Warner Norcross + Judd

A BETTER PARTNERSHIP®

Warner's culture, values and approach are refreshingly different and effective, making us the right fit for our clients and our colleagues.

Employee Benefits

As one of the largest Employee Benefits law practices in Michigan, we offer a team who has seen it all before and has up-to-the-minute expertise – including in highly specialized areas as ESOPs and pensions.

- Retirement plans
- Employee benefits litigation
- Pensions
- Fiduciary governance
- Tax qualified plans
- Non-qualified plans
- Deferred compensation
- 409A
- Executive compensation
- ESOPs
- Nonprofit and government benefit plans
- Health and welfare benefit work
- Privacy and cybersecurity
- Multi-employer benefit work
- Withdrawal liability
- De-risking
- Pension termination
- Health Care Reform Act
- HIPAA

Heidi Lyon | Partner

hlyon@wnj.com | 616.752.2496

- Specializes in retirement plans and executive compensation
- Counsels employers, plan fiduciaries, and service providers on designing, operating, and maintaining retirement and executive compensation plans
- Former chair of Warner’s Employee Benefits Practice Group

Stephanie Grant | Sr. Counsel

sgrant@wnj.com | 313.546.6068

- Attorney who specializes in health and welfare benefits, including COBRA, HIPAA and the ACA
- Counsels employers on wellness plans and other employee benefits matters

Our Focus Today

- **Retirement Plan Topics**:
  - New IRS limits
  - Agency guidance: catch up and RMD relief
  - New DOL and IRS rules: proxy voting, ESG, and forfeitures
  - Audit activity update
  - SECURE legislation: status of mandatory and optional changes
  - ERISA litigation: trends and claims

- **Health and Welfare Topics**:
  - Anti-gag clause attestations
  - Mental Health Parity proposed regulations
  - Cross-plan offsetting
  - Preventive coverage under ACA
  - “Wellness” programs
  - ERISA pre-emption

Agency Guidance – Notice 2023-75
2024 IRS Retirement Plan Limits

IRS Retirement Plan Limit	2024	2023
Annual Compensation	$345,000	$330,000
Elective Deferrals	$23,000	$22,500
Age 50 Catch Up Contributions	$7,500	$7,500
Defined Contribution Plan Limits	$69,000	$66,000
Defined Benefit Plan Limits	$275,000	$265,000
HCE Threshold	$155,000	$150,000
Social Security Taxable Wage Base	$168,600	$160,200

Agency Guidance –IRS Notice 2023-62

SECURE 2.0 Roth Catch-Up Relief

- Interpreted Code post-SECURE 2.0 to continue to permit catch-ups
- Two-year delay in enforcement of requirement to treat catch-up elective deferrals of participants with prior year FICA compensation of $145,000+ as Roth contributions (“administrative transition period”)
- Included likely future IRS guidance
  - Elections to defer can be deemed Roth for those affected
  - Participants without W-2 wages (e.g., partners and self-employed individuals) exempt
  - In a multi-employer plan, wages with one participating employer don’t count for another employer
- Asked for input on the many open issues, including whether those who would be subject to the rule can just be cut off from catch-ups

Agency Guidance –IRS Notice 2023-54

RMD Relief

Those turning age 72 in 2023 do not have to take an RMD in 2023 under SECURE 2.0 (increasing the RMD age to 73). If one was already made before 7/31/23:

- The participant (or spouse) could roll it over up to September 30, 2023
- Not a failure of the eligible rollover distributions requirements (i.e., permitting a direct rollover, withholding at 20%, providing a 402(f) notice)

Includes other relief for beneficiaries of recently deceased participants.

Final DOL Rule 2550.404a-1 - Proxy Voting & ESG Investing

- Fiduciary duties of loyalty and prudence require exercise of shareholder rights
  - Proxy voting
  - Environmental, social and governance investment factors
- Political issue - guidance has varied
- Final Rule effective January 30, 2023
  - Who votes your plan’s proxies?
  - Have a documented process to guide decision-making?

Proposed IRS Rule 1.401-7 - Forfeitures

- Effective: Plan years on or after January 1, 2024
- DC Plans
  - Timing – use by end of year following occurrence
    - 2024 plan year transition period
    - Have a process for this?
  - Uses – if plan document permits
    - Pay plan expenses
    - Reduce employer contributions
    - Allocation to participants as additional benefit
  - Class action litigation attacking uses other than allocation
- DB Plans
- May need interim plan amendment by end of 2026 PY

Audit Activity

- DOL, IRS, PBGC
- Uncashed checks, lost/missing participants, missed RMDs
- Plan fiduciary's role in monitoring providers and handling certain aspects
- Cybersecurity
  - Vendor agreements
  - Participation education
  - Employee training for information handling
- Fees
  - What are they?
  - Are they reasonable?
  - Investment decisions focused on participant best interests or fees?

SECURE Legislation: Long-Term Part-Time (LTPT) Employees

- SECURE 1.0: 401(k) plans must allow LTPT employees to contribute beginning with 2024 plan year
  - LTPT employee = 500 hours of service in three consecutive years
- SECURE 2.0
  - Reduces three-year period to two years (beginning with 2025 PY)
  - Applies rules to 403(b) plan as well
  - Clarifies pre-2021 service not counted for vesting

SECURE Legislation: LTPT Employees (Continued)

- IRS has not yet issued guidance, but it's coming
- If in plan solely due to LTPT status, employer contributions not required
    - Do you lose this if more generous than law requires?
- What about excluded classifications?
    - Is exclusion hours-based?
- What entry dates are used?

SECURE Legislation: Cash-Out Limit

Applicable to:	**401(k), 403(b), governmental 457(b), and defined benefit plans**
Effective Date:	**Distributions after December 31, 2023**

- Amounts below limit in plan must be distributed even if participant does not consent
- Maximum limit moving from $5,000 to $7,000
- Check plan language to understand whether limit will go up if you do nothing

SECURE Legislation: RMDs - Roth Accounts Excluded

Applicable to:	**401(k), 403(b), and governmental 457(b) plans**
Effective Date:	**2024 taxable year**

- Exempts Roth accounts from pre-death mandatory distribution rules
- Aligns 401(k) Roth accounts with Roth IRA rule

SECURE Legislation: Optional Changes – Awaiting Guidance

- Student loan matching
- Roth employer contributions
- Emergency savings accounts
- Small participation incentives
- Unenrolled participant notices
- Updated EPCRS correction options

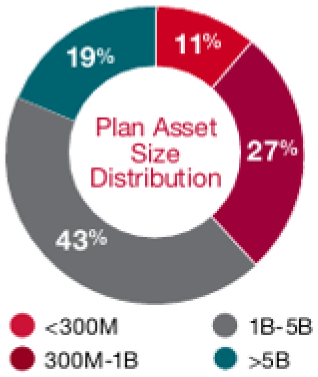
SECURE Legislation: New Distribution Options

Event	Types of Plans	Effective Date	Dollar Limit	Repayment Right (Yes/No)
Emergency	401(a), 401(k), and 403(b) Plans	After December 31, 2023	$1,000 per calendar year	Yes
Qualified Birth and Adoption (if added, SECURE 2.0 changes required)	401(a), 401(k), 403(a), 403(b), and 457(b) Plans	After December 29, 2022	$5,000 per qualifying event	Yes
Federal Disasters	401(a), 401(k), and 403(b) Plans	On or after January 26, 2021	$22,000 per disaster	Yes
Domestic Abuse	401(a), 401(k), 403(b), and 457(b) plans	After December 31, 2023	Lesser of $10,000 or 50% of vested account balance	Yes
Long-Term Care Insurance	401(a), 401(k), and 403(b)	After December 29, 2025	Lesser of: annual amount paid for insurance; 10% of vested account balance; or $2,500 annually (indexed for inflation)	No
Terminal Illness (waiver of tax applies, not a distribution event)	401(a), 401(k), 403(a), and 403(b) plans	After December 29, 2022	None	Yes

ERISA Fee Litigation: Trends

- 22 Michigan cases
  - 4th behind CA, NY and MA
  - Plaintiff-friendly courts
- Insurance pricing affected

SOMPO INTERNATIONAL



Data sourced from Lex Machina's 2010 – 2022 Graph of ERISA claims

CHUBB

Excessive Litigation Over Excessive Plan Fees In 2023

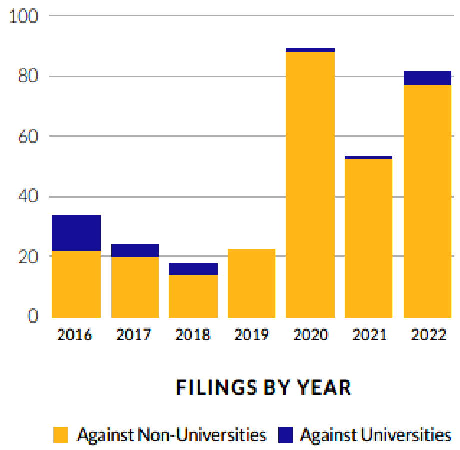
An inside look at the continuing barrage of excessive fee litigation targeting retirement plan fiduciaries

As one of the leading carriers of fiduciary liability insurance protection, Chubb is dedicated to helping our clients understand and mitigate the risks they may face. The onslaught of claims over alleged excessive fees in retirement plans continues to be a potential exposure for all types of plan sponsors (e.g. publicly traded companies, privately owned companies, not-for-profit organizations) in all types of industries, while defined contribution plans of all sizes are being targeted.[1]

The pace of filings industry-wide remains elevated with no end in sight.

Although fiduciary excessive fee claims first appeared in 2006, they were historically infrequent, other than a brief period in 2016 when a series of claims were brought against universities.

Notwithstanding the wave of suits against universities, the filing activity over the last three years has significantly increased.



ERISA Class Action Litigation: Claims

- Misuse of forfeitures
- Unsuitable investments
  - Excessive investment fees and share class
  - Insufficient returns
  - Proprietary funds, target date funds, stable value funds, managed accounts
- Excessive recordkeeper fees
- Failure to monitor float, indirect or hidden fees
- Participant data as an asset
- Schlichter firm (started 401k litigation) looking at health plans

Retirement Plan Takeaways

- **Prevent**: Adopt, document, follow and review prudent processes, particularly in evolving and emerging areas
- **Protect**: Use fiduciary safe harbors (e.g. QDIA, 404c), contract for fiduciary services, maintain liability insurance, keep documents current
- **Monitor and Follow Up**: SECURE guidance continuing to come, will involve teaming with recordkeeper, investment advisor and legal

Anti-Gag Clause Attestations

- Consolidated Appropriations Act, 2021 (CAA) prohibits gag clauses in contracts with health plans
- Gag clause = restrictions on sharing provider-specific cost information or quality-of-care information with patients, other providers, or plan sponsors, or restrictions on sharing de-identified claims data and other encounter information with patients and providers
- First attestations due by December 31, 2023 (and annually thereafter)
  - Fully-insured plans: Carrier will submit
  - Self-insured plans: TPA can submit if there’s a written agreement in place

Mental Health Parity

- Mental Health Parity and Addiction Equity Act (MHPAEA)
  - Mental health and substance use disorder (MH/SUD) benefits must be on par with medical and surgical (M/S) benefits
  - CAA, 2021 requires “comparative analysis” of plan’s nonquantitative treatment limitations (NQTLs) for MH/SUD and M/S benefits
    - DOL audit of comparative analyses – ALL failed
    - Employers and carriers struggling to comply

Mental Health Parity

- Proposed regulations for NQTL comparative analysis issued July 2023
- Defines key terms
- Includes a six-step process
  - Identify relevant NQTL
  - Identify factors used to design or apply NQTL
  - Describe how each factor is used in designing or applying NQTL
  - Demonstrate how plan's terms as written in designing or applying NQTL to MH/SUD are comparable to M/S benefits
  - Demonstrate how plan's operations in designing and applying each NQTL to MH/SUD are comparable to M/S benefits
  - Discuss in detail findings and conclusions
- Contemplates evaluating network adequacy
- Proposes that plan fiduciaries must sign off on comparative analysis

Cross-Plan Offsetting

- Cross-plan offsetting = one plan's overpayment to a provider is offset by reducing payment to that provider from another plan
  - Raises issues of violating ERISA's exclusive benefit rule
  - Benefits TPA/insurer by wrongfully retaining assets from one plan for a debt owed by another plan
  - Puts participants at risk for balance billing by out-of-network providers
- DOL recently settled with EmblemHealth, Inc. regarding the TPA's cross-plan offsetting practices

Preventive Coverage

- Braidwood Management Inc. v. Becerra
  - Challenges ACA's preventive care coverage mandate:
    - Requirements for USPSTF recommendations of covered preventive services is unconstitutional
    - Covering PrEP violates plaintiffs' religious rights under RFRA
- Currently on appeal
  - USPSTF preventive services recommendations remain in effect while on appeal and government agreed not to take enforcement action
- Does not affect preventive services related to allowable HDHP/HSA first-dollar coverage

“Wellness” Programs

- Brokers are promoting new variation of prohibited “double dipping” scheme
- Key red flags:
  - Promises payroll tax savings
  - Significant “pre-tax premium” paid by employees
    - Some have been as high as $1,200/month
  - Employee then engages in very simple/easy “health” activity to trigger almost complete restoration of premium
    - Rarely qualifies as “medical care”

ERISA Preemption

- General rule:
  - ERISA preempts any state law that “relates to” an ERISA plan
  - But state laws that regulate insurance are not preempted
  - Self-funded plans are considered “insurance” subject to state regulation
- States toeing the line of ERISA preemption with PBM regulation

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Thank you!

Questions? Contact Us

Stephanie Grant: sgrant@wnj.com | 313.546.6068

Heidi Lyon: hlyon@wnj.com | 616.752.2496