



Pension & Benefits Quarterly

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April 2022

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Qualified Retirement Plans Updates

Ami Givon | GCA Law Partners LLP

Retirement Related Provisions of the Infrastructure Investment and Jobs Act (IIJA): The IIJA, the \$1.2 trillion infrastructure bill signed into law on November 15, 2021, included the following provisions impacting retirement plans:

- The interest rate smoothing provisions set by the American Rescue Plan Act of 2021 was extended by five years (to 2031 from 2026).
- The automatic extension of certain deadlines (including those for pension, individual retirement account (IRA) and rollover contributions) in the case of taxpayers affected

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“For the first time since the pandemic, I was able to travel outside of the United States for the holiday weekend and felt incredibly fortunate to relish in the cultural diversity of Mexico City. ”

Victoria Fung
President’s Letter - Pg 2



President's Letter

Happy Financial Literacy Month!

Welcome back to our newsletter. I hope that everyone had a happy and celebratory season, whether it's Easter, Ramadan, or Passover!

For the first time since the pandemic, I was able to travel outside of the United States for the holiday weekend and felt incredibly fortunate to relish in the cultural diversity of Mexico City. After a couple years of virtual Zoom, Microsoft Teams, and WebEx calls, we were thrilled to spend time away from the computer desk. As we head into the remaining balance of 2022, I am hopeful that our WP&BC family and community we share professionally will be increasingly invigorated with opportunities to get out of the house, travel, and meet one another in person. There really is no replacement for in-person interactions!

Our Board and Programming Committee kicked off the fiscal year with outstanding virtual programs focused on a range of topics relevant to today's benefits community. In February, we featured an incredibly well attended webinar, which featured a **Legislative Update** by esteemed **Attorney/Senior Consultant, Craig P. Hoffmann, from Nova 401(k) Associates** to discuss the nuances of the proposed bipartisan retirement plan legislation, SECURE 2.0 and other proposals, including the Automatic Retirement Plan Act (as introduced in the Build Back Better legislation.)

Following our initial kick off webinar series "**Women in Investing**" in December with **Rachel Pearson from Engage** to talk about advocacy of women's financial security and literacy, we hosted the second meeting in February in partnership with **WIPN** to hear from two HR professionals on how employers consider unique needs of women as a worker demographic and how it shapes compensation and employee benefits programs. The session was titled "Investing in Women and an Inclusive Workforce," which featured expert panelists, **Kay Prescher, Director of Total Rewards at Webcor**, and **Stephanie Wemusa, Director, Diversity, Equity, Inclusion and Belonging, Mindbody and Adjunct Professor – Communications Trainer at San Jose State University**.

While we have been hard at work bringing highly valued educational webinars to our community, we are particularly excited about two upcoming events. The first is our **in person Happy Hour** this year on **April 28th** dedicated to express our appreciation to Benefits Professionals for all their dedication to serving employees and participants. Please join us at **Sam's Grill and Seafood Restaurant** in downtown San Francisco. In addition, we look forward to our EBP SAS Brown Bag Webinar, led by speaker **Jasmine Baker** from **Withum Smith and Brown**, to discuss the changes that have been made recently to annual benefit plan audits on May 4th via Zoom. Please sign up!

We hope this year will be the year we transition back to more in-person events. It'll certainly be a "test and learn" process and we appreciate your continued membership, sponsorship, and engagement to keep our community strong. We continue to welcome interest in getting involved and have **available positions** within our sub-committees. Please reach out to us with your interest! Thanks to our dedicated Board who has been working hard behind the scenes on behalf of our organization. The leadership team for 2020-2022 includes Robert Gower as Vice President, Brad Wall as Treasurer and Michon Caton as Secretary. Our Board members include Karen Mack, Bill Berry, Karen Casillas, Ami Givon, Matt Gouaux, Robert Gower, Lori McKenzie, Sandy Purdy, and Alison Wright. Our Program committee is co-chaired by Virginia Sutton and Marc Fosse, the Brown Bag coordinator is Sandy Purdy, and Robert Gower is our Membership Board Liaison working with the committee leadership and the newsletter editor is Bryan Card. Thank you and here's to a safe and healthy summer and successful remainder to the FY21-22 program year!

Sincerely,

Victoria Fung, President

Victoria Fung

Vice President, Senior Defined Contribution Specialist

T. Rowe Price Associates, Inc.

333 Bush Street, Suite 2550

San Francisco, CA 94104



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WP&BC San Francisco Chapter Happy Hour Member Appreciation Event – Thursday, April 28 at 4:30pm

THANK YOU TO OUR BENEFITS PROFESSIONALS!

Location – Sam's Grill and Seafood Restaurant
374 Bush Street, San Francisco, CA 94104



We are ready to bring back what has been so special about our chapter... meeting in-person! Instead of worrying about CEs, let's get back together while having a drink and appetizers on us! We appreciate everyone's dedication to continuing membership through the last two years and we couldn't be more excited to see everyone again.

2022 Legislative Update Western Pension & Benefits Council, San Francisco Chapter Meeting

February 17, 2022

At the February 17, 2022, Chapter meeting, **Craig P. Hoffman** provided a comprehensive legislative update regarding the retirement landscape. Craig is an Attorney/Senior Consultant with Nova 401(k) Associates in Houston, Texas. For over 35 years, Craig's practice has focused exclusively on federal tax and ERISA matters relating to the design, implementation, and operation of tax-qualified retirement plans. He previously served as Counsel to Trucker Huss, APC ("Trucker Huss"), an employee benefits boutique law firm in San Francisco, California. Before joining Trucker Huss, Craig served 10 years as General Counsel for the American Retirement Association, ("ARA"), a national organization of over 20,000 members who provide actuarial, consulting, administrative, legal, investment and other professional services for qualified retirement plans and tax-sheltered annuities. Craig had previously served ARA as President, a member of the Board of Directors, Co-Chair of the Government Affairs Committee and Co-Chair of the Political Action Committee. Prior to joining ARA, Craig served for over 19 years as General Counsel to the Relius division of SunGard, which is now part of Fidelity National Information Services, Inc. ("FIS").

Craig focused the discussion on bipartisan bills currently pending in Congress, including the Securing a Strong Retirement Act of 2021 (SECURE 2.0), the Retirement Security and Savings Act of 2021 ("Portman-Cardin"), the Disaster Retirement Savings Act of 2021; and the Enhancing Emergency Retirement Savings Act of 2021. The following are important provisions that Craig highlighted for each bill:

SECURE 2.0:

- This bill requires employers that establish new defined contribution plans to automatically enroll their employees when eligible. The minimum contribution level is three percent of the employee's pay. This would increase annually by one percent up to at least 10 percent but not over 15 percent. Employees can opt out or elect a different contribution percentage.
- This bill increases the annual catch-up contribution amount to \$10,000 for participants aged 62, 63 and 64.
- This bill increases the required minimum distribution ("RMD") age to 73 starting in 2022, to age 74 starting in 2029; and to age 75 starting in 2032.
- This bill creates a "Retirement Savings Lost Fund" (i.e., a national database to find lost retirement accounts).
- The bill allows employers to provide de minimis financial incentives to their employees who enroll in their employer's retirement plan.



LEGISLATIVE UPDATE

2022 Legislative Update, continued

Portman-Cardin:

- This bill increases the annual catch-up contribution amount to \$10,000 for participants over the age of 60.
- This bill increases the existing tax credit from 50% to 75% of qualified start-up costs for start-up employers with up to 25 employees or less.
- This bill increases the RMD age to 75 beginning in 2032.

Disaster Retirement Savings Act of 2021:

- This bill permits the survivors of any federally-declared disaster to access \$100,000 of their retirement funds without paying early-withdrawal penalties or fees.
- Under current law, individuals impacted by natural disasters are subject to up to a 20% withholding and 10% tax penalty if they withdraw from their retirement funds to cover emergency disaster costs.

Enhancing Emergency Retirement Savings Act of 2021:

- This bill permits penalty-free distributions of up to \$1,000, from tax-exempt retirement plans for emergency personal expenses, limited to one distribution in a calendar year. Repayment to plans of such distributions may be paid ratably over a three-year period.

The event was held remotely. Prior to Craig's presentation, attendees had an informal networking session. A special thanks to Gallagher for sponsoring this presentation.



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Program Review: Investing in Women and an Inclusive Workplace

March 30, 2022

At the March 30, 2022, Chapter meeting, a distinguished panel discussed the importance of a diverse and inclusive workforce. As employers have begun to recognize the importance of fostering a diverse and inclusive workforce, human resources ("HR") professionals have been tasked with generating ideas to recruit and increase retention of a diverse and inclusive workforce.

The event was extremely interactive and included many questions and comments from attendees that dealt with issues affecting employers, employees and HR professionals. The program featured a panel discussion with two HR professionals: **Kay Prescher, Director, Total Rewards, Webcor**; and **Stephanie Wemusa, Director, Diversity, Equity and Inclusion, Mindbody**. The panel was moderated by **Virginia Krieger-Sutton of Johnson & Dugan**.

The two panelists shared insights and perspectives on a number of topics including:

- The changes each of their company's has made to recruit new employees and cultivate leaders in today's tight labor market and multi-generational workforce.
- The ways in which employee resource groups ("ERGs") and employee affinity groups ("EAGs") have been able to foster a more engaged workforce and improve retention of employees. Also, the ways in which ERGs/EAGs have been able to provide pathways to leadership and create new business opportunities.
- How the panelists have been able to work with leadership to create and embrace changes designed to promote an inclusive culture.
- Practical approaches to implementing a new diversity/inclusion mission statement and executing such mission statement. Specifically, approaches on how to convince management/leadership on how to execute the company's diversity/inclusion mission statement.
- The manner in which their company has measured success with respect to diversity and inclusion.

After the panel discussion concluded, attendees were provided the opportunity to ask Kay and Stephanie various questions regarding how to promote a more inclusive and diverse workforce in their own companies.

The event was held remotely.

A special thanks to our sponsors of this event.



Upcoming Chapter Events



Join us for a Brown Bag lunchtime webinar!

**Wednesday, May 4, 2022
12:00 p.m. to 1:00 p.m.**

Topic:

Changes to Your Annual Employee Benefit Plan Audits - What You Need to Know

Speakers:

**Jasmine Baker
WithumSmith+Brown, PC | Partner**



May Chapter Meeting

**Thursday, May 19, 2022
11:00 a.m. to 12:00 p.m.**

Topic:

Data Management - Cyber Insurance 101

Speakers:

**Francis Tam
Moss Adams LLP | Partner**

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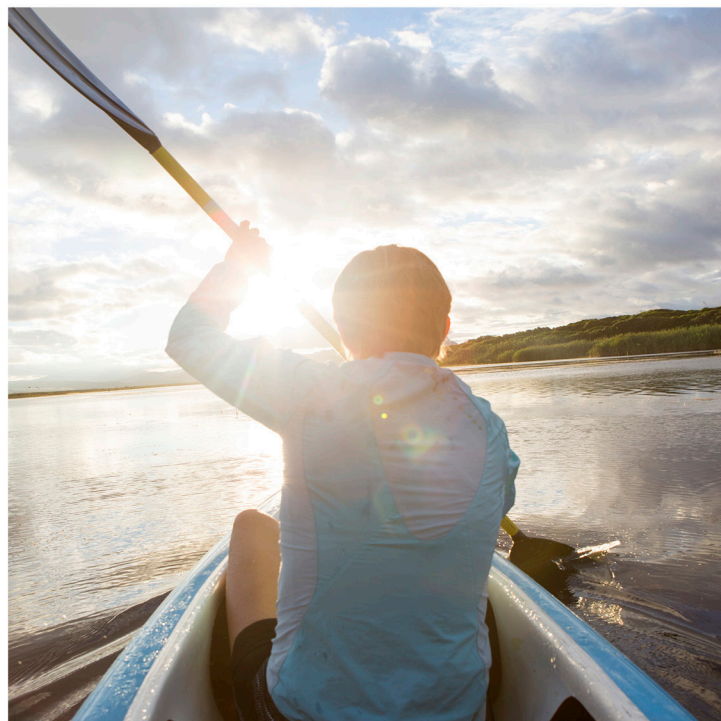
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Member Profile: Charity Hall

Company: T. Rowe Price

Title: Consultant Relations Associate

Education: MA in Executive Leadership, Liberty University; BS in Business Administration, Accounting, CSU East Bay; BA in Music, Patten University

Years in the industry: 6

Please tell us about your first “real” job: As a teenager I worked in the office of my local church and gained experience as a financial assistant helping with the day-to-day operations while also learning tax scenarios specific to not-for-profit religious institutions. This taught me the value of volunteer experience and piqued my interest into the world of accounting and finance. The rest, as they say, is history!



BUSINESS BACKGROUND

Nature of your work: At T. Rowe Price, I work within the distribution team where we manage relationships with many of the largest institutions in the U.S. and around the world, e.g., corporate retirement plans, public pension funds, endowments, and foundations. These institutions often enlist the service of an institutional investment consultant to assist them with their fiduciary duties, which is where the consultant relations team comes into play. I strategically partner with consultants in our sales, client service, investment management, and marketing efforts to offer the most thoughtful investment solutions to our mutual clients.

How you got into the field: My launch and interest into this space stemmed from my early experiences working in the not-for-profit arena and recognizing the importance of strong financial planning for organizations as the foundation to making positive and lasting impact in the communities they serve. I landed at T. Rowe Price after working as an auditor in the employee benefit plan space for three years. I recognized the impact we were making and the importance of an employee benefits package on quality of life and retirement security, but I knew there was room for me to make a larger impact. T. Rowe Price was attractive to me given its strong brand and mission of putting clients first, so I knew they would be a strong cultural fit for me personally. Being newer in my profession, it was also important to me to choose a firm with robust training programs, a wide breadth of career paths for me to explore, and room for upward potential. What gets me out of bed in the morning is knowing that I’m making a positive impact on the world, and I’ve found that T. Rowe Price has been an excellent place for me to learn, grow, and transform my passions into a meaningful career!

What you like about the field: One reason I love this field is the continued need for learning and innovation. We keep our finger on the pulse to learn what’s important to our clients as fiduciaries and their participants. I love being part of the team creating lasting solutions that will serve our clients not only in the present, but also in the future as we find innovative ways to create investment and retirement security for generations to come. For example, younger generations are putting a greater emphasis on environmental, social and governance (ESG) investing and I’m excited about what the future will hold in terms of impact investing and sharing how we’re integrating these values into our investment strategies.

PERSONAL

Ways you spend free time: I enjoy spending time outdoors, singing and playing music, getting brunch or coffee with friends and family, exploring the latest wellness or biohacking discovery and reading a good book.



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Member Profile: Charity Hall, continued

Guiding philosophy: Work Hard, Be Kind, Stay Curious and Trust Your Gut... always believe something amazing is right around the corner, even on the hard days!

Favorite charities: Girls Who Code & Girls Who Invest. I'm passionate about empowering young women to discover and pursue careers and futures they otherwise wouldn't have known existed without these organizations raising awareness and paving pathways for involvement.

Last books read: "Think Again" by Adam Grant & "Pay Up" by Reshma Saujani.

Restaurant recommendations: I love supporting local coffee shops and restaurants! Two of my most recent favorites have been Lever Coffee in Alamo and States Coffee & Bread in the East Bay.

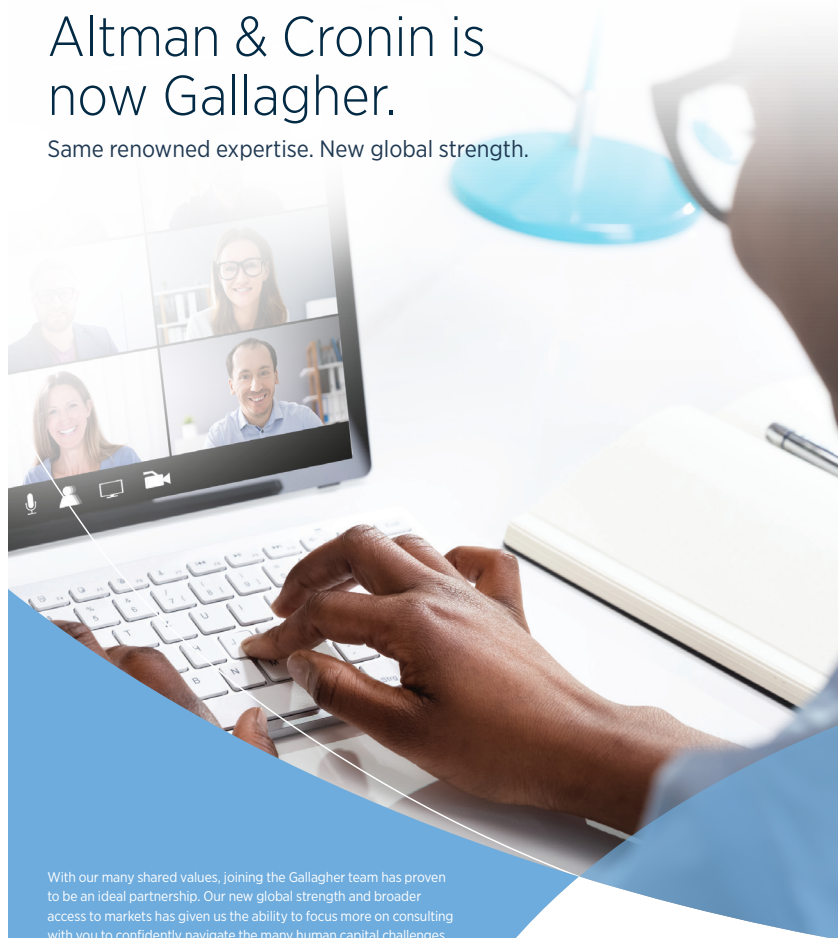
What will you do when you retire: Does one ever fully retire or just redirect energy in a new space? Retirement is a long way out for me, but my hope would be to travel the world and pursue volunteer and mentorship opportunities in the social impact space that fulltime work often inhibits.

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Qualified Retirement Updates, continued

by federally declared disasters under Internal Revenue Code (Code) section 7508A was clarified by the amendment of the definition of a disaster area in Code section 7508A(d)(3) to mean “an area in which a major disaster for which the President provides financial assistance under section 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5174) occurs.”

Covered Compensation Tables: In Revenue Ruling (Rev. Rul.) 2022-2, the Internal Revenue Service (“IRS”) provided tables of covered compensation under Code section 401(l)(5)(E) and the regulations thereunder for the 2022 plan year.

Required Amendments List: In Notice 2021-64, the IRS issued the 2021 Required Amendments List (2021 RA List) applicable to individually designed Code section 401(a) plans and individually designed Code section 403(b) plans. The 2021 RA List states that if an eligible multiemployer plan receiving special financial assistance was previously amended to suspend benefits pursuant to Code section 432(e)(9) or Section 4245(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), or had suspended benefits operationally under Code section 418E(a) without adopting a plan amendment, the plan must be amended to reinstate those suspended benefits, effective as of the month in which the special financial assistance is paid to the plan, for individuals who are participants or beneficiaries as of that month, as required by Code section 432(k)(2)(A)(i). Also, an eligible multiemployer plan that receives special financial assistance must be amended to provide make-up payments to individuals who are participants or beneficiaries on, and who have commenced benefits by, the date the special financial assistance is paid to the plan, as required by Code section 432(k)(2)(A)(ii).

IRS Guidance on Determination of Substantially Equal Periodic Payments: In Notice 2022-6, the IRS provided updated guidance on whether a series of payments from an individual account plan or IRA is considered a series of substantially equal periodic payments within the meaning of Code section 72(t)(2)(A)(iv) to constitute an exception to the Code section 72(t) 10% additional tax for payments made before the payee attains age 59½. The updated guidance takes into account the final regulations under Code section 401(a)(9) issued in 2020 that provided for new life expectancy tables for determining required minimum distributions that apply for distribution calendar years beginning on or after January 1, 2022. The notice’s guidance replaces the guidance in Rev. Rul. 2002-62 and Notice 2004-15 for any series of payments commencing on or after January 1, 2023, and may be used for a series of payments commencing in 2022. For a series of payments commencing in a year prior to 2023 using the required minimum distribution method for determining a series of substantially equal periodic payments, substitution of the new Single Life Table, Joint and Last Survivor Table or Uniform Lifetime Table for the corresponding table that was used under Rev. Rul. 2002-62 will not be treated as a modification within the meaning of Code section 72(t)(4) or section 72(q)(3).

Proposed Required Minimum Distribution (RMD) Regulations: On February 24, 2022, the IRS issued proposed regulations relating to the RMD requirements applicable to Code section 401(a) plans (e.g., 401(k) plans), section 457(b) plans, section 403(b) annuity contracts and IRAs. The proposed regulations detail and clarify the changes to the RMD rules made by the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), and provide guidance and revisions to pre-SECURE RMD rules that remain applicable.

With regard to the SECURE Act’s new “eligible designated beneficiary” provisions, the proposed regulations:

- Provide that 21 is the age of majority for purposes of determining whether a child is or ceases to be an eligible designated beneficiary (although defined benefit plans that have used the prior definition of age of majority may continue to do so).

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Qualified Retirement Updates, continued

- For purposes of determining whether a designated beneficiary is “disabled” to be an eligible designated beneficiary, while continuing to refer to the Code section 72(m)(7) standard of disability based on whether an individual is unable to engage in substantial gainful activity, provide that for beneficiaries younger than age 18 a comparable standard that requires the beneficiary to have a medically determinable physical or mental impairment that results in marked and severe functional limitations, and that can be expected to result in death or to be of long-continued and indefinite duration, may be used. Also, a Social Security Administration determination of disability will serve as a safe harbor disability determination. In all events, the determination of whether a beneficiary is disabled is made as of the date of the employee’s death.
- Set out documentation requirements for disabled or chronically ill status.
- Provide that if an employee has more than one designated beneficiary, one of whom is not an eligible designated beneficiary, the employee generally is treated as not having an eligible designated beneficiary, unless one of two exceptions applies.
- Clarify that whether a designated beneficiary is not more than 10 years younger than the employee is determined based on the dates of birth of the employee and the beneficiary (not calendar years).
- Provide if the surviving spouse is waiting to begin distributions until the year in which the employee would have attained age 72 and the surviving spouse dies before the beginning of that year, then the determination of whether the surviving spouse’s designated beneficiary is an eligible designated beneficiary is made by substituting the surviving spouse for the employee (including for purposes of establishing the date as of which that determination is made).

In addition, the proposed regulations:

- Provide that if an employee dies after the required beginning date, distributions to the employee’s beneficiary for calendar years after the calendar year in which the employee died must satisfy both the requirement that annual required distributions be made and the requirement that benefits be fully distributed within 10 years of the employee’s death or another applicable event.
- Revise provisions of the current RMD regulations that apply when a trust is a beneficiary or there are multiple beneficiaries.
- Provide that if an employee is a participant in more than one plan, the plans in which the employee participates are not permitted to be aggregated for purposes of testing whether the RMD requirements are met.
- Include rules for determining the applicable denominator for calculating RMD amounts.
- List the circumstances in which full distribution from other than defined benefit plans is required.
- With respect to defined benefit plans:
 - Reflect that the required actuarial increase under Code section 401(a)(9)(C)(iii) for defined benefit plan employees whose RMD is age 72 but who did not receive any benefits under the plan after age 70½ applies only to employees who are not 5-percent owners.
 - Describe the interaction of benefit restrictions under Code section 436(d) and the RMD rules.



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Qualified Retirement Updates, continued

- Include new rules applicable to annuity contracts from which distributions are to be made.
- Update the rollover provisions to reflect statutory changes made after the current regulations were adopted.
- Amend the regulations under Code section 4974 (relating to excise taxes on certain accumulations in plans) to conform to the SECURE Act changes and provide for two situations in which an automatic waiver of the excise tax applies.

The rules are proposed to apply for purposes of determining RMDs for calendar years beginning on or after January 1, 2022. For the 2021 distribution calendar year, taxpayers must apply the existing regulations, taking into account a reasonable, good faith interpretation of the amendments made by applicable provisions of the SECURE Act. Compliance with the proposed regulations will satisfy that requirement.

Updated Procedures for Determination Letter Requests Plans: In Revenue Procedure 2022-4, the IRS updated its explanation of how it provides advice to taxpayers on issues under the jurisdiction of the Tax Exempt and Government Entities Division, Employee Plans Rulings and Agreements Office (Employee Plans Rulings and Agreements), and set out updated procedures for requesting such advice, including for submitting determination letter requests.

2022 Cumulative List for Pre-approved Section 403(b) Plans: IRS Notice 2022-8 sets forth the 2022 Cumulative List of Changes in Section 403(b) Requirements for Section 403(b) Pre-approved Plans (2022 Cumulative List). The 2022 Cumulative List identifies changes in the requirements of Code section 403(b) that will be taken into account by the IRS with respect to a plan document submitted to the IRS for the second remedial amendment cycle (Cycle 2), which began on July 1, 2020, and that were not taken into account during the first remedial amendment cycle. Section 403(b) plans may be submitted for approval during the Cycle 2 on-cycle submission period, which begins May 2, 2022, and ends May 1, 2023.

Department of Labor (DOL) Supplemental Statement on Private Equity in Defined Contribution Plan Designated Investment Alternatives: On December 21, 2021, the DOL issued a statement supplementing its June 30, 2020, information letter regarding the inclusion of private equity investments in the menu of designated investment alternatives made available in defined contribution plans. While the statement reaffirmed the information letter's statement that a decision to include private equity investments could be appropriate in certain circumstances and would be subject to ERISA fiduciary obligations, it expressed the DOL's agreement with some responders to the information letter that the letter's recitation of representations by its requester regarding the claimed benefits of private equity investments reflected the perspective of the private equity industry and were not balanced with counter-arguments and research data from independent sources. The statement also clarified that because the information letter responded to concerns raised by the requesters about plan fiduciaries who have experience in evaluating private equity investments in a defined benefit plan, plan-level fiduciaries of small, individual account plans are not likely suited to evaluate the use of private equity investments in designated investment alternatives in such plans, except in a minority of situations.

DOL Compliance Assistance on 401(k) Plan Investments in Cryptocurrency: In Compliance Assistance Release No. 2022-01, issued on March 10, 2022, the DOL cautioned plan fiduciaries to exercise extreme care before they consider adding a cryptocurrency option to a 401(k) plan's investment menu for plan participants. In the release, the DOL expressed its serious concerns, based on the speculative and volatile

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Qualified Retirement Updates, continued

nature of cryptocurrency investments, the challenges to participants in making cryptocurrency investments, custodial, recordkeeping, valuation and regulatory uncertainties, about the prudence of a fiduciary's decision to expose a 401(k) plan's participants to direct investments in cryptocurrencies or related products. The release stated that the DOL expects to conduct an investigative program aimed at plans that offer participant investments in cryptocurrencies and related products, and to take appropriate action to protect the interests of plan participants and beneficiaries with respect to these investments; plan fiduciaries responsible for overseeing investment options or allowing such investments through brokerage windows should expect to be questioned about how they can square their actions with their fiduciaries duties in the selection and monitoring of plan investment options.

Pension Benefit Guaranty Corporation (PBGC) Developments: The PBGC has issued the ERISA section 4044 mortality table for 2022 valuation dates to determine the present value of annuities in involuntary terminations and distress terminations of single-employer plans as well as the ERISA section 4050 mortality table for 2022 valuation dates to be used as part of the "missing participant annuity assumptions" as discussed in that section.

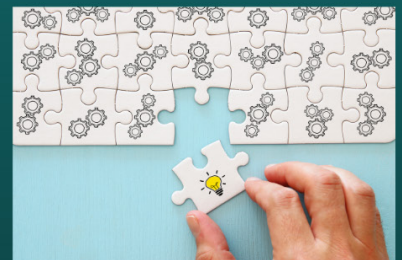
On December 3, 2021, the PBGC amended its regulation on allocation of assets in single-employer plans by substituting a new table for determining expected retirement ages for participants in pension plans undergoing distress or involuntary termination with valuation dates falling in 2022.

On January 14, 2022, the PBGC issued its inflation-adjusted maximum penalties under ERISA sections 4071 (for failure to provide certain notices or other material information) and 4302 (for failure to provide certain multiemployer plan notices). Effective as of January 14, 2022, the section 4071 penalty is \$2,400 (up from \$2,259) and the section 4302 penalty is \$320 (up from \$301).



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San Francisco Enacts a Groundbreaking Ordinance for Domestic Workers

On January 13, 2022, San Francisco Mayor London N. Breed signed into law the Domestic Workers' Equal Access to Paid Sick Leave Ordinance (the "2022 Ordinance"), which is the nation's first-of-its-kind law that requires employers to provide paid sick leave ("PSL") to certain domestic workers (explained below). Unlike the traditional PSL, domestic workers will be able to accrue PSL even if they work for more than one employer.

Background

Of the more than 2 million domestic workers in the United States, approximately 10,000 of such individuals perform various services in employers' homes, such as cooking, cleaning, caring for children, older adults and people with disabilities, and other services. Domestic workers are generally paid low wages and are unlikely to receive health benefits or paid time off from employers and are at high risk of wage theft and other violations of worker protections due to long-standing "deep historic, economic and social roots in racism and sexism." In some cases, domestic workers are fearful of losing their jobs, or worse, being deported by speaking out about violations of worker protections due to their immigration status.

With the COVID-19 pandemic, domestic workers are at a heightened risk of contracting COVID-19 because they typically work indoors, often in close proximity to their employers and their families, which increases the exposure risk. Domestic workers are generally not covered by the Occupational Safety and Health Act or its California equivalent and are unlikely to receive personal protective equipment or other COVID-19 safety measures.

Even though San Francisco passed the nation's first Paid Sick Leave Ordinance in 2006, there was no infrastructure or a centralized system that would have assisted small employers with the burdensome task of tracking paid leave for domestic workers. The 2022 Ordinance will allow domestic workers to earn and consolidate PSL benefits from several employers. Even if domestic workers transfer from one hiring entity (explained below) to another, previously accrued PSL will be portable, as such accrual will be tracked through a centralized PSL system.

The 2022 Ordinance defines "domestic worker" as an individual who is employed by or contracted with a "hiring entity" to provide labor or services in a residence: (1) caring for a child; (2) serving as a companion or providing other non-medical care or services for a sick, convalescing, disabled, or senior persons; or (3) cleaning, cooking, providing food or butler service, gardening, personal organizing, or performing other in-home personal or domestic service. The 2022 Ordinance defines "hiring entity" as any person, as defined in Section 18 of the California Labor Code, including corporate officers or executives, who directly or indirectly or through an agent or any other person, including through the services of a temporary services or staffing agency, employs, contracts with, or hires a domestic worker.

How the 2022 Ordinance Works

Under the 2022 Ordinance, a domestic worker will accrue a right to at least one hour of pay, at the domestic worker's regular rate of pay, for every 30 hours of work for a hiring entity performed on or after February 12, 2023. Both the domestic worker and the hiring entity are required to report the number of hours of work and net pay rate to the centralized PSL system. Based on the information received from the domestic worker and hiring entity, the centralized PSL system will calculate the domestic worker's right to PSL funds from a hiring authority.

The right to PSL funds will accrue in hour-unit increments. However, the hiring entity will not transfer the PSL funds to the domestic worker until the domestic worker requests the PSL funds. The hiring entity will be responsible for any tax withholding and reporting obligations for such contributions at the time PSL funds are transferred to the domestic worker.



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Depending on the size of the hiring entity, the cap on how many PSL hours a domestic worker can accrue will differ. Specifically, if a hiring entity is a “small employer” under Administrative Code Section 12W.2(f) (i.e., fewer than 10 employees), a hiring entity may cap a domestic worker’s PSL accrual at 40 hours. On the other hand, a hiring entity with 10 or more employees may cap a domestic worker’s PSL accrual at 72 hours. The 2022 Ordinance allows accrued PSL benefits to be carried over from year to year, regardless of calendar or fiscal year.

What Happens if a Hiring Entity Violates the 2022 Ordinance?

The Office of Labor Standards Enforcement (the “Agency”) is authorized to implement and enforce the 2022 Ordinance. If the Agency finds that a violation has occurred following an investigation, the Agency may order any appropriate relief, including but not limited to the reinstatement of a domestic worker, backpay, and payment of an additional sum as an administrative penalty to each employee or person whose rights under the 2022 Ordinance were violated. If any PSL contributions were unlawfully withheld, the greater of (i) the dollar amount of such contributions multiplied by three, or (ii) \$250, will be included in the administrative penalty paid to a domestic worker. Additionally, the Agency may order an additional sum as an administrative penalty of \$1,000 for the hiring entity’s first violation, \$5,000 for the second violation, and \$10,000 for the third and subsequent violations.

The Tri-Agencies’ New Guidance on COVID-19 Over-the-Counter Tests

On January 10, 2022, the Departments of Labor, Health and Human Services (“HHS”) and the Treasury (collectively, the “Departments”) issued a jointly prepared Frequently Asked Questions (the “New Guidance”) regarding implementation of the Families First Coronavirus Response Act (the “FFCRA”) and the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) with respect to health plan coverage requirements for over-the-counter at-home COVID-19 tests.

Background

On March 18, 2020, the FFCRA was enacted to require group health plans and health insurance issuers, including grandfathered health plans, to provide diagnosis of COVID-19 without imposing any cost-sharing requirements (such as deductible, copayments and coinsurance), pre-authorization or other medical management requirements. On March 27, 2020, the CARES Act was enacted to amend the FFCRA to expand the range of diagnostic items and services that plans and issuers must cover without cost-sharing requirements.

In June 2020, the Departments issued guidance, stating that plans and issuers are required under the FFCRA to cover at-home COVID-19 testing when the test is ordered by an attending health care provider who has determined that the test is medically appropriate based on current accepted standards of medical practice. Since then, the Food and Drug Administration authorized additional at-home testing kits by prescription or over-the-counter (“OTC”) at pharmacies and retail stores.

On December 2, 2021, President Biden announced that the Departments would issue guidance on who will be able to seek reimbursement for OTC COVID-19 testing kits from their plan or issuer.

A Summary of the New Guidance from the Departments

Plans and issuers must provide coverage, without cost-sharing requirements or pre-authorization, of OTC COVID-19 tests without an order by a health care provider that were purchased on or after January 15, 2022, and during the public health emergency. At the time this article was written, the U.S. was still in the midst of the

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public health emergency. The public health emergency will terminate upon HHS's 60 days' notice. While coverage before January 15, 2022, is allowed, it is not mandatory.

While the FFCRA does not require a plan or issuer to provide "direct coverage" (i.e., reimbursing sellers of OTC COVID-19 tests directly), a plan or issuer can require a participant, beneficiary or enrollee who purchases an OTC COVID-19 test to submit a claim for reimbursement to the plan or issuer. However, the Departments' preference is that a plan or issuer provide direct coverage, so that a participant, beneficiary or enrollee does not have to incur upfront out-of-pocket expenses prior to seeking reimbursement.

A plan or issuer providing direct coverage of OTC COVID-19 tests cannot limit coverage to only tests that are provided through preferred pharmacies or certain retailers. However, a plan or issuer is allowed to limit reimbursement amounts to non-preferred pharmacies or certain retailers for direct coverage of OTC COVID-19 by the lesser of the actual price of OTC COVID-19 tests or \$12. Plans and issuers can elect to provide a more generous reimbursement amount up to the actual price of the test. To clarify, this limitation is allowed only when there is direct coverage, where a participant, beneficiary or enrollee is not involved in the reimbursement process. The Departments emphasize that when a plan or issuer is providing OTC COVID-19 tests its direct program, it must ensure that participants, beneficiaries and enrollees have adequate access to OTC COVID-19 tests through an adequate number of retail locations, whether in-person or online locations. This permissible limitation applies only to OTC COVID-19 tests, not other COVID-19 tests that are prescribed by health care providers.

Moreover, a plan or issuer is allowed to restrict the number or frequency of OTC COVID-19 tests covered without cost sharing under a plan or coverage. Specifically, a plan or issuer can set the limit to at least eight individual tests per 30-day period. The Departments are clear in the New Guidance that this limitation applies to an individual, not a household. In addition, a plan or issuer cannot limit the cap on the number of tests over a shorter period of time (for example, limiting individuals to four tests per a 15-day period. Of course, plans and issuers can set the cap at a higher number.

Impact of the New Guidance on Previous Guidance

The Departments emphasizes that the New Guidance will not affect two items contained in previously issued guidance. First, the New Guidance will not affect prior guidance requiring coverage of COVID-19 test ordered by an attending health care provider. Second, the New Guidance will not have an impact on previous guidance addressing coverage for purposes not primarily intended for individualized diagnosis or treatment of COVID-19, including the guidance that states that plans and issuers are not required to provide coverage of testing (including an OTC COVID-19 test) that is for employment purposes.

U.S. Department of Labor's Temporary Enforcement Policy on Disclosures

The Consolidated Appropriations Act ("CAA") amended section 408(b)(2) of the Employee Retirement Income Security Act ("ERISA") to require certain service providers to group health plans to disclose specified information to a responsible plan fiduciary about the direct and indirect compensation that the service provider expects to receive in connection with its services to the plan. This new disclosure requirement applies to any persons who provide "brokerage services" or "consulting" to ERISA group health plans who reasonably expect to receive at least \$1,000 in direct and indirect compensation for providing those services. According to the U.S. Department of Labor ("DOL"), such required disclosures are designed to provide plan fiduciaries with sufficient information to assess the reasonableness of the compensation that the above-mentioned service providers receive as



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indirect compensation from sources other than the plan or the plan sponsor. This amendment went into effect on December 27, 2021. While the DOL stated that it is not issuing regulatory guidance at least for now, the DOL indicated that it will enforce the new disclosure requirements “using a good faith reasonable interpretation of the law.”

On December 30, 2021, the DOL issued Field Assistance Bulletin No. 2021-03 in an effort to answer many questions that service providers to group health plans have with respect to the new disclosure requirements. Below is a brief summary of DOL’s responses to several commonly asked questions.

Can service providers rely on DOL guidance developed for service providers of pension plans?

Even though certain provisions in ERISA section 408(b)(2)(B) are not identical to the pension plan disclosure provisions, the DOL takes the view that there are similar disclosure requirements for ERISA pension plans available in the Notices published in connection with DOL’s 2012 final rule relating to pension plan disclosures. While group health plan compensation arrangement may differ from that of pension plans, the DOL states that much of the terminology and disclosure requirements are identical, such that DOL’s regulations on pension plans disclosure requirements may be useful when analyzing the amended ERISA section 408(b)(2) with respect to group health plans.

Does ERISA section 408(b)(2)(B) cover both insured and self-insured group health plans?

ERISA section 408(b)(2)(B) covers both insured and self-insured group health plans. Under ERISA section 733(A) a “group health plan” is “an employee welfare benefit plan to the extent that the plan provides medical care ... to employees or their dependents ... directly or through insurance, reimbursement, or otherwise.” DOL clarifies that this term includes both insured and self-insured group health plans, including grandfathered health plans. However, since ERISA section 733(a)(1) expressly excludes qualified small employer health reimbursement arrangements from the definition of group health plan, such arrangements are not subject to the amended ERISA section 408(b)(2)(B).

If a plan covers only limited scope dental and vision benefits, is it a “covered plan”?

If a plan that provides only “excepted benefits,” such as limited scope dental and vision benefits, the plan is still a “covered plan” under the meaning of ERISA section 733(c)(2). ERISA section 408(b)(2)(B) states that covered brokerage services include those rendered to a “covered plan with respect to the selection of insurance products (including vision and dental)” and that covered consulting services include those “related to the development or implementation of plan design, insurance product selection (including vision and dental).”

Does ERISA section 408(b)(2)(B) only apply to service providers who are licensed or market themselves as “brokers” or “consultants”?

“Covered service providers” are not only limited to brokers and consultants who are licensed as or who market themselves as brokers or consultant. ERISA section 408(b)(2) does not actually define brokers or consultants but describes a list of services brokers or consultants may provide. Specifically, “consulting services” includes services related to the development or implementation of plan design, insurance or insurance product selection, recordkeeping, medical management, benefits administration, etc. Accordingly, the DOL will examine whether a service provider is a broker or consultant, based on the type of services such broker or consultant provides, rather than how they classify themselves.

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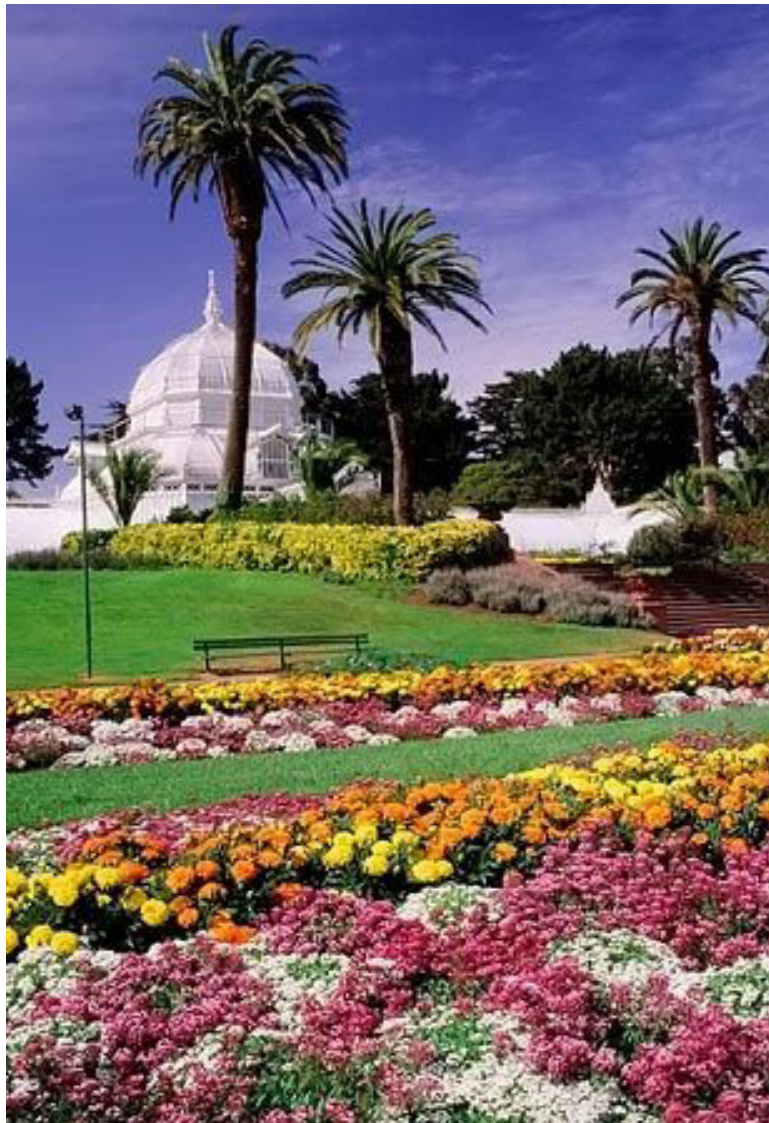
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How would I know whether my service contract or arrangement is subject to the new disclosure requirements?

The DOL states that contracts entered into before December 27, 2021, are not subject to the new disclosure requirements. The DOL will consider when a contract was executed, rather than when the contract will go into effect. However, if a contract that was executed before December 27, 2021, needs to be renewed or extended, or a new contract is executed on or after December 27, 2021, then the new disclosure requirements will apply to such contract.

Are small plans exempt from the new disclosure requirements?

ERISA section 408(b)(2) applies to all group health plans regardless of their size. Even though a small plan (covering fewer than 100 participants) is exempt from filing a Form 5500 annual report, a small group health plan is nonetheless subject to the new disclosure requirements.



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