Current Topics in Retirement Plan Compliance

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Greater Pittsburgh Chapter
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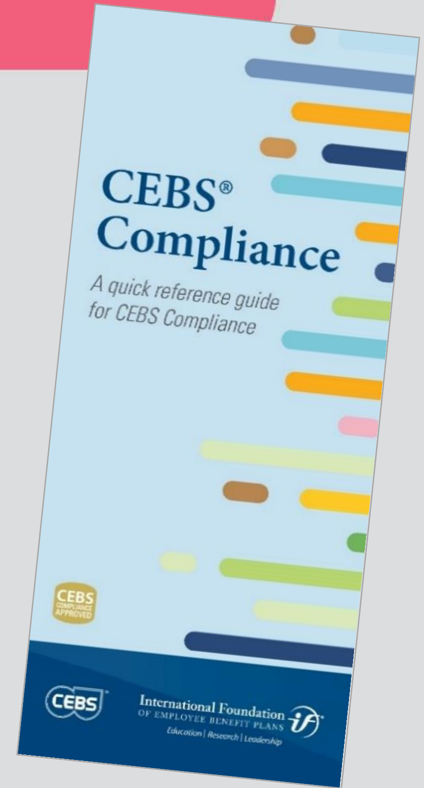

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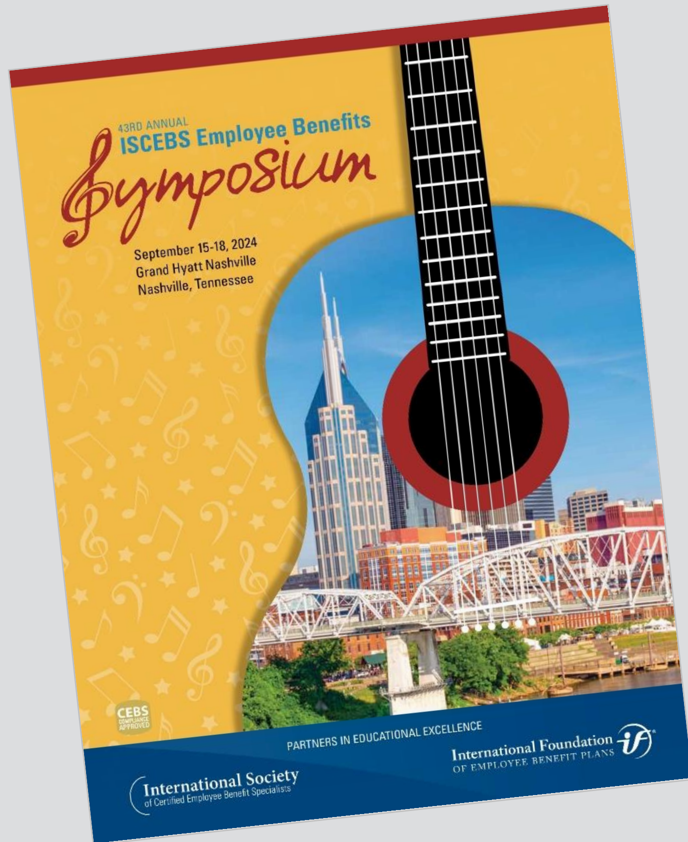

- September 15-18, 2024
- Grand Hyatt Nashville
- Nashville, Tennessee

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Retirement Plan Compliance

Prepared for

ISCEBS

Greater Pittsburgh Chapter

April 10, 2024

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Topics to Cover

- **SECURE 2.0 compliance**
  - Quick Overview of Significant Provisions
  - Current IRS Guidance
  - Practical Tips for Compliance
- **Minimizing Fiduciary Risk**
  - ERISA Compliance
  - Prudent investments
  - Reasonableness of expenses
  - Lessons learned from litigation
- Process and Documentation
  - Committee charter, IPS, Meeting minutes
- Current Topics
  - Forfeitures
  - Crypto
  - ESG & Proxy Voting
  - Arbitration

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Major Provisions of SECURE 2.0

Required Minimum Distribution Age: RMDs must commence at age 73 (was 72), and 75 starting in 2033.

Catch-Up Contributions: In 2025, the age 50+ plan catch-up contribution limit ($7,500 for 2024) will, for participants ages 60 to 63, increase to 150% of the conventional catch-up limit.

Optional Roth Treatment of Employer Contributions: Starting in 2023, plan sponsors can allow employees to treat all employer contributions as after-tax Roth contributions.

Roth Treatment of Catch-up Contributions for HCEs: Effective in 2026, all catch-up contributions by persons with prior year FICA wages over $145,000 must be made to Roth accounts.

Part-Time Workers Eligibility: The measuring period for determining eligibility of long-term part-time workers (500 hours worked) is reduced from three to two consec. years, starting in 2023 (eligible in 2025).

More Significant Provisions

Student Loan Repayments may be matched (optional) – Starting in 2024, plans may treat student loan repayments as deferrals eligible for an employer match.

Small financial incentives may be provided to increase participation, effective now. $250 limit. Notice 2024-02 provides details.

$1,000 Emergency Personal Expense Distributions (optional) – Starting in 2024, Plans may allow participants to take one $1,000 distribution per year to use for emergency expenses. This is exempt from the 10% excise tax and is repayable.

Pension-Linked Emergency Savings Accounts (optional) – Starting in 2024, plans can offer Roth-type accounts to non-HCEs for employee contributions, with balances capped at $2,500, no penalty for withdrawals. FAQ guidance released in Notice 2024-22.

403(b) Hardship distribution rules have been conformed to 401(k) hardship rules effective in 2024. Earnings would become eligible for hardship withdrawal as well as employee contributions.

Provisions Easing Admin Burdens

Eliminating unnecessary plan notices related to unenrolled participants: Plans are no longer be required to provide certain ERISA or IRS notices to unenrolled participants. An annual reminder of eligibility would be required, effective beginning in 2023.

Relief for recovering plan overpayments to participants: ERISA is amended to allow fiduciaries discretion in deciding not to recover an inadvertent benefit overpayment, effective immediately.

Separate Top-Heavy Testing for excludable Employees: Starting in 2024, plans covering excludable employees (under age 21 or less than 1 year of service) can test this group separately for top-heavy testing purposes.

Extension of Safe Harbor for Employee Deferral Failures: The safe harbor for correcting reasonable errors in auto enrollment and auto escalation is extended past its 2023 expiration.

More Provisions Easing Admin Burdens

The IRS **Employee Plan Compliance Resolution System (EPCRS**) is expanded to allow self-correction of more types of errors including plan loan errors; effective immediately.

The **mandatory distribution limit** is increased from $5,000 to $7,000, optionally effective for distributions after 2023.

Hardship Self-Certification – starting in 2023, plans may allow participants to self-certify the need for a financial hardship.

Provisions for New or Small Plans

Automatic enrollment and auto-escalation of deferral percentages is **required** for new plans beginning in 2025. Must start at 3% of pay, but not more than 10%.

The **small business credit** for starting a DC or DB Plan is increased from 50% to 100% of administrative costs, and a generous tax credit is provided for employer contributions (in years 1 and 2, 100% of costs up to $1,000 per participant, percentage declines in later years). Effective immediately.

The **small business credit** is further clarified retroactive to 2019 to disregard the start date of the MEP that a small employer joins for the purpose of counting the number of years the credit is available.

Miscellaneous Provisions

Unused Section 529 balances (up to $35,000) may be contributed to Roth accounts starting in 2024. 529 plan must have existed for 15 yrs.

No pre-death required minimum distributions are required for Roth accounts within 401(k) plans after 2023.

The IRA Catch-up limit of $1,000 for age 50+ will be indexed for inflation starting in 2024.

Distributions to participants who are terminally ill or a victim of domestic abuse are not subject to the 10% premature distribution penalty. For terminally ill, the provision is effective immediately, for domestic abuse victims, it is effective in 2024 and capped at $10,000.

Regulations, guidance and report to Congress on a number of topics including reducing plan paperwork and streamlining forms and disclosures are required by the DOL, IRS, and other agencies.

Post-SECURE 2.0 Guidance

Certain deadlines in the SECURE 2.0 Act were unreasonably difficult to meet, other provisions required clarification or quick guidance short of formal regulations.

Guidance	Date	Description
Notice 2023-62	Aug. 25, 2023	Implementation of required Roth treatment of catch-up contribs delayed until 2026
Notice 2024-02	Dec. 23, 2023	12 miscellaneous topics including plan amendment deadlines
Notice 2024-22	Jan. 12, 2024	PLESA withdrawals and matching contributions

IRS Notice 2024-02 – SECURE 2.0 Guidance

In this late December notice, the IRS released guidance in Q&A form with respect to twelve sections of the SECURE 2.0 Act. Those of interest to most 401(k) plan sponsors include -

- Extended plan amendment deadlines
- Small immediate financial incentives for contributing to a plan
- Distributions on account of terminal illness
- Safe harbor for correction of auto enroll or escalation failures
- Optional treatment of matching contributions or nonelective contributions as Roth contributions.

Notice 2024-02 - Extended Amendment Deadlines

IRS Notice 2024-02 extended the plan amendment deadlines for the SECURE Act of 2019, the CARES Act and SECURE 2.0 to the following –

Employer Type	Plan Type	Amendment Deadline
Non-governmental	401(a), 401(k), 403(b)	Dec. 31, 2026
Non-governmental collectively bargained	401(a), 401(k), 403(b)	Dec. 31, 2028
Governmental / public school	457(b), 403(b)	Dec. 31, 2029

Notice 2024-02 - Financial Incentives to Defer

Section 113(c) of the SECURE 2.0 Act allows employers to offer employees a *de minimis* financial incentive to defer, which is exempted from the tax on prohibited transactions.

A *de minimis* financial incentive cannot exceed **$250** in value.

It may only be offered to employees for whom no election to defer is already in effect.

An incentive is taxable to the employee and is not a deductible plan contribution for the employer.

The incentive may be paid over more than one year, contingent on the employee continuing to make deferrals.

The IRS guidance also specifies that 403(b) plan sponsors may offer financial incentives under these rules.

Notice 2024-02 - Terminally Ill Distributions

Section 326 of the SECURE 2.0 Act added a new exception to the 10 percent premature distribution penalty tax for any distribution made to a terminally ill individual, effective late December 2022.

A "terminally ill individual distribution" is a distribution to an employee who is terminally ill as certified by a physician.

The Notice defines terminal illness as one reasonably expected to result in death within 84 months, and includes the requirements that a physician certification must include.

If a plan does not adopt a terminally ill distribution provision, a terminally ill employee may use the plan's in-service distribution feature to avoid the 10% penalty if the terms of the guidance are followed.

Notice 2024-02 - Auto-Enrollment & Auto-Escalation Error Correction

The Notice provides specific relief for plans that have corrected a reasonable error made in implementing an automatic enrollment or automatic escalation provision, or improperly excluding an individual.

For these errors, the employer is not required to provide a QNEC but if the missed deferral amount was to be matched, a corrective matching contribution is required.

For employees improperly excluded from a plan, the corrective guidance in Appendix A of Revenue Procedure 2021-30 is to be followed.

Notice 2024-02 - Roth Matching Contributions

Under SECURE 2.0 Act, plans may permit employees to designate matching and nonelective contribution as after-tax Roth contributions.

The guidance specifies that such contributions are includible in the employee's income for the year in which the contribution is made and are not wages for withholding or FICA tax purposes.

They are to be reported using Form 1099-R (not Form W-2). The plan may require that an employee be fully vested in employer contributions to designate a matching or nonelective contribution as a Roth contribution.

Distributions – 10% Penalty Exceptions

Event	In-Service Distribution	Can be Repaid w/in 3 yrs?	Optional
Emergency Expenses	Yes	Yes	Yes
Domestic Abuse	Yes	Yes	Yes
Terminal Illness	Unclear	Yes	No
Birth or Adoption	Yes	Yes	Yes
Qualified Disaster	Yes	Yes	Yes

Terminal illness distributions do not necessarily require a plan amendment, as this exception requires that individuals provide the IRS with proof of their qualification for the penalty exemption.

Generally, repayments may be made back into the plan or into an IRA within 3 years, under same principles as COVID-related distributions.

Implementing New Plan Features

While plan amendment deadlines have been extended, you should consider adopting optional provisions in coordination with your administrative firm.

- For example, forms are needed for self-certification; some recordkeepers have these ready for use, some don't.
- From the list of optional provisions, determine which require payroll or other administrative changes (such as tracking prior year FICA wages or adding a Roth feature)
- Determine which provisions should be added to the plan and work with your recordkeeper to establish an implementation schedule.
- Communicate upcoming changes to employees to help them plan, particularly regarding Roth options.

ERISA Compliance - Minimizing Fiduciary Risk

We'll now focus on ERISA Compliance –

- ERISA's Fiduciary responsibilities
- Plan Investments and Fees
- ERISA Litigation and Settlements
- Best Practices

ERISA – Fiduciary Standards of Conduct

ERISA spells out 4 primary duties in §404(a)(1)

Duty of Loyalty

Duty of Prudence

"A fiduciary shall discharge his duties with respect to a plan **solely in the interest of the participants and beneficiaries** and—

(A) for the **exclusive purpose** of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) 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;

(C) by **diversifying the investments** of the plan so as to minimize the risk of large losses, and

(D) in **accordance with the documents** and instruments governing the plan.

What acts invite lawsuits?

Participants (through class action counsel) allege that plan fiduciaries breach their fiduciary duties by –

- Maintaining overly expensive investments, typically retail share classes of mutual funds
- Failing to monitor plan investments or ignoring expert advice to remove poorly performing funds
- Paying unreasonable administrative fees (Princeton)
- Using the plan to benefit corporate interests – such as awarding plan service agreements to vendors in order to obtain more favorable terms for corporate banking or other purposes (WalMart, MIT)

To succeed at trial, Plaintiffs must prove by a preponderance of evidence that: (1) the defendant is a fiduciary; (2) the defendant breached its fiduciary duty; and (3) that breach caused a loss to the Plan.

Nicolas v. Princeton University – 3rd Circuit

In *Nicolas v. Trustees of Princeton University*, the University was unsuccessful in dismissing the complaint that alleged specific breaches of the duty of prudence:

- failing to conduct a competitive bidding process;
- failing to use significant bargaining power to negotiate lower fees;
- retaining two recordkeepers; and
- failing to remove two particularly unreasonable funds.

Judge Thompson held that Ms. Nicolas alleged "specific breaching conduct: failing to conduct a competitive bidding process; failing to use significant bargaining power to negotiate lower fees; retaining two recordkeepers; and failing to remove two particularly unreasonable funds.

Princeton agreed to settle this case in April 2020. Terms included a $5.8 million settlement.

Terms of Princeton’s 403(b) Settlement

Princeton will pay $5.8 million and has agreed not to increase the recordkeeping fees for its plans or three years.

Princeton will conduct RFPs recordkeeping-administrative services and independent investment consulting.

Additionally, Princeton agreed to have its benefits committee and investment committee amend their respective charter and/or operating documents to “**adopt and follow best practices** for 403(b) plans as described by the plans’ current independent investment consultant.”

Princeton also agreed that its investment committee will meet at least four times per year with the plans’ consultant. In those meetings, they will evaluate the expense and performance of each plan investment option, review and consider changes to the investment option lineup, review administrative and recordkeeping costs of the plans, and investigate and pursue additional strategies to lower the plans’ costs.

Best Practices – Demonstrating Prudence

"Courts have held that a variety of actions can support a finding that a fiduciary acted with procedural prudence, including for example, appointing an independent fiduciary, seeking outside legal and financial expertise, holding meetings to ensure fiduciary oversight of the investment decisions, and continuing to monitor and receive regular updates on the investment's performance".

Tatum v. RJR Pension Investments Committee, 761 F. 3d 346 – Court of Appeals, 4th Circuit 2014

Investment Monitoring

The Supreme Court in two separate opinions found it necessary to define precisely what ERISA's duty of prudence requires regarding plan investment monitoring.

In *Tibble v. Edison Intl.*, a case from 2015, the Supreme Court noted that **an ERISA plan fiduciary has a duty to regularly monitor all plan investments and remove imprudent investments within a reasonable time**.

In *Hughes v. Northwestern University*, a unanimous Supreme Court in 2022 reminded the 7th Circuit Court of Appeals of its holding in *Tibble*, further explaining that "**fiduciaries are required to conduct their own independent evaluation to determine which investments may be prudently included in the plan's menu of options".**

Fees and Expenses

Fiduciaries are also expected to keep all fees paid through plan assets reasonable. These fees would include all investment related fees and also vendor fees, such as -

Recordkeeping / administrative fees

Consulting / investment advisory fees

Audit fees

As there is no precise definition of "reasonable" with respect to plan expenses, the plan fiduciary must understand market forces and be able to defend plan expenditures as reasonable based on an analysis of the quality of the service in light of the fees to be charged. (DOL Advisory Opinion 2002-08A).

Fees and Expenses – Best Practices

Fiduciaries can benchmark a vendor’s current fees through a “blind” request for information (RFI) every few years

- Determines “reasonableness” of current vendor’s costs
- Provides documentation to negotiate potential fee reduction from current vendor

A formal vendor RFP should be considered every several years

- Demonstrates proactive steps by committee
- Facilitates vendor concessions
  - Sound fiduciary practice
  - Provides a record of a prudent process
  - In best interest of participants

Wildman v. American Century decision

A January 2019 decision in favor of American Century against allegations of fiduciary breaches due to high fees and poor funds demonstrates the importance of plan process.

Participants alleged that the lineup of 45 proprietary funds was maintained for the benefit of American Century and resulted in higher than reasonable expenses for the $438 million 401(k) plan.

American Century successfully demonstrated that their decision making was prudent and loyal through –

Fiduciary training	Regular committee meetings	Consultant presentations
Stated performance criteria	Written reports read in advance of meetings	Fund performance data
A formal IPS	Maintenance of watchlist	Thorough meeting minutes

Wildman v. American Century, US District Court, Western District Missouri, Jan. 23, 2019

Governing the Plan – the Committee

- Companies typically create a retirement or investment committee to oversee their 401(k) plan.
  - Publicly traded companies are obligated by the SEC to establish compensation and audit committees, among others.
  - Many pension and retirement committees are structured in a similar fashion to manage pension matters.
- A **committee charter** serves as a procedural guide for managing the plan, by establishing -
  - the committee's purpose and duties (investment and/ or operational)
  - a decision-making framework (size of committee, quorum, meeting frequency, etc.)
  - a process for adding or removing committee members
- The committee charter is an internal corporate document, not a plan document.

Investment Policy Statements

ERISA requires a prudent process for making investment decisions. Plan committees often use an Investment Policy Statement to guide their decision-making.

An IPS for a 401(k) plan should include:

- The purpose of the IPS
- The process for determining investment categories ("asset classes")
- The process and criteria for selecting the designated investment options
- The process and criteria for monitoring investment options
- The process for replacing poor performing investment options
- A process for documenting the steps listed above.

Meeting Minutes

Written documentation of fiduciary actions demonstrates prudence and minimizes liability.

- A committee should act consistently with its charter.
- Meeting minutes should be kept and retained.
- Minutes should be written as if the DOL, IRS and plaintiff's attorneys were to read them.
- Minutes should reflect fiduciary exercise of due diligence - requesting additional information, evaluating alternatives and making prudent decisions.
- Minutes should record actions taken but not be a meeting transcript
- Minutes should be securely retained and available to auditors.

Current Topics

- Forfeitures
- Cryptocurrency
- ESG Investing & Proxy Voting
- Arbitration of ERISA claims

Thank You for your attendance!

Questions Welcome!

Please feel free to send a question later on via email –

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Upcoming Webinars

- August 13: Cybersecurity in HR and Benefits
- August 27: Health Plan Compliance
- Watch for details on these and other sessions in the works!

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