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The Insider's Guide to Plan Design, Administration, Funding & Compliance

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DOL Finalizes Round One of the Revised Rules for Form 5500

Adrienne Robertson, Esq.

On December 29, 2021, the Department of Labor (DOL) finalized certain changes to the instructions for the Form 5500 (Annual Return/Report of Employee Benefit Plan) applicable to filings for plan years beginning on or after January 1, 2021. The DOL will provide subsequent additional guidance with respect to the other rule changes.

1. The finalized reporting changes are as follows:

Multiple Employer Plans (MEPs). The proposed rule changes included a requirement, pursuant to Section 103(g) of ERISA as amended by the SECURE Act, that multiple employer plans report aggregate account balance information by participating employer. The finalized rule addresses this new reporting requirement by requiring multiple employer plans that are defined contribution plans to include aggregate account balance information by employer on the existing Form 5500 attachment providing participating employer information. The DOL confirmed in the final rule that this reporting requirement does not apply to defined benefit MEPs.

For 2021, aggregate account balance information by employer may be provided on a non-standard attachment. The DOL clarified that it is appropriate to (a) round to the nearest dollar, consistent with the way in which dollar amounts are otherwise reported on the Form 5500 and accompanying schedules, and (b) use an end-of-year valuation.

Pooled Employer Plans. Pooled employer plans were established under the SECURE Act to allow multiple unrelated employers to participate in a single employer benefit plan without the need for a common interest among the adopting employers (other than adoption of the plan), effective with plan years beginning after December 31, 2020. As such, the 2021 plan year is the first year for which a Form 5500 would need to be filed for a pooled employer plan. In addition, the SECURE Act further amended ERISA Section 103(g) to establish a requirement that pooled employer plans provide identifying information for the person designated under the terms of the plan as the Pooled Plan Provider.

To accommodate reporting for this new type of multiple employer plan, the instructions for completing Line 1, Part A will be revised to note that a pooled employer plan is a multiple employer plan that is required to file a single Form 5500 and is thus subject to all filing provisions applicable to multiple employer plans. In addition, a pooled employer plan will be required to indicate in an attachment to the Form

5500 whether the plan's Pooled Plan Provider has complied with the registration requirements for PPPs, and, if so, to provide the AckID number for the Pooled Plan Provider.

Multiple Employer Welfare Arrangements (MEWAs). Currently, MEWAs are required to provide certain participating employer information in attachments to their Form 5500 filings. The DOL confirms in this final rule that the amendments to ERISA Section 103(g) under the SECURE Act, modifying the information that must be provided to the DOL by multiple employer plans, do not preclude the DOL's collection of participating employer information from MEWAs. MEWAs, therefore, continue to be required to comply with current reporting requirements and file participating employer information as a non-standard attachment to their Form 5500 (as has been the case since the 2014 plan year filing), to the extent not otherwise exempted from the requirement.

2. Not addressed in this final rule were the proposed rule changes that pertain to filings for plan years beginning on or after January 1, 2022. The proposed rules that are not yet finalized fall into several categories. They include establishing the requirements for filing a consolidated Form 5500 for Defined Contribution Retirement Plan Groups (see below); changing the reporting requirements to enhance financial transparency and accountability; modifying the methodology used to count participants for determining whether a plan can file as a "small" plan and be exempted from an independent accounting firm audit to include only participants with account balances; adding a limited number of questions intended to improve reporting by PBGC-covered plans; and including a number of Internal Revenue Code compliance questions to improve tax oversight and compliance.

The comment period for the proposed rule changes closed on November 1, 2021. Of the proposed rule changes not yet finalized, the establishment of requirements for filing a consolidated Form 5500 for Defined Contribution Retirement Group Plans, called "Defined Contribution Groups" or "DCGs," in the proposed rules, garnered significant attention in the comments provided to the DOL. The SECURE Act created the ability of a "group of plans," as defined in the SECURE Act, to file a single aggregated Form 5500; the definition included, among other items, the use of the same trustee. The requirements proposed by the DOL vary from those enumerated in the SECURE Act by requiring not just the use of the same trustee across the DCGs, but also the same trust. The comments, generally, ask the DOL to remove the "same trust" requirement and retain only the "same trustee" requirement, consistent with the language in

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the SECURE Act. As we await "Round Two" of the DOL's finalization of changes to the Form 5500 rules, it remains to be seen whether the DOL will adjust its requirements in this regard in response to the comments received.

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Prudence Isn't Just for Investments!

Peter Gulia, Esq.

Many people too often think of fiduciary responsibility only in selecting a retirement plan's investment alternatives. But the Employee Retirement Income Security Act of 1974 (ERISA) does not state different duties for different fiduciary activities. Rather, a fiduciary's duties apply broadly to all of a fiduciary's activities. That includes writing and delivering the plan's communications, and deciding claims. This article shows how fiduciary principles might relate to some tasks, beyond investments, in administering a retirement plan.

(Although ERISA puts statutory and fiduciary responsibilities on a plan's administrator, this article imagines a typical situation in which an employer sponsors a single-employer retirement plan and serves as the plan's administrator and named fiduciary.)

Obedience

"[A] fiduciary shall discharge his duties with respect to a plan … in accordance with the documents and instruments governing the plan[.]" ERISA § 404(a)(1)(D). When a plan's governing documents are one or two hundred pages of dense legalese and tax jargon, meeting a duty to administer a plan according to its written terms can be a challenge. But an employer must do all it can to read the written plan. And if one's own reading is not enough to understand the plan, the employer must get its expert lawyer's advice.

Loyalty

ERISA § 404(a)(1)(A) commands a fiduciary to act "solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing [the plan's] benefits to [the plan's] participants and their beneficiaries[.]" This does not mean an employer should approve whatever claim or request a participant or beneficiary submits. For example, approving a hardship payout when the claimant lacks a financial need could be contrary to the exclusive purpose of providing the plan's benefits, which are only those the plan's governing documents provide.

A fiduciary considers only the purpose of providing the plan's benefit; nothing else, not even her employer's interest. Choosing a course of action because it would be convenient for the employer breaches one's fiduciary duty. Instead, legitimate grounds for a decision include (i) that it obeys applicable law, (ii) that it administers the plan according to the plan's documents, or (iii) that what the fiduciary does could improve participants' or beneficiaries' plan benefits (and is not contrary to applicable law or the plan's documents).

Impartiality

A fiduciary does not "play favorites." For example, approving what one's friend wants but denying a similar request of someone else is contrary to a fiduciary's duties of loyalty and impartiality.

To help meet the duty of impartiality, an employer might make, use, and regularly revise written procedures. For discretionary decisions, perhaps especially those about hardship and domestic-relations claims or about deciding who is a rightful beneficiary, using written procedures can help an employer apply the plan's terms as fairly as it is feasible to do.

Communication

A fiduciary must communicate information not only about the plan's investment alternatives but also about the plan's terms, administration, and practical operations. An employer must furnish the communications the statute requires—usually, a summary plan description, a summary annual report, and required notices. An employer must furnish documents, reports, and similar information a participant or beneficiary properly requests. And beyond those statute-prescribed communications, a fiduciary must furnish—without waiting for a request—information a prudent fiduciary should know someone needs to protect his or her interests about the plan.

Furthermore, a fiduciary must care about the accuracy, completeness, and understandability of each communication. A notice is a little help to a participant who cannot understand the information that the notice presents. If an employer lacks the skill or time needed to do a careful writing job, the employer can spend the plan's money to engage a professional.

Prudence

In meeting each duty, a plan's fiduciary must act with no less care, skill, caution, and diligence than would be used by a prudent person who is experienced in managing a similar retirement plan. ERISA § 404(a)(1)(B). A fiduciary who

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lacks prudent-expert skill must get, and carefully consider, an expert's advice. Likewise, a fiduciary who lacks enough time and attention to do all that a prudent fiduciary would do must engage professionals and service providers so that the fiduciary can focus one's limited time and attention on supervising and reviewing others' work.

Pulling It All Together

Meeting an employer's duties involves a thoughtful balance of several fiduciary principles, including obedience, loyalty, impartiality, communication, and overall prudence. An adviser can help an employer focus on logical steps and careful thinking about a plan-administration fiduciary's responsibility.

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DOCUMENT UPDATE

Distributing Assets When an Unrelated Employer Leaves a Multiple Employer 401(k) Plan

Jeffrey A. Herman, Esq., and Douglas S. Neville, Esq.

A 401(k) plan or other qualified retirement plan can be either a single-employer plan or a multiple employer plan (MEP). In a single-employer plan, only employees within the same "controlled group" of businesses are allowed to participate. Put very simply (because the rules are complicated), a controlled group consists of different entities that share enough common ownership to be treated as a single employer under the Code and ERISA. And all of those employers' employees can participate in one plan.

In contrast, in an MEP, the employees of unrelated employers—*i.e.*, those falling in two or more controlled groups—may participate in a single plan. The entities may share some ownership or control, but not enough to be treated as a single employer.

There are often good business reasons for allowing non-controlled group members to participate in a single pension plan. But circumstances change, and the time may come when it is appropriate for an unrelated employer to leave. When this occurs, the MEP often seeks to distribute benefits to those employees, which allows the plan to cut ties with the unrelated employer and avoid unnecessary administrative burdens.

Assuming that there is no other distributable event (which typically is employment termination, death, etc.), there are three options to consider in such a situation:

- Complete plan termination
- Partial plan termination
- Spinoff termination

Complete Plan Termination

A plan termination is a distributable event. Generally, an employer leaving an MEP does not constitute a plan termination because there is just one plan and it will still exist after the unrelated employer leaves. However, it is possible under applicable Code and ERISA rules for an MEP to technically consist of a collection of separate plans, as opposed to a single plan. In such a case, the withdrawing employer could be treated as having its own individual plan, and that plan could be terminated and the assets distributed (provided such actions are consistent with the plan and trust documents).

Separate plans will exist under the Tax Code if the plan's assets are not available to satisfy the benefits of all participants and beneficiaries. In other words, the assets must be segregated in some way, such that some assets are designated and may only be used to pay the benefits of the employees of the unrelated employer. This is not typically the case, however.

Under ERISA, the U.S. Department of Labor modified its regulations in 2019 to make it easier for certain otherwise unrelated businesses to form an MEP known as an "association retirement plan" (ARP). Generally, to maintain a single plan, these employers must form a bona fide organization that has a substantial business purpose and either the employers operate in the same trade, industry, or profession, or they have a principal place of business in the same geographic region. If the ARP requirements are not met, however, then separate plans will exist.

If there are separate plans, the withdrawing employer could terminate its separate plan and distribute the assets.

Partial Plan Termination

Assuming—in all likelihood—that an MEP constitutes a single plan, a partial termination could occur when an employer ceases participating in the plan. This is determined based on all facts and circumstances surrounding the participating employer's exit from the plan. While there

is no bright-line test, if 20 percent or more of the participants are excluded from further plan participation, a partial termination is likely to have occurred. While this 20-percent rule of thumb technically only applies to ERISA plans, it nonetheless provides a good framework for non-ERISA plans as well.

If it is unclear whether a partial termination has occurred, the plan sponsor of the MEP could ask for the IRS' opinion. This is accomplished by filing Form 5300 (Application for Determination for Employee Benefit Plan) with the IRS. The plan sponsor would provide the basic facts and a description of why it believes a partial termination has occurred (or might occur in the future).

If a partial termination occurs, then benefits for the affected employees must become nonforfeitable, and any previously unallocated funds must be "allocated" to the affected employees. The rules governing partial terminations permit, but do not require, a distribution of benefits to participants affected by the partial termination so long as that distribution is consistent with the plan document. If the MEP does not provide for benefit distributions, it could likely be amended to so provide.

Spinoff Termination

If there is neither a complete termination nor a partial termination (and again, assuming there is no other distributable event), the only option is to spin off the withdrawing employer's participants into a new plan (sponsored by the unrelated employer or another entity in its separate controlled group), which can then be terminated and assets distributed. This would likely be the most expensive option, as it would first require the creation and establishment of an entirely new plan, as well as additional coordination between the MEP and the unrelated employer leaving the plan.

Regardless of which method outlined above applies, it is important for a participating employer that terminates participation in an MEP to be treated in a manner consistent with the terms of the governing plan document. Therefore, for MEPs in which an employer withdrawal is anticipated or likely, it is important to review the terms of the plan and, if necessary, update the plan to comply with the legal framework outlined above and achieve the desired result to the greatest extent possible.

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LEGAL UPDATE

Retirement Plans: 2022 Opportunities

Marcia S. Wagner, Esq.

Employers and plan sponsors of retirement plans need to be aware of some responsibilities and opportunities that are available as we head into 2022.

Adopting a New Plan—Employers can take advantage of extended deadlines under the SECURE Act to adopt a new plan or to adopt a safe harbor design.

a. *Adopting a new plan*—In the past, plan sponsors had to adopt a new plan by the last day of the year for which the plan was effective. Under the SECURE Act, the deadline is now the due date, including extensions, of the plan sponsor's income tax return for that year. Thus, a calendar year taxpayer that adopts a plan by the extended tax return due date for 2021 will be treated as having adopted the plan as of the last day of 2021, which gives the adopting employer the opportunity to make deductible contributions and retroactively provide benefits and reduce its tax liability.

b. *Adopting a safe harbor design*—The SECURE Act also allows plan sponsors to amend their 401(k) plans to add a safe harbor nonelective contribution feature (but not a safe harbor matching contribution feature) after the last day of a plan year as long as they do so by the due date of the plan sponsor's income tax return for that year. The employer's safe harbor contribution would have to be 4 percent of compensation instead of 3 percent of compensation. Thus, for example, an existing calendar year 401(k) plan can be amended by the extended tax return due date for 2021 to retroactively adopt a safe harbor design, and automatically satisfy 401(k) nondiscrimination testing, for 2021, which is a useful option if the plan fails

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such testing and would have to make refunds to highly compensated employees.

Amend and restate defined contribution plan documents—Defined contribution plans, such as profit sharing plans, 401(k) plans, and money purchase pension plans, that rely on documents preapproved by the IRS need to amend and restate their documents by July 31, 2022. The new documents include statutory and regulatory changes since the last version of these documents, which was six years ago.

Update summary plan description (SPD)—ERISA requires that a plan's SPD be updated and redistributed from time to time, generally every five years if changes are made to the plan or the law. SPDs for defined contributions plans that are being amended and restated now generally are updated at the same time, but SPDs for individually-designed plans, meaning those plans that do not fit neatly within a preapproved document, also should be reviewed and updated.

Cybersecurity—Some service providers are including updated service agreements with their amended and restated documents. These agreements should be carefully reviewed to ensure they address cybersecurity issues. The Department of Labor considers cybersecurity to be of utmost importance; vigilance and documentation of practices and procedures are key.

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Q&A

Protecting Qualified Plans and IRAS from Creditors

Michael Coyne, Esq.

A**ttorney Richard A. Naegele**, a fellow in the American College of Employee Benefits Counsel, recently spoke to ASPPA's Benefit Council of Cleveland, Ohio, concerning creditors rights with respect to qualified retirement benefits and IRAs and steps that participants and beneficiaries must take to protect their benefits. We took this opportunity to take a deeper look at the extent to which retirement benefits are safe from creditors.

Q Richard, whenever I hear you speak on this subject, I am always struck by the complexity and nuance of the law that protects retirement benefits from creditors. There really is not a simple answer whether retirement benefits are protected from creditors, is there?

A You are correct that the law is complex and nuanced, and no, there is not a black and white answer regarding protection from creditors. First, the law varies depending upon whether the debtor is in or outside of bankruptcy. Even within bankruptcy, there are complexities. The Bankruptcy Code allows debtors to claim certain property is exempt, using either exemptions allowed under state law, or exemptions provided in the Bankruptcy Code. Some states allow the debtor a choice between the two laws, but thirty-two states have elected to "opt out" of the federal bankruptcy exemptions, thereby requiring their citizens to use state exemptions only. With respect to retirement benefits, however, debtors can utilize both the federal and state law exemptions. Finally, characteristics of the retirement plan can impact the extent to which benefits are protected.

Q Let's start by focusing on participants or beneficiaries facing bankruptcy. What protections are offered by the Bankruptcy Code?

A The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) exempts retirement plan assets from a debtor's bankruptcy estate if the assets are held in a Section 401(a) qualified plan, a Section 403(b) arrangement, a Section 457 plan, or an IRA (including traditional IRAs, Roth IRAs, SEPs, and SIMPLEs). The exemption for an individually funded IRA is limited to $1 million (now $1,362,800 due to cola adjustments), but this limit does not apply to employer-sponsored IRAs (SEPs or SIMPLE-IRAs). Importantly, rollovers into IRAs from qualified plans are also not subject to the $1 million limit, but a rollover from a SEP or SIMPLE IRA appears to be subject to the limit, because SEPs and SIMPLE-IRAs are not qualified plans.

Q With so many retirement benefits being rolled into IRAs, keeping track of the source of the IRA funds seems to be pretty important, correct?

A Absolutely. For this reason, I always urge my clients to establish separate rollover IRA and contributory IRA accounts. This is the best way of assuring that the individual

receives the full $1,362,800 exemption on contributory IRAs and the unlimited exemption on IRA rollovers.

Q What protection is there for retirement benefits outside of bankruptcy?

A While assets are held in an employer-sponsored qualified plan, ERISA's anti-alienation provision protects the individual's benefits from being attached by a creditor, with a few exceptions. Under ERISA Section 206(d)(3): qualified domestic relations orders' benefits may be exempted; up to 10 percent of any benefit in pay status may be voluntarily and revocably assigned or alienated; and a participant may direct the plan to pay a benefit to a third party if the direction is revocable and the third party files an acknowledgment of the lack of enforceability of the assignment. Additionally, the IRS may enforce a tax levy against benefits that are in pay status, and the Fourth Circuit has held that the Federal Mandatory Victims Restitution Act authorizes garnishment of ERISA-protected retirement funds pursuant to criminal restitution orders.

IRAs are a different matter. Since BAPCPA only applies to assets in bankruptcy, one must look to state law for protection of IRA assets in state law (e.g., garnishment) actions.

Q One of the surprisingly complex issues you discussed in your presentation is the need to determine whether a plan is qualified. Can you explain?

A Implicit in the Bankruptcy Code protection is that the retirement assets seeking protection are from a qualified plan. If a plan has a favorable determination letter in effect on the date that the individual filed for bankruptcy, then the plan is considered to be qualified. As your readers are aware, it has become increasingly difficult to obtain an individual determination letter. Unfortunately, the courts are split as to whether an IRS Prototype or Volume Submitter Opinion Letter (Pre-Approved Plan Opinion Letter) is the equivalent of an IRS determination letter for bankruptcy exemption purposes.

If a plan has not received a favorable determination letter (and in those courts where a Pre-Approved Plan Opinion Letter is not considered equivalent to a determination letter), the debtor must prove that neither the IRS nor a court has made a determination that the plan is not qualified and that either the plan is in substantial compliance with the Internal Revenue Code or the plan is not in substantial compliance but the debtor is not materially responsible for the failure.

The IRS is aware of the problem it created by eliminating the availability of determination letters and has tried to offer clarification. In Section 7.04 of Revenue Procedure 2017-41, the Service states that "If an employer may rely on an Opinion Letter pursuant to this section, the Opinion Letter will be equivalent to a determination letter."

Q Is the Revenue Procedure the final word on this issue?

A Unfortunately, no. As I said, there is a division among Federal bankruptcy courts regarding this issue. Additionally, one Federal Circuit Court of Appeal has ruled that a bankruptcy court can determine whether a retirement plan has lost its tax-qualified status, and therefore its protection in bankruptcy. Another Circuit has ruled that a debtor possesses a right under federal tax law to participate in the IRS Voluntary Correction Program (VCP) in order to cure any potentially disqualifying defects to retroactively bring a plan back into compliance. Thus, we are unlikely to see a hard and fast rule as to how the qualified status of the plan is determined.

Q I was surprised to learn that some retirement plan distributions may be protected by BAPCPA.

A Yes, BAPCPA provides a limited post-bankruptcy protection for distributions of retirement plan assets to plan participants. Specifically, "eligible rollover distributions" may retain their exempt status after they are distributed. As a general rule, however, once assets have been distributed from a qualified plan or IRA, the assets are no longer exempt from creditor claims.

Q Are owner-only plans protected in bankruptcy?

A There is case law and Department of Labor (DOL) Regulations holding that a qualified retirement plan that benefited only the business owner (and/or the owner's spouse) was not an Employee Retirement Income Security Act (ERISA) Plan and, therefore, could not invoke ERISA anti-alienation protections either inside or outside of bankruptcy. However, within a federal bankruptcy proceeding, this concern has been eliminated to the extent that the debtor has a favorable ruling from the IRS or is otherwise deemed to have a tax-exempt plan.

Q What is the status of owner-only plans outside of bankruptcy?

A Outside of bankruptcy, it appears that owner-only plans may be subject to attachment by creditors. Department of Labor regulations provide that a husband and wife who solely own a corporation are not employees for retirement plan purposes. Those regulations further provide that a plan

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which covers only partners or a sole proprietor is not covered under Title I of ERISA.

However, it only takes the inclusion of one non-owner employee to bring a plan under Title I of ERISA. It may be something for a business owner to consider if he or she is worried about creditor protection.

Q Does an ERISA Title I plan also have additional protections in bankruptcy?

A Yes, ERISA Title I creditor protections apply both outside of bankruptcy and in bankruptcy. In *Patterson v. Shumate* (1992), the U.S. Supreme Court held that ERISA's prohibition against the assignment or alienation of pension benefits is enforceable in bankruptcy. Thus, a debtor's interest in an ERISA retirement plan is excluded from the bankruptcy estate.

Although Patterson was decided prior to BAPCPA, it is still good law and excludes "ERISA plans" from bankruptcy. BAPCPA is not limited to ERISA plans but provides an exemption, rather than an exclusion, for retirement plans and IRAs that are tax exempt under the Internal Revenue Code. In effect, this may give debtors in bankruptcy two potential bites at the apple—debtors can argue that their benefits in an ERISA plan are excluded in bankruptcy under Patterson and, alternatively, that such benefits are exempt under BAPCPA.

Q Earlier, you discussed the protection available to IRAs. You talked about rollover IRAs versus contributory IRAs. What about inherited IRAs? Do they have any protection?

A This is one place where there is a bit of clarity. *Clark v. Rameker* (2014) involved a debtor who inherited an IRA from her mother. The U.S. Supreme Court held that inherited IRAs are not "retirement funds" under the Bankruptcy Code and are therefore not exempt in bankruptcy. The Court cited three reasons for its decision. First, the holder of an inherited IRA cannot contribute additional funds to the account. Second, holders of inherited IRAs are required to receive distributions from the accounts regardless of their age. Third, the holder of an inherited IRA can withdraw the entire balance of the account at any time regardless of age and use the funds for any purpose without a 10 percent premature distribution penalty.

Interestingly, the Court implied that if the surviving spouse rolled over an inherited IRA into his or her own IRA, it will not be treated as an inherited IRA and will be exempt under the Bankruptcy Code. Yet, if the spouse chooses to treat the IRA as an inherited IRA, it may not be an exempt asset. The Supreme Court stated that "the spouse has a choice."

However, the Supreme Court did not have the final word on inherited IRAs. At least nine states that have opted out of the federal exemptions provide for some form of exemption for inherited IRAs. For example, Ohio specifically exempts inherited IRAs from creditor claims for a debtor domiciled in Ohio.

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BENEFITS CORNER

William F. Brown, Esq.

The Seven Deadly Sins of Retirement Planning

Articles about retirement planning errors are a dime a dozen. In a post on the benefitspro website, Bryce Sanders takes a novel approach by using the well-known deadly sins to illustrate some key errors and make suggestions for advisors to combat them. Mr. Sanders is the president of Perceptive Business Solutions Inc. and author of the book *Captivating the Wealthy Investor*.

The first error is "delaying too long," which Mr. Sanders equates with the deadly sin of Sloth. Too many people think retirement is years or even decades away. They live the mantra of enjoying life while they are healthy and traveling when they are young. They are far too concentrated on spending, rather than saving. A good advisor needs to focus clients' attention on the long-term. "Retirement" can seem like a far-off goal, but "financial independence" may seem more pertinent.

Next up is Greed, which relates to assuming that good times will last forever. Why don't people save? Because things

are going well; their career is on an upward trajectory, possibly towards the executive suite. Retirement planning can come later because they will be making lots more money down the road. Advisors need to stress the need for a Plan B. The COVID pandemic is an obvious example that the unexpected can happen. Even without that, companies merge or get acquired, or upper management can do dumb things that damage that rosy future. There are always losers along with winners, and retirement savings can be a nest egg if things go wrong.

The third sin is expecting a great lifestyle in retirement, which corresponds to Gluttony. People often see retirement as the time they will take a world cruise or dine out weekly in fancy restaurants. Others plan to spend time at the beach house they don't even own yet. Unfortunately, if a person cannot afford these luxuries while working full time, they probably won't be able to afford them without that regular paycheck. We all must align our retirement lifestyle to our projected retirement income.

Fourth on the list is Anger, which a person may feel when they realize that their expenses are not significantly lower after retirement. This optimism comes from the logic that there won't be commuting expenses, the need for new suits, or daily lunch expenses. However, Fidelity estimates that retirement expenses are 55 to 80 percent of expenses when fully employed. An advisor can help a client develop a comprehensive picture of their retirement expenses rather than back-of-the-envelope, wishful approximations.

Mr. Snyder's next Deadly Sin is Envy, which he equates to the feeling that someone else, meaning the government, should make up a retirement income shortfall. Many people have friends who planned ahead, who can take multiple vacations, and who aren't worried about cash flow. Some won't admit they didn't adequately prepare, so they think the government should top up their income with increased retirement benefits. An advisor can explain well before retirement that Social Security is only part of a client's retirement income picture and is not meant to be the sole source of retirement income. We are all responsible for planning our retirement future.

Not factoring in inflation touches on the sin Pride. Many of us take pride in being fiscally prudent, searching for bargains, and keeping expenses down. Health care costs have risen much faster than inflation, however, and there is no indication that this trend will lessen. None of us can live in the past; we all must pay current prices. An advisor can help with accurate projections and "Monte Carlo analyses" of what future retirement expenses may be.

Finally, there is the sin of Lust, which corresponds to not realizing how long one might live. Most of us assume we will stay in good health and live forever. But how long is that? Will our assets last until age 100? Then there is the issue of deteriorating health and the costs that come with that decline. It's a touchy subject, but "what if" discussions need to look at catastrophic health expenses and/or the need for long term care down the road.

Prison for Embezzling Plan Sponsor

Ron Estes is the sole owner of Ohio company R&R Steel LLC. He was also the sole trustee and plan administrator of R&R's 401(k) plan. An investigation by EBSA's Cincinnati office determined that he had fraudulently collected between $15,000 and $40,000 from the company's 401(k) plan by forging participant signatures on distribution forms and using the funds for his personal benefit. The distribution checks were sent to the company or Estes' personal address, and he then forged checks with participants' signatures and converted the funds for personal use by cashing the checks at local banks and markets.

Investigators also found he committed mail fraud when he wrote and mailed an $800 R&R Steel company check to receive ten fraudulent OSHA training certificates that he used to meet requirements necessary to obtain a $450,000 subcontract to perform work on a Cincinnati commercial development in October 2015.

This behavior eventually led to a federal indictment and Estes' guilty plea to one count of theft or embezzlement from an employee benefit plan and one count of mail fraud relating to the OSHA certificates. Under a plea agreement, a federal judge in Cincinnati has sentenced Estes to 18 months in prison. The judge also ordered Estes to forfeit $25,000 to the U.S government and to pay an amount of restitution to the affected participants of the 401(k) plan that will be determined at a later hearing. He must also pay an assessment of $200 and serve three years of supervised release following his prison term.

Some of Estes' victims were non-English speaking or had limited English proficiency. According to Joe Rivers, an EBSA Regional Director: "Estes offered his employees a tangible benefit, and willfully stole retirement earnings from employees he knew were most likely not going to report the fraud or exercise their legal rights."

Surprise! Courts Expect People to Follow Their Orders

Shawn Woldt is the owner of Thunderbird Engineering Inc., a company in Madison, Wisconsin. An EBSA investigation determined that he had failed to forward employees' voluntary payroll contributions and loan repayments from January 1, 2014, through August 6, 2020, to Thunderbird's 401(k) plan. Last March, Woldt consented to a federal order

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REGULATORY AND JUDICIAL UPDATE

Item:	Statement
Lack of meaningful benchmarks defeats challenge to plan's allegedly high administrative fees and underperforming investments	***Forman, et al. v. TriHealth, Inc., et al.*, U.S. District Ct., S.D. Ohio, No. 1:19-cv-613, September 24, 2021.** Lower fees offered by putative comparable 401(k) plans did not allow the inference that a plan's administrative fees were unreasonably high or that plan fiduciaries imprudently permitted the plan to incur the fees, without evidence of the specific services offered in exchange for the fees, according to a federal trial court in Ohio (DC OH). In addition, the plan participants could not create an inference that the fiduciaries breached their duty of prudence by selecting, maintaining, and failing to remove allegedly underperforming funds, absent a meaningful comparable benchmark and actionable underperformance. TriHealth, Inc. maintains a 401(k) plan that had over 10,000 participants and assets (as of 2017) in excess of $457 million. Plan participants alleged that, for every year between 2013 and 2017, the administrative fees charged to plan participants were greater than the fees (calculated on the basis of cost per plan participant or a percentage of total assets) of more than 90 percent of comparable 401(k) plans that had similar numbers of participants and assets under management. By selecting and retaining the plan's unreasonably expensive cost investments while failing to adequately investigate the use of lower-cost share classes, offered by the same investment companies, or superior, lower-cost mutual funds from other fund companies that were readily available to the plan, it was alleged that the fiduciaries caused the plan participants to lose millions of dollars. In concluding that the participants failed to assert sufficient allegations to support the claim that the fiduciaries breached their duty of prudence by permitting the plan to incur allegedly excessive administrative fees, the court stressed that the participants did not describe the services the plan received in exchange for the allegedly excess fees or identify the services that the allegedly comparable 401(k) plans received in exchange for their loss costly fees. Allegedly high administrative fees, the court emphasized, will not be viewed as imprudent absent evidence that the fees were excessively relevant to the services rendered. In addition, the court found that the participants did not identify less costly alternatives (vendors or service options) available to the fiduciaries. Nor did the participants identify what a reasonable cost would have been based on the services offered to the plan or how much the plan actually paid. Absent allegations establishing, for example, a reasonable administrative cost based on market information, the actual cost paid by the plan, or the failure to engage in a competitive bidding process, the court could not presume that the plan's administrative fees were unjustifiably high or that the fiduciaries imprudently permitted the plan to incur the fees. In similarly dismissing the charge that the fiduciaries breached the duty of prudence by selecting, maintaining, and failing to remove underperforming, high-cost funds, the court stressed that plan participants may not merely allege underperformance or high fees. Participants must provide a "meaningful benchmark" that allows for a sound comparison. Thus, the court explained, without sufficient factual allegations permitting the challenged fund's characteristics and performance to be compared to such a meaningful benchmark, a participant will not be able to sustain a claim of fiduciary breach. The participants identified several lower-cost share class funds as putative benchmarks. However, the court found that, without the support of facts establishing a meaningful benchmark, the participants' claim was not plausible.

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and judgment that required him to restore $53,122 to the plan through a scheduled series of payments.

So far so good, but after making two of the required payments, totaling $18,866, Woldt failed to make the rest of the payments. EBSA followed up and hauled him back to the U.S. District Court in Madison. The U.S. District Court Chief Judge James Peterson held Woldt in civil contempt for failure to comply with the March consent order and judgment and then brought the hammer down. Judge Peterson ordered that Woldt had until Dec. 28, 2021, to restore the remaining $34,254, plus interest, to the plan. Failure to restore the funds by the deadline would trigger a penalty of

$100 per day to the plan. The court also removed Woldt and others as fiduciaries to the plan and immediately appointed an independent fiduciary to manage the plan.

The $100 penalty would accumulate daily until all amounts owed to the plan and all penalty amounts were paid in full. The court also ruled that plan losses and all fees and expenses related to the independent fiduciary's services could be drawn from Woldt's personal 401(k) account, and a set-off from Woldt's account was allowed to restore all amounts due to the plan. In addition, the order prohibited Woldt from withdrawing or moving any funds from his individual plan account until all monies were restored to the plan and the independent fiduciary's fees and reasonable expenses are paid.

Emphasizing what should be obvious, Employee Benefits Security Administration Regional Director Jeffrey Monhart in Chicago noted: "Complying with a court order is not voluntary."

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As for an effective redress for employees to gain the retirement and health plan promises made to them and then broken, ERISA has failed miserably.

For many formidable reasons, it still is nearly impossible for employees protected by ERISA to enforce their rights to obtain the pension or welfare plan benefits they were promised. Reasons include, as examples only, what follows. The lawyers who are willing to take plaintiffs' cases often don't possess adequate knowledge of ERISA to effectively fight an attorney who represents the defendants, which attorney often is an ERISA expert. Individuals cannot afford the fees to fight for their rights, and indeed a common strategy for employers or others defending those cases is to simply break the bank of the employee and plaintiffs' attorney, bleeding them to death. ERISA is so gosh darn complex that many judges have a hard time figuring out (or having the time to figure out) whether to believe the plaintiff or the defendant or adequately understand the law when it comes to matters of ERISA, and indeed many so-called "experts" are anything but. Furthermore, the law is also so complex that most plaintiff attorneys recognize the formidable behemoth it is, and stay clear of it and the massive resources a success would require. The exception to ERISA's horrific failure to make employees whole are the class action suits, where an employee just needs to be lucky enough to fall within the applicable facts, the most notable example resulting in litigation against employers and others for plan fees and expenses. But class actions are a rare breed of cases, not helping all of the employees who have asked me and others over the years to help them against their fiduciaries or other providers in the industry.

Interestingly, it is the tax laws, the fear of plan disqualification, requiring employees be made whole, that has done a heck of a lot of good to restore plan benefits. As a result, as much as many taxpayers don't like our tax system, EPCRS is included in those few changes of thousands that have made ERISA better in meeting its founding principles.

If one were to just read several relevant cases, one would completely understand how horribly stacked against the employee ERISA is. Thank goodness most fiduciaries and plan providers seem to want to do the right thing for employees. And so in my view the vast majority of employees do obtain the plan benefits promised to them. But for those who aren't so lucky, the battle for the employee to gain justice is most always entirely futile.

There are several different ways to field my original question as to whether ERISA is better today than it was when enacted in 1974 (or in my case, 1982). One arguable answer is that the many thousands of changes in the law between then and now have done little to truly advance ERISA, particularly when weighed against the impracticalities of the changes. The hurt of the herculean effort with its necessary full-on deployment of resources to comply with these never-ending changes far outweighs the arguably insufficient improvement in the law these changes have yielded.

Jeffery Mandell *is the founder of The ERISA Law Group and Employee Benefit Publications & Seminars, and the editor of this publication. Jeff is a Fellow of the American College of Employee Benefits Counsel and a former adjunct professor of law. He can be reached at 208-342-5522 or* jeff@erisalawgroup.com.

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LAST WORD ON 401(k) PLANS

Change in Status, and an Assessment of ERISA's Health

Jeffery Mandell, Esq.

Hello, before sharing a few observations regarding ERISA, allow me to introduce myself with a personal note. I'm Jeff Mandell, editor, architect, and contributing author to *The 401(k) Advisor.* I also founded the ERISA Law Group, P.A., in 2001, after 20 years of legal practice in other law firms. With the wonderful contributions of the articles you read by seasoned dedicated ERISA professionals, as well as the amazing work of my staff, this publication is possible.

1. Change in Status. After 40 years of a legal practice dedicated solely to ERISA, I will continue to provide ERISA services to new and old clients, but not as an active licensed attorney. I am excited about my next chapter in life, and still young enough to have a run at it. I will continue to fully run this publication as I have in the past.

The ERISA Law Group, LLC, owned by my friend and excellent lawyer, Jeff Johns, and incorporated in Kansas, is the successor to my firm. The name of my firm has changed to The ERISA Group, Inc. It took me a long search to find the perfect successor to my firm. Jeff and I have worked together now for about three years, and he has taken lead of the firm. He shares my values, and I fully trust him to do tremendous work for our firms' clients, and with reasonable prices.

Having dedicated 40 of my 67 years to serve clients to the best of my abilities, a multitude of feelings, thoughts, remembrances, and the like accompany my decision to slow down. Helping clients in all kinds of ERISA difficulties, achieving the best plans and solutions for them, and meeting their ERISA objectives, has brought me untold satisfaction. Representing clients when working both along with and adverse to the IRS and DOL has been very rewarding, as have been my contributions to the advancement of knowledge in the ERISA industry.

2. ERISA's Health Now Versus 40 Years Ago. What follows are a few observations of the ERISA in effect when I started to practice in 1982, compared to now. These are solely my personal views. I welcome hearing other or contrary views, particularly with stats to confirm or challenge my viewpoint.

Taking into account the complex and constant changes to ERISA, is ERISA better now than 40 years ago? Well, it depends on the meaning of "better" and the question's specific context, and the lens through which the question is answered (the employees' perspective, the employers', the different providers, etc.). ERISA was born (in good part) to protect employees, advance their retirement interests, and provide them with an effective redress to wrongs perpetrated mostly by employers, fiduciaries, and unions. ERISA also provided a framework for uniform law, and its enforcement, of retirement, health, and their related tax laws throughout the country.

Regarding protecting employees, I would argue the law has improved protections. Included in this group that aids participants are considerably shorter eligibility, shorter vesting schedules, more and improved disclosures to employees (if anyone were to read them), important additions of providing plan benefits for spouses of participants, recognition of same sex marriages, expedited and fairer claims procedures, and the reduction of expenses charged participants brought about by the confluence of excellent proposed and finalized DOL regulations and a small group of plaintiff class action lawyers ready to capitalize on the opportunity they saw. There are other additional significant employee protections the last 40 (even 52) years have yielded.

As for whether employees' retirement benefits have grown (meaning greater a coverage of employees and an increased per-capita amount relative to COLA), the answer to that is a bit more troublesome for me. I leave that issue for another day.

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