CHANGING TIDES

- Some notices required under ERISA and CODE no longer required for those unenrolled
- However, plans must send annual reminder notice of eligibility and election deadlines

Lost and Found Database

- National online searchable lost and found database for retirement plans
- Goal to enable former participants to search plan administrator contact information

Former Employees

- Employers may transfer account balances of former employees into IRA if less than $7,000

Expansion of EPCRS

- Allows more errors to be corrected through Self Correction Program
- Applies EPCRS to inadvertent IRA errors
- Exempt certain failures to make RMDs from excise tax

Paper Benefit Statement

TCHR CHANGING TIDES

- Amendment to ERISA to require DC plans to provide paper benefit statement at least once annually
- For DB plans, provide paper benefit statement at least once every 3 years

Top Heavy Testing

TCHR CHANGING TIDES

- Employers can perform top-heavy test separately on non-excludable and excludable employees

Qualified Birth & Adoption Distributions

- Participants may re-contribute distributed amounts within 3 years (previously unlimited)

Self-Certification

- Employees can self-certify that they have experienced hardship event to receive hardship distribution
- Plans may permit participants who self-certify that they have experienced domestic abuse to withdraw lesser of $10,000 or 50% of account
  - 10% on early distributions does not apply

403(b) Hardship Distributions

- Align 403(b) hardship distribution rules with the current 401(k) hardship distribution rules

Roth Treatment

- All catch-up contributions
- Matching contributions (optional)

Small Employer Updates

TCHR CHANGING TIDES

- Modification of credit for small employer pension plan startup costs
- Allow small employers who join a MEP to receive the credit for small employer pension plan startup costs for up to three years
- Military spouse tax credit

Additional Updates

TCHR CHANGING TIDES

- Promotion and enhancement of Saver's credit
- Permit 403(b) custodial accounts to invest amounts in collective investment trusts
- Index IRA catch-up limit
- Polled employer plans may designate a named fiduciary (other than an employer) to collect contributions to the plan

Additional Updates

TCHR CHANGING TIDES

- Allow 403(b) plans to participate in MEPs
- Deferral of tax for certain sales of employer stock to ESOP sponsored by S corporation
- Certain securities treated as publicly traded in case of ESOPs
- Eliminate certain barriers to the availability of life annuities in qualified plans and IRAs

Additional Updates

TCHR CHANGING TIDES

- QLAC updates
- Update participant disclosure regulations for designated investment alternatives
- IRS, DOL, PBGC to review reporting and disclosure requirements for pension plans
- Expand the IRA charitable distribution provision
- Extends the age 50 rule available to qualified public safety employees to private sector firefighters

Additional Updates

TCHR CHANGING TIDES

- Permit first responders to exclude service-connected disability pension payments from gross income after reaching retirement age
- Adjust individual retirement plan statute of limitations for excise tax on excess contributions and certain accumulations (starts when the taxpayer files an individual tax return for the year of the violation)

Additional Updates

TCHR CHANGING TIDES

- Update stock attribution rules for related businesses
- Amendments to increase benefit accruals under plan for previous plan year allowed until employer tax return due date
- Retroactive first year elective deferrals for sole proprietors

Additional Updates

TCHR CHANGING TIDES

- Limit cessation of IRA treatment to portion of account involved in a prohibited transaction
- DOL to review of pension risk transfer interpretive bulletin
- Allow SIMPLE IRAs to accept Roth contributions as well

DC Plan Investment Guidance

- ESG (environmental, social governance) proposals
- Alternative investments
- Cryptocurrency

THOMPSON COBURN LLP

ESG Guidance

TCHR CHANGING TIDES

- Trump era regulations (EBSA)
- Plan investments
  - Evaluation “based solely on pecuniary factors”
  - Primacy of interests of participants
  - Duty of loyalty implications
  - QDIA ban
- Proxy voting and shareholder rights
  - Exercise rights “solely in accordance with the economic interest of the plan”
  - Similar considerations to the above

ESG Guidance (cont'd)

TCHR CHANGING TIDES

- Biden "day one" executive order
- DOL announced reconsideration of ESG rules
- October 2021 proposal
  - Acknowledges ESG factors have implications for long-term financial impact
  - Acknowledges ESG factors may impact risk-return analysis
  - Factors may be considered so long as interests of participants is primary
  - Applies to investment selection and shareholder rights
  - Removes "ban" on QDIA

Alternative Investments in DC Plans

TCHR CHANGING TIDES

- June 2020 DOL response letter
- Inquiry from firms offering
  - Collective trust
  - Managed portfolio
  - Includes private equity
- Argument for diversity and long-term return
- DOL response indicated no “per se” violation of ERISA
- Multi-factor analysis of propriety

Alternative Investments (cont'd)

- SEC "Risk Alert" issued shortly after in June 2020
- Responses to the letter questioned the wisdom of the guidance
- December 2021 "Supplemental Statement"
  - Highlighted non-endorsement
  - Added emphasis on qualifications to evaluate and risk factors
  - Acknowledged that DB fiduciaries with professional management may be suited
  - Discouraged in other contexts

Cryptocurrency Guidance

TCHR CHANGING TIDES

- DOL Compliance Assistance Release 2022-01
- Note marketing crypto in 401(k)
- Fiduciary considerations
  - Selection of funds
  - Ongoing prudence (Northwestern)

Cryptocurrency Guidance (cont'd)

TCHR CHANGING TIDES

- SEC cautions on volatility, speculative
- Implications of selection on participant perceptions
- Custodial and recordkeeping concerns
- Regulatory environment may be subject to change
- Planning investigations

Recent Court Case:
Hughes v. Northwestern University

THOMPSON COBURN LLP

Overview

- First retirement fee case to reach SCOTUS
- Unanimous decision
- Issued 1/24/22
- Reversed and remanded a lower court ruling that had dismissed the case against sponsor

Summary of Claims

- Violation of fiduciary duties due to investment choices and fees in two 403(b) plans
  - Funds available included excessive fees and underperformed
  - Too many investment options
  - Failure to monitor

Lower Court Decisions

TCHR CHANGING TIDES

- District Court: Dismissed in 2018
  - Claims similar to other cases that 7th Circuit had dismissed
- Seventh Circuit: Affirmed Dismissal
  - Participants not bound to invest in the particular investments challenged
  - While plaintiffs might prefer low-cost index funds, the inclusion of the challenged investment is not a fiduciary breach

Supreme Court

- Unanimous decision
  - "The Seventh Circuit erred in relying on the participants' ultimate choice over their investments to excuse allegedly imprudent decisions by respondents…If the fiduciaries fail to remove an imprudent investment"
- Seventh Circuit's reasoning was flawed
  - Duty of prudence is context specific

Looking Ahead

- Participant choice in investment options is not enough; fiduciary duty to monitor and remove imprudent options still applies
- Unclear whether complaint will survive motion to dismiss on remand

Additional Plan Updates

- RMD Regulations
- SECURE & CARES Act Amendments
- MEP Guidance

Proposed RMD Regulations

TCHR CHANGING TIDES

- Implement SECURE Act Changes
  - Increase age to 72
  - Restrict “stretch” payments
- Complete reworking of longstanding regulations
- Additional guidance on “see-through” trusts

Proposed RMD Regulations (cont'd)

TCHR CHANGING TIDES

- End to lifetime distributions
  - General 10 year rule
  - Exception for eligible beneficiaries
- More detail in defining those eligible
  - Children
  - Disabled
- May rely on proposal pending final

SECURE & CARES Act Amendments

TCHR CHANGING TIDES

- Reminder – due this year!
- RMD changes
- Part-time eligibility
- Coronavirus distributions

Lifetime Income Illustrations

TCHR CHANGING TIDES

- Required by SECURE Act
- Interim final rule in 2020
- Additional FAQs in 2021
- Annual disclosure of:
  - Life annuity
  - 100% QJSA

Lifetime Income Illustrations (cont'd)

TCHR CHANGING TIDES

- Participant-directed plans – Q2 2022
- Model language included

MEP Guidance

- "One Bad Apple" rule revisited
  - Procedures for correction
- Pooled plan provider guidance
  - Fiduciary responsibilities
  - Administrative responsibilities
  - Amendment responsibilities
  - Procedures for maintaining qualification similar to above

QUESTIONS?