Volume 32
Number 7
July 2022

Insider

Supreme Court overturns *Roe v. Wade*: Q&As for employer plan sponsors

By Maureen Gammon, Anu Gogna, Ben Lupin and Kathleen Rosenow

The U.S. Supreme Court issued its decision in **Dobbs v. Jackson Women's Health Organization**, concluding that the U.S. Constitution does not grant a right to abortion. This decision overturns *Roe v. Wade* and *Planned Parenthood of Southeastern Pa. v. Casey*, leaving it to the states to decide on abortion issues.

Employer group health plan sponsors should discuss with legal counsel how this decision impacts their workforces and their employee health benefits, and continue to monitor developments in the states in which they do business. The following Q&A addresses some key issues.

Q. The U.S. Supreme Court overturned *Roe v. Wade*. What happens now?

With the decision on how to regulate abortion left to the states, a patchwork of laws is emerging as some states are moving to ban or limit abortion while others are creating additional protections for people who perform or obtain the procedure.

Before the ruling, 13 states had "trigger" laws in place, designed to ban or restrict abortion as soon as *Roe* was overturned. Some of those bans have already gone into effect, while others are likely to take effect within days or weeks. The Guttmacher Institute is tracking the various state laws via an **interactive map**.

In addition, both Texas and Oklahoma have already enacted laws that enable private citizens to bring a civil action against a "person" for aiding and abetting an individual in obtaining a prohibited abortion. Additional states could consider adding these laws as well. Employers should work with legal counsel to monitor and appropriately respond to such laws.

Finally, some states have enacted or are considering laws to make it illegal to travel across state lines for an abortion as well as to receive abortion-inducing pills by mail or via telemedicine. Other states could consider criminal penalties for violations of their abortion laws.

ERISA self-insured plans might be able to argue that ERISA preempts certain state civil and insurance laws; however, it is more unlikely that ERISA will preempt state *criminal* laws. For ERISA-covered plans, this is likely to be tested in the courts in the coming months.

Q. My company has decided to provide coverage for abortion services, including travel expenses, under our medical plan. Are there any compliance concerns for doing so?

The answer depends on whether the medical plan is fully insured or self-funded. Fully insured plans are subject to state insurance laws, which may limit coverage for abortion-related services. A number of states currently limit insurance coverage for abortion services (and more are likely to do so or impose additional restrictions), and state laws regulating insurance are not preempted by ERISA for fully insured plans. Self-funded medical plans that are governed by ERISA, however, are not subject to state insurance laws and have much greater flexibility in determining how abortion services are covered.

In This Issue

ERISA generally preempts state laws on issues related to an employer-sponsored benefit plan; however, it does not preempt "generally applicable" state criminal laws. It is unclear whether ERISA would preempt state abortion laws that are not insurance-related, including state civil laws imposing penalties on those who aid and abet abortions in violation of state law. Changes to state civil and criminal laws regarding abortion are likely in the coming months, and legal challenges against them are expected. How these laws apply to employer-sponsored group health plans should be discussed with legal counsel.

In addition to the issues discussed above, employers providing abortion-related services under their medical plans should consider the following:

- **Mental health parity.** The Mental Health Parity and Addiction Equity Act (MHPAEA) prohibits imposing more stringent limitations on mental health and substance use disorder (MH/SUD) benefits than on medical/surgical benefits. If a travel benefit for medical care is integrated with a group health plan that also provides MH/SUD benefits, compliance issues could arise if the travel benefit is not extended to MH/SUD care. For example, if travel benefits are provided under a group health plan for abortion-related care because of accessibility issues, legal counsel should be consulted to determine whether a plan that does not provide similar travel benefits for MH/SUD-related care when there are accessibility issues remains in compliance under MHPAEA.
- **HSA compliance.** Generally, an employee enrolled in a high-deductible health plan (HDHP) cannot contribute to a health savings account (HSA) if that HDHP or any other health plan under which the individual is covered reimburses all or part of the cost of medical services before the individual satisfies the minimum HDHP deductible; however, preventive services may be reimbursed by an HDHP before the deductible is satisfied. Currently, abortion services and related travel expenses do not appear to be a preventive service for HSA eligibility purposes. As with other non-preventive services, for those participants to be able to make and receive HSA contributions, an HDHP should require participants to meet the plan's deductible before being reimbursed for travel costs relating to abortion services.
- **HIPAA privacy protections.** Benefits offered through a group health plan are protected by the Health Insurance Portability and Accountability Act (HIPAA) privacy and security rules. Under HIPAA, covered entities (e.g., group health plans, healthcare providers, insurers and third-party administrators) cannot disclose protected health information (PHI) without a patient's consent. This rule applies to all covered entities (and their "business associates") that transmit health records electronically but not to entities that do not bill for insurance; however, *HIPAA doesn't protect PHI in all instances*. For example, PHI may be disclosed to law enforcement upon request in certain situations — such as in response to a court order or a warrant — and when it's required by law for public health surveillance. It is unclear how these law enforcement and public health surveillance exceptions in HIPAA may come into play post *Roe v. Wade*. Legal counsel should be consulted.
- **ERISA reporting and disclosure.** As a reminder, if any provisions of an ERISA-governed group health plan are changed or a new plan is established, all of ERISA's reporting and disclosure requirements will need to be satisfied, including maintaining a plan document and summary plan description and filing a Form 5500.

Changes to state civil and criminal laws regarding abortion are likely in the coming months.

Q. My medical plan covers travel expenses for abortion-related services for those enrolled in the plan. Are those benefits taxable to my employees?

The taxability of medical benefits depends on whether the service is considered medical care under the Internal Revenue Code. If it is considered medical care, it is excluded from an employee's gross income under the code. Travel to access abortion services constitutes medical care if the travel is principally to obtain a legal abortion by a licensed provider.

***Insider* is a monthly newsletter developed and produced by WTW Research and Innovation Center.**

***Insider* authors**

Ann Marie Breheny, Cindy Brockhausen, Gary Chase, Stephen Douglas, Maureen Gammon, Rich Gisonny, Anu Gogna, Russ Hall, William Kalten, Benjamin Lupin, Brendan McFarland, Steve Nyce, Kathleen Rosenow, Maria Sarli, Steven Seelig

Reprints

For permissions and reprint information, please email Joseph Cannizzo at joseph.cannizzo@wtwco.com.

More information can be found on the website: wtwco.com.

Publication company

WTW
Research and Innovation Center
800 N. Glebe Road
Arlington, VA 22203
T +1 703 258 7635

IRS Publication 502 explains what a reimbursable or tax-deductible medical expense is. The publication includes sections on items such as transplants, lodging and transportation, but there are limitations. Specifically, lodging expenses may be provided on a tax-favored basis with a limit of no more than $50 per person, per night. With respect to transportation expenses, there is no hard dollar limit, but there are limits on who can be included in the travel (i.e., parent of a child or nurse/person who can give injections, medications and treatment). To the extent the plan provides for benefits in excess of these limits (e.g., covers lodging benefits at $250 per person, per night), then the amounts above the limit would be taxable to the participant.

This also means that these travel expenses (up to any applicable limits) can be reimbursed via an HSA, health reimbursement arrangement (HRA) or health flexible spending account (assuming they are not reimbursed via the medical plan).

Q. My company has decided to provide coverage for abortion-related travel expenses for all my employees, including those who are not enrolled in the medical plan. Are there any compliance concerns with this approach?

As discussed above, travel to access abortion services constitutes medical care. As a result, providing abortion-related travel benefits to individuals who are not enrolled in your group health plan may create a new group health plan.

Covering abortion-related travel benefits on a first-dollar basis may impact an employee's ability to contribute to his or her HSA.

Employers should carefully structure any such program to make sure it complies with applicable federal law, including the ACA's insurance market reforms, HIPAA and COBRA. Employers may consider an integrated HRA, an excepted benefits HRA or an employee assistance program that qualifies as an "excepted benefit" (all of which would be ERISA-covered plans). In addition, employers with HSA-qualifying HDHPs should be aware that covering abortion-related travel benefits on a first-dollar basis may impact an employee's ability to contribute to his or her HSA. Employers considering this approach should discuss the potential compliance issues with their legal counsel.

For comments or questions, contact
Maureen Gammon at +1 610 254 7476,
maureen.gammon@wtwco.com;
Anu Gogna at +1 973 290 2599,
anu.gogna@wtwco.com;
Ben Lupin at +1 215 316 8311,
benjamin.lupin@wtwco.com; or
Kathleen Rosenow at +1 507 358 0688,
kathleen.rosenow@wtwco.com.

Senate Finance Committee approves SECURE 2.0 legislation

By Ann Marie Breheny and Stephen Douglas

The Senate Finance Committee approved the Enhancing American Retirement Now (EARN) Act — the Finance Committee's version of SECURE 2.0 — by a vote of 28 to 0 on June 22. The bipartisan legislation includes a broad range of provisions intended to increase retirement savings, encourage plan sponsorship, and simplify plan administration and compliance. SECURE 2.0 discussions now move into a new phase during which lawmakers will negotiate a final bill that encompasses provisions of the Securing a Strong Retirement Act approved by the House on March 29; the RISE & SHINE Act approved by the Senate Health, Education, Labor and Pensions (HELP) Committee on June 14; and the EARN Act.

SECURE 2.0 discussions now move into a new phase during which lawmakers will negotiate a final bill.

Provisions in the EARN Act address a range of issues, including pooled employer plans (PEPs), multiple employer plans (MEPs), reporting and disclosure, plan eligibility and more. The Finance Committee approves legislation based on descriptive text rather than legislative language, so additional details about the legislation may emerge once the actual legislative language is released.

Key provisions

Following are key provisions of the EARN Act. Negotiators will have to resolve any differences between provisions that are similar to those in the Securing a Strong Retirement Act or the RISE & SHINE Act when the final legislation is negotiated.

- **Automatic enrollment:** A new, additional safe harbor, called a secure deferral arrangement, would allow higher default contributions and higher escalation for participants who are automatically enrolled. In general, employers could automatically enroll participants at a contribution rate of at least 6% of compensation and automatically escalate 1% per year until the employee is contributing at least 10% of compensation. Employers would be required to match 100% of the first 2% of deferred compensation, 50% of 3% to 6% of compensation and 20% of 7% to 10% of compensation. Small employers that use this safe harbor would qualify for a tax credit. The provision would take effect after 2023. The House bill would require automatic enrollment for *new* defined contribution plans.
- **Increase required beginning date for RMDs:** The required beginning date for required minimum distributions (RMDs) would increase to age 75 beginning in 2032. The House bill includes a provision that would phase the required beginning date to age 75 by 2033.
- **Higher catch-up contribution for individuals age 60 to 63:** The annual catch-up contribution limit would be $10,000 ($5,000 in SIMPLE plans and SIMPLE IRAs) for employees who are age 60 to 63 beginning in 2025. Under the House bill, higher catch-up contributions would apply for those age 62 to 64.
- **Mandatory Roth treatment for catch-up contributions:** Catch-up contributions to 401(k), 403(b) and governmental 457(b) plans would be required to be made on a Roth basis by participants whose income exceeds a not-yet-determined income threshold. The income threshold, added by an amendment approved during the committee's deliberations, would be designed to ensure the estimated cost of the legislation does not change. The provision serves as a revenue offset for other provisions in the legislation. Under the House bill, all catch-up contributions would be made on a Roth basis.
- **Matching contributions on student loan payments:** Employers would be permitted to make matching retirement plan contributions based on an employee's qualified student loan payments, and separate nondiscrimination testing for employees who receive such matching contributions would be allowed. The plan would be required to match and vest qualified student loan payments and elective deferrals at the same rate. The provision, also included in the House bill, would take effect after 2023.

A new, additional safe harbor...would allow higher default contributions...for participants who are automatically enrolled.

- **Reduced tenure for part-time employee eligibility:** Part-time employees would be eligible to participate in employer-sponsored defined contribution plans after they have completed 500 hours of service for two consecutive years (rather than three consecutive years as required under the SECURE Act). The provision would apply for plan years beginning after 2022 and is included in the House bill and the RISE & SHINE Act.
- **403(b) plan investment in collective investment trusts:** Contributions to 403(b) custodial accounts could be invested in collective investment trusts. The provision would be effective after the date of enactment. Due to legislative jurisdiction restrictions, securities law exemptions related to this requirement are not included in the EARN Act. The provision is also included in the House bill.
- **403(b) MEPs:** In general, 403(b) MEPs and PEPs would be permitted for plan years beginning after the date of enactment. The House bill and the RISE & SHINE Act would also authorize 403(b) MEPs and PEPs.
- **Small immediate financial incentives for plan participation:** Employers would be permitted to offer de minimis financial incentives, such as small gift cards, to encourage participation in 401(k) and 403(b) plans for plan years that begin after the date of enactment. The provision is also in the House bill.
- **Distributions for emergency expenses:** The legislation would authorize emergency personal expense distributions, which would allow individuals to take penalty-free distributions of up to $1,000 for unforeseeable or immediate personal or family expenses. The plan sponsor could rely on the employee's certification that the distribution is an eligible emergency personal expense distribution. The provision generally would permit one distribution per year. Distributions could be repaid over a three-year period. Additional emergency distributions during the three-year repayment period would be prohibited unless the previous distribution had been repaid or the individual had subsequently made contributions in an amount at least equal to the amount of the prior emergency distribution. The provision would take effect in 2024. The HELP Committee's RISE & SHINE Act would authorize separate emergency savings accounts linked to employer-sponsored defined contribution plans.

- **Safe harbor for corrections of employee elective deferrals:** The legislation would establish a grace period to correct automatic contribution errors without penalty if certain conditions are met. The House bill includes a similar provision.
- **Remove RMD barriers for life annuities:** The legislation would allow life annuities in defined contribution plans and IRAs that include certain annual increases, lump sum return of premium death payments and other features. The House bill includes a similar provision.
- **Qualifying longevity annuity contracts:** The legislation would modify the rules for qualifying longevity annuity contracts (QLACs) by repealing the provision that limits QLAC premiums to 25% of the account balance, increasing the dollar limit from $145,000 to $200,000; facilitating QLACs that allow spousal survivor rights; and making other changes. The House bill includes a similar provision.
- **Variable exchange-traded funds (ETFs):** The Secretary of the Treasury would be directed to update regulations to facilitate the use of ETFs in variable insurance contracts. The provision generally would be effective seven years after enactment. This provision is also included in the House bill.
- **Recovery of plan overpayments:** In general, plan fiduciaries could decide that the plan will not recover overpayments mistakenly made to retirees, and the legislation would establish protections for retirees who receive overpayments. The provision would generally apply for plan years beginning after enactment. The provision is also in the House bill and the RISE & SHINE Act.
- **Reduced penalty for failure to take RMDs:** The excise tax for failure to take RMDs would be reduced to 25%. If the failure is corrected in a timely manner, the excise tax would be reduced to 10%. The provision would be effective for taxable years beginning after enactment. The provision is also in the House bill.
- **Report to Congress regarding reporting and disclosure requirements:** The Department of the Treasury, the Department of Labor and the Pension Benefit Guaranty Corporation would be directed to review current reporting and disclosure requirements for retirement plans and make recommendations to Congress to consolidate, simplify and improve the requirements. The House bill and the RISE & SHINE Act also include this provision.
- **Disclosure relief for unenrolled employees:** Defined contribution 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. The provision would take effect for plan years beginning after enactment. The provision is also in the House bill and the RISE & SHINE Act.

The excise tax for failure to take RMDs would be reduced to 25%.

- **Retirement savings lost and found:** The legislation incorporates the Retirement Savings Lost and Found Act, which would direct Treasury to establish a national database to help workers locate retirement benefits from former employers. In addition, it would increase the cash-out limit to $6,000. The House bill includes lost and found program provisions and would increase the cash-out limit to $7,000. The RISE & SHINE Act would increase the cash-out limit to $7,000.
- **Self-correction of inadvertent violations:** In general, inadvertent plan violations could be self-corrected under the Employee Plans Compliance Resolution System (EPCRS) without a submission to the IRS unless the IRS discovers the violation before the employer can show that it has taken action that demonstrates a commitment to correction. The provision would take effect after the date of enactment. The House bill includes a similar provision.
- **Eliminate the 457(b) "first day of the month" requirement:** Participants in a 457(b) plan would be permitted to request changes in their deferral rate prior to the date that the compensation being deferred is available (rather than prior to the beginning of the month in which the deferral will be made). The provision would apply after the date of enactment. The provision is also in the House bill.
- **Matching and nonelective contributions may be made on a Roth basis:** Employers may permit employees to elect for their matching and nonelective contributions under 401(k), 403(b) and governmental 457(b) plans to be made fully or partially on a Roth basis after 2022. This provision serves as a revenue raiser and is also included in the House bill, where it is limited to matching contributions.
- **Top-heavy testing:** If a plan covers employees who are otherwise excludable under the general age and service rules and the employees separately meet the top-heavy minimum contribution rules, the employees may be excluded from consideration in determining if the plan (or any plan of the employer) satisfies the top-heavy rules. The provision would be effective for plan years beginning after enactment. The House bill also includes this provision.
- **Distributions to firefighters:** The legislation would extend existing special distribution rules for qualified public safety employees to private sector firefighters after the date of enactment. The provision is also in the House bill.

- **Saver's credit:** The Saver's credit would be 50% of eligible retirement contributions for taxpayers with adjusted gross income below the threshold specified in the legislation (initially $41,000 for joint filers, $30,750 for heads of household and $20,500 for single taxpayers). The credit would phase out for filers with income exceeding the initial thresholds. In addition, the credit would be refundable. The House bill includes different provisions to modify and promote the Saver's credit.
- **Repayment of qualified birth and adoption distribution:** Repayment of qualified birth or adoption distributions would have to be made within three years of the date the distribution was received. The SECURE Act, which authorized the distributions, did not limit the repayment period. The provision is also in the House bill.
- **Self-certification of hardship:** Employees would be permitted to self-certify that an event constitutes a hardship for purposes of hardship withdrawals. In addition, the legislation would codify the current rule that permits self-certification regarding that the amount of a distribution does not exceed the need. The provision would be effective for plan years beginning after the date of enactment and is also included in the House bill.
- **Domestic abuse withdrawals:** The legislation would permit penalty-free, repayable withdrawals of up to $10,000 in the case of domestic abuse. The provision is also in the House bill.
- **Family attribution rules:** For purposes of determining whether two or more businesses must be aggregated for certain non-discrimination tests, ownership by family members is attributed to other family members. The legislation would make changes to these attribution rules, including by disregarding community property laws. The House bill also includes the provision.
- **Retroactive plan amendments:** Certain retroactive plan amendments that increase benefits (other than matching contributions) for a year could be made by the due date of the employer's tax return for the year. This provision is also in House bill.
- **Auto-portability:** Retirement plan service providers would be permitted to provide employers with automatic portability services, which would allow automatic transfers of a participant's default IRA into a new employer's retirement plan if certain conditions are met.
- **Conform 403(b) and 401(k) hardship rules:** The legislation would conform the current 403(b) and 401(k) hardship rules after the date of enactment. The House bill also includes this provision.
- **Treasury guidance on rollovers:** Treasury would be directed to issue sample forms by 2025 for direct rollovers and trustee-to-trustee transfers, to help simplify, standardize and facilitate such rollovers and transfers. The forms would be required to apply to both the distributing plan and the receiving plan or IRA.

The provision would codify permanent rules regarding the use of retirement plan assets following declared disasters.

- **415 limit for rural electric cooperative plans:** The section 415 compensation limit would be repealed for non-highly compensated employees who participate in a plan offered by a rural electric cooperative plan. The provision would take effect for limitation years ending after the date of enactment.
- **Eliminating incentives not to partially annuitize:** Where a portion of an interest in a retirement plan is distributed in the form of annuity payments, and the annuity payments exceed the amount that would be required to be distributed under the individual account rules based on the value of the annuity, the excess annuity payment amount for a year could be applied toward the RMD for the year with respect to any remaining interest in the same retirement plan.
- **Distributions for individuals with terminal illness:** The 10% penalty on early distributions would not apply when distributions are made to employees who are certified by a physician as having an illness or physical condition that is reasonably expected to lead to death within 84 months after the date of the certification. The provision would be effective after the date of enactment.
- **Surviving spouse election to be treated as employee:** A surviving spouse could elect to be treated as the deceased employee for purposes of the RMD rules, effective in 2024.
- **Long-term care contracts purchased with retirement account distributions:** In general, the provision would allow individuals to take penalty-free distributions of up to $2,500 annually to pay qualifying long-term care premiums. The provision would take effect three years after enactment.
- **Disaster relief:** The provision would codify permanent rules regarding the use of retirement plan assets following declared disasters. In general, qualifying individuals could withdraw up to $22,000. Amounts would be penalty-free and repayable. Income could be included over three years. Special rules would apply for amounts that were previously withdrawn for the purchase of a home. The provision would be retroactive to disasters occurring on or after January 26, 2021, and would eliminate the need for the IRS to issue disaster relief on a disaster-by-disaster basis.

- **Starter 401(k) and 403(b) plans:** Employers that do not sponsor a retirement plan could offer a "starter 401(k)" or "safe harbor 403(b)" plan. In general, the employer would be required to default all employees into the plan at a contribution rate of 3% to 15%. The limit on annual deferrals, and the annual catch-up limit, would mirror the annual IRA limits. For 2022, the IRA contribution limit is $6,000 and the catch-up limit is $1,000. A separate provision would index the IRA catch-up limit.
- **Mortality proposal:** The legislation would require the Secretary of the Treasury to amend the regulation relating to "Mortality Tables for Determining Present Value Under Defined Benefit Pension Plans" (October 5, 2017). Under the amended regulations, for valuation dates occurring during or after 2022, mortality improvement rates would not assume future mortality improvements at any age that are greater than 0.78%. Further regulatory amendments would be made to modify the 0.78% figure as necessary to reflect material changes in the overall rate of improvement projected by the Social Security Administration.
- **Section 420:** The sunset date for section 420 transfers would be extended until 2032 (from 2025 under current law). In addition, limited transfers to pay retiree medical or life insurance would be permitted for plans that are at least 110% funded.
- **402(f) notices:** The Government Accountability Office would be required to report to Congress on the effectiveness of section 402(f) notices.
- **Small employer tax credits:** The legislation would expand the current-law tax credit for small employers to offer retirement plans by increasing the credit percentage from 50% to 75% of eligible expenses for employers with up to 25 employees. In addition, the credit would be available to eligible employers that join a MEP or PEP, regardless of how long the MEP or PEP has been in existence. In addition, the legislation would establish new tax credits for small employers that automatically reenroll employees in automatic enrollment arrangements and small employers that adopt automatic portability. The House bill also includes tax credit provisions for small employers, although there are significant differences between the House and Senate Finance Committee bills.

Final legislation could be enacted later this year, possibly after the November elections.

The legislation also includes technical corrections to the SECURE Act, additional provisions addressing small employer plans and IRAs, and other changes.

Going forward

Lawmakers will now work to negotiate a final bill that includes provisions of the House, Senate Finance Committee and Senate HELP Committee bills. Final legislation could be enacted later this year, possibly after the November elections.

For comments or questions, contact Ann Marie Breheny at +1 703 258 7420, ann.marie.breheny@wtwco.com; and Stephen Douglas at +1 203 326 6315, stephen.douglas@wtwco.com.

SEC requests additional comments on Dodd-Frank clawback rules

By Stephen Douglas and Steve Seelig

On June 8, the **U.S. Securities and Exchange Commission (SEC) announced** that it has once again reopened the comment period for its proposed rule on recovery of compensation paid based on erroneous financial data under section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank Act).[1] The comment period for these clawback provisions has been reopened for an additional 30 days and is set to close on July 14.

Also on June 8, the SEC released an **internal memo** from the Division of Economic and Risk Analysis (DERA) that provides a summary of what issues might be included in an economic analysis under any final regulations, if and when they are adopted.

Following is an overview of the issues the SEC is seeking to resolve during the reopened comment period.

[1] For background and information on previous comment periods, see "**SEC finalizing Dodd-Frank clawback policy**," *Insider,* December 2021.

'Little r' restatements

Last October, the SEC noted it was considering expanding the rule to cover restatements to correct errors that are not material to previously issued financial statements but would result in a material misstatement if (a) the errors were left uncorrected in the current report or (b) the error correction was recognized in the current period. Commenters have raised concerns to the SEC about the latter issue.

In response, the SEC asked its DERA to look at what the data would show about the impact of the expanded coverage of the rule. The DERA report found that although "little r" restatements may account for roughly three times as many restatements as "Big R" restatements, based on 2019 – 2021 data, the proportion of "little r" restatements that trigger clawbacks would be far lower because they result in smaller stock price reaction that might not trigger a need to recover any compensation. According to the DERA, benefits to expanding the rule include that compensation recoveries would provide additional corporate funds for other productive uses and could encourage even higher-quality financial reporting by companies. Additionally, companies would be less likely to create incentives to avoid "Big R" restatements when future "little r" restatements also would trigger clawbacks.

The cost of compliance is cited as a reason why the SEC might decide not to include "little r" restatements where recoveries might be less beneficial when share price impacts are minimal. The DERA also noted that data clearly reflect that smaller reporting companies disproportionately report "little r" restatements, so their administrative burden would be heightened compared with larger companies.

Relative total shareholder return plans

For performance-based equity grants that use share price or generally accepted accounting provision (GAAP) measures, calculation of the compensation that is subject to clawback after a restatement would be fairly straightforward. More complicated calculations would be required when determining the impact of a restatement on non-GAAP performance metrics used under a performance-based compensation plan.

For relative total shareholder return plans, companies would face even greater burdens when determining the impact of a restatement. Not only would a company need to do an event study of the stock price impact of the restatement on the company itself, it would also need to do the same study for every company in its comparator group because share prices of peers are impacted by any financial restatement of a company within that peer group.

For relative total shareholder return plans, companies would face even greater burdens when determining the impact of a restatement.

Disclosures and calculations

When the SEC previously reopened the comment period in October 2021, the rules it was considering would require more disclosure when a clawback is invoked. While it appears that the SEC would now prefer to give companies more flexibility in how they make cost/benefit calculations to determine whether to claw back, companies could be required to show their work in calculating the clawback amounts in proxy and other filings. Decisions about how much or how little information to disclose in SEC filings always introduce tricky legal questions to be negotiated by appropriate counsel.

Going forward

Although it is not known when final regulations will be issued, companies should continue to monitor this issue and prepare for compliance. Once the regulations are finalized, the various listing exchanges must adopt rules to implement the SEC guidance, which would likely add another six months before companies would be required to adopt clawback policies.

For comments or questions, contact Stephen Douglas at +1 203 326 6315, stephen.douglas@wtwco.com; or Steve Seelig at +1 703 258 7623, steven.seelig@wtwco.com.

New IRS 90-day pre-examination compliance pilot program

By Stephen Douglas and Bill Kalten

On June 3, the IRS Employee Plans function **announced** it is piloting a pre-examination retirement plan compliance program. Under this program, the IRS will notify a retirement plan sponsor by letter that its plan has been selected for an upcoming examination. The sponsor will be given a 90-day window to review its plan's document and operations to determine if they meet current tax law requirements. Any mistakes revealed during the review can then be self-corrected by the sponsor using the voluntary correction program (VCP) under the IRS Employee Plans Compliance Resolution System (EPCRS).

If a plan sponsor cannot self-correct a mistake, it can request a closing agreement from the IRS to settle the issue. The sanction amount the sponsor would need to pay under the closing agreement would be determined using the VCP fee structure, which currently has a maximum user fee of $3,500. VCP fees are generally significantly lower than sanctions imposed under an IRS audit, so plan sponsors that receive a pre-examination letter would likely benefit from participating in the pilot program correction opportunity.

The IRS will review the sponsor's documentation to determine whether it agrees with the sponsor's conclusions and that any defects have been "appropriately corrected." The IRS will then issue a closing letter or conduct either a limited-scope or a full-scope examination.

A sponsor that doesn't respond within 90 days can expect an IRS examination.

[The pilot] provides a great opportunity for sponsors...to avoid costly sanctions that might otherwise be imposed following an audit.

Going forward

- Although the pilot is currently very limited, it provides a great opportunity for sponsors that receive a pre-examination letter to avoid costly sanctions that might otherwise be imposed following an audit. Plan sponsors who receive a pre-examination notice should immediately work with their benefit consultants, attorneys and other advisors to conduct a self-audit to identify any compliance issues within the 90-day window.
- All plan sponsors should take a proactive approach and periodically conduct operational compliance reviews, which signals to the IRS a commitment to compliance.
- The pilot program began in June 2022 and is expected to be completed by the end of this year.

For comments or questions, contact Stephen Douglas at +1 203 326 6315, stephen.douglas@wtwco.com; or Bill Kalten at +1 203 326 4625, william.kalten@wtwco.com.

About WTW

At WTW (NASDAQ: WTW), we provide data-driven, insight-led solutions in the areas of people, risk and capital. Leveraging the global view and local expertise of our colleagues serving 140 countries and markets, we help you sharpen your strategy, enhance organizational resilience, motivate your workforce and maximize performance. Working shoulder to shoulder with you, we uncover opportunities for sustainable success – and provide perspective that moves you. Learn more at wtwco.com.

wtwco.com/social-media