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WHAT WE'RE SEEING: HOT TOPICS IN EMPLOYEE BENEFITS

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TODAY'S PRESENTERS

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AGENDA

- DOL Proposed Rules And Enforcement Activities: ESG And Proxy Voting
  Elizabeth Goldberg
- Multiemployer Plans: Much Ado About Discount Rates
  Mike Gorman
- COVID Conundrum: Dependent Care Spending Account 55% Testing Issues
  Andy Anderson
- Deferring Employee Social Security Taxes In Light Of The Coronavirus Pandemic
  Anna Pomykala
- Plan Sponsor Considerations
  Lisa Barton

DOL PROPOSED RULES AND ENFORCEMENT ACTIVITIES: ESG AND PROXY VOTING

"ESG"

Environmental, Social and (Corporate) Governance factors and considerations

E

Environmental

- Climate Change
- Biodiversity
- Natural Resources
- Carbon Emission
- Air and Water Pollution

S

Social

- Health and Safety
- Labor Standards
- Product Liability
- Privacy and Data Security

G

Governance

- Diversity and Inclusion
- Transparency
- Board Independence
- Ownership and Ethics
- Executive Compensation

ESG PROPOSED REGULATION – BACKGROUND

- Over the last few decades, the US Department of Labor (DOL) has issued a series of guidance documents providing instruction on how fiduciaries can comply with ERISA's fiduciary duties while using ESG factors in the context of investment decisions, proxy voting, and shareholder engagement.
- The guidance has been consistent in affirming that in order to comply with ERISA Section 404, plan fiduciaries must make investment decisions solely in the interest of plan participants, so that decisions cannot be made solely to achieve policy goals.
- But the tone and nuances have varied with the issuing administration, creating a tennis-like regulatory back and forth.
- The key issue?
  - Whether ESG factors are (a) part of the economic consideration of an investment (which is permitted) or (b) collateral to the economic considerations and instead reflect public policy or political objectives (which may violate ERISA's fiduciary duties).

ESG PROPOSED REGULATION – HISTORY

Clinton Administration

Interpretive Bulletin 94-1

- "ETIs" are subject to the same standards as any other investment.
- If an ETI can meet prudence requirements, a fiduciary can elect to invest in an ETI.

Bush Administration

Interpretive Bulletin 2008-01

- "ERISA's plain text does not permit fiduciaries to make investment decisions on the basis of any factor other than the economic interest of the plan."
- ETI could be a tiebreaker in the case of two identical investments.

Obama Administration

Interpretive Bulletins 2015-01 and 2016-01

- ESG may be a proper component of the economic merits of an investment.
- ESG factors are not "inherently suspect or in need of special scrutiny."

Trump Administration

Field Assistance Bulletin 2018-1

- Did not repeal IB 2015-01, but signaled a shift in tone and focus.
- "Fiduciaries must not too readily treat ESG factors as economically relevant to the particular investment."

Executive Order Promoting Energy Infrastructure and Economic Growth

- "It is the policy of the United States to promote private investment in the Nation's energy infrastructure."
- Ordered DOL to review plan investments in the energy sectors.

New Proposed Regulations Amending 29 C.F.R. Section 404a-1

- Adds new standards around reviews of investments, including the use of ESG factors.
- Adds a new section on proxy voting.

ESG PROPOSED REGULATION – SUMMARY

- On June 23, 2020, the DOL issued a Notice of Proposed Rulemaking.
- The proposed rule is titled "Financial Factors in Selecting Plan Investments."
- The DOL described the rule as "codifying a regulatory structure" and "establishing clear regulatory guideposts," and "to confirm that ERISA requires plan fiduciaries to select investments . . . based solely on financial considerations."
- The proposal largely reflects the current administration's skepticism of ESG investing.
  - For example, the regulatory preamble starts with an attack of ESG investing, positing that ESG investing "has engendered important and substantial questions and inconsistencies, with numerous observers identifying a lack of precision and rigor in the ESG investment marketplace."

ESG PROPOSED REGULATION – SUMMARY

Key Elements	• A fiduciary cannot: - Subordinate interests of participants and beneficiaries to "unrelated objectives." - Sacrifice investment return or take on additional risk to promote "goals unrelated" to the financial interests of participants and beneficiaries. • Requires investments and investment courses to be based solely on "pecuniary factors." - Defines "pecuniary factors" as factors that have a material effect on the risk/return of an investment. - "Plan fiduciaries are not permitted to sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits." - Creates a specific duty to compare with "other alternative investments."

ESG PROPOSED REGULATION – OTHER CONSIDERATIONS

Return of the Tiebreaker	• Rekindles ESG factors as a "tiebreaker" for "economically indistinguishable investments" and adds new documentation requirement. - If after completing the comparison to other available alternatives, investments are economically indistinguishable; and - if one of the investments is selected on non-pecuniary factors; - Then "the fiduciary should document specifically why the investments were determined to be indistinguishable and document why the selected investment was chosen."
Impact on DC Plans	• ESG-oriented investment options may be permitted in DC plan lineup - But a fiduciary must use "only objective risk-return criteria." The DOL gives examples of such criteria as: benchmarks, volatility measures, expense ratios, etc. - Also, the fund option must be "prudently selected, well managed, and properly diversified." • But ESG-oriented investment options cannot as part of the QDIA.

BIGGER IMPACT?

- One question is whether the proposed rule could have an impact on the fiduciary standards beyond ESG.
- The proposed rule amended the existing investment duty regulation (29 C.F.R. Section 404a-1).
- For example (amended text in red):
  - (a) In general. Section 404(a)(1)(B) of the Employee Retirement Income Security Act of 1974 as amended (ERISA or the Act) provide, in part, that a fiduciary shall discharge that person's duties with respect to the plan solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.
- For example, the new standard for DC plan investments is not limited to ESG funds:
  - "[I]n selecting and monitoring all investment alternatives for the plan **including** any environmental, social, corporate governance, or similarly oriented investment."
- Some are concerned that the proposal could disrupt existing fiduciary standards and settled jurisprudence.

ESG PROPOSED REGULATION – NEXT STEPS

Comments were due at the end of July

DOL appears eager to finalize the regulation

Ultimate fate likely to depend on election results

- Not a scientific study, but comments appear to be largely critical
- Concerns include:
  - Presumption that ESG factors cannot be pecuniary
  - Requiring comparisons, documentation and tiebreaker tests that will be impossible to satisfy
  - Also, the tests (including obligation to consider alternative investments) are ambiguous
  - Overly restrictive language for QDIAs
  - Concern regarding impact on broader fiduciary standards

PROXY VOTING PROPOSED REGULATION – SUMMARY

- On August 31, 2020, the DOL issued a Notice of Proposed Rulemaking.
- The proposed rule is titled "Fiduciary Duties Regarding Proxy Voting and Shareholder Rights."
- The DOL described the rule as "designed to ensure plan fiduciaries execute their ERISA duties when exercising shareholder rights in an appropriate and cost-efficient manner."
- The DOL also wants to correct the "misunderstanding" that ERISA's fiduciary duties "require fiduciaries to vote all proxies presented to them."
  - "As the amount and types of proxy proposals have increased and the investment landscape has changed, this misunderstanding may lead some plans to expend plan assets unnecessarily to research and vote on proxy proposals not likely to have a material impact on the value of the plan's investment. This misunderstanding also may result in use of plan assets on proxy proposals for purposes that have no connection to increasing the value of the plan's investments."

PROXY VOTING PROPOSED REGULATION – SUMMARY

Key Elements	
Key Elements	• Fiduciaries may only consider "factors that they prudently determine will affect the economic value of the plan's investment. • Fiduciaries are prohibited from voting any proxy unless they determine that the matter has an economic impact on the plan. • The proposal also sets out other requirements for fiduciary proxy voting, including: - Requiring a review of voting policies every two years.

- The proposal could be viewed as reflecting the current administration's skepticism of ESG driven proxy voting.
- If adopted as proposed, the rule is expected to limit the voting of proxies, especially on ESG proposals, because it is expected to be difficult to justify the voting of proxies, especially on ESG issues, given the proposed rule's requirement that proxy voting be economic only.

PROXY VOTING PROPOSED REGULATION – NEXT STEPS

- Comments were due in early September
- As with the ESG rule, DOL appears eager to finalize the rule
- As with the ESG rule, ultimate fate likely to depend on election results

DOL ESG ENFORCEMENT

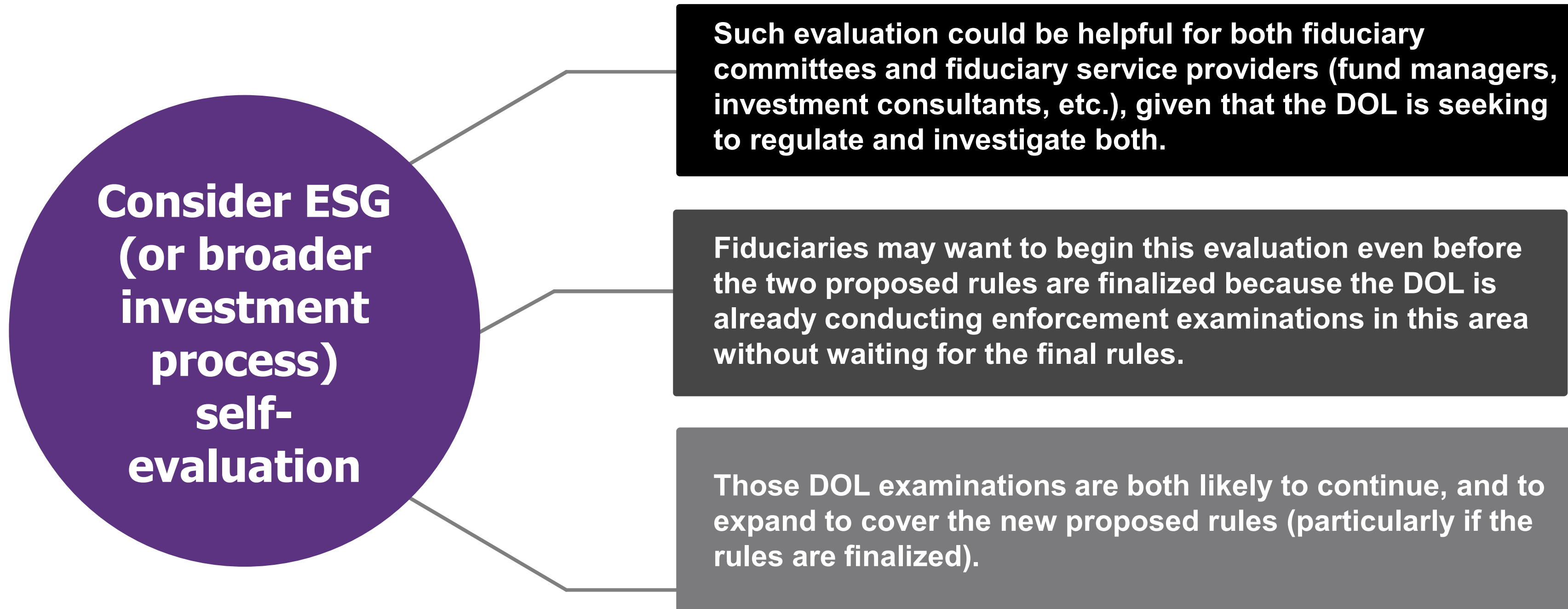
- Simultaneously, the DOL has been conducting enforcement examinations on the use of ESG factors and proxy voting by plan fiduciaries and fiduciary service providers.
  - These investigations are being conducted out of multiple DOL regional offices.
  - The document requests indicate that the DOL is examining whether, and how, fiduciaries are making investment decisions or voting proxies, based on ESG considerations.
- It is not yet clear if the DOL has a true enforcement intent or if this is only part of the regulatory effort.

DOL ESG ENFORCEMENT

Sample Document Requests	
All investment policies or guidelines currently in effect for the Plan, specifically including, but not limited to, any policies or guidelines concerning the use of ESG factors (or any similar factors) in making investment decisions or in selecting investment funds for inclusion in the Plan’s fund lineup, or monitoring the performance of Plan investments or funds.	All documents relating to the fiduciaries' use or consideration of ESG factors (or any similar factors) in connection with any investment decisions made by the Plan, selection of investment funds for inclusion in the Plan’s fund lineup, or monitoring the performance of Plan investments or funds.
Documents sufficient to show the names, addresses, and responsibilities of all persons or entities with responsibility for making investment decisions, or providing investment advisory or consulting services, that take into account ESG factors in connection with the Plan's investments.	Documents sufficient to identify any investment holdings or transactions which were based in whole or part on the consideration of ESG factors (or any similar factors).
Any statements furnished to the participants of the Plan related to the Plan’s or Plan fund’s use of ESG factors (or any similar factors).	Asset listings or portfolio statements for any investment holdings included in the Plan's portfolio in whole or part based on the consideration of ESG factors (or any similar factors).

NEXT STEPS

In light of the DOL's regulatory and enforcement activities around ESG and proxy voting, it may be a good time for plan fiduciaries to evaluate their usage of such factors and their proxy voting practices and/or monitoring—or even a broader evaluation since the proposed rules are not limited to ESG.



MULTIEMPLOYER PLANS: MUCH ADO ABOUT DISCOUNT RATES

WITHDRAWAL LIABILITY RECAP

Employers who contribute to multiemployer pension plans that are not fully funded are liable for their share of the plan's unfunded vested benefits ("UVBs") upon withdrawal.

- An employer withdraws when it experiences a reduction or cessation of its contribution obligation to the plan that satisfies certain criteria.

The trustees of the plan will assess "withdrawal liability" against a withdrawing employer in amount equal to the present value of the UVBs allocable to the withdrawing employer.

Withdrawing employers can challenge the withdrawal liability assessment.

- Request for Review
- Arbitration
- Litigation

ALLOCATING UVBS AND DETERMINING DISCOUNT RATES

- ERISA, as amended, includes a number of methods to allocate UVBs among withdrawing employers and to calculate withdrawal liability.
- The amount of the withdrawal liability depends on the discount rate applied to determine the present value of the allocated UVBs.
- The plan's actuary determines what discount rate is appropriate.
  - The lower the discount rate, the higher the withdrawal liability.

NOW IS THE WINTER OF EMPLOYERS' DISCONTENT (WITH DISCOUNT RATES)

01

Withdrawing employers have recently had some success challenging the use of a lower discount rate for WL purposes than for funding purposes.

02

ERISA 4213(a) addresses the discount rate used for withdrawal liability.

A plan's actuary must use "actuarial assumptions and methods which, ***in the aggregate,*** are **reasonable** (taking in account the experience of the plan and reasonable expectations) and which, in combination, offer the actuary's **best estimate** of anticipated experience under the plan" (emphases added).

03

ERISA 304(c) addresses the discount rate used for plan funding.

A plan's actuary must use "actuarial assumptions and methods, each of which is **reasonable** (taking into account the experience of the plan and reasonable expectations), and which, in combination, offer the actuary's **best estimate** of the anticipated experience under the plan" (emphases added).

THE STORY SO FAR…

Employer was successful:

- *New York Times v. Newspaper and Mail Deliverers' – Publishers' Pension Fund* (S.D.N.Y. Mar. 26, 2018)
- *Sofco Erectors, Inc. v. Trs. of the Ohio Operating Eng'rs Pension Fund* (S.D. Ohio May 19, 2020)

Fund was successful:

- *Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund* (D. NJ July 3, 2018)
- *United Mine Workers of Am. of 1974 Pension Plan v. Energy West Mining Co.* (D.D.C. May 22, 2020)

New York Times v. Newspaper and Mail Deliverers' – Publishers' Pension Fund

1

Prior to *NYT*, no arbitration decision or court ruling directly addressed whether it was impermissible to use a different (i.e. lower) discount rate for withdrawal liability purposes than for funding purposes.

2

In 2018, the SDNY bucked this trend, overturning an arbitrator's decision that it was permissible to use a lower rate for WL purposes.

3

The actuary in this case failed to show that the lower rate was the reasonable best estimate of the plan's anticipated experience.

- If one rate is the actuary's best estimate, it "strains reason" that a lower rate can be accepted as the plan's anticipated experience.

Manhattan Ford Lincoln, Inc. v. UAW Local 259 Pension Fund

1

Later in 2018, the DNJ addressed the same issue.

- Using the lower rate resulted in WL of $2.5MM instead of $0.

2

Plans are not prohibited, as a matter of law, from using different discount rates for WL and funding purposes.

3

The "clear error" standard of review applies to determining whether the arbitrator erred in determining whether the actuary's use of the Segal Blend for withdrawal liability purposes was reasonable.

4

The arbitrator did not clearly err in determining that Manhattan Ford failed to prove that the Segal Blend was not a reasonable discount rate and the actuary's best estimate of anticipated experience.

Sofco Erectors, Inc. v. Trs. of the Ohio Operating Eng'rs Pension Fund

1. On May 19, 2020, the S.D. Ohio addressed this issue.

2. The S.D. Ohio rejected the employer's argument that the Fund is prohibited by law from using different discount rates for withdrawal liability and funding purposes.

3. Unlike in the NY Times case, the Fund's actuary in this case expressly testified that the Segal Blend rate was his best estimate calculation of the anticipated experience of the plan.

4. Nevertheless, based on the Fund's actuary's testimony regarding the higher discount rate used for funding purposes, the court held that the arbitrator erred in allowing the use of the lower rate for withdrawal liability.

United Mine Workers of Am. of 1974 Pension Plan v. Energy West Mining Co.

1. **On May 22, 2020, the D.DC weighed in on this issue.**

2. **The court, like those discussed above, held that applicable law does not prohibit the use of different discount rates for WL and funding.**

3. **The Fund used the PBGC rate (2.71-2.78%) when calculating withdrawal liability, rather than the funding rate (7.5%).**
   - This resulted in WL of more than $115MM, approximately $75MM higher than what it would have been had the funding rate been used.

4. **The court held that the arbitrator did not err in holding that the PBGC rate was reasonable and the actuary's "best estimate."**

THE STORY CONTINUES…

- We anticipate more litigation over this issue, and potentially a circuit split.
  - Thus far, all of the decisions have been at the district court level. But *Sofco* and *UMWA* are on appeal with the 6th and D.C. Circuits, respectively.
- Participating employers will want to get a better understanding of how the multiemployer plan in which they participate calculates withdrawal liability.
  - This is especially true given the uncertain economic climate and the potential for inadvertent partial withdrawals.
  - Employers should understand how the recent case law precedent may impact any potential challenge to a withdrawal liability assessment
- Trustees on multiemployer pension plans that use lower discount rates for withdrawal liability purposes may wish to discuss this practice with the actuary to determine if it creates additional risk for the plan.

COVID CONUNDRUM: DEPENDENT CARE SPENDING ACCOUNT 55% TESTING ISSUES

55% Test Basics

Unusual utilization test—LP average contribution % must be at least 55% of HP average contribution %

HP definition is, generally, retirement plan $125K threshold

Applies across ALL eligible individuals---and results in very small average amounts

Few eligible individuals can actually contribute given restrictions on eligible dependents

Often results in lower limits for HP contributions at annual enrollment

COVID-19 OPPORTUNITIES/ PROBLEMS

- Allows dependent care spending account participants to change their 2020 elections for any reason—or no reason at all
- Practically difficult to incur dependent care expenses due to closed day care centers and cancelled summer day camps

PRACTICAL IMPLICATIONS

Many employers and participants took advantage of permissible COVID-19 changes

Many participants significantly changed (reduced or stopped) contributions for the balance of 2020

Likely that projected 55% tests from early in 2020 are severely impacted

COVID-19 SOLUTIONS

- Rerun 55% test ASAP
- Take what are likely to be immediate corrective actions

PRACTICAL IMPLICATIONS

Reduce or end future HP contributions

May need to treat some HP reimbursements as imputed income before 12.31.2020

Should consider ending opportunity to change elections for balance of 2020 (to prevent 55% testing problem from getting worse)

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DEFERRING EMPLOYEE SOCIAL SECURITY TAXES IN LIGHT OF THE CORONAVIRUS PANDEMIC

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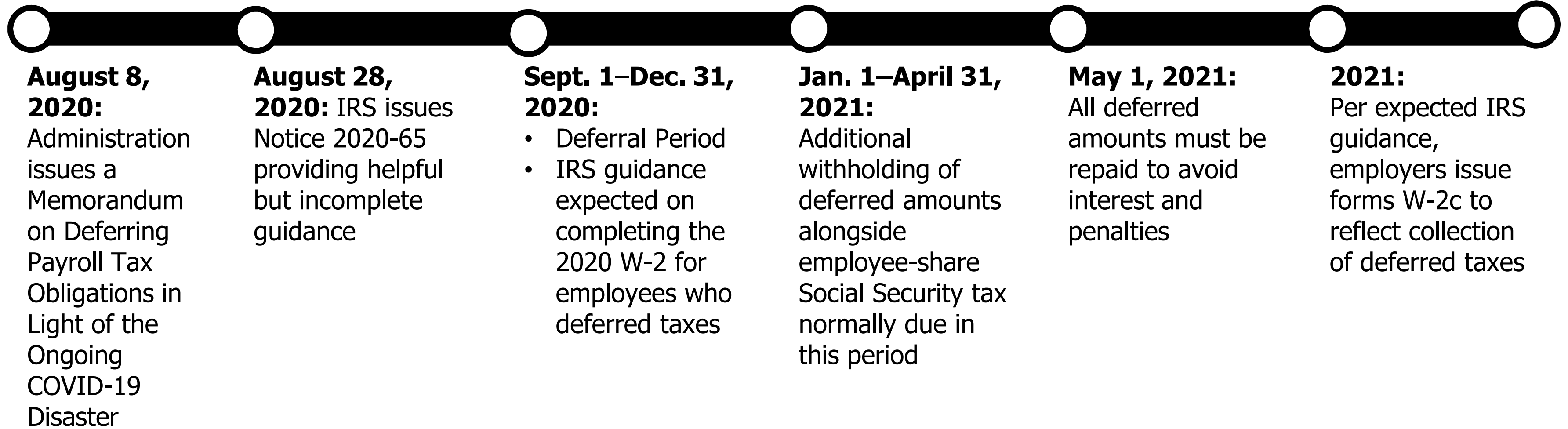
TIMELINE OF PAYROLL TAX DEFERRAL PROGRAM



AFFECTED EMPLOYEES

- Employees whose Social Security wages pre-tax do not exceed $4,000 paid for a biweekly pay period.

- Eligibility is determined on a pay-period-by-pay-period basis.

- The Notice does not address whether and how supplemental wages like bonuses, equity compensation, and other single-day payroll events qualify for deferral.

PARTICIPATION IS THE EMPLOYER'S CHOICE

- IRC Section 7508A allows the Trump administration to authorize employee tax deferral during the COVID-19 pandemic.
- Treas. Reg. § 301.7508A-1(b)(2): when deadlines are delayed pursuant to Section 7508A, Affected Taxpayers are "eligible for postponement," indicating the voluntary nature of the relief program.

Confirmed by:

- The IRS news release for Notice 2020-65: "allows" employers to defer; makes relief "available to employers"
- A spokesperson for the IRS during a September 3, 2020 monthly payroll tax conference call.
- statements by the Treasury Secretary and others.

LEGAL PROVISIONS AFFECTING AN EMPLOYER'S CHOICE TO PARTICIPATE

The Code and regulations impose joint and several liability on employees and employers for employee-share taxes.

Employers can pursue repayment from an employee, but employers will be secondarily liable for uncollected deferred taxes

An employer's payment of an employee's personal tax liabilities will be treated as taxable wages to the employee in the year the employer pays the employee's tax liability.

The Internal Revenue Code prohibits a private cause of action under FICA by employees against their employer once taxes are deposited with the IRS.

BENEFIT AND DOWNSIDE TO EMPLOYEES

Benefit:

Interest-free loan with a term shorter than 4 months at <%0.1

Downside:

Payback requirements in Jan-April of 2021 will result in extra withholding for each pay period, potentially squeezing wages and consuming bonuses

COSTS TO EMPLOYERS

1. Modifying withholding, deposit and payroll reporting systems (and then unwinding these changes in 2021)
2. Secondary liability for deferred taxes of employees no longer employed
3. Costs of issuing Forms W-2c to employees after deferred taxes have been collected
4. Contractual arrangement costs with departing employees to recover deferred taxes after departure, together with enforcement costs

MESSAGING TO EMPLOYEES IS KEY

Employers should clearly message their decision whether or not to participate:

Yes?

- Identify consequences to employees so they can make an informed decision whether to defer taxes

No?

- Communicate key downside – repayment in 2121 – and unlikelihood that Congress will act to forgive deferred taxes

PLAN SPONSOR CONSIDERATIONS

LIFETIME INCOME ILLUSTRATION REQUIREMENTS

- SECURE Act requires defined contribution plans to provide “lifetime income illustrations” to participants
- The Interim Final Rule was published on September 18, 2020 providing for an effective date of September 18, 2021
  - Must be provided to participants at least annually as part of benefit statements
  - Must reflect current value of participant account
  - Must assume that payments will start to be paid immediately
  - Must be expressed as both a lifetime stream of payments for a single and a married participant

DEFINED BENEFIT FUNDING RELIEF

- CARES Act delayed 2020 funding deadlines
- IRS issued guidance on July 31 relating to the delayed funding deadlines
  - Contributions otherwise due in 2020 are due on January 1, 2021
  - Interest will accrue at the plan's effective rate for the period between the original contribution due date and the actual due date
- IRS Guidance clarified related issues
  - No delay for IRS Form 5500 filings
  - Extended contribution deadlines applies to minimum required contributions and any contributions that exceed the minimum funding requirements
  - Penalties will accrue for failure to meet the January 31, 2021 deadline

OTHER RETIREMENT PLAN DEVELOPMENTS

- CARES Act Distributions
  - IRS published Notice 2020-50 providing guidance on distributions and loans
  - Expands definition of “qualified individual”
  - Distributions are not required to be used only for COVID-19 related expenses
  - CARES Act distribution considered a hardship for purposes of nonqualified plan deferral elections
- Loan Offset Regulations
  - IRS issued proposed regulations and FAQs regarding the extension of the 60-day rollover period to roll over a qualified loan offset

QUESTIONS?

Biography

Andy Anderson
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Leader of Morgan Lewis's health and welfare task force, **Andy R. Anderson** is often recognized for his work in counseling clients on employer, individual, and insurer issues created by the Affordable Care Act, and regulatory compliance issues in relation to the Internal Revenue Code, ERISA, COBRA, HIPAA, and Mental Health Parity. Tax-exempt organizations and Fortune 500 companies turn to Andy for handling their benefit plans, and legal review surrounding welfare benefit plans, government self-correction programs, cafeteria plans, and VEBAs.

Biography

Lisa Barton
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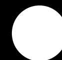
Lisa H. Barton advises clients in designing, drafting, and operating tax-qualified retirement and health and welfare plans, as well as nonqualified deferred compensation and equity compensation plans. She counsels companies on complying with the US Internal Revenue Code, ERISA, COBRA, the Affordable Care Act, and other state and federal laws pertaining to benefit plans and programs. Her clients come from such industries as retail, manufacturing, life sciences, energy, and information technology. Lisa is the Managing Partner of Morgan Lewis's Boston office.



Biography

Liz Goldberg
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Elizabeth S. Goldberg advises clients on ERISA matters with a focus on fiduciary responsibility provisions, prohibited transaction rules and exemptions, and the management of employee benefit plan assets. She negotiates investment-related agreements on behalf of plans and financial services providers; designs, implements, and administers employee benefit plans; and counsels clients on US Department of Labor (DOL) investigations, plan fiduciary governance structures, ERISA reporting and disclosure obligations, ERISA litigation, and general benefit plan compliance considerations. Liz's work experience includes several years at the DOL's Office of the Solicitor.

Biography

Mike Gorman
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Michael Gorman advises multiemployer benefit funds, public and private companies, tax-exempt organizations, and governmental employers on the design, governance, operation, and compliance of qualified and nonqualified retirement plans and welfare benefit plans. Mike also counsels clients on legal issues arising under ERISA, the Internal Revenue Code, the Affordable Care Act, the Multiemployer Pension Protection Act, the Pension Protection Act, the Multiemployer Pension Reform Act, HIPAA, and COBRA. Prior to joining Morgan Lewis, Mike worked at a boutique law firm in Washington, DC, focusing on compliance issues confronting multiemployer plans.

Biography

Anna Pomykala
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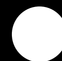
Anna M. Pomykala works with a team of employee benefits lawyers to assist clients in finding creative solutions to their employee benefit–related business challenges. Our clients include small, middle-market, and Fortune 500 companies in the technology, consumer goods, retail, pharmaceutical, healthcare, hospitality, and energy industries. We also represent many financial institutions, startups and tax-exempt organizations, educational institutions, and state and local governments. Prior to joining Morgan Lewis, Anna earned her LL.M. in taxation from New York University School of Law.



Our Global Reach

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Asia Pacific
Europe
Latin America
Middle East
North America

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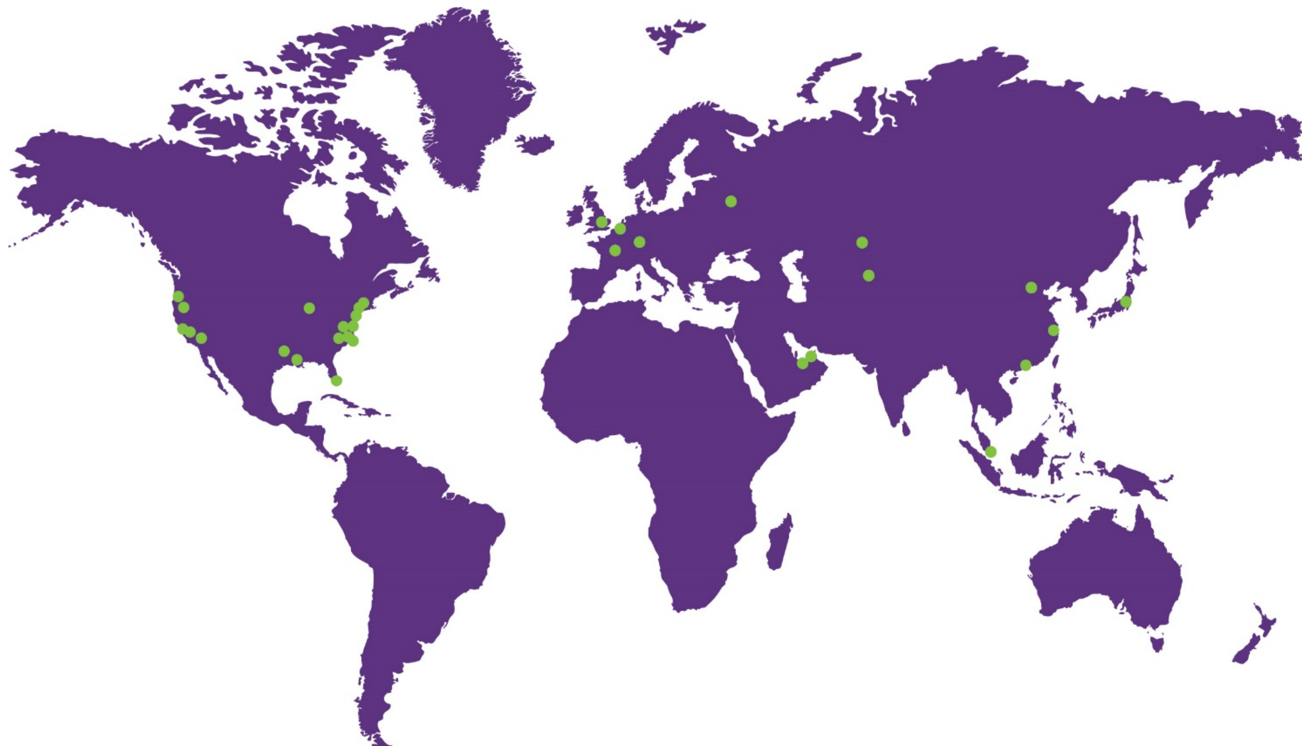

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