

Q1 | 2024

# Happenings On and Off the Hill

Everything you need to know about current regulation, legislation and litigation

At Columbia Threadneedle Investments, we understand how challenging it is for retirement plan advisors and plan sponsors to stay on top of complex legal and regulatory requirements. To save you time and help you meet your fiduciary obligation, we divide defined-contribution updates into three categories — regulation, legislation and litigation — and explain the impact of each event.

## REGULATION

### Cybersecurity: It's a fiduciary issue

**What happened?** Infosys McCamish Systems LLC, a third-party service provider that helps multiple nonqualified plan providers process and update participant transactions, faced a ransomware attack that halted those nonqualified plan platforms on or around November 2, 2023. The attack left tens of thousands of plans essentially paralyzed for more than a month.

**What's the legal guidance?** In 2021, the Department of Labor (DOL) issued three sets of tips and best practices aimed at protecting plan sponsors, fiduciaries, service providers and participants from cybersecurity risks. In doing so, the DOL confirmed: "ERISA requires plan fiduciaries to take appropriate precautions to mitigate these risks."

**What's the fiduciary consideration?** Recent fiduciary breaches serve as an important reminder of the growing cybersecurity risks to retirement plan data. The DOL guidance reminds us that they expect fiduciaries to take steps to mitigate those risks.

Plan fiduciaries — whether on their own or with the assistance of an advisor or consultant — may consider asking any of the plan's service providers with access to participant data (for example, the recordkeeper or third-party administrator) to confirm they have implemented each of the DOL's Cybersecurity Program Best Practices.<sup>1</sup>

### Long-term part-time employees: Coverage rules are live

**What happened?** The long-term part-time (LTPT) rules from SECURE 1.0 kicked in on January 1, 2024, resulting in many part-time employees gaining their first opportunity to make deferrals to 401(k) and 403(b) plans.

**What's the legal guidance?** SECURE 1.0 requires that employees with at least 500 hours of service in three consecutive years be afforded the opportunity to make deferrals beginning in 2024. SECURE 2.0 shortens the service measuring period to two years, effective January 1, 2025. The IRS published a proposed interpretive regulation on November 23, 2023.<sup>2</sup>

**What's the fiduciary consideration?** Sponsors of plans that require more than 500 hours of service for eligibility purposes may review their plan documents with their advisor, consultant, recordkeeper and/or TPA to confirm whether the SECURE 1.0 and 2.0 rules impact their plans. If so, they may confirm with their payroll department or provider that the affected individuals received the opportunity to start plan deferrals.

<sup>1</sup> U.S. Department of Labor. "CYBERSECURITY PROGRAM BEST PRACTICES." April 14, 2021.

<sup>2</sup> Internal Revenue Service. "Long-Term, Part-Time Employee Rules for Cash or Deferred Arrangements Under Section 401(k)." REG-104194-23.

## Fiduciary status: Is the fiduciary umbrella about to expand?

**What happened?** The DOL conducted public hearings related to their latest fiduciary rule proposal on December 12 and 13, 2023. The corresponding public comment period closed on January 2, 2024. Lisa Gomez, the Assistant Secretary of Labor for the DOL's Employee Benefits Security Administration, has foreshadowed changes within the final rule.

**What's the legal guidance?** The DOL published the proposal, the Retirement Security Rule: Definition of an Investment Advice Fiduciary, on October 31, 2023. On March 8, 2024, the final version of the rule was sent to the Office of Management and Budget for final review and will likely be published in the Federal Register within 90 days (or less).

**What's the fiduciary consideration?** Plan sponsors and financial advisors may:

- Discuss the proposed rule with their consultant, legal and regulatory counsel.
- Prepare for questions from participants who may be reading the headlines.
- Prepare to monitor for developments in the rule over the coming year.

## LEGISLATION

### SECURE 2.0: What's in the grab bag?

**What happened?** SECURE 2.0 created many unanswered questions. In 2023, the IRS had indicated it would issue SECURE 2.0 interpretive guidance "in the fall."

**What's the legal guidance?** The IRS came through on the last day of fall with a "grab bag" of SECURE 2.0 guidance in the form of Notice 2024-2.<sup>3</sup> The guidance addressed 12 SECURE 2.0 sections, including de minimis financial incentives to encourage:

- Plan participation, tax treatment and eligibility of Roth employer contributions
- Application of the new automatic enrollment requirements in various merger and spinoff contexts
- Safe harbor automatic enrollment corrections

**What's the fiduciary consideration?** Plan sponsors and committees may now discuss the practical availability of de minimis financial incentives of up to \$250 (perhaps in the form of gift cards) and Roth employer contributions. Advisors and consultants may offer creative opportunities to encourage plan participation and/or help participants expand their access to Roth contributions.<sup>4</sup>

### SECURE 2.0: What's your emergency?

**What happened?** The DOL and the IRS issued interpretive guidance related to the emergency savings account option provided by SECURE 2.0.<sup>5</sup> The DOL guidance provides extensive practical guidance in a Q&A format. The IRS guidance is limited in scope to the possibility that a participant may manipulate emergency savings account rules to receive excess matching contributions.

**What's the legal guidance?** SECURE 2.0 creates the possibility of a "Pension-Linked Emergency Savings Account" (PLESA). In general terms, it permits a plan sponsor to amend its plan to permit participant contributions of up to \$2,500 (in total — not measured annually) into a PLESA.

<sup>3</sup> Internal Revenue Service. "Miscellaneous Changes Under the SECURE 2.0 Act of 2022." Notice 2024-2.

<sup>4</sup> This is in the comment period and may change based on feedback.

<sup>5</sup> Internal Revenue Service. "Guidance on Anti-Abuse Rules Under Section 127 of the SECURE 2.0 Act of 2022, and Certain Other Issues with Respect to Pension-Linked Emergency Savings Accounts." Notice 2024-22.

**What's the fiduciary consideration?** From a practical perspective, access to PLESAs remains quite limited. At a time when many other provisions of SECURE 2.0 have eaten up service provider resources, recordkeepers, TPAs, payroll providers and payroll departments have been exploring the allocation of resources, programming needs and other costs associated with PLESAs.

Interested plan sponsors should check first with their recordkeeper and plan document provider and be prepared to wait until 2025 or later for access.

## LITIGATION

### Plan forfeitures: The details matter

**What happened?** Fiduciaries of multiple household name plans are facing lawsuits alleging that they breached their fiduciary responsibilities when using plan forfeitures to offset employer contributions. Plaintiffs had filed lawsuits against fiduciaries for Qualcomm, Intuit, Clorox and Thermo Fisher Scientific, among others, in 2023. Plaintiffs filed the latest such lawsuit against Honeywell fiduciaries on February 13, 2024.<sup>6</sup>

**What's the legal guidance?** This recent wave of lawsuits relates to plan documents that provide plan administrators a choice between various permissible uses of forfeitures, including (but not necessarily limited to) plan expenses or offsetting employer contributions. In February 2023, the IRS published a proposed regulation that would generally require plan administrators to use forfeitures no later than 12 months after the close of the plan year in which the forfeitures arose.

**What's the fiduciary consideration?** At this stage, the litigation is pending, and the regulation is merely proposed. Plan fiduciaries may consider the following steps:

- Review plan document language regarding the use of forfeitures.
- Confirm forfeitures are only being used in a permitted manner.
- Consider the timeline on which forfeitures are being used and whether it would be timely under the proposed regulation.

### Proprietary fund usage: Another large settlement

**What happened?** In October 2023, the parties reached a settlement in Kohari v. MetLife Group, Inc.,<sup>7</sup> a case in which plaintiffs had alleged that the defendant fiduciaries had “stocked the Plan's investment menu with their own proprietary index funds.”<sup>8</sup>

**What's the legal guidance?** ERISA section 404(a) imposes upon fiduciaries a duty of loyalty, which requires that a fiduciary discharge its duties solely in the interests of the participants and beneficiaries.

**What's the fiduciary consideration?** The last decade of retirement plan fee litigation has brought heightened awareness around the use of a plan fiduciary or service provider's proprietary funds within a plan's investment lineup. Plan fiduciaries may wish to review the plan's lineup for the inclusion of any proprietary funds and to consider whether their presence would be consistent with ERISA's duty of loyalty.

<sup>6</sup> Barragan v. Honeywell Int'l Inc., Case 2:24-cv-01194 (C.D. Cal. Feb. 13, 2024).

<sup>7</sup> Case 1:21-cv-06146-JHR (S.D.N.Y. September 1, 2022).

<sup>8</sup> Memorandum of Law in Support of Plaintiffs' Motion for Class Certification, Case 1:21-cv-06146-JHR (May 31, 2023).

## Excessive recordkeeper fees: The value of benchmarking

**What happened?** In late 2023, plaintiffs filed an excessive 401(k) fee lawsuit: *Ruebel v. Tyson Foods*.<sup>9</sup> The lawsuit is similar to the scores of lawsuits filed in recent years. For example, it includes the allegation that the fiduciary defendants caused the participants to pay “over a 75% premium per-participant” for recordkeeping and administrative fees.

**What’s the legal guidance?** ERISA section 404 imparts a duty of prudence upon plan fiduciaries. The United States Supreme Court has confirmed that this duty is ongoing, including a duty to monitor and to incur only costs that are reasonable.

**What’s the fiduciary consideration?** This suit is merely at the allegation stage. However, it is noteworthy because it reflects that plaintiff attorneys have adjusted their pleading approaches in response to some courts’ recent dismissal of similar lawsuits. The complaint asserts that the fees were too high because of the “fungibility and commoditization” of the associated services.

Plan fiduciaries may be inspired to benchmark their recordkeeping and administrative services — not necessarily with an eye toward making a change, but to distinguish the level of services and to memorialize a step consistent with their duty of prudence.

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or visit **[columbiathreadneedle.com](https://columbiathreadneedle.com)**.



<sup>9</sup> No. 5:23-cv-05216-TLB (W.D. Ark. Nov. 30, 2023).

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