

First Quarter 2022 Roundup of New Developments

WELCOME TO GRACE RISTUCCIA!

Isler Dare is pleased to welcome our newest Partner, **Grace H. Ristuccia**, who joins the Firm after serving as a Shareholder at Ogletree Deakins, where she practiced for eight years. Grace brings significant experience to the Firm's thriving Employee Benefits and Executive Compensation group. Her diverse practice includes advising businesses on a broad range of compliance, administration, and plan design issues for all types of employee benefit plans, including qualified and non-qualified retirement plans, welfare plans, and multiemployer plans. Before joining Ogletree Deakins, Grace clerked for the Honorable Kenneth F. Ripple, United States Court of Appeals, Seventh Circuit, and was an employee benefits associate at Covington & Burling. Grace earned her A.B. from Princeton University, summa cum laude, and her J.D. from the University of Virginia School of Law.

EXECUTIVE SUMMARY OF NEW DEVELOPMENTS

This Employee Benefits Update summarizes the following developments from the first quarter of 2022:

- The Internal Revenue Service proposed new regulations impacting required minimum distributions from retirement plans;
- The Department of Labor issued guidance warning against 401(k) plan investments in cryptocurrency; and
- The Internal Revenue Service proposed rules under the Affordable Care Act for premium tax credit "affordability" determinations for family members.

Proposed Required Minimum Distribution Regulations

The Internal Revenue Service (the "IRS") issued proposed required minimum distribution ("RMD") regulations that incorporate changes made by the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE Act"). The changes in the proposed regulations impact RMDs from qualified retirement plans, tax-deferred annuity 403(b) plans, and 457(b) plans. The proposed regulations make the following changes:

- For a participant who reaches age 70-1/2 in 2020 or later, the starting date for RMDs is April 1 of the year after the participant turns age 72 and is no longer employed by the plan sponsor. Before the SECURE Act, the starting date for RMDs was April 1 of the year after the participant turned age 70-1/2. (Note that different rules apply to participants who own 5% or more of the plan sponsor.)

IMPORTANT DATES

April 15:

- Fund Q1 2022 contributions to defined benefit pension plans
- Process distributions of excess 402(g) deferrals from 2021 under 401(k)/403(b) plans

April 30:

- Distribute Annual Funding Notice for defined benefit pension plans with more than 100 participants

May 1:

- Distribute IRC Section 436 notice for defined benefit pension plans with AFTAP below 80% if notice has not yet been provided

May 15:

- Confirm 401(k)/403(b) recordkeepers have provided benefit statements to participants for quarter ending March 31

- For beneficiaries of a participant who died before reaching age 70-1/2 but would have reached that age in 2020 or later, such beneficiaries may wait until the calendar year in which the participant would have reached age 72 to begin taking RMDs.
- For plan participants who die on or after January 1, 2020, the proposed regulations eliminate the ability to stretch distributions over the beneficiary's lifetime and instead require that distributions be made within 10 years of the participant's death. However, the participant's surviving spouse is exempt from this rule, as are certain "eligible designated beneficiaries", such as the participant's child under the age of 21, a disabled or chronically ill beneficiary, or someone more than 10 years younger than the participant.
- Under the proposed regulations, defined benefit pension plans must actuarially increase the benefit for the period after the calendar year in which the participant turns age 70-1/2 in which such participant was not receiving benefits.

Plan amendments incorporating the RMD changes must be adopted by the end of the plan year beginning on or after January 1, 2022 (December 31, 2022 for calendar year plans). Although the IRS historically has provided model plan amendments for RMD rules, the IRS has yet to provide model amendments for the proposed regulations.

- ✓ **Action Steps for Employers:** The proposed regulations are lengthy and provide far greater detail on how to comply with the SECURE Act. Retirement plan sponsors should work with their plan recordkeeper to implement any operational changes necessary to comply with the proposed regulations, and work with plan document providers and plan counsel to adopt the required plan amendments by the end of the 2022 plan year.

Department of Labor Guidance on 401(k) Plan Investments in Cryptocurrency

The Department of Labor ("the DOL"), through Compliance Assistance Release 2022-01, cautions plan fiduciaries to "exercise extreme care" before adding a cryptocurrency option to a 401(k) plan's investment menu.

The guidance expresses the DOL's "serious concern" about the prudence of exposing 401(k) plan participants to direct investments in cryptocurrency, or other products whose value is tied to cryptocurrency. In the DOL's view, investments in cryptocurrency present significant risks of fraud, theft, and loss, because they are "speculative and volatile" investments and create valuation, custodial, and recordkeeping challenges. Moreover, the DOL observed that cryptocurrency presents unique difficulties for plan participants to make informed investment decisions, as cryptocurrency is more challenging to evaluate, and participants are less likely to have sufficient knowledge or expertise about cryptocurrencies relative to traditional investments. The DOL notes that fiduciaries should also consider how regulatory requirements such as securities laws may affect investments in cryptocurrency by 401(k) plan participants.

The DOL also announced that it expects to conduct an investigative program targeting plans that offer participant investments in cryptocurrencies and related products. It further cautioned that plan fiduciaries responsible for overseeing the investment options (or allowing cryptocurrency investments through brokerage windows) should expect to be questioned about how their actions relating to cryptocurrency align with their duties of prudence and loyalty in light of the risks described in the guidance.

- ✓ **Action Steps for Employers:** In light of the DOL's guidance, we urge plan fiduciaries to exercise extreme caution in evaluating cryptocurrencies, adding them as investment options to your plans, or making them available for investment through brokerage windows.

Internal Revenue Service Proposes Rules to Fix the ACA’s “Family Glitch” for Premium Tax Credit Affordability Determinations for Family Members

The IRS has issued proposed regulations regarding its premium tax credit (“subsidy”) rules that would change how the “affordability” of an employer’s health plan coverage is determined under the Affordable Care Act (the “ACA”) for an employee’s family members. If finalized, these rules would become effective January 1, 2023.

Under current rules, both employees and their family members are ineligible for a subsidy on the ACA marketplace exchange if the employee-only coverage is considered “affordable.” For these purposes, existing regulations determine the affordability of employee-only coverage based on the cost to the employee for the lowest tier of employee-only coverage, so coverage is affordable if the employee cost is less than 9.5% (as adjusted) of the employee’s household income, regardless of the cost for family coverage.

Under the new proposed regulations, affordability for the employee’s family members would be determined based on the employee’s cost of family coverage, such that family coverage is “affordable” only if the employee’s share of the cost for that coverage is less than 9.5% (as adjusted) of the employee’s household income. This means that family members of employees who were previously ineligible for a subsidy on the exchange because the self-only coverage was “affordable” – although family coverage was not – may now be eligible for a subsidy. In addition, the proposed regulations provide that the determination of whether an employer’s group health plan provides “minimum value” coverage (meaning that the plan reimburses at least 60% of total allowed costs) would be determined by reference to family member costs and would also need to include substantial inpatient hospital services and physician services.

- ✓ **Action Steps for Employers:** Plan sponsors should work with their consultants and plan providers to determine the impact that the proposed regulations may have on their plans, to ensure that their plans continue to meet the new minimum value standards, and to develop effective enrollment/communication materials informing employees about the expanded availability of subsidies for family members. Importantly, however, we do not anticipate that the proposed regulations will increase an employer’s penalties under the ACA because those penalties are triggered only when the employee, not the employee’s family, receives a subsidy on the exchange.

Additional Information

For additional information about these benefit plan topics, or any other employee benefits matter, please contact any member of our Employee Benefits and Executive Compensation Practice Group listed below.

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