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Insider

Senate committee advances SECURE 2.0 retirement legislation

By Ann Marie Breheny and Bill Kalten

The Senate Health, Education, Labor and Pensions (HELP) Committee approved the Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg (RISE & SHINE) Act (H.R.4353) by voice vote on June 14. The RISE & SHINE Act includes a range of provisions intended to increase retirement savings, encourage plan sponsorship, simplify plan administration and address other retirement issues. The legislation is the HELP Committee's contribution to a bipartisan SECURE 2.0 package and represents an important step toward enacting SECURE 2.0 this year. The Senate Finance Committee has jurisdiction over tax issues and is expected to debate separate SECURE 2.0 legislation this month. It is expected that a number of tax code provisions that were not included in the RISE & SHINE Act will be included in the Finance Committee's bill.

Legislation overview

The RISE & SHINE Act provisions address pooled employer plans (PEPs), multiple employer plans (MEPs), reporting and disclosure, plan eligibility and other issues affecting retirement plan sponsors and participants. The legislation shares some provisions with the House-approved Securing a Strong Retirement Act (H.R.2954), though it does not include all the provisions approved by the House. It also shares some provisions with the Retirement Security and Savings Act (S.1770), which is expected to play an important role in the development of the Senate Finance Committee's SECURE 2.0 legislation. Some provisions are unique to the RISE & SHINE Act.

Provisions of the RISE & SHINE Act include:

- **Cash-out limit:** The limit would increase from the current $5,000 to $7,000.
- **403(b) MEPs and PEPs:** In general, 403(b) MEPs and PEPs would be permitted.
- **Clarification of PEP trustee duties:** The legislation would clarify that any named fiduciary (not just a trustee) could be responsible for collecting contributions from contributing employers.
- **DOL review of pension risk transfer interpretive bulletin:** The Department of Labor (DOL) would be directed to review ERISA's fiduciary standards for selecting an annuity provider for a defined benefit (DB) plan (the safest available annuity standard) in consultation with the ERISA Advisory Council to determine whether amendments to the standard are warranted and report on findings, including an assessment of risks to participants.
- **Performance benchmarks for TDFs:** The DOL would be directed to provide that investments that contain a mix of asset classes – such as target-date funds (TDFs) – may be benchmarked against a blend of broad-based securities market indices reasonably representative of the fund's asset holdings. The DOL would report to Congress within three years on the utilization, effectiveness and participants' understanding of the benchmarking provision.
- **Report to Congress regarding reporting and disclosure requirements:** The Department of the Treasury, the DOL and the Pension Benefit Guaranty Corporation would be directed to review current reporting and disclosure requirements for retirement plans and make

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recommendations to Congress to consolidate, simplify and improve the requirements.

- **Disclosure relief for unenrolled employees:** Defined contribution (DC) plans would not be required to provide notices to unenrolled participants, except for an annual reminder that the individual is eligible to participate in the plan.
- **Recovery of plan overpayments:** In general, plan fiduciaries could decide that the plan will not recover overpayments mistakenly made to retirees. The legislation would also establish protections for retirees in the event recoupment is sought.
- **Reduced tenure for part-time employee eligibility:** Part-time employees would be eligible to participate in employer-sponsored DC plans after they have completed 500 hours of service for two consecutive years (rather than three consecutive years as required under the SECURE Act). In addition, the legislation would incorporate the part-time employee eligibility requirement into ERISA and apply the requirement to ERISA-governed 403(b) plans.
- **Emergency savings accounts linked to DC plans:** The legislation would authorize emergency savings accounts linked to employer-sponsored DC plans. Employers could automatically enroll participants at a contribution rate up to 3% of compensation. Contributions would be made on an after-tax basis and would be treated as elective deferrals for purposes of employer matching contributions. In general, contributions to the accounts would be disallowed once the account balance reaches $2,500. In general, assets could be withdrawn at any time, without penalty. Assets would be invested in principal preservation investments. Contributions that exceed the cap would be directed into the participant's retirement savings account.

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- **DC plan fee disclosures:** The DOL would be required to review fee disclosure requirements for participant-directed plans and report to Congress on the findings of the review and legislative recommendations.
- **Consolidation of DC notices:** Treasury and DOL would be directed to amend their regulations to permit plan sponsors to consolidate certain notices, including qualified default investment alternative notices, 401(k) safe harbor notices and permissive withdrawal notices.
- **Enhanced disclosure for lump sum windows:** The legislation would require enhanced disclosure to participants who are offered lump sum windows. The enhanced disclosure would be required to indicate whether the lump sum would replicate the plan's stream of payments if the lump sum is used to purchase a retail annuity, tax consequences of lump sum distributions and other information.
- **DB plan annual funding notices:** The legislation would modify the assumptions used for calculating the funded status reported in the annual funding notice and make other changes.
- **Automatic reenrollment for plans that add new automatic enrollment arrangements:** In general, new automatic enrollment arrangements in DC plans would be required to reenroll automatically employees who opt out at least every three years. Arrangements in existence before 2025 would not be affected.
- **Incidental plan expenses:** The legislation would allow incidental plan expenses incurred "solely for the benefit of participants and their beneficiaries" to be paid from plan assets. We understand that this provision is intended to allow employers to use plan assets to add plan features that would improve retirement savings, such as automatic enrollment.
- **Report on PEPs:** The DOL would be directed to study PEPs, including fees, disclosures and the impact of PEPs on increasing retirement plan coverage, and report findings and legislative recommendations every five years.
- **Annual audits for groups of plans:** The legislation would clarify that plans filing a single Form 5500 under a group of plans, as permitted by the SECURE Act, need only submit an audit if the plan has at least 100 participants.

- **Cash balance interest crediting rate:** For cash balance plans that use a variable interest crediting rate, the legislation would provide that for purposes of applicable requirements under the Internal Revenue Code and ERISA (e.g., backloading and section 415), the interest crediting rate that is treated as in effect and as the projected crediting rate will be considered a reasonable projection of the variable interest rate, subject to a maximum of 6%.
- **VRP indexing:** The legislation would end the indexing of the variable rate premium (VRP) amount and set the VRP at $48 per $1,000 in underfunding.
- **Section 420:** Section 420, which is scheduled to sunset on December 31, 2025, would be extended until December 31, 2032.
- **Inflation study:** Treasury and DOL would be required to study the impact of inflation on retirement savings and report their findings to Congress within 90 days of enactment.
- **Tribal domestic relations orders:** The legislation would treat domestic relations orders issued by tribal governments as qualified domestic relations orders.

SECURE 2.0 discussions are ongoing…Final enactment could occur later this year.

Going forward

SECURE 2.0 discussions are ongoing. The Senate Finance Committee is expected to approve the legislation, after which lawmakers are expected to negotiate a bill that incorporates provisions from the House, HELP Committee and Finance Committee bills. Final enactment could occur later this year.

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Court rules plans' civil action filing deadlines not enforceable

By Maureen Gammon and Kathleen Rosenow

In two separate cases, the United States District Court for the District of Utah ruled that if an ERISA welfare benefit plan sets a time limitation on when a claimant may file a civil action after receiving an adverse benefit determination, that time limitation must be stated in the final claim denial; otherwise, it will not be enforced in court.

Following the [court] decision, the civil action filing deadline should be included in the final adverse benefit determination.

Background

Every benefit plan governed by ERISA must have claims and appeals procedures that meet ERISA requirements and regulations. If those procedures are not followed, a claimant may immediately file a civil action in federal court. If the procedures are followed but a claimant does not agree with a final adverse benefit determination (where payment for a benefit is denied, reduced, terminated, or not provided or paid to the claimant), the claimant may also file a civil action in federal court.

ERISA does not set the deadline for filing a civil action after a final adverse benefit determination, so to avoid being subject to varied and lengthy state statutes of limitations, many plans set their own two- or three-year deadlines. For most plans, this deadline is included not only in the formal ERISA plan document but also in the claims and appeals section of the summary plan description (SPD).

Following the recent federal court's decisions, the civil action filing deadline should also be included in the final adverse benefit determination (typically within an explanation of benefits or final denial letter).

Court rulings

The two recent ERISA cases ruled on by the U.S. District Court in Utah involved separate ERISA plans (one **fully insured** and one **self-insured**) sponsored by different employers. Both plans involved group health plan denials by the same entity – UnitedHealthcare – as insurer for the fully insured plan and claims administrator for the self-insured plan. In each case, the insurer/claims administrator asked the court to dismiss the lawsuit because it was not filed within the time limit specified by the plan.

Both plans contained a three-year limitations provision for filing a civil action after a final adverse benefit determination; however, because in both cases the final adverse benefit determination did not include a notice of the plan's time limit for bringing legal action, the federal district court held that those limitations could not be enforced.

Going forward

Plan sponsors should review their ERISA plan documents, SPDs and claims denial communications, including those used by third-party administrators adjudicating claims on the plan's behalf, to ensure that any deadline for filing a civil action on a final adverse benefit determination is clearly stated.

Plan sponsors should review their ERISA plan documents, SPDs and claims denial communications.

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