

RETIREMENT & BENEFIT PLAN SERVICES

Legislative and Regulatory Brief

2Q 2019

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- Health Savings Proposals
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- State Run Retirement



Congressional hearings and other activity

STATUS: The prolonged partial government shutdown that ended on January 25, 2019 slowed the progress of regulatory projects at IRS, Treasury, DOL and SEC. Meanwhile, Congress was in session and was busy with various hearings, some related to retirement savings.

Status in Washington

House Ways and Means committee held a hearing on “Improving Retirement Security for America’s Workers” focused on the need to fortify.

- Social Security, the need to make employer-sponsored retirement plans more accessible and more effective, the multiemployer pension crisis, and recent state efforts to bolster retirement savings through state-run IRAs.
- Throughout the hearing, members of both parties and the witnesses widely supported the suite of retirement proposals collectively known as the Retirement Enhancement and Savings Act (RESA) which includes the open multiple employer plan (“open MEP”).

Senate Special Committee on Aging led by Sen. Susan Collins (R-ME) held a hearing on “Financial Security in Retirement: Innovations and Best Practices to Promote Savings” and indicated that the US is on the verge of a national crisis with regard to American’s retirement security raises concerns about outliving their savings.

- She indicated she would be introducing two pieces of legislation, the *Retirement Security Act of 2019* and the *SIMPLE Plan Modernization Act of 2019* and also focused on the specific challenges facing women in retirement.

Government Accountability Office GAO recently released a report on the need for the IRS and DOL to issue guidance to clarify the treatment of 401(k) assets that are transferred to state unclaimed property funds. Their research showed that most unclaimed assets sent to states come from terminated plans. They made three recommendations that guidance should address related to reporting, withholding, rollover eligibility after being sent to the state and how to handle uncashed distribution checks from active plans.

Our Point of View

- The fact the various committees in both the House and the Senate are focused on the issue of retirement savings and security is important as it is clearly an issue with bi-partisan support.
- In a Congress where little will advance without bi-partisan support, seeing this activity and interest from both parties is important.
- While much of the legislative proposals may not move past the branch in which they originated this year, active interest in retirement savings and employee benefits will likely continue into the next election cycle for 2020.
- The GAO report was requested by Sen. Ron Wyden (D-OR) from Senate Finance, so we could see some legislative proposals related to the GAO recommendation for additional clarity, or we could see regulatory activity as a result.



Legislative Activity Retirement Security and Savings (S. 3781)

STATUS: Introduced in Senate by Sen. Rob Portman (R-OH) and Sen Ben Cardin (D-MD)

Status in Washington

The proposal would include in part:

- Secure deferral arrangement safe harbor -a new auto enrollment safe harbor with a minimum default at 6% and maximum at 10% – matching employer contribution of dollar for dollar up to the first 1% of pay, 0.50/\$ on the next 5% of pay and 0.25/\$ on the remaining 4% of pay, providing a match all the way to the 10% maximum.
- A special tax credit for employers with 100 or fewer employees who adopt the new safe harbor.
- Amend top heavy rules to expand coverage.
- 403(b) Investment Expansion.
- Permit qualified student loan payments to be used for eligibility of “matching” contributions in a DC plan.
- Increase RBD age from 70 ½ to 72 in 2023 and again to 75 in 2030.
- Conform 401(k) hardship distribution rules from Bipartisan Budget Act of 2018 to 403(b) plans as well.
- Index the \$1,000 IRA catch-up at age 50 and increase the catch-up contribution limit under a retirement plan from \$6,000 (in 2018) to \$10,000 for individuals who have attained age 60. The catch-up contribution limit for SIMPLE plans would similarly be increased from \$3,000 to \$5,000 for those age 60 or older.
- Various defined benefit rule reforms including cash balance clarification, parity for employers that provide more generous lump sum distributions, correct errors in mortality regulations.

Our Point of View

- Senators Portman (R-OH) and Cardin (D-MD) have both been supporters of improved retirement savings for years back to the Pension Protection Act in 2006.
- The Senators released a discussion draft of legislation to enhance retirement security in October 2018 and have since formally introduced the bill in the Senate.
- There are several elements of the Portman/Cardin draft that are similar to provisions in the proposed Family Savings Act from the House and the Retirement Enhancement Security Act in the Senate.



Retirement Parity for Student Loans Act (S. 3771)

STATUS: Introduced in the Senate by Sen. Ron Wyden (D-OR)

Status in Washington

- The bill would allow employers that offer 401(k), 403(b), or SIMPLE plans to voluntarily elect to make matching contributions to a plan for employees on account of a “qualified student loan payment.” Generally, a “qualified student loan payment” would mean a payment made by an employee in repayment of a qualified education loan incurred by the employee to pay for his or her qualified higher education expenses (i.e., the cost of attendance at eligible educational institutions).
- An employee would only be eligible if they submit “evidence” loans and loan payments to the employer.
- Nondiscrimination Rules -matching contributions made on account of qualified student loan payments would not violate various nondiscrimination rules. Additionally, the bill would permit 401(k) safe harbor plans to make matching contributions on account of qualified student loan payments.
- Matching would have to be made at the same rate as matching contributions for elective deferrals.
- Plans would only be permitted to provide matching contributions for employees who are otherwise eligible to make elective deferrals.

Our Point of View

- The IRS released a Private Letter Ruling (PLR) in 2018 that permitted the plan that submitted the request to make these student loan “matching” contributions under certain, specific circumstances. But a PLR can only be used by the applicant.
- If passed, this new type of matching contribution would be available to all plan sponsors, where the PLR could only be used by the plan that requested it.
- The legislation addresses various non-discrimination testing issues that the PLR did not, so it would provide more comprehensive and broadly applicable guidance for plan sponsors who are interested.
- A match like this would enable participants who cannot afford to both pay their student debt and make a plan contribution to avoid losing out on an employer matching contribution.
- There is interest in seeing this match expanded to also be tied to 529 or ABLE account contributions.



Rehabilitation for Multiemployer Pensions (HR397)

STATUS: Introduced in House by Rep. Richard Neal (D-MA) and Bobby Scott (D-VA)

Status in Washington

- The legislation would establish the Pension Rehabilitation Administration (PRA) within the Treasury Department.
- The PRA would be authorized to issue loans to multiemployer plans that are in “critical and declining” status, including plans that:
 - Have already been approved to cut benefits under the Multiemployer Pension Reform Act.
 - Plans that are already insolvent and receiving assistance from the Pension Benefit Guaranty Corporation (PBGC).
- Approved plans would be provided with 30-year loans that are financed through the issuance of special Treasury bonds.
- Multiemployer plans receiving loans would be required to:
 - Purchase commercial annuity contracts issued by insurance companies that are “rated A or better by a nationally recognized statistical rating organization”;
 - Invest in a “cash matching portfolio”; or,
 - Invest in a portfolio determined appropriate by the Secretary of the Treasury.

Our Point of View

- With limited Republican support, the Rehabilitation for Multi-employer Pensions Act even if the bill passes in the House, it faces an uphill battle in the Senate.
- Companion legislation was previously introduced in the Senate by Senator Sherrod Brown (D-OH), but it has not yet been reintroduced in the current session of Congress.



Health Savings Proposals

STATUS: Passed in the House in July 2018 – no new activity to date in 2019

Status in Washington

Two pieces of health savings legislation were passed by the House before they recessed this summer.

H.R. 6199: *Restoring Access to Medication and Modernizing Health Savings Accounts (HSAs) Act*

- Allow greater HSA first dollar insurance coverage prior to the satisfaction of the plan's minimum deductible.
- Permit HSA use for direct primary care arrangements.
- Make services at on-site or retail clinics not HSA disqualifying.
- Make spouse's health Flexible Spending Accounts (FSAs) not HSA-disqualifying.
- Allow transfer of unused FSA and Health Reimbursement Arrangements (HRAs) funds to an HSA.
- Reinstate provisions to permit HSA use for over-the-counter medicines.
- Allow HSA use for sports and fitness expenses.

H.R. 6311: *Increasing Access to Lower Premium Plans and Expanding Health Savings Accounts Act*

- Increase annual permitted HSA contributions.
- Allow spousal HSA catch-up contributions to be made into the other spouse's HSA.
- Allow more generous FSA carry-forwards.
- Allow HSAs for working Medicare eligible individuals.

Our Point of View

- The House approved and reported on 11 separate health savings bills in late July, eventually combing them down into two bills, H.R. 6199 and H.R. 6311.
- The two bills show that House Republicans are very supportive of Health Savings Accounts (HSAs) and are working to make them more accessible and flexible.
- Both bills were passed on party lines before the August recess with only 12 Democrats voting in favor of H.R. 6311.
- Neither of these bills has been taken up by the Senate which would be the next required stop and the Senate Leader, Senator McConnell (R-KY) has made no indication he intends to take up health savings legislation this year.
- If there is a change in control of the House or the Senate during the mid-term elections, it is not likely Democrats will work to advance these proposals in 2019.
- There continues to be policy focus on health savings and the cost of health care so these proposals and other like them will likely continue to be around for some time.



State Run Retirement Programs

STATUS: Ongoing in various states with a national mandate unlikely in the near future

Status in Washington

- There has been no further action in Washington on state run automatic IRA programs since Congress repealed the former Department of Labor favorable guidance on state run programs under the Congressional Review Act in 2017.
- Rep. Richard Neal (D-MA) has proposed Automatic Retirement Plan Act which would create a nationally mandated automatic 401(k) program (deferrals only would be required) for all employers without a work based retirement savings offering who have 10 or more employees and have been in business 3 or more years.
- Additional states considering legislation in 2019 include Hawaii, Massachusetts, Minnesota, Missouri and New Jersey.

Our Point of View

- A national mandate has a very steep hill to climb to gain support from both Republicans and some Democrats.
- The mandate idea has some backing because it would get large amounts of workers into work based retirement savings programs with the hope that more people will be better saved for retirement.
- There are costs to small and mid-sized employers that continue to be a concern.
- Congressional legislation with a national mandate would likely freeze existing state run programs and prevent future programs from developing.
- If open Multiple Employer Plans (MEPs) are legislated and provide a more cost effective means for coverage in small to mid-size employers we could see an expanded proposal to require employers to offer an open MEP or default into a national mandate.



Regulatory Updates

- DOL Guidance Plan for 2019
- IRS issues Notice 2019–18 on Lump Sum Windows
- IRS/Treasury priority guidance plan for 2019



DOL Guidance Plan for 2019

STATUS: No updates in 2019 at this time. The prolonged government shutdown slowed down progress on regulatory guidance.

Status in Washington

- **Form 5500:** DOL previously listed its next step as analyzing comments, but this project is now just listed as “next action undetermined.”
- **Fiduciary Relief for Investments in Qualified Default Investment Alternatives:** No targeted date is given. ERISA Advisory Council has indicated they will address this year.
- **Notices and Electronic Disclosure:** There is no targeted date for this project but the Executive Order issued by the President in August 2018 directs the DOL to explore ways to improve and make notices more useful and provide for broader use of electronic delivery within one year.
- **Other “Long Term” Projects:** DOL lists its projects regarding pension benefit statements (including a lifetime income disclosure), the annuity safe harbor, and fee disclosure for welfare plans all as next action “to be determined.”
- **Health Reimbursement Accounts (HRAs):** Proposed rule released in 2018.
- **Association Retirement Plans:** Proposed rule released in 2018.

Our Point of View

- There are relatively few changes to the agenda of the Employee Benefit Security Administration.
- The agenda contains longstanding projects for the abandoned plan program, electronic filing of top hat plan statements, and a restated voluntary fiduciary correction program, but few of them are active.
- The current Administration has been focused on regulatory reform to reduce unnecessary regulations and to regulate where they cannot legislate.
- We will continue to see regulatory projects at the direction of the Administration.
- Two of the listed projects have already been released as proposed regulations (HRAs and Retirement Association Plans).



IRS Notice 2019–18 on Lump Sum Windows

STATUS: Notice issued

Status in Washington

- On March 6, the IRS issued Notice 2019-18, reversing its previous position that offering a one-time lump-sum “window” option for participants in pay status violates Internal Revenue Code section 401(a)(9) required minimum distribution rules.
- Notice 2019-18 supersedes Notice 2015-49 in which the IRS indicated its intent to amend the required minimum distribution (“RMD”) regulations to prohibit amendments to qualified defined benefit plans permitting participants in pay status to take the remaining value of their annuity payments and convert it to a lump-sum payment during a limited window.

Our Point of View

- Notice 2019-18 is a surprising reversal that expands the possible “derisking” strategies for defined benefit plan sponsors.
- Plan sponsors should consult with their tax advisors and carefully consider possible additional guidance from the IRS on retiree lump-sum windows, and other Code provisions that may be impacted by offering this lump sum option.
- Plan sponsors may also need to think about the various other administrative issues that could be impacted such as QDROs, retiree medical premium, etc.
- Also note that the IRS is not the only agency that has been looking at derisking activities, the PBGC and Department of Labor may also be looking at the implications of adding a retiree lump-sum window.



IRS/Treasury priority guidance plan for 2019

STATUS: No updates in 2019 at this time. The prolonged government shutdown slowed down progress on regulatory guidance.

Status in Washington

- **Hardship Distributions:** The Bipartisan Budget Act of 2018 made changes to hardship distribution rules including: removal of the requirement that a participant first take any available loan under the plan prior to being eligible for a hardship distribution and elimination of the requirement that participants must suspend contributions for 6 months following a hardship distribution. The Act also permits hardship distributions of earnings on elective deferrals, qualified matching contributions (QMACs), and qualified nonelective contributions (QNECs). Proposed regulatory guidance was published in the Federal Register on 11/14/2018 followed by a 60 day comment period.
- **One Bad Apple Rule for MEPs:** Proposed rule addressing the “one bad apple” rule for MEPs, which the President’s Executive Order directs them to address. Targeted April 2019.
- **Governmental Plans:** Project to define governmental plan status. Targeted for April 2019.
- **Cadillac Tax:** Guidance on the excise tax on high cost employer sponsored health coverage, which has been delayed until 2020. No targeted release at this time.
- **162(m) Changes:** Amend the regulations that limit deductibility of compensation above \$1 million to certain executives, to reflect the changes made by the Tax Cuts and Jobs Act. Targeted for July 2019.
- **Nonprofit Excise Tax:** New excise tax for compensation paid to executives of non-profits above \$1 million. Targeted for May 2019.

Our Point of View

- **Hardship Distributions:** Changes are effective for plan years beginning in 2019 and later and plan sponsors had been concerned that they would not have guidance in time to comply. The recently issued proposed regulation would delay the requirements to apply to distributions made on or after January 1, 2020, giving plan sponsors time to amend their plans. It is good this is on the Treasury/IRS plan as it shows it is a priority for them.
- **One Bad Apple Rule:** In the event the open MEP legislation is passed prior to the release of IRS guidance, this project could fall off of their plan.
- **Governmental Plans:** This project has been on the project plan with no action has been taken for a number of years.
- **Cadillac Tax:** Congress keeps delaying the implantation of this excise tax and we will not likely see a working guidance project until we are closer to its 2020 effective date.
- **162(m) Changes:** The IRS issued limited interim guidance in August 2018 and the have heard from industry groups that the remainder of the guidance is eagerly awaited.
- **Nonprofit Excise Tax:** Comments on the interim guidance are due to the IRS November 9th. The IRS anticipates issuing further guidance on other aspects of section 162(m), including the Act’s amendments to section 162(m).

