



BENEFITS LEGISLATION – EXISTING AND PROPOSED

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Tax Cut and Jobs Act

- A number of provisions affecting tax-qualified plans and 403(b) plans were introduced in the House and Senate versions, but most deleted from final Act.
- Extended rollover period for loan offset.
- Special rules for qualified 2016 distributions.
- Also, rule prohibiting certain IRA conversions.



Bipartisan Budget Act

- Removes the requirement to take a loan before requesting a hardship withdrawal.
- Removes 6-month prohibition on contributions to retirement plans after taking a hardship withdrawal.
- Allows QNECs (plus earnings), QMACs (plus earnings and earnings on elective deferrals to be part of hardship withdrawal).



Bipartisan Budget Act

- Allow an individual to recontribute to an IRA or tax-qualified plan an amount withdrawn (plus earnings) pursuant to an IRS levy and later returned to the individual by the IRS.
- Special disaster related rules for individuals impacted by California wildfires.
- Creation of a Joint Committee on Solvency of Multiemployer Pension Plans.



Acceleration of Funding for Tax Qualified Plans

- Change in tax rate increases the value of a corporate deduction to a tax qualified plan for the 2017 tax year.
 - \$1,000,000 contribution for a defined benefit plan or profit sharing plan worth \$350,000 in 2017.
 - Worth only \$210,000 in 2018.
 - Ancillary consequences of increasing funded status of plan .
 - Possible reduction of PBGC premiums
 - May allow for or affect LDI strategy
 - Facilitate derisking activity such as transfer to third party carrier.



Missing Participant Legislation

- Retirement Savings Lost and Found Act of 2018.
 - Introduced by Senators Elizabeth Warren and Steven Daines.
 - Update of 2016 legislation.
- Would create an Office of Retirement Savings Lost and Found.
 - A central location of retirement plan information for retirees.
- Would create an online searchable database.
 - Plan participants could search for plan, contact plan administrator.
 - Database would be updated based upon information provided to IRS.



Missing Participant Legislation

- Employers would be required to report “forced transfers” to IRS.
 - Forced transfers occur when (a participant has left employment and cannot be found or participant did not notify plan where his account should be sent).
 - Plan must provide for these contingencies for forced transfers to occur.
 - If participant’s account balance is \$1,000 or less, he or she can be paid in cash.
 - If account balance or value of accrued benefit is between \$1,001 and \$5,000, amount can be transferred to an IRA.
- Dollar cap on forced transfers would be increased from \$5,000 to \$6,000.



Missing Participant Legislation

- Employers would report forced transfer information to IRS.
 - Name of participant.
 - Name and address of IRA issuer that received the account.
 - Account number.
 - If annuity purchased, name and address of annuity issuer and annuity contract number.
- Plan administrator making a forced transfer of \$1000 or less must send the distribution to the Office of Retirement Savings Lost and Found or to an IRA established by the Secretary of Treasury on behalf of participant.



Missing Participant Legislation

- One attempt to contact the individual at the last known address by certified mail or by electronic email if that is only address on record.
 - If the first attempt to contact the individual was by mail and was unsuccessful, one additional step is required.
 - If the first attempt to contact the individual was by electronic email, 2 additional steps are required.
 - Check with administrator of a retired plan or plan sponsor's records for an updated address.
 - Make one attempt to contact a designated beneficiary.
 - At least one search using free electronic search tool.
 - Use a commercial locator service.



Automatic Retirement Plan Act of 2017

- Introduced by Congressman Neal-(D. Ma.).
- Applicable in 2020 to employers with 10 or more employees.
- Applicable in 2022 to employers with 100 or fewer employees earning at least \$5,000 in prior year.
- Exclusions for government employers, church employers, and businesses in existence for fewer than 3 years.
- Penalty for noncompliance - \$10 per day per employee.



Automatic Retirement Plan Act of 2017

- Grandfathered plans-tax qualified plans, 403(b), SIMPLE, and SEPs in existence on date bill is enacted and in existence on date of enactment for at least one year.
 - Can be maintained in existing form for 6 years after enactment.
 - 8 years for employers with 100 or fewer employees earning at least \$5,000 in prior year.
 - After the applicable period, the relaxed eligibility and prohibition against unreasonable fees would apply.



Automatic Contribution Plan Act of 2017

- Automatic contribution plan must:
 - Be a defined contribution plan described in Code Section 401(a), 403(a), or 403(b).
 - Be either a deferral only plan, or a deferral only plan with employer contributions.
 - Deferral only plan - a new 401(k) plan safe harbor.
 - No employer contributions permitted.
 - Automatic contributions beginning at 6%, increasing to 10% after 4 years.
 - \$8,000 cap on annual contributions (\$9,000 if age 50 or older).
 - Redefaulted into automatic contribution rate every 3 years.
 - A deferral only plan with employer contributions must satisfy ADP, ACP, and top heavy tests.



Automatic Retirement Plan Act of 2017

- Must generally cover all employees.
Exclusions for:
 - employees under age 21;
 - nonresident aliens with no U.S. sourced earned income;
 - certain union employees;
 - seasonal employees; and
 - Employees who have been employed for a period of less than 1 month.
- Default investment of contributions into a QDIA, in absence of participant election.



Automatic Retirement Plan Act of 2017

- Must allow participant to receive at least 50% of his or her account as lifetime income.
 - Guaranteed annual income for life of the employee or joint lives of the employee and a designated beneficiary; or
 - An annuity for life or over joint lives of employee and beneficiary.
- Not charge a participant an unreasonable fee because his or her account balance is small, or the employer is mandated to maintain the plan.



Automatic Retirement Plan Act of 2017

- Federally financed matching contributions for automatic contribution plan participants with low income.
 - 50% of first \$1,000 of qualified savings contributions.
 - Joint filers with modified adjusted gross income of \$65,000 or less would be eligible for full credit.
 - Credit would be phased out between \$65,000 and \$85,000.
 - This “credit” would be contributed to either a Roth 401(k) or Roth IRA designated by participant or, if no designation, a Treasury Retirement bond that would receive Roth IRA treatment.



Automatic Retirement Plan Act of 2017

- 401(k) qualified automatic contribution arrangements could be designed to automatically increase elective deferrals more rapidly, and above 10%.
- All safe harbor plans could provide a match on elective deferrals above 6%.
- Various provisions relating to tax credits.



Automatic Retirement Plan Act of 2017

- Common ownership or common business purpose would no longer be required.
- Would provide relief from “one bad apple” requirement for MEPs.
 - Currently, disqualifying action of one employer affects all participating employers.
- Employers would be relieved of all fiduciary and administrative responsibility (other than remitting contributions and providing necessary information) if the designated MEP provider.



Other Proposed Legislation

- Retirement Plan Modernization Act would increase the forced cash out limit from \$5,000 to \$7,600.
 - Would be indexed for inflation after 2018.
- Increasing Access to Secure Retirement Act of 2017.
- A fiduciary in a defined contribution plan selecting an insurance carrier to provide lifetime benefits would satisfy the requirement that carrier be financially capable if:



Other Proposed Legislation

- It obtained representations from insurers such as they are appropriately licensed and in compliance with state regulatory requirements.
- Insurer must notify the fiduciary of any change in circumstances.
- Fiduciary cannot be aware of facts that would cause it to question the insurer's representations.



Receiving Electronic Statement to Improve Retirement Earnings Act

- Any document permitted or required to be disclosed to a participant under ERISA could be provided electronically if:
 - the electronic system used (email or website) was “designed to result in effective access to the document”;
 - the system permits participants to select among specific electronic delivery options, to change that selection, or elect to receive paper documents (at no additional cost);
 - the system protects the confidentiality of participant’s personal information; and
 - an annual paper notice is provided describing the participant’s current selection and the right to change.



Retirement Enhancement and Savings Act of 2018

- Bipartisan legislation introduced by Senators Hatch and Wyden.
- Would eliminate barriers to the use of MEPs.
- Would remove 10% cap under an auto enrollment safe harbor plan.
- Increase the credit for a small employer pension plan start up costs.
- Create a new small employer automatic open enrollment credit.
- No plan loans through credit cards or similar arrangements.



Retirement Enhancement and Savings Act of 2018

- Existing arrangements before September 21, 2016, would be grandfathered.
- Would prohibit loans of \$1,000 or less, and loans with or on premises of liquor store, casino, gaming establishment, or adult entertainment establishment.
- Provide for portability of lifetime income options under Code Sections 401(a), 403(b), and 457(b).
- Would deem custodial account held by IRS approved nonbank trustees pursuant to termination of a 403(b) plan to be an IRA.



Retirement Enhancement and Savings Act of 2018

- Clarify which individuals can be covered by church controlled organizations under Code Section 403(b)(9).
- Plans adopted by the filing due date (including extensions) would be treated as in effect on the close of the year.
- IRS and DOL would effectuate a combined annual report (Form 5500) for similar defined contribution plans.
- Benefit statements provided to defined contribution plan participants would include a lifetime income disclosure at least once every 12-month period.



Retirement Enhancement and Savings Act of 2018

- Provide a fiduciary safe harbor for the selection of a lifetime income provider.
- Modification of nondiscrimination rules for closed plans to permit existing participants to continued to accrue benefits.
- Modify required minimum distribution rules upon death of participant in defined contribution plan or IRA owner.
 - For aggregate account balances in excess of \$450,000, distributions must be completed by the end of the 5th year after the participants (or IRA owner's death).



Tax Reform 2.0

- Rep. Brady indicated the following will be part of Tax Reform 2.0.
- Universal savings account – a fully flexible savings tool for families.
 - Probably with no connection to employment.
- Code Section 529 would be modified to cover payment of student debt.
- Baby Savings.
 - Allow families to access their own retirement accounts penalty tax-free for expenses for a new child(birth or adoption).
 - Permissible to replenish in future.



Protecting Taxpayers Act

- Bipartisan proposal by Senators Cardin and Portman.
- Except as otherwise provided in regulations, all inadvertent plan violations may be self-corrected without IRS.
 - Exception- violations identified by IRS on audit prior to any employer action that demonstrates a commitment to implementing a self-correction.
- IRS would be directed to publish additional safe harbor means of correcting an inadvertent violation, including how to determine lost earnings.



Protecting Taxpayers Act

- Any plan loan violation that is corrected through the use of an IRS approved safe harbor would be treated as meeting the requirements of the DOL's Voluntary Fiduciary Correction Program.
- IRS would be directed to expand EPCRS to cover inadvertent IRA errors for which the IRA owner is not at fault.
 - Ex.-waiver of the excise tax for failure to satisfy required minimum distribution provisions.
- IRS would be permitted to waive excise taxes if an inadvertent required minimum distribution failure is by plan or IRA custodian within 180 days.



Cybersecurity

- Despite calls for action from the ERISA Advisory Council in 2011 and 2016, the DOL has not issued specific guidance to plan administrators.
- Many commentators believe that inaction by plan sponsors followed by an improper disclosure of participant personal information, will constitute a breach of fiduciary duty.
 - Plaintiffs will clearly allege this, but no assurance that they will prevail.
 - Even if DOL issues general guidance to plan sponsors, it may not address the issue of whether cybersecurity is a fiduciary obligation and the preemption of state laws dealing with cybersecurity.



Cybersecurity

- Appendix to 2016 ERISA Advisory Council's Cybersecurity Concerns for Benefit Plans included the following:
 - Information to help plan sponsors and fiduciaries better understand how plan data is handled.
 - Components of a successful cybersecurity framework.
 - Tips for establishing protocols and cybersecurity risk management strategies.
 - List of questions to ask before contracting with service providers.



Fiduciary Rule Status

- As of July 12, 2018, DOL Fiduciary Rule is dead.
- Unclear what future regulatory action that the DOL will take.
 - Fifth Circuit decision limits the scope of future DOL activity.
- Today, the definition of a fiduciary providing investment advice for a fee is the 1975 5 factor test.
 - Not likely this will be the final DOL position.



Fiduciary Rule Status

- Plan sponsors have become more sensitive to issue of identifying fiduciaries.
 - Historically, recordkeepers not regarded as ERISA fiduciaries.
 - Their functions ministerial in nature.



SEC Proposed Regulation Best Interest

- Issued by a 4-1 vote on April 18, 2018.
- Regulates the standard of conduct for broker-dealers.
 - No direct impact on recordkeepers.
- DOL Fiduciary Rule an important source for Proposed Regulation.
- Comment period ends August 7, 2018.
 - More than 2800 comments have been received to date.



SEC Proposed Regulation Best Interest

- Applies to recommendations with respect to securities transactions and investment strategies to retail customers.
 - Retail customer - narrowly defined.
 - Applies to IRA owners and participant accounts in 401(k) plan.
 - May apply to non-ERISA 403(b) plan.
 - Does not cover advice given to sponsor of 401(k) plans.



Litigation Against Plan Sponsors

- Plan sponsors in several recent cases have been successful in defeating claims of breach of fiduciary duty.
 - Relatively easy to draft copy-cat claims, but difficult to prove them.
 - Establishing that fund A cost less and performed better than Fund B does not establish that it was imprudent to select fund B.
 - Plaintiff must establish appropriate benchmark.
 - No fiduciary duty under ERISA to select the best performing fund.
 - Fact that a fund performed below market does not establish that the methodology for selecting the fund was flawed.



Litigation Regarding Recordkeeper

- Recent cases in Southern District of New York show difficulty of maintaining breach of fiduciary duty claims against recordkeeper .
 - Malone and McKeogh v TIAA, 2017 WL 913699 (S.D.N.Y., March 9, 2017).
 - Haley v. TIAA, 2018 WL 1585673(S.D.N.Y. March 28, 2018).



Litigation Regarding Recordkeeper

- Recent suits have alleged breach of fiduciary duty by a plan sponsor in providing data about plan participants (a plan asset?) to TIAA.
 - Not acting for exclusive benefit of plan participants.
 - Not preventing TIAA from using that information to market its services to participants.
 - Prohibited transaction-use of plan assets for benefit of party in interest.

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