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Electronic Disclosure and Access to Savings Programs – New Bills Introduced to Address Not-So-New Issues

With the Senate and House on recess until mid-November, we review select retirement bills of interest that may gain traction during the lame-duck session.

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Electronic Disclosure of Pension Plan Information

Pension plan sponsors and administrators are subject to various disclosure delivery rules often considered burdensome and out-of-date. There have been efforts to modernize the rules and make them more workable, including last month when Sen. Sherrod Brown (D-OH) and Sen. Mike Enzi (R-WY) introduced bipartisan legislation in the Senate: the Receiving Electronic Statements to Improve Retiree Earnings (RETIRE) Act (S. 3417).

This bill, similar to a House bill introduced in 2015, would amend ERISA and the Code to provide employers with the flexibility to disclose required pension plan information (e.g., summary plan descriptions, blackout period notices and participant statements) in an electronic format. Specifically, the bill provides for electronic delivery (e.g., by email or posting to a website or intranet) as the default method, while providing plan participants and beneficiaries the right to opt out and receive paper disclosures.

The Senate and House bill are not identical, despite their having the same title. Two notable differences are:

- The Senate bill would permit participants to choose from the electronic delivery means offered/available, whereas the House bill would permit participants to choose from any *possible* electronic means.
- The Senate bill applies only to documents that are *required* to be furnished, whereas the House bill applies to both required and *permitted* documents, thus eliminating the possibility that a participant could demand electronic communications that the plan administrator was not prepared to deliver.

Comment. As the Senate and House bills would each make electronic delivery the default method of disclosure, they could foster a reduction in plan administration costs currently borne by employers or participants, or both.

Disclosure Compliance Resources

Our annually updated Reporting & Disclosure Guides help plan sponsors understand their ERISA disclosure obligations. The **general guide** is supplemented by a stand-alone version for **multiemployer plans**. Also, an **IRS guide** and **DOL guide** provide similar summaries of the requirements.

State-Run Retirement Programs

With access to workplace retirement plans a hot topic, last month, Sen. Martin Heinrich (D-MN) sponsored a bill — the State Retirement Savings Act of 2016 (S. 3389). The bill has two prongs, one for state-sponsored multiple employer plans (MEPs) and the other for state payroll deduction IRA savings programs.

MEPs. The bill would allow a state to establish a plan in which employers in the state would be permitted (but not required) to participate. It also provides that individuals would be eligible to enroll in the state plan even if their employer is not a participating employer. Importantly, a MEP authorized under this bill would have the state as its named fiduciary (as well as the plan sponsor and plan administrator).

Comment. The current DOL rules for a state-sponsored MEP and a private-sector MEP are not the same. For example, employers participating in a private-sector MEP must have a common bond or nexus. However, legislation that would level the playing field for state-sponsored and private-sector MEPs has advanced. Specifically, last month, the Senate Finance Committee approved a bill — the Retirement Enhancement and Savings Act of 2016 — that would eliminate the nexus requirement and modify the “one bad apple” rule, provided other requirements are met. (Please see our September 26 *Legislate* for more information on this comprehensive bill.)

Savings Programs. The Heinrich bill would permit a state to establish a state-run payroll deduction IRA savings program that would not be an ERISA-governed plan if certain requirements are met. Furthermore, the bill provides that, if a state does not establish such a program, cities and counties within the state (with a population greater than or equal to the least populated of the 50 states) may establish such a program.

Comment. Together with the final DOL rule for state-run retirement programs, the DOL issued a notice of proposed rulemaking seeking input on extending the safe harbor to some cities and counties. Employers have voiced concerns about the dizzying array of possible state and local mandates that may ensue from this expansion.

Like the final DOL rule, the Heinrich bill would treat such savings programs as non-ERISA governed if certain requirements are met, including:

- An employer’s participation is mandatory
- The program is established, implemented and administered by a state pursuant to state law
- The state is responsible for investing the assets or selecting the available investment funds

House GOP: A Better Way

Earlier this year, House Republican leaders issued a report, dubbed “A Better Way.” A blueprint for future legislation and public policy initiatives, it reflects their support for open MEPs and greater reliance on electronic communication. Please see our **June 20** and **June 13** issues of *Legislate* for additional background on the retirement policies identified in the report.

Importantly, the bill provides that, for any such savings program, the employer's role would be limited to:

- Collecting, remitting and maintaining records of employee contributions through payroll deductions
- Providing notice and information to the employees of the program, as well as information to the state as necessary to operate the program
- In terms of financial burden, the bill (unlike the DOL guidance) would permit (but not require) employers to contribute to an employee's account under the program. In addition, an employer would be entitled to reimbursement of their actual costs of participating in the program.

> **Comment.** If the Heinrich bill is enacted, it would likely erase any challenges to the DOL's view that state programs established in accordance with its final safe harbor rule are not subject to ERISA. See our February 1 *Legislate* and our August 29 *For Your Information* for background on additional efforts to create access to workplace savings plans and the DOL's guidance for state-run retirement programs.

Looking Ahead

With both chambers on recess and less than one month until the presidential and congressional elections, members of the Senate and House will remain focused on their respective campaigns. Upon their return in mid-November for the lame-duck session, they will refocus on government funding to avert a shutdown. Specifically, they will scramble (or perhaps fly at supersonic speed) to pass legislation to provide continued funding for after December 9. Whether either of the above retirement proposals is swept into the government funding bills remains to be seen.

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