CHAPTER 5

Providing Meaningful Access to, and Features in, Retirement Savings Plans to Address Savings Gaps and Boost Retirement Savings

MICHELLE CAPEZZA*

Synopsis

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* **Michelle Capezza** is Of Counsel with Mintz in the Employee Benefits & Executive Compensation practice. For more than 25 years, she has represented a range of clients in ERISA, employee benefits, and executive compensation matters including qualified retirement plans, ERISA fiduciary responsibilities, nonqualified deferred compensation arrangements, employee welfare benefit plans, equity/incentive programs, and benefits issues that arise in corporate transactions, across various industries. She also advises clients on the implications of increased automation and artificial intelligence in the workplace and the related employee benefits and compensation considerations for a changing workforce. For many years, Ms. Capezza has been recommended for her work in The Legal 500 United States, selected to the New York Metro Super Lawyers and Top Women Lists, and she has been ranked in Chambers USA 2022.

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§ 5.01 INTRODUCTION

According to the U.S. Bureau of Labor Statistics, as of March 2020, fifty-two percent of private industry workers had access to defined contribution retirement plans, whereas twelve percent had access to both defined benefit and defined contribution retirement plans, and three percent had access only to defined benefit retirement plans.[1] In addition, union workers were more likely than non-union workers to have access to defined benefit retirement plans, full-time workers were more likely than part-time workers and workers in organizations with one hundred or more workers were more likely than those in smaller organizations to have access to any type of retirement plan, and forty-two percent of the lowest twenty-five percent wage earners had access to any type of retirement plan as compared to eighty-eight percent of the highest wage earners. It is not surprising, therefore, that it is consistently reported in the news that American workers are behind in retirement savings. Disparities in access to retirement plans certainly contribute to the lack of retirement preparedness for American workers.

In addition to unequal access to retirement plans, there are many other reasons why American workers lack sufficient retirement savings. For example, a recurring theme in the retirement security debate for American workers is that the movement away from the employer-sponsored defined benefit pension plan model toward a more precarious defined contribution plan model has greatly contributed to the lack of retirement preparedness. Many workers are unable to voluntarily save for retirement, either due to lack of access to save in such plans or lack of available funds to make employee contributions to retirement accounts. Yet, a return to the defined benefit pension plan model to assist workers in securing sufficient funds for their retirement is unlikely given the many underfunding challenges experienced in such plans, especially among multiemployer pension plans.[2] Additional reasons contributing to lack of retirement preparedness were cited in the Advisory Council on Employee Welfare and Pension Benefit Plans (ERISA Advisory Council) December 2021 Report to the U.S. Secretary of Labor Martin Walsh, entitled Gaps in Retirement Savings Based on Race, Ethnicity and Gender (the "2021 Report") which examined the extent of gaps in retirement savings by people of color, ethnic minorities, and women. The 2021 Report found that these groups face many challenges impacting their accumulation of retirement savings which include unequal access to retirement plans, wage inequities, breaks in service due to caregiving responsibilities, and financial literacy. The 2021 Report further noted that

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[1] See U.S. Bureau of Labor Statistics, 67 Percent of Private Industry Workers Had Access to Retirement Plans in 2020 (March 1, 2021): https://www.bls.gov/opub/ted/2021/67-percent-of-private-industry-workers-had-access-to-retirement-plans-in-2020.htm.

[2] See Title IX, Subtitle G, Part 8, Subtitle H of the American Rescue Plan Act of 2021, Pub L 117-2 (March 11, 2021) providing financial assistance to certain underfunded multiemployer defined benefit pension plans.

the portion of the U.S. labor force actively participating in a private retirement plan has stagnated at about 50 percent. Employers are also becoming more reluctant to sponsor retirement plans in light of increasing fiduciary breach litigation and fiduciary liabilities, with potentially looming claims as far reaching as whether the plan fiduciaries vetted the climate-related financial risk of their plan investment options.[3]

As the proliferation of State-mandated retirement programs requiring payroll contributions to individual retirement accounts by employers who do not sponsor retirement plans demonstrates, retirement security is an important societal concern.[4] These State-mandated retirement programs were developed to fill in gaps where workers do not have access to retirement savings programs at work but, given their contribution limitations, they were not designed to fully solve the retirement savings gap problem. Government-mandated retirement programs will likely increase and evolve if voluntary solutions to fix the retirement savings gap are not found. Therefore, in order to preserve a voluntary, employer-provided model for retirement plans, it is necessary for employers to provide meaningful retirement savings plan access with robust features that will allow employees to accumulate reasonable retirement savings. In light of these concerns, the purpose of this article is to outline some of the ways that employers can provide their employees with such meaningful access to retirement savings plans to address retirement savings gaps.

§ 5.02 MAKING THE DECISION TO PROVIDE ACCESS TO A RETIREMENT SAVINGS PLAN BENEFIT

[1] Overview

A key decision point for employers is whether to sponsor a retirement savings plan and provide their employees with a retirement savings plan benefit. When the Employee Retirement Income Security Act ("ERISA") was passed in 1974, almost fifty years ago, to protect the establishment, management and administration of private-sector retirement plans, its main goal was to safeguard employee pensions and provide retirement security. Since then, the defined contribution plan model became predominant over traditional pension plans, and an employer's decision to even offer a plan can be influenced by a multitude of factors including whether (i) the employer has determined it is necessary to offer employees a plan to remain competitive in a particular industry and talent market, (ii) there is strong employee demand and

[3] See Department of Labor Request for Information Seeking Public Comment on Protecting Workers' Life Savings, Pension from Climate-Related Financial Risks (February 11, 2022); See Section 4 of President Biden's Executive Order on Climate-Related Financial Risk (May 20, 2021).

[4] State-mandated programs are active in California, Connecticut, Illinois, Massachusetts, Oregon, Washington, and programs are scheduled to become effective in Colorado, Maine, Maryland, New Jersey, New Mexico, Virginia, Vermont, and New York. Legislation continues to evolve in additional states.

expectation concerning eligibility to participate in an employer-provided retirement plan or overwhelming lack of interest, (iii) the employer is aware of the types of available programs and whether the employer can manage the costs (actual or perceived) of sponsoring a plan, (iv) the employer can manage its fiduciary responsibilities. Even though many smaller organizations do offer their employees access to a retirement savings plan, many other smaller organizations have specific challenges and have been found to cite three main reasons why they do not offer a retirement plan: (i) the cost associated with establishing and administering a plan; (ii) unpredictable revenues to support a plan, especially for a newer organization; and (iii) employee preferences for regular wages and other benefits, especially where there is a younger workforce.[5]

Many employer concerns can be allayed with employer education concerning the many types of retirement plan programs that are available in the marketplace and the benefits they can provide to employers, as well as communications to employees concerning the importance of retirement savings. The Department of Labor has been working to educate small business owners about various retirement plan options, such as SIMPLEs (Savings Incentive Match Plans for Employees of Small Employers), SEPs (Simplified Employee Pensions), Individual Retirement Accounts, payroll deduction plans, and 401(k) plans.[6] For example, the SEP IRA which is funded solely by employer contributions, requires that each eligible employee receive the same percentage contribution which can vary each year between 0% and 25% of compensation (maximum $61,000 for 2022). A SIMPLE IRA is another option for businesses with 100 or less employees which are funded by employee deferrals (up to a maximum of $14,000 for 2022 ($17,000 if age 50 or older)) and employer contributions (mandatory matching contribution up to three percent of compensation or non-elective contribution up to two percent of compensation). In 401(k) plans, employees can decide how much to contribute based on a salary reduction agreement up to $20,500 in 2022 (plus participants age 50 or over can make additional contributions up to $6,500 in 2022).[7] Employers interested in exploring traditional 401(k) plans to offer employees should be

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[5] See Why do Some Small Businesses Offer Retirement Plans, Center for Retirement Research at Boston College (May 2022 Report).

[6] See Department of Labor: https://www.dol.gov/general/topic/retirement/retirementsavings.

[7] The Internal Revenue Service can also announce increases to contribution limits. Further, pending legislation known as the SECURE Act 2.0 (which will evolve from the House's Securing a Strong Retirement Act, the Senate Finance Committee's Enhancing American Retirement Now Act and the Senate Health, Education, Labor & Pensions Committee's Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg, or Rise & Shine Act) is likely to pass in 2022 and also seeks to increase catch-up contributions (which might also be required to made in the form of Roth contributions). Although subject to change by the time the law is passed, the catch-up provision may apply to workers age 62, 63, and 64, or age 60 to 63, and allow for an extra $10,000 per year in catch up contributions.

aware that the plan could be designed as a safe-harbor plan to pass certain nondiscrimination test requirements (where the employer must make either specified matching contributions or a three percent contribution to all participants) or non-safe-harbor whereby the employer can make additional contributions, including matching contributions, as it defines in plan terms.

Under the SECURE Act,[8] employers with one-hundred or fewer employees may also be eligible for a $500 per year tax credit (for up to three years) for the start-up costs to establish new 401(k) plans and SIMPLE IRA plans that include automatic enrollment, or to convert to an automatic enrollment design. This is in addition to another credit available for such small employer plan start-up costs (up to $5,000 for up to three years) to make it more affordable for small businesses to set up retirement plans.[9]

In the 2021 Report, the ERISA Advisory Council also recommended that the Department of Labor encourage more employers to offer retirement plans by promoting models such as multiple employer plans ("MEPs") and pooled employer plans ("PEPs"). Employers interested in MEP and PEP models for retirement plans should be aware of evolving considerations which are highlighted below.

[2] MEPs

A MEP is a multiple employer plan under Section 413(c) of the Internal Revenue Code of 1986, as amended (the "Code") maintained by two or more employers that are not members of a single controlled group. Feasibility of a MEP approach is limited due to considerations under both the Code and ERISA. Historically, with certain exceptions, the tax qualification rules for MEPs applied on an employer-by-employer basis[10] by treating the portion of the plan covering the employees of each unrelated participating employer as if it were a single employer plan[11] and the failure of one employer or the plan itself to satisfy a qualification requirement would cause the entire plan to lose its

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[8] The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) was enacted on December 20, 2019, as Division O of the Further Consolidated Appropriations Act of 2020, Public Law 116-94 (133 Stat. 2534).

[9] The SECURE Act 2.0, moving its way through Congress in 2022, also seeks to increase various tax credits including those for small businesses starting a retirement plan and as relates to certain employer contributions.

[10] Three exceptions to the employer-by-employer rule: determinations of minimum age and service requirements for plan participation, for purposes of satisfying the Code's exclusive benefit rule, and for satisfaction of minimum vesting standards. Each exception is applied on a plan-wide basis. For example, when determining vesting service, all hours that an employee works for any employer maintaining a MEP are aggregated for determining the employee's vesting service.

[11] For example, the Code's provisions regarding coverage, nondiscrimination, and vesting upon plan termination are applied separately to each employer's employees.

tax-qualified status for all employers maintaining the plan.[12] This is sometimes referred to as the "unified plan rule" or the "one-bad-apple" rule.

Effective for plan years beginning after December 31, 2020, Section 101(a) of the SECURE Act added Section 413(e) to the Code. Section 413(e) of the Code creates a statutory exception to the unified plan rule for certain types of MEPs that are Section 413(c) defined contribution plans[13] described in Section 401(a) of the Code or that consist of individual retirement accounts described in Section 408 of the Code in two circumstances: (a) the MEP is maintained by employers that have a common interest other than having adopted the plan, and (b) MEPs that are not maintained for employers with a common interest, but that do have a "pooled plan provider." Plans of either type that satisfy the statutory conditions will not be treated as failing to meet the tax-qualification rules merely because one or more employers using the arrangement fail to take actions needed to satisfy those rules. To qualify for this relief, the terms of the plan must provide that if an employer fails to take any actions required to satisfy the tax qualification rules, the assets of the MEP attributable to the employees of that employer will be spun off into a separate plan maintained only by the noncompliant employer (or its successor), to an eligible retirement plan (a term that includes individual retirement plans), or to another arrangement that the Secretary of the Treasury determines is appropriate (unless it is determined that the assets may remain in the MEP if that would be in the best interest of the affected employees). Regardless of which alternative is implemented, the plan must also state that the noncompliant employer will be liable for any plan liabilities attributable to its employees.

In July 2019, the DOL issued a regulation expanding the arrangements that can be considered a single employer plan under ERISA.[14] Under the 2019 regulation,[15] a MEP

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[12] Treas Reg § 1.413-2(a)(3)(iv). In 2019, the IRS proposed regulations under Code Section 413(c) (84 Fed Reg 31777 (July 3, 2019)) that would create an exception to the unified plan rule for known and potential qualification failures. That exception would be available only to MEP administrators with established practices and procedures that are reasonably designed to promote compliance with applicable Code requirements. Following the passage of the SECURE Act, however, those proposed regulations were re-proposed to provide an exception, if certain requirements are met, to the application of the "unified plan rule" for MEPs in the event of a failure by one or more employers participating in the plan to take actions required of them to satisfy the applicable requirements of the Code (87 Fed Reg 17225 (March 28, 2022)).

[13] Section 403(b) plans are not plans described in section 401(a) or 408. Therefore, section 413(e)(1) does not apply to section 403(b) plans.

[14] Prior to the issuance of final regulations on July 31, 2019, the DOL required a "sufficiently close economic or representational nexus" between unrelated employers and their employees, unrelated to the provision of benefits, to maintain a MEP. This is sometimes referred to as a "closed MEP." An association retirement plan can be maintained by a bona fide group or association of employers or a bona fide professional employer organization (PEO).

[15] Definition of "Employer" under Section 3(5) of ERISA—Association Retirement Plans and Other

that is a "bona fide group or association of employers"[16] or a "bona fide professional employer organization"[17] as defined in the regulation will constitute a single employee benefit plan for purposes of title I of ERISA.[18] Participating employers retain an obligation for choosing and monitoring the arrangement, monitoring the activities of the group or association, or PEO, and other fiduciaries of the MEP, and forwarding required contributions to the MEP. The DOL expects that participating employers will

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Multiple-Employer Plans, 29 CFR Part 2510, 84 Fed Reg 37508 (July 31, 2019) (effective Sept. 30, 2019). The regulation was prompted, at least in part, by an executive order directing the DOL to consider expanding the circumstances under which employees of different private-sector employers could participate in a single plan. Executive Order on Strengthening Retirement Security in America (Aug. 31, 2018) (as visited Aug. 26, 2020).

[16] Under the regulation, a group or association will be a "bona fide group or association of employers" that can establish a MEP if it has at least one substantial business purpose unrelated to providing employee benefits, a formal organizational structure with a governing body and bylaws, the activities of the group or association are controlled by its employer members and the members of the group or association that participate in the MEP control the MEP. A substantial business purpose is presumed if the group or association would be a viable entity even if it did not sponsor a benefit plan. The members must share a "commonality of interest" (*i.e.*, they must be in the same trade, industry, line of business, or profession, or their principal places of business must be within a region that does not exceed the boundaries of the same state or metropolitan area). Members participating in the plan must control the plan and be the direct employer of at least one covered participant. Participation must be available only to employees and former employees of members, and their beneficiaries. Finally, the group or association must not be a bank, trust company, insurance issuer, broker-dealer, or other similar financial services firm (see Labor Regulation Section 2510.3-55, Definition of Employer-Association Retirement Plans and Other Multiple-Employer Plans).

[17] A PEO can be a "bona fide professional employer organization" and establish a single-employer MEP if they (1) perform "substantial employment functions" on behalf of client employers; (2) have substantial control over the MEP as plan sponsor, plan administrator, and a named fiduciary; (3) ensure that each client employer adopting the MEP is the direct employer of at least one participating employee; and (4) make the MEP available only to employees and former employees (and their beneficiaries) of the PEO, its client employers, and their beneficiaries. Employees and former employees must have become participants during a contract period between their employer and the PEO. A safe harbor in the regulations deems a PEO to be performing substantial employment functions if the PEO demonstrates specified levels of responsibility for payment of employees' wages; employment tax withholding and reporting; recruiting, hiring, and firing workers; and assumes responsibility for, and has substantial control over employee benefits. The regulation also requires that the PEO's plan obligations to MEP participants continue after the client-employer ends its PEO contract.

[18] It is important to determine whether a MEP constitutes a single plan or a collection of separate plans when applying ERISA's reporting and disclosure requirements, fiduciary rules, bonding requirement, and other obligations. For example, 401(k) plans generally must file an annual report on Form 5500. If a trade association sponsors a multiple employer 401(k) plan for its members and that plan is treated as a single plan, the sponsoring trade association will file an annual Form 5500 for the entire plan. If the MEP is treated as a collection of separate plans sponsored by the various participating employers, however, that advantage would be lost.

be furnished with periodic reports on the management and administration of the MEP, including information on fees and expenses paid to the MEP's service providers.

In the preamble to the Final Regulation, DOL stated its view that, as a result of its fiduciary duties of loyalty and prudence, a group or association, or PEO, acting as the sponsor of a MEP, or other fiduciary of the MEP, would be required to be deal "impartially" with participating employers and their associated MEP participants. DOL opined that when such a MEP fiduciary negotiates pricing of services provided to the MEP and investments made available under the MEP, and secures discounted pricing, the fiduciary should take care to see that these advantages are allocated among participants in an evenhanded manner because of the fiduciary's responsibility to act on behalf of all participants, regardless of the size of their employer. These statements raise questions regarding the allocation of administrative and investment fees and expenses on a differential basis.

In the event an employer would seek to terminate participation in these MEPs, the DOL opined that pending an employer's termination of its relationship, and within a reasonable timeframe following the effective date of the termination, the MEP would continue to constitute a single plan for purposes of ERISA, and the group or association, or PEO, would continue to owe fiduciary obligations to the participants and beneficiaries associated with the terminating employer. However, if the employer fails to take action to implement the termination, such as spinning off or transferring the assets associated with the employer within a reasonable timeframe, the employer will be considered to have created a separate, single plan for purposes of ERISA, and the group, association, or PEO would be considered a service provider to the single plan. DOL stated that the employer's failure to implement a spin-off or transfer would not, however, affect the status of the other participating employers as participating in a unified MEP.

[3] PEPs

PEPs provide a way for unrelated employers with no common interest or other organizational relationship to participate in a multiple employer defined contribution retirement plan, such as a 401(k), and offer a retirement savings option to their employees. A PEP allows many of the administrative and fiduciary responsibilities of sponsoring a retirement plan to be transferred to a pooled plan provider. A well-run PEP has potential to offer employers, especially small employers, a workplace retirement savings option with reduced burdens and costs compared to sponsoring their own separate retirement plan.

The SECURE Act amended ERISA to expand the arrangements that are treated as maintained by a single employer with the addition of Section 3(43) of ERISA (pooled employer plan)[19] and Section 3(44) of ERISA (pooled plan provider). Effective for plan years beginning after December 31, 2020, plans that are not maintained by employers with a common interest, but are operated by a pooled plan provider, will be treated as a single employer plan under ERISA, and as a plan to which Section 210(a) of ERISA[20] applies (which is the parallel provision to Code Section 413(c)). Employers who participate in a PEP will be treated as the plan sponsor of their respective portions of the plan, except with respect to the pooled plan provider's administrative duties.

Under Section 3(43) of ERISA as amended by the SECURE Act, the terms of the "pooled employer plan" (PEP) must:

- designate a pooled plan provider[21] as the PEP's named fiduciary;
- designate one or more trustees responsible for collecting contributions and holding the PEP's assets;
- provide that each participating employer retains fiduciary responsibility for certain functions, including the selection and monitoring of the pooled plan provider, and the investment and management of the employer's portion of the PEP's assets (unless that has been delegated to another fiduciary by the pooled plan provider and subject to ERISA Section 404(c));
- not subject employers, participants, or beneficiaries to unreasonable restrictions, fees, or penalties due to ceasing participation, receipt of distributions, or otherwise transferring assets;

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[19] A PEP under Section 3(43) of ERISA (i) is an individual account plan established or maintained for the purpose of providing benefits to the employees of 2 or more employers, (ii) that is tax qualified under Code section 401(a) or a Plan that consists of accounts described in Code section 408, and (iii) whose plan document includes certain specified terms.

[20] Section 210(a) of ERISA identifies which ERISA rules will be applied to a MEP as if the MEP were a single employer plan.

[21] To qualify as a pooled plan provider under Section 3(44) of ERISA as amended by the SECURE Act, a person must:

- be designated by the PEP as a named fiduciary, as the plan administrator, and as the person responsible for all administrative duties (including nondiscrimination testing) that are reasonably necessary to ensure (1) that the plan satisfies any requirement under the Code or ERISA, and (2) that each employer provides any disclosures or other information, and takes such other actions, as the Secretary deems necessary to satisfy the Code and ERISA;
- register as a pooled plan provider with the Secretary before beginning operations as a pooled plan provider;
- acknowledge named fiduciary status in writing; and
- accept responsibility for making sure that all PEP fiduciaries and persons handling PEP assets are bonded.

- require the pooled plan provider to provide to employers mandated disclosures;
- require each employer to take whatever actions the Secretary or the pooled plan provider determines are necessary to administer the PEP or satisfy any requirement under the Code or ERISA, including providing required disclosures; and
- permit disclosures to be in electronic form and require that they be designed to ensure that only reasonable costs are imposed on the employers and pooled plan provider.

DOL final regulations implementing the registration requirements for pooled plan providers under the Code and ERISA became effective on November 16, 2020.[22] Those regulations require three types of filings. An initial registration must supply basic information about the provider, its structure, affiliates, activities, and certain civil, administrative, and criminal proceedings. It must also designate a "responsible compliance official" to receive status and compliance-oriented questions. Supplemental filings must report information about a provider's PEPs (to the extent the information was not included in the initial filing) and disclose reportable events such as changes to information in previous filings and significant financial and operational events. A final filing is required when the provider's last PEP terminates and the provider ceases operations. All filings must be made electronically on new Form PR (Registration for Pooled Plan Provider), using the electronic filing system currently used to file Form 5500 (EFAST2).[23]

On June 18, 2020, the DOL also issued a request for information to help it assess whether a prohibited transaction class exemption is needed for transactions involving association retirement plan MEPs sponsored by employer groups or associations with "commonality of interest" and those sponsored by PEOs, and seeking public comment

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[22] Registration Requirements for Pooled Plan Providers, 29 CFR Part 2510, 85 Fed Reg 72934 (Nov. 16, 2020).

[23] The initial Form PR generally must be filed at least 30 days before a pooled plan provider begins operations, which is deemed to occur when the first employer executes or adopts a participation, subscription, or similar agreement for the plan specifying that the plan is a PEP, or, if earlier, when the trustee of the plan first holds any assets in trust. Registration is not required for preliminary activities such as establishing a business organization, obtaining licenses, entering into contracts with partners and subcontractors, and marketing. Supplemental filings are required before each new PEP begins operations. Supplemental filings are also required 30 days after the calendar quarter in which a specified "reportable event" occurs or, if later, 45 days after the event. Reportable events include changes in previously reported information, significant changes in structure, and the initiation or resolution of certain legal proceedings. A provider's final filing would be due after termination of its last PEP and within 30 days after the calendar quarter in which the final Form 5500 for that last PEP is filed, or if later, within 45 days after that final Form 5500.

on whether the DOL should issue a class exemption to provide a safe harbor for fiduciaries of MEPS, including PEPs created by the SECURE Act.[24]

It is understandable why employers may find the provision of a retirement savings plan to their employees a daunting task. There are many complex rules and emerging models replete with their own technical rules, government filing requirements, and evolving laws and regulations. That being said, it is worthwhile to compare the various types of programs that are available and the suitability of a single-employer plan versus adoption of a MEP or PEP. Employers should also be mindful that participation in MEP or PEP may also limit the types of features that can be offered to a particular participating employer's employees. Thus, while these approaches may serve to solve the access problem, it remains to be seen whether they will serve to provide a means whereby sufficient retirement savings can be accumulated to support the retired employee.

If a decision is made not to offer employees a retirement plan, then employers must be mindful of expanding State requirements for employers to participate in state facilitated retirement savings programs and be prepared to be exposed to potential penalties for noncompliance.[25] Employers must also understand that these state programs were not designed to provide a path towards robust accumulation of retirement savings, and most do not permit employer contributions which can enhance retirement savings. The state mandated retirement programs were intended to fill a gap, not to become the retirement savings standard for the American worker. Defaulting to a state program can also become administratively burdensome for employers operating in multiple states with varying state program requirements to follow. Multi-state employers using the state programs would create a patch work of programs for their

[24] PEPs are required to designate a pooled plan provider who is a named fiduciary of the PEP. As a fiduciary, the pooled plan provider is subject to the standards and restrictions of ERISA and the Code, including the prohibited transaction provisions restricting fiduciaries of plans from engaging in conflict of interest transactions. The Request for Information asks 14 questions, consisting of multiple parts, under three categories: (1) MEP sponsors and pooled plan providers, (2) plan investments, and (3) PEP and MEP participating employers. The request included questions about the types of entities that are likely to act as pooled plan providers, the business models those providers will use, anticipated conflicts of interest, fees and compensation, PEP and MEP investments, which employers will seek to use PEPs and MEPs, and the need for additional prohibited transaction relief. Thus, employers participating in these types of plans must understand where conflicts of interest may arise and prudently select the program.

[25] For example, penalties for noncompliance with California's CalSavers program became effective in January ($250 per employee upon receipt of an initial noncompliance notice, which can escalate to $750 per employee). The Board for the NY Secure Choice program held its first meeting on January 26, 2022, signaling that implementation of that program is underway which will require New York State employers, with at least ten employees in the state, who have been in business at least two years, and have not offered a qualified retirement plan in the last two years, to participate in the program and set up necessary Payroll deposit arrangements to participate within 9 months of the official guidance opening the program.

employees, and to date these state laws have not been preempted by ERISA. In the end, American workers would lose the protections that ERISA was intended to provide for them and their retirement security.[26]

Employers should evaluate all of the various types of retirement savings plans that can be offered and monitor evolving laws. Overall plan design will be subject to what a plan sponsor desires to attract and retain talent, what it can competitively offer to eligible employees, and its ability to properly manage and administer the plan with appropriate fiduciary oversight.

§ 5.03 DESIGNING A RETIREMENT SAVINGS PLAN WITH MEANINGFUL FEATURES

An employer that sponsors its own defined contribution plan, such as a 401(k) plan, will have the flexibility to design the plan as it desires in accordance with applicable law. Once an employer determines that it will offer employees such a retirement plan benefit, it is crucial to design the plan's features in a manner that will provide a meaningful benefit. A preliminary design issue for the employer will be to determine how to define the employees eligible for participation in the plan as broadly as possible, and to limit the exclusions on the classifications of eligible workers. Effective for plan years beginning after December 31, 2020, Section 112 of the SECURE Act requires 401(k) plan sponsors to allow part-time employees who work at least 500 hours per year for at least three consecutive 12-month periods,[27] and are at least 21 years old by the end of the last 12-month period, to participate in a 401(k) plan and make deferrals.[28] This requirement will assist in providing part-time workers with access to retirement savings plan that are sponsored by their employers. Immediate plan entry dates upon hire for eligible employees would also be desirable for the ability to make salary deferrals, as well as receive employer contributions. In the 2021 Report, the ERISA Advisory Council also advocated for expanding eligibility for part-time seasonal and contingent workers.

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[26] ERISA provides minimum standards for participation, vesting, benefit accrual and funding; requires plans to provide participants with plan information including important information about plan features and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; gives participants the right to sue for benefits and breaches of fiduciary duty.

[27] The pending legislation commonly referred to as "SECURE Act 2.0" seeks to shorten the measurement period to two years. This law is likely to pass in 2022.

[28] For purposes of counting the 500 hours per year, hours of service during 12-month periods beginning before January 1, 2021 will not be taken into account. As a result, it will not be necessary to permit any employees to make deferrals under this provision before 2024. Under these rules, these part-time employees may be excluded from nondiscrimination, coverage and top-heavy testing, and plan sponsors are not required to provide employer non-elective or matching contributions to these part-time employees.

There are many other plan design features for employers to select that will assist workers in accumulating retirement savings, and certainly employer payment of fair and equitable wages from the outset will provide employees with the income they need to make salary deferrals to retirement savings plans. Retirement plan auto-enrollment features can dramatically increase participant savings and help to foster more equitable retirement outcomes for workers, as well as provisions for auto-escalation of contributions to reduce the disparity in savings rates among employees.[29] Roth accounts can also allow for deferral of post-tax contributions which are not taxed later when distributed (and earnings on Roth contributions can avoid tax if there is a "qualified distribution").[30] Provisions to allow for annual catch-up contributions for those who are age 50 or over at the end of the calendar year can assist employees in saving for retirement (which may also be enhanced under SECURE Act 2.0[31] and required to be made in the form of a Roth contribution). Placing limitations on the types of withdrawals and number of loans a participant may have under the plan would also provide a safeguard to spending down retirement savings, especially in the case of loan repayment defaults.

Employers can also enhance their retirement savings benefit offering by providing various forms of employer contributions to the plan and participant accounts. For example, employers can design their plans to make matching contributions for an employee who contributes elective deferrals to the 401(k) plan and the plan might provide that the employer will contribute 50 cents for each dollar that participating employees choose to defer under the plan. The SECURE Act 2.0, if passed, will likely include a provision to allow employers to match their employees' student loan payments (which they certify are being made) with a contribution to the employee's 401(k) retirement plan to the extent the participant was making student loan repayments. An employer can also make additional contributions (other than matching contributions) for participants, including participants who choose not to contribute

[29] The SECURE Act 2.0 seeks to expand coverage and increase retirement savings, and, as currently drafted, will require automatic enrollment in new 401(k) and 403(b) plans (with exceptions for certain new and small businesses).

[30] A qualified distribution is a distribution that is made at least 5 years after the first contribution to the Roth account; and after the participant attains age 59½, becomes disabled, or distribution is to a beneficiary after the participant's death. With the SECURE Act's elimination of the "Stretch IRA" that used to allow beneficiaries such as adult children to gradually take distributions from inherited IRAs over their lifetime, desire for Roth 401(k) features increased so that future distributions of those accounts could at least be taken without additional income tax burden. SECURE Act 2.0 may also allow SEP and SIMPLE participants to make Roth contributions.

[31] Pending legislation known as the SECURE Act 2.0 will evolve from the House's Securing a Strong Retirement Act, the Senate Finance Committee's Enhancing American Retirement Now Act and the Senate Health, Education, Labor & Pensions Committee's Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg, or Rise & Shine Act, and is likely to pass in 2022.

elective deferrals to the 401(k) plan, such as non-elective contributions or profit sharing contributions. Vesting schedules that permit immediate vesting would also enhance a participant's retirement savings.[32] Employers should also be aware that contributions are deductible on the employer's federal income tax return to the extent that the contributions do not exceed applicable Code limitations.[33]

For ongoing plans, an analysis of participant data would also serve to inform which features of a plan are working to meet objectives and where there may be opportunity to make design changes, to add plan features to enable participants to save more, and limit withdrawals. A review of plan participant data and plan design can also be part of a diversity, equity, and inclusion (DEI) strategy, including measuring plan data to find out how different segments of the plan population are deferring, accumulating savings, where they may be missing employer contribution opportunities, and what plan features can be added to make the plan more equitable.

The various types of available retirement savings plan programs have their own design limitations. Employers should explore each program's available features and determine how they can offer the most robust features for their desired plan. Employers should also seek to design their plans to encourage participation and to assist their employees in achieving meaningful retirement savings.

§ 5.04 IMPLEMENT AND FOLLOW FIDUCIARY BEST PRACTICES

The decision to offer employees a retirement savings plan, and the design of its features, is generally a matter of business, or settlor, functions. The implementation, management and administration of the plan are matters of ERISA fiduciary responsibility. Certainly, it is understood that a mismanaged plan, with poor investment options, will not allow participants to achieve retirement savings success. Yet, the area of fiduciary responsibility gives many plan sponsors concern because it is an area of potential personal liability and increased litigation. Fiduciary responsibilities can be prudently managed, however, and there are many steps that can be taken to establish plan governance, and best practices that can be implemented, to not only protect plan fiduciaries, but also to facilitate a well-run and meaningful plan for the participants and beneficiaries.

In establishing plan governance, plan sponsors should seek to (i) prudently select individuals or members of benefit plan committees that will be delegated fiduciary responsibility to oversee management and administration of the plan, (ii) document their delegation decision through adoption of a board or similar resolution, and devise

[32] A safe harbor plan design must provide for employer contributions that are fully vested when made.

[33] For example, under Section 404 of the Code, employer tax deductions for employer contributions to 401(k) plans would not exceed 25% of compensation paid during the employer's tax year to beneficiaries under the plan.

a mechanism to monitor such individuals or the committee, (iii) adopt a committee governing charter to establish committee member roles and responsibilities (as applicable), and (iv) secure appropriate levels of fiduciary liability and cybersecurity insurance, and ensure the plan is properly bonded as required under ERISA. Some committees are established to oversee all ERISA-governed benefit plans, and some have sub-committees to separately focus on oversight of plan investments versus plan administration. Plan sponsors should determine the organizational structure that is most suitable for them.

Those individuals or committee members that have been delegated fiduciary responsibilities should seek to address their duties by taking action steps which, for example, preliminarily include: (i) adopting plan policies and procedures including an investment policy statement for retirement savings plans, procedures for compliance with Section 404(c) of ERISA, and plan cybersecurity protocols, (ii) establishing methods to prudently select and monitor plan service providers and plan services, investment advisors and plan investments, and for determining reasonableness of plan service and investment option fees, (iii) determining whether to appoint an investment advisor for the retirement savings plan as an ERISA 3(21) advisor to serve as a co-fiduciary and provide recommendations for the plan fiduciaries to evaluate to make their decisions, or as an ERISA 3(38) fiduciary investment manager with discretionary authority for plan investment decisions, (iv) determining the scope of plan education and/or investment advice services to offer participants, (v) working with their plan recordkeeper and advisors to ensure plan documents are maintained in accordance with applicable law and to reflect discretionary amendments, that administrative practices are in place to ensure adherence to plan terms in operation (including timely remittance of plan contributions), and that the myriad of required reporting and disclosure obligations are timely met, and (vi) establishing a calendar to conduct periodic plan meetings and investment reviews. It is also prudent for plan fiduciaries to conduct periodic self-audits of plan practices and operations to ensure there are no compliance gaps.

With respect to plan investment options, plan fiduciaries must prudently select the options made available to participants, and they have an ongoing duty to monitor their prudence as plan investment options.[34] Plan fiduciaries should spend time with their

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[34] See Tibble v. Edison Int'l, 135 S Ct 1823 (2015). On January 24, 2022, the US Supreme Court issued an opinion in the *Hughes v. Northwestern University*, 142 S Ct 737, in which the Court vacated a decision from the Seventh Circuit, and remanded the case for further review of allegations by 403(b) plan participants that the plan fiduciaries violated the ERISA duty of prudence for reasons such as having too many investment options included on the plan menu; having multiple recordkeepers; and having high cost investment options that underperformed. While the Court acknowledged the plan had a diverse menu of investment options which is prudent, it found that the Seventh Circuit erred by focusing on the fact that participants had the ability to direct and control the investment of their accounts as a way to excuse plan

advisors to ensure that they are regularly monitoring each of the investment options available in the plan, removing those that are underperforming or costly without a reasonable basis to justify such costs, reviewing share classes, revenue share arrangements, fee models, and be prepared to defend the basis for their decision making that the decisions made were in participants best interests. Plan fiduciaries should take care to conduct regular reviews of target date funds and qualified default investment alternatives in line with existing Department of Labor guidance which can be a topic for plan meeting agendas. Going forward, fiduciaries should apply these considerations to evaluations related to offering ESG funds,[35] alternative investments and guaranteed income options. Plan fiduciaries offering plan participants the opportunity to invest their accounts in alternative investments will need to be prepared to defend their decisions and show that they properly evaluated the risks and rewards of an investment in private equity or other alternative asset classes (as applicable),[36] that they engaged

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fiduciaries from alleged imprudent decisions. The short opinion leaves many unanswered questions, which are unfortunately going to be resolved on a fact pattern that is atypical for many 401k plans, and it is unclear what standards may evolve for fiduciaries as this case proceeds. Plaintiffs must assert in pleadings more than conclusions or speculations of fiduciary breach. It remains to be seen what may be considered a reasonable period of time to remove an allegedly imprudent investment from a plan, or what is specifically imprudent when fiduciaries are typically weighing a myriad of factors when selection the plan fund line-up, or whether law will address whether it is prudent to have revenue sharing arrangements or asset based fee structures versus per participant fee structures.

[35] On the ESG front, employees are increasingly demanding 401k options that invest with environmental, social and corporate governance guidelines in mind. Final Department of Labor (DOL) guidance will likely emerge in 2022 for ERISA-covered retirement plans. Based on the proposed DOL guidance in October 2021, the proposed rules recognize that whether a fund invests with ESG guidelines could have an impact on its performance and projected returns, and therefore plan fiduciaries will need to balance such factors when evaluating and selecting its fund lineup because ESG factors are "no different than other 'traditional' material risk-return factors" that prudent fiduciaries evaluate.

[36] On the alternative investment front, in December 2021, the Department of Labor (DOL) issued a "Supplemental Statement of Private Equity in Defined Contribution Plan Designated Investment Alternatives" To its June 3, 2020 information letter where it addressed private equity investments in "designated investment alternatives" (or DIAs) such as custom target date funds. The 2020 information letter identified factors that plan fiduciaries should consider to conduct an objective, thorough and analytic process when evaluating DIAs with a private equity component, and concluded that a plan fiduciary would not violate ERISA fiduciary duties solely because the fiduciary offers an asset allocation fund with a private equity component. The 2021 Supplement reiterated that these investments are permissible under ERISA as part of a professionally managed multi asset allocation fund alternative in a 401k plan, but that is subject to the plan fiduciaries conclusion that adding it is prudent and in the best interest of participants, and warning that many fiduciaries might not have enough experience to evaluate such investments. In a January 8, 2022 decision in the Northern District of California, the court granted a motion to dismiss fiduciary breach claims involving alternative investments brought against a prominent technology company whose plan had a target date fund that included roughly up to 37.2% hedge funds and commodities, and an investment option that included approximately 56.22% hedge funds, private equity and commodities. The court found the plaintiff's pleadings conclusory without sufficient facts so that case turned on the pleadings.

in an objective, thorough and analytical process (which may require assistance from independent advisors), and concluded that the decision is in the best interests of plan participants, and document their decision process appropriately.[37]

ERISA plan fiduciaries are held to high standards. The goal of the plan fiduciary is to act in the best interest of the plan participants and beneficiaries. Development of, and adherence to, best practices for plan governance will serve to protect the plan fiduciaries from assertions of fiduciary breach and will serve to provide the participants and their beneficiaries with a meaningful benefit.

§ 5.05 PROVIDE ELIGIBLE EMPLOYEES AND PARTICIPANTS WITH ROBUST EDUCATION AND COMMUNICATION PLANS

In addition to the required plan disclosures that must be provided to plan participants as prescribed under ERISA and the Code, plan sponsors and fiduciaries should consider developing plan communications that will enable eligible employees and plan participants to more fully understand their retirement plan benefit offering and the importance of saving for retirement. Plan education campaigns can include investment education as defined in the Department of Labor's Interpretive Bulletin 96-1 without rising to the level of investment advice.[38] In recent years, financial wellness programs have also emerged that can provide participants with broader tools to understand how to manage money, save for retirement, health care, and overall financial needs, and reduce financial stress.

At a minimum, education programs that are designed to provide generic plan information in an easily understandable manner, explain the impact of not opting out from automatic plan enrollment, show participants how to engage with their account to increase contributions and view asset allocation models to select plan investment

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[37] The Department of Labor also issued Compliance Assistance Release No. 2022-01 on 401(k) Plan Investments in "Cryptocurrencies" (March 10, 2022) cautioning plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option to a 401(k) plan's investment menu for plan participants for many reasons, and noting that EBSA expects to conduct an investigative program aimed at plans that offer participant investments in cryptocurrencies and related products, to take appropriate action to protect the interests of plan participants and beneficiaries with respect to these investments, and warning that the plan fiduciaries responsible for overseeing such investment options or allowing such investments through brokerage windows should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks outlined in this Release.

[38] Interpretive Bulletin sets forth the Department of Labor's interpretation of section 3(21)(A)(ii) of ERISA, and 29 CFR 2510.3–21(c) as applied to the provision of investment related educational information to participants and beneficiaries in participant directed individual account pension plans. For example, education can include information and materials that inform a participant or beneficiary about the benefits of plan participation, the benefits of increasing plan contributions, the impact of preretirement withdrawals on retirement income, the terms of the plan, descriptions of the plan investment alternatives, general financial and investment concepts, general asset allocation models.

options from the available plan portfolio, and explain the impact of plan withdrawals and loans on retirement savings, would provide meaningful information to participants to assist them in accumulating retirement savings and can be crucial for eligible employees who do not grasp the importance of the plan to motivate them to participate in the plan. Plan recordkeepers often have plan participant tools, including webinars, videos, brochures and other educational materials that plan fiduciaries can select from to offer to the plan participants. Plan fiduciaries should work with their plan advisors to confirm the scope of services that they wish to make available to the participants, and whether the services will include education and/or access to investment advice.[39]

The 2021 Report also explored the importance of meaningful communications, especially for diverse groups. In the 2021 Report, the ERISA Advisory Council recommended that the Department of Labor clarify that targeted educational communications (such as those aimed at speaking directly to particular groups of participants) would not be considered investment advice, and that Interpretive Bulletin 96-1 should be updated to clarify the fine line between education and advice so that the goal of providing meaningful participant financial and retirement education to achieve financial wellness is not lost. The ERISA Advisory Council also opined that the hiring of more diverse investment professionals in the financial services industry would serve to enhance the receptiveness of diverse retirement plan participants in working with investment advisors, and that guidance concerning potential liability in including diversity criteria in requests for proposals for service providers should be provided. Employers should monitor new developments on these issues.

There are many ways to design education campaigns and investment advice offerings. Plan fiduciaries should consider a program that includes stages of information from the generic education that does not overwhelm the eligible employees and participants as they become enrolled, to the more in depth services that enable them to manage their accounts in a meaningful manner. Given all of the required information and documentation that must be provided, even finding small ways to provide eligible employees and participants with quick and digestible educational tips in an ongoing manner will have a positive impact.

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[39] Plan fiduciaries must prudently select and monitor any education program or investment advice program. Investment advice extends beyond education. Investment advisors render participants advice for a fee, make investment recommendations, and may have discretion or control over the investments made in the participant's account (e.g., managed account models). Under an eligible investment advice arrangement under ERISA, a fiduciary adviser may receive a level-fee which does not vary depending on the investment options selected, or an objective, unbiased computer-model approach may be used. Plan fiduciaries should evaluate these programs under Labor Regulation Section 2550.408(g)-1 and applicable guidance.

§ 5.06 CONCLUDING THOUGHTS

It is daunting that despite the trillions of dollars that have been saved in retirement savings accounts, and the many varieties of available retirement programs and tools in the retirement industry, that there are still a myriad of factors causing a wide gap in the retirement preparedness and security among American workers. Gaps can be bridged with equitable compensation practices, and broader workplace access to retirement plans with robust plan features, employer contributions, prudent investment options, understandable plan communications and accessible financial tools. Legislation, regulations and agency guidance will continue to evolve as well. The SECURE Act 2.0, which is likely to pass in 2022 and will need to be monitored, will impact plan designs (as determined in the final legislation), and will further secure strong retirements with its provisions that seek to ease tax penalties on certain withdrawals, allow automatic portability of accounts, and establish mechanisms for locating lost retirement accounts. Industry focus on financial wellness and increased education and advice will also serve to benefit employees, as well as attention to addressing the important issues raised in the ERISA Advisory Council's 2021 Report. All of these actions can serve to enhance employee access and participation in retirement savings plans in a meaningful way and boost the retirement savings of American workers.