

24TH ANNUAL

Employment Law Conference

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Four Seasons Biltmore, Santa Barbara, CA



Mullen & Henzell L.L.P.
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2020 Benefits Update

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Important Note:

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- The information provided in this presentation is a brief summary of legal developments, subject to change, that is provided for general guidance only and does not create an attorney-client relationship between the author and the reader or attendee.
- You must seek individualized legal advice in regard to any particular factual situation.

- Retirement Plan Changes under the SECURE Act
- New Rules for E-Delivery of ERISA Documents and Notices
- Update on ACA Repeal and CalSavers

Retirement Plan Changes

Under the **SECURE Act of 2019**

SECURE Act Changes

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- Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE)
 - Part of the Further Consolidated Appropriations Act of 2020 – a “must pass” government funding bill.
 - SECURE was a House proposal; was melded with the Retirement Enhancement and Savings Act (RESA), a Senate proposal.
- SECURE Act is the most significant legislation affecting benefit plans since the Pension Protection Act of 2006.

SECURE Act Changes

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- This presentation will focus on SECURE Act provisions affecting employers who already maintain a 401(k)/profit sharing or other qualified retirement plan.
- It will not cover SECURE Act provisions re: “pooled employer plans” or increased tax credits available to small employers (up to 100 employees) who establish new retirement plans.
 - However, note that the deadline to adopt a new retirement plan has been extended to your tax return deadline, including extensions, for that year.

SECURE Act Changes

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- Unless otherwise mentioned, SECURE Act provisions are effective for plan years beginning on and after January 1, 2020.
- Unless otherwise mentioned, SECURE Act plan amendments may be postponed to the last day of the first plan year beginning on or after January 1, 2022 (remedial amendment period).
 - In the meantime you must operate your plan in compliance with the mandatory SECURE Act changes and with the optional changes you choose to implement.

SECURE Act Changes

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- Mandatory Change: Coverage for “Long-Term Part-Time Employees” (LTPTEs):
 - 401(k) plans must allow part-time employees to contribute via salary deferrals once they have:
 - Reached age 21; and
 - Worked at least 500 hours in 3 consecutive 12-month periods.)
 - Deferral right only; no need to provide match or profit sharing contribution, or top-heavy contributions.
 - You must start counting hours for plan years beginning on or after December 31, 2020.
 - Thus 2024 will be first year part-timers will be eligible to participate.

SECURE Act Changes

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- Mandatory Change: Coverage for “Long-Term Part-Time Employees” (LTPTEs), cont’d.:
 - Not applicable to collectively-bargained plans.
 - No need to count hours worked in prior years (may do so voluntarily).
 - If you are in a low-turnover industry, consider opening deferral option up to all part-times upon hire, to eliminate need to count hours.
 - Plan may impose standard entry date.

SECURE Act Changes

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- Mandatory Change: Disclosure of Account Balances as Lifetime Income Stream (e.g., Annuity Payout):
 - At least once per year, defined contribution plans must illustrate what participant's lump sum account balance would look like, if distributed over their life expectancy.
 - Not effective until after DOL publishes further guidance including model disclosures and assumptions to be used to model payouts.
 - Not likely to occur until 2021 at earliest.
 - No fiduciary liability for providing statement that follows DOL guidelines, if annuity payout is less than modeled.

SECURE Act Changes

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- Mandatory Change: Required Minimum Distribution Start Age Pushed back to 72
 - Impacts those born on or after July 1, 1949.
- Mandatory Change: Acceleration of Required Minimum Distributions
 - 10-Year Rule replaces Life Expectancy payout for many Designated Beneficiaries
 - Exception for “Eligible Designated Beneficiaries” including surviving spouse; disabled/chronically ill individuals.
 - Effective for deaths occurring after December 31, 2019; also impacts beneficiaries of those dying before that date.
 - Generally applicable to defined contribution plans; delayed effective dates for governmental and collectively bargained plans.

SECURE Act Changes

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- Mandatory Change: Increased penalties for failing to timely file Form 5500 Return/Report:
 - Penalties increase 10-fold for returns required to be filed after December 31, 2019:
 - \$250 per day, up to \$150,000.
 - DOL penalties still may apply, absent use of Delinquent Filer Voluntary Compliance Program.
 - Those penalties are \$2,233 per day, no maximum for penalties assessed after January 15, 2020.
 - Additional \$\$ penalties related to Form 8955-SSA registration statement (separated vested participants).

SECURE Act Changes

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- Optional Change: Increased Maximum Limit for Auto-Escalation of Salary Deferrals (QACA).
 - QACA's are exempt from 401(k) ADP/ACP testing provided certain requirements are met.
 - One requirement is that the maximum auto-enrollment deferral rate not exceed 10% of compensation; SECURE Act raises that to 15%, except for the first year's deferral rate which must not exceed 10%.
 - Effective for plan years beginning after December 31, 2019.
 - Employers wishing to implement should realize matching contribution costs will also rise.

SECURE Act Changes

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- Optional Changes: Increased flexibility re: 401(k) safe harbor election and notice.
 - Plan that is subject to ADP testing can convert to non-elective safe harbor plan:
 - Up to 30 days before plan year end (PYE) at 3% contribution.
 - As late as 12 months after PYE for 4% contribution
 - 401(k) safe-harbor notice for employer non-elective plans eliminated.
 - Notice still must be provided for safe-harbor matching plans.
- Both optional changes are effective for plan years beginning after December 31, 2019.

SECURE Act Changes

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- Optional Change: Fiduciary liability safe harbor for selecting insurance company that issues “guaranteed retirement income contracts,” such as annuities, under a defined contribution plan.
 - Effective as of December 20, 2019; simplifies and improves prior DOL safe harbor issued in 2008.
 - Allows fiduciary to rely on state insurance regulators to audit carriers, issue certificates of authority, and otherwise confirm that carriers are financially sound.
 - Fiduciary decision as to choice of carrier is based on facts available to them at time of selection; carrier is obligated to notify fiduciary of subsequent changes to their condition.
 - Fiduciary need not select lowest-cost carrier.

SECURE Act Changes

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- Optional Change: Qualified Birth or Adoption Distributions:
 - Effective January 1, 2020.
 - New parents are exempt from the 10% penalty tax on pre-age 59.5 distributions, for amounts up to \$5,000 that are withdrawn on account of a “qualified” birth or adoption. Income tax still applies.
 - Distribution must occur after the qualified birth or adoption, not prior.
 - The dollar limit applies per parent, so a couple could each qualify for the dollar limit unless an employer plan provides otherwise.
 - Distributions may be paid back to the plan at any time (pending regulations).

SECURE Act Changes

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- Optional Change: Expanded disaster relief for victims of nationally declared disasters occurring from January 1, 2018 through February 18, 2020.
- Impacted participants can take a plan distribution (with no 10% penalty tax) of up to \$100,000.
 - May be rolled back to plan or IRA within 3 years.
 - May be included in income over 3-year period.
- Loan limit doubled to \$100,000; extra year to pay.
- Effective December 20, 2019; participants have 180 days (June 17, 2020) to take advantage of the relief.
- Plan sponsors must adopt special plan amendments by end of 2020 plan year.
- Should include 2018 California wildfires (no double-dipping if already benefitted under Bipartisan Budget Act of 2018).

New Rules for E-Delivery

Of ERISA Documents and Notices

New Rules for E-Delivery

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- Proposed DOL regulations released in October 2019 sets forth a new safe harbor procedure for retirement plans disclosures, only.
 - It is an alternative to existing DOL safe harbor for e-delivery of ERISA disclosures, which applies to both retirement and health and welfare plan disclosures. (Covered at M&H ELC 2016)
- The safe harbor applies to “covered documents” provided to “covered individuals.”
- Citation: DOL Regulation § 2520.104b-31.

New Rules for E-Delivery

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- The new e-delivery safe harbor works on a “notice and access format”:
 1. Initial Notice of Default Electronic Delivery
 2. Obtain electronic addresses from participants and beneficiaries (e.g., upon hire).
 3. Post the document(s) online at a secure site meeting criteria set forth in the proposed regulation:
 - Note: proposed regulation does not say anything about use of the “cloud,” or use of “apps.”
 4. At time each document is posted, e-transmit Notice of Internet Availability to covered individuals, explaining the posted document, how to access, and how to opt-out (paper copy).

New Rules for E-Delivery

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- Initial Notice of Default Electronic Delivery
 - Must be provided in hard copy to covered individuals.
 - Must state:
 - That some or all “covered documents” will be provided electronically to an electronic address.
 - That the covered individual has a right to request and obtain a paper copy of a covered document, without charge, and can opt-out of the e-delivery system altogether.
 - How a covered individual can request a paper copy and/or opt-out.

New Rules for E-Delivery

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- Notice and access format, cont'd.:
 - The posted documents must be word-searchable.
 - Employer must take reasonable measure to protect confidentiality of covered individuals' personal information.
 - Documents must be posted timely per ERISA deadlines.
 - Documents must remain available online until superseded by a new version.
 - Other criteria apply (ability to print out, etc.)

New Rules for E-Delivery

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- Covered documents: any document that ERISA requires a plan administrator to provide to participants and beneficiaries under ERISA Title I.
- Does not include documents that participants or beneficiaries make individual requests to receive.
- New safe harbor is stricter than a 2006 safe harbor for posting statements and other retirement plan disclosures on a “continuous access website” because it requires plan administrator obtain an electronic address; 2006 safe harbor did not.

New Rules for E-Delivery

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- Covered documents include:
 - Participant account statements
 - Summary Plan Description
 - Summary of Material Modifications
 - Summary Annual Report
 - Annual funding notice (pension plans)
 - Participant fee disclosure
 - Qualified Default Investment Alternative Notice
- Note: All or some combination of the above can be provided in a single consolidated Notice of Internet Availability, if certain criteria are met.

New Rules for E-Delivery

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- Covered individuals: plan participants and beneficiaries who furnish the plan administrator with an “electronic address” consisting of:
 - An email address (including company-assigned address) or
 - A smartphone number.
- Covered individual also must not opt-out.
- On termination of employment, the plan administrator must take steps to confirm that the electronic address on file will remain viable, or obtain a new one, in order to continue using the safe harbor e-delivery method for that covered individual.

New Rules for E-Delivery

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- Notice of Internet Availability
 - Timing: furnish each time you post a new ERISA disclosure document to the secure website (subject to special rule for consolidated notice).
 - If consolidated notice is used it must be provided at least annually and no longer than 14 months after the prior year's notice.
 - There are special procedures to follow if e-notification of posted document bounces back, or if online system fails.

New Rules for E-Delivery

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- Notice of Internet Availability, cont'd.:
 - Content:
 - A prominent title such as “Disclosure About Your Retirement Plan.”
 - A statement that “Important information about your retirement plan is available at the website address below. Please review this information.”
 - A brief description of the covered document.
 - The internet website address where the covered document is available.
 - A direct link to the document or
 - Link to login page that provides (pre or post-login) a prominent link to the covered document.

New Rules for E-Delivery

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- Notice of Internet Availability, cont'd.:
 - Method of furnishing: transmittal to the electronic address provided.
 - Subject to consolidated notice rule, must be separate from any other documents or disclosures.
 - Must be drafted to a fairly simple reading level –10th to 12th grade reading level, maximum.

New Rules for E-Delivery

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- Effective Date for E-Delivery Safe Harbor: it is to apply to disclosures required under retirement plans on the first day of the first calendar year following publication of final regulations.
- DOL estimates that use of the safe harbor will allow plan administrators to save an estimated \$2.4 billion net cost over the next 10 years for in printing, mailing and administrative costs.
- However the Pension Rights Center opposes the new rule on the grounds that it puts individuals without regular computer or smartphone access at a disadvantage.

New Rules for E-Delivery

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- Practical considerations:
 - Health and welfare plan administrators MUST continue to follow the 2002 safe harbor rules for now, e.g., for COBRA notices and other communications.
 - Give consideration to waiting to implement until expanded to include health and welfare plans.
 - Also, the safe harbor may not be workable for employers who obtain different disclosures from different sources (e.g., recordkeeper/investment provider, third party administrator (TPA))
 - Also consider your employee demographic and level of access to smartphones and computers.

Update on ACA Repeal and CalSavers

ACA REPEAL

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- 2017 Tax Cut and Jobs Act zeroed out tax penalty for not complying with individual mandate, effective 1/1/2019.
- However, California instituted its own individual mandate effective 1/1/2020 (S.B. 78), until 1/1/2023.
 - Premium subsidy for persons earning up to 600% of federal poverty level (\$74,940 for an individual, \$154,500 for family of 4).
 - This creates a greater incentive for employees to enroll in employer-sponsored coverage, to avoid the penalty.
 - ACA “Applicable Large Employer” reporting (Forms 1094-C and 1095-C) suffices for California mandate.

ACA REPEAL

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- SECURE Act Repeals:
 - Annual fee on health insurers (passed on to employers) repealed effective 1/1/2021.
 - Impacted premiums by about \$158 per person and \$458 per family in large group market.
 - Cadillac Tax repealed before it ever went into effect; would have imposed 40% excise tax on value of employer-provided healthcare coverage exceeding \$10,200 (self) and \$27,500 (family).
- Not repealed: PCORI fee – also passed on to employers – was extended 10 years; \$2.45 per person for plan years that ended between October 1, 2018 and October 1, 2019.

- *Texas v. United States* (now, *U.S. House of Representatives v. Texas* and *California v. Texas*): federal court litigation seeking repeal of the ACA as a whole, on the grounds that:
 - ACA survived earlier court challenges because individual mandate was a permissible federal tax.
 - Now that tax is \$0.00, the mandate exceeds Congress's powers under the constitution.
 - Because the mandate is inextricably connected to other ACA provisions, the whole law must fall.

- *Texas v. United States*, cont'd.
 - Trial court agreed with plaintiffs – individual mandate unconstitutional (no tax collected).
 - 5th Circuit Court of Appeals affirmed, but did NOT strike down the rest of the ACA and sent case back to trial court for additional analysis.
 - California and H.R. have since petitioned Supreme Court for review (certiorari) on a fast-track basis.
 - Supreme Court rejected fast-track but granted certiorari on March 2, 2020. Will likely be *heard* before but *decided* after the November 2020 election.

- *Texas v. United States*, cont'd.
 - Trump Administration is continuing to enforce the ACA while the case is pending.
 - There are a number of issues before Supreme Court, but the viability of the rest of the ACA is of primary importance.
 - Potential outcomes:
 - Supreme Court agrees individual mandate is unconstitutional but upholds the rest of the ACA – status quo remains.
 - Possible loss of pre-existing condition protections – states will have to pass pre-ex laws (California already has one).
 - Federal funding for premium subsidies and Medicaid expansion may stay in place.

- CalSavers is a state-run auto-enrollment program for establishing Roth IRAs for employees whose employers do not sponsor any retirement plan.
- Slated rollout dates:
 - 6/30/2020: employers > 100 employees
 - 6/30/2021: employers with 51-100 employees
 - 6/30/2022: employers with 5 to 50 employees
- The Howard Jarvis Taxpayers Association has challenged CalSavers in state court (E.D. Cal.) under the ERISA “preemption” rule.

- ERISA Section 514 voids all state laws to the extent that they “relate to” employer-sponsored plans.
- Supreme Court has interpreted “relate to” broadly, such that ERISA preemption impacts state laws that either directly regulate employer sponsored plans or indirectly affect them.
- Also relevant to the case: certain retirement arrangements are exempt from ERISA if there is no employer involvement other than forwarding contributions and if participation is completely voluntary on the part of the employees.

- Plaintiff's arguments against CalSavers:
 - Auto-enrollment feature means that it is not voluntary for employees.
 - Penalty imposed on non-complying employers (\$250 per employee increasing to \$500 per after 180 days) also means it forces employers to participate; is in effect a mandate to sponsor an ERISA plan.
- In defense of the program, CalSavers points to other states' successful auto-IRA programs (e.g., Oregon, Illinois) and fact that opt-out restores voluntariness to the program.

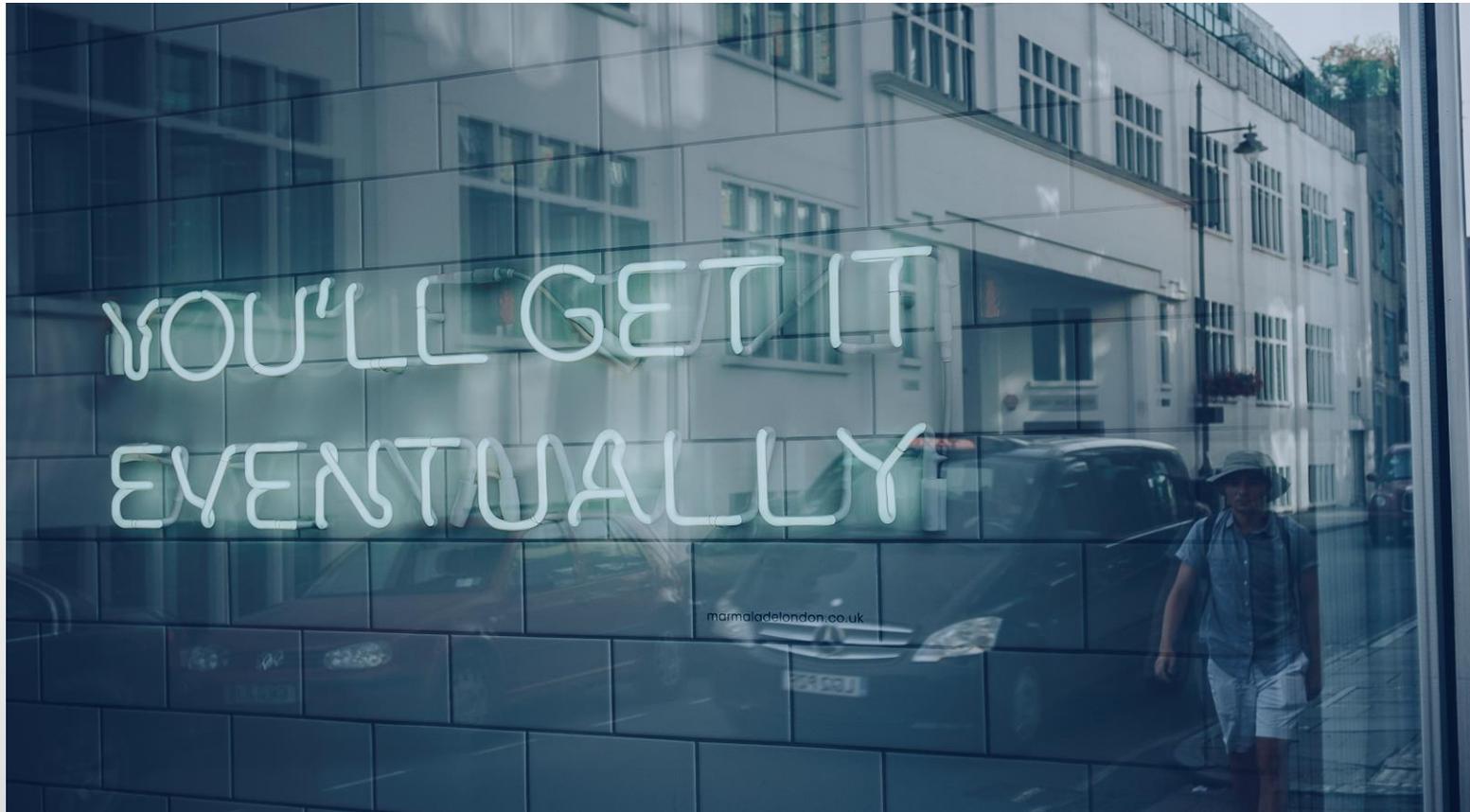
- Trial court threw out complaint in May 2019, Taxpayers' Assn. re-filed.
- While court was considering amended complaint, the U.S. Department of Justice filed a "statement of interest" supporting plaintiff's ERISA preemption argument.
 - The point of ERISA preemption is uniformity among state benefit laws, and the auto-IRA phenomenon does disrupt that.
- Employer involvement in these programs is limited, however. Payroll providers likely to undertake most compliance duties.

- With a 6/30/2020 rollout for employers with > 100 employees hanging in the balance, the fate of CalSavers is unsure. The parties last filed briefs in November 2019.
- The SECURE Act increased tax credits (up to \$16,500 over 3 years) for certain small employers (< 100 employees) who establish new retirement plans, which may encourage some employers to adopt their own plans to avoid CalSavers obligations.
- Check www.eforerisa.com for updates to the CalSavers saga, as they occur.

Questions?

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