



August 4, 2023

Delivered via email

Lisa Gomez, Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Additional Guidance Needs Under SECURE 2.0

Dear Assistant Secretary Gomez:

The American Benefits Council ("the Council") is writing to follow up on our February 7, 2023, letter¹ to you in which we identified what we believed to be the most important, time-sensitive issues on which guidance from the U.S. Department of Labor (DOL) is needed with respect to certain provisions of the SECURE 2.0 Act of 2022. The items addressed in our February 7 letter generally had a 2023 or earlier effective date, or otherwise had immediate implications for plan sponsors, service providers and other stakeholders.

In our February 7 letter, we noted that the council would follow up with additional SECURE 2.0 items for which guidance is needed, but where such need was not as immediate. This letter serves as the first such follow-up letter, with a focus on SECURE 2.0 provisions that are generally effective beginning in 2024 or 2025. In addition, the Council's members have, with the benefit of more time for consideration, identified some additional time-sensitive guidance needs with respect to SECURE 2.0 provisions that are already effective or that otherwise have immediate implications. We hope this letter is helpful as DOL continues to identify and prioritize its SECURE 2.0 guidance projects.

¹ <https://www.americanbenefitscouncil.org/pub/?id=C18F9C9D-EFBE-7D41-D6F9-D7FB4DA397EF>

RECOVERY OF RETIREMENT PLAN OVERPAYMENTS (SECTION 301)

Summary of Relevant Change

SECURE 2.0 generally allows plan fiduciaries to decide not to recoup overpayments that were mistakenly made to participants. If plan fiduciaries choose to recoup overpayments, then limitations and protections on the amount and manner of the recoupment apply to protect participants. This provision is effective as of the date of enactment.

Time-Sensitive Issues

Council members have identified the following issues and questions with respect to Section 301, in addition to those we previously identified in our February 7 letter:

- As amended by Section 301 of SECURE 2.0, Section 206(h)(4)(F) of ERISA provides that, if a responsible plan fiduciary decides to seek recoupment of an inadvertent benefit overpayment from a participant or beneficiary, then “[r]ecoupment may not be sought if the first overpayment occurred more than 3 years before the participant or beneficiary is first notified in writing of the error, except in the case of fraud or misrepresentation by the participant.” If, for example, a plan determines that it has been making monthly overpayments to a participant that began 37 months ago, the statute could be read as prohibiting the recoupment of all such overpayments from months 0-37. Under an alternative reading of the statute, the fiduciary would be prohibited from recouping the overpayment made 37 months ago, but it would be permitted to recoup the overpayments from months 0-36 (assuming the other conditions for recoupment are met). We believe the latter interpretation makes more sense from a policy standpoint, but clarification on the application of this three-year rule would be helpful. As another example, consider a case in which a participant received inadvertent overpayments in connection with two lump sum payments, one of which was received 10 years prior to the date of notification and the second of which was received one year prior to the date of notification. Here again, we believe it makes the most sense that the plan fiduciary could choose to recoup the overpayment that was made one year ago and only be prohibited from recouping the overpayment that was made 10 years ago.
- Section 301 is silent with respect to the recoupment of inadvertent overpayments to a participant or beneficiary who subsequently dies before recoupment (if sought) is obtained.
- Section 301 does not define several terms that are pertinent to implementing the new provision.

- Clarification regarding the interaction of Section 301 with, or continued status of, related case law and regulations would be helpful.

Guidance Requested

With respect to the above issues:

- Please confirm the application of the three-year rule and whether a fiduciary may recoup inadvertent overpayments to the extent that they were made within the past three years of notification, even if the participant or beneficiary had previously received an inadvertent overpayment more than three years before the notification is provided.
- Please confirm that a plan fiduciary may seek to recover an overpayment from the estate of a deceased participant or beneficiary if the estate is not a beneficiary under the plan. SECURE 2.0 precludes recovery of participant overpayments from a beneficiary. If the estate is not a plan beneficiary, then the ban on recoupment from beneficiaries does not apply.
- In coordination with the U.S. Treasury Department, please provide guidance on the meaning of the following terms as used in the amendments that Section 301 of SECURE 2.0 made to the Internal Revenue Code (“Code”) and/or ERISA:
 - o “Inadvertent benefit overpayment.” For example, does the term include a premature distribution, or a distribution that is inadvertently paid in a lump sum and that should have been paid as an annuity? As another example, does the term include the release of plan loan proceeds as a result of an inadvertent administrative error, such as in cases where the loan results in a participant exceeding the limit on the number or total dollar amount of loans that may be taken? If it is determined that Section 301 applies with respect to an impermissible disbursement of a loan, then we assume that the plan would still have to collect loan repayments at the scheduled rate with interest, but the impermissible disbursement would not have to be immediately undone.
 - o The “hardship” to be taken into account in determining the amount of a proposed recoupment and whether to rely on hardship withdrawal standards.
 - o When a participant is “culpable,” such that the participant is not entitled to all the protections of Section 301, including when a participant had “good reason to know under the circumstances” that the participant was overpaid and whether a participant’s financial literacy is relevant in making this determination. Further, unless a plan specifically excludes

from coverage undocumented immigrants, an employee's misrepresentation as to his or her status should not be regarded as a fraudulent act or misrepresentation. So long as such individual's benefit has been calculated correctly and distributed in a proper form at an appropriate time, the fact that the individual should not have been hired should not cause any benefit payment received by him or her to be regarded as a benefit overpayment.

- o In the context of pursuing recoupment via litigation, what it means for a responsible plan fiduciary to "[make] a determination that there is a reasonable likelihood of success to recover an amount greater than the cost of recovery."
 - o Please address what is meant by the phrase "past overpayment of a non-decreasing annuity." For example, does this include an overpayment that was in the form of an annuity, or an overpayment that occurred when the benefit actually payable should have been an annuity?
- Please clarify the continued vitality of case law where Section 301 of SECURE 2.0 is silent. This is especially important for pre-enactment overpayments.
- Please clarify the standards that apply under Section 503 of ERISA if a participant challenges attempts to recoup overpayments.
- Please clarify whether SECURE 2.0 affects the DOL suspension of benefits regulations and, if so, how. The DOL regulations are issued pursuant to an express grant of rulemaking authority in Section 203(a)(3)(B) of ERISA. However, the relationship between Section 301 and suspension of benefits for reemployment is unclear.
- Pending DOL's issuance of requirements for recoupment of overpayments of a benefit other than a non-decreasing annuity, what do fiduciaries need to do for these recoupments? Do fiduciaries have to follow the same recovery limits that apply to non-decreasing annuity overpayments, or just the remaining participant protections with no recovery limits?
- Clarification would also be helpful regarding whether Section 301 of SECURE 2.0 applies to the Pension Benefit Guaranty Corporation (PBGC). PBGC's recoupment regulation is based on Section 4022 of ERISA, which governs guaranteed benefits. Guaranteed benefits, in turn, are those for which a participant has met the conditions for entitlement under Title 1 of ERISA. As PBGC is also a statutory trustee under Section 4042 of ERISA, it is mindful of the norms for ongoing plans even if Section 4042 of ERISA does not extend those norms to PBGC as a matter of law.

Recognizing that the issuance of comprehensive guidance under Section 301 of SECURE 2.0 will require coordination between DOL, Treasury and the PBGC, any temporary or interim guidance provided on the correction of overpayments under Section 301 should be flexible. We request that any such guidance should provide maximum protection to fiduciaries who are acting in good faith and in accordance with their understanding of applicable law, including case law.

PAPER BENEFIT STATEMENTS (SECTION 338)

Background and Summary of Relevant Change

Section 105(a) of ERISA requires retirement plan administrators to provide plan participants with benefit statements that include certain information about participants' accounts and benefits. In the case of defined benefit ("DB") plans, Section 105(a)(1)(B)(i) generally requires that benefit statements be delivered at least once every three years. Although paper mailing and hand delivery have long been acceptable methods for furnishing benefits statements to participants, various DOL safe harbors created in 2002 and 2020 have permitted the electronic delivery of benefit statements if certain conditions are met.

As an alternative to the requirement described in Section 105(a)(1)(B)(i), Section 105(a)(3)(A) of ERISA provides that a DB plan administrator is treated as satisfying the benefit statement requirement if, at least once each year, the administrator provides to the participant notice of the availability of the pension benefit statement and the ways in which the participant may obtain such statement. Under that alternative notice provision, notice may be delivered in written, electronic, or other appropriate form to the extent such form is reasonably accessible to the participant.

Under Section 338 of SECURE 2.0, retirement plan administrators will be newly required to deliver certain benefit statements on paper. In the case of DB plans, such benefit statements must be furnished on paper at least once every three years unless an exception applies. The provisions in Section 338 regarding paper benefit statements apply with respect to plan years beginning after December 31, 2025.

Issue

Section 338 of SECURE 2.0 does not impose the new paper benefit statement requirement on plans that use the alternative notice provision for DB plan administrators under Section 105(a)(3)(A) of ERISA.

Guidance Requested

Please confirm that the paper benefit statement requirement added by Section 338 of SECURE 2.0 does not apply with respect to DB plan administrators that comply with the alternative notice provision under Section 105(a)(3)(A) of ERISA. This is clearly the correct result under the statute, as the paper benefit statement only applies in the case of plan administrators complying with Section 105(a)(1) to satisfy the requirement to provide plan benefit statement under Section 105(a)(1). Because Section 105(a)(3)(A) provides an alternative to compliance with Section 105(a)(1), the paper benefit statement requirement is not applicable when Section 105(a)(3)(A) is used.

PENSION-LINKED EMERGENCY SAVINGS ACCOUNT (SECTION 127)

Summary of Relevant Change

SECURE 2.0 allows a 401(k), 403(b), or governmental 457(b) defined contribution plan to include a pension-linked emergency savings account (PLESA).

Issues

- Under the statute, no contribution to a PLESA may be accepted to the extent that such contribution would cause the portion of the account balance attributable to participant contributions to exceed the lesser of \$2,500 or a lower amount set by the plan sponsor. The question has been raised regarding whether “the portion of the account balance attributable to participant contributions” includes earnings. The answer has to be no, because if earnings were included, there would be no reason to refer to “the portion of the account balance”; if earnings were included, that would mean that the entire account balance would be taken into account.
- Under the statute, withdrawals are permitted at the discretion of the participant, subject to certain timing restrictions. There is no requirement for the participant to demonstrate or certify the existence of an emergency or other need.
- The statute does not specify which participants may be charged for the cost of maintaining the PLESA.
- The statute does not address the issue of whether the lifetime income disclosure rules of ERISA Section 105(a)(2)(D) apply to PLESAs.
- The statute defines an eligible participant as an individual who meets any age, service, or other eligibility requirements of the plan. In our view, the statute does not preclude allowing individuals to participate in the PLESA even if they are not eligible to participate in the retirement part of the plan, such as individuals

who have not met the plan's general service requirement.

- The statute imposes certain requirements on how a PLESA may be invested, such as in an investment product designed to preserve principal. We are aware of no reason why money market funds or stable value funds could not be offered as investments.
- The statute permits employers to employ reasonable procedures to prevent manipulation of the rules with respect to matching contributions to the non-PLESA account under the plan. It is not clear (1) what employers are permitted to do, or (2) if there is anything employers must do to prevent employees from making PLESA contributions solely to get a matching contribution.
- The statute authorizes DOL to issue regulations establishing minimum standards for PLESAs in order to get ERISA preemption.
- One of the requirements of offering a PLESA is that, with respect to at least the first four withdrawals from the account in a plan year, there can be no fees or charges "solely on the basis" of such a withdrawal. Any subsequent withdrawals, however, may be subject to "reasonable fees or charges in connection with such a withdrawal, including reasonable reimbursement fees imposed for the incidental costs of handling of paper checks." The statute implies that fees *may* be charged on the first four withdrawals from a PLESA in a plan year provided that such fees are not charged "solely on the basis" of the withdrawal. It is not clear, however, what types of fees or charges are contemplated as being permitted in this regard. For example, if a recordkeeper ordinarily charges a check writing fee on any and all distributions from the plan, may that check writing fee be charged on the first four PLESA withdrawals in a plan year, so long as the fee is applied to withdrawals broadly and not solely with respect to withdrawals from PLESAs?

Guidance Requested

- Please confirm that earnings are not taken into account in applying the \$2,500 (or lower) limit on a PLESA.
- Please confirm that, in order to make a withdrawal, there is no need for a participant to demonstrate or certify the existence of an emergency or other need.
- Please confirm that the employer has discretion to charge the cost of the PLESA in any reasonable manner to all participants in the plan or only to participants in the PLESA.
- Please confirm that the lifetime income disclosure rules do not apply to PLESAs,

which are generally intended to be emergency savings, not to provide retirement income.

- Please confirm that the statute does not preclude allowing individuals to participate in the PLESA even if they are not eligible to participate in the retirement part of the plan, such as individuals who have not met the plan's general service requirement.
- Please confirm that money market funds or stable value funds may be offered as PLESA investments. Please also address whether the PLESA investment option may be limited to the PLESA and not made available as a designated investment alternative under the plan. Further, how does the PLESA investment need to be reflected on the participant investment disclosures under 29 CFR 2550.404a-5?
- We ask that the agencies issue model plan language and notices pursuant to Section 127(f)(3) of SECURE 2.0.
- We recommend that the agencies not issue any guidance regarding possible manipulation with respect to matching contributions. It is possible under current law for employees to make contributions to a retirement account solely to get a matching contribution and then take the money out immediately without the 10% early distribution tax (such as in the case of employees who have attained age 59½). That practice has not been an issue, so there is no reason to assume that this will be a problem in the case of PLESAs. Accordingly, we recommend waiting to see if this problem emerges in practice before issuing any guidance on it.
- We ask that DOL make it clear that it will not issue any required minimum standards in order for ERISA preemption to apply, at least until a compelling case is made for such minimum standards based on data collected over several years. Otherwise, the threat of the loss of preemption could chill the market for the establishment of PLESAs.
- Please issue guidance on what it means for a fee or charge to be assessed on a PLESA withdrawal in a manner that is not considered to be made "solely on the basis" of such withdrawal.
- Please issue guidance on the exclusion of highly compensated employees (HCEs). Some plans don't identify HCEs for nondiscrimination purposes until testing is underway, which typically happens after the plan year to which the HCE determination relates. However, it appears that plans offering PLESAs will need to identify HCEs at the beginning of the year to enforce this restriction unless DOL and IRS provide more flexibility.

- Please issue guidance on corrections for the inadvertent inclusion of HCEs.
- Please address whether all PLESA contributions count toward the annual deferral limit, or whether only contributions up to the applicable PLESA contribution limit (in the event of offsetting withdrawals) count toward the limit. For simplicity, we request that plan sponsors have the option of electing to apply the PLESA contribution limit as an annual contribution limit.
- Please address how the prohibition on minimum contributions applies. May plans still require participant contributions to be in percentage increments, or must they allow small dollar contributions?
- Please address when plan sponsors must restart PLESA contributions after participants who reached the account limit take a withdrawal. May plan sponsors wait until the beginning of the next plan year?
- Will PLESA distributions need to be reported on 1099-R?
- How does PLESA automatic enrollment interact with a plan's existing automatic enrollment arrangement? May a plan sponsor count the up-to-3% PLESA contribution toward the plan's automatic enrollment rate, or are they separate contribution rates? How do permissible withdrawals under an EACA work if the participant's initial contributions are all going to the PLESA?

UNENROLLED PARTICIPANT DISCLOSURES (SECTION 320)

Summary of Relevant Change

Section 320 of SECURE 2.0 generally exempts defined contribution plans from furnishing disclosures and notices that are otherwise required to be furnished to “unenrolled participants” if certain conditions are satisfied. For this purpose, “unenrolled participant” is defined in part as an employee who is eligible to participate in the plan but is not participating in the plan. One condition of this exemption is that defined contribution plans are required to furnish an annual reminder notice of the participant's eligibility to participate in the plan and any applicable election deadlines. The annual reminder notice must also notify unenrolled participants of the “key benefits and rights under the plan, with a focus on employer contributions and vesting provisions.” Section 320 applies to plan years beginning after December 31, 2022.

Time-Sensitive Issue

As plan sponsors work to implement the option provided under Section 320 of SECURE 2.0, additional guidance regarding the annual reminder notice would be helpful.

Guidance Requested

Some of the Council's members have indicated that it would be helpful if DOL would provide a sample annual reminder notice that plans may reference to help understand the requirements of such notice.

ANNUAL FUNDING NOTICE (SECTION 343)

Summary of Relevant Change

Administrators of defined benefit plans that are required to be insured by the PBGC must provide, for each plan year, a plan funding notice to the PBGC, participants and beneficiaries (among other recipients). Section 343 of SECURE 2.0 streamlines the information required to be provided in the annual funding notice (AFN) by eliminating certain means of presenting a plan's funded status. Section 343 applies with respect to plan years beginning after December 31, 2023.

Issues

- The requirement under Section 343 of SECURE 2.0 to provide participant counts as of the end of the plan year, rather than the beginning of the plan year, could be challenging for many plan sponsors. This is because the data editing and reconciliation process can require several months, especially for large, complex plans. Under current law, the AFN requires a measurement of assets and liabilities as of the end of the plan year, which is relatively straightforward to prepare. However, the participant count is as of the valuation date, which is required to be the first day of the plan year for plans other than small plans. For example, an AFN for the 2022 plan year sent to participants in early 2023 included information on assets and liabilities as of December 31, 2022, but participant counts as of January 1, 2022 (which would generally have been reported already on the Form 5500 for the 2021 plan year filed by October 15, 2022). When the changes made by Section 343 become applicable, a plan sponsor might be able to provide estimated participant counts by the time the AFN needs to be prepared and distributed, but the final counts could likely end up being different.
- DOL guidance and model annual funding notices do not reflect the changes made by Section 343.

Guidance Requested

- With respect to the new requirement to use end-of-year participant counts, it would be helpful to have guidance allowing the use of beginning-of-year counts as an alternative to end-of-year counts or explicitly acknowledging that the use of estimates is acceptable.
- Please update the model notices and other relevant guidance regarding the annual funding notice.

SMALL IMMEDIATE FINANCIAL INCENTIVES FOR CONTRIBUTING TO A PLAN (SECTION 113)

Summary of Relevant Change

Effective for plan years beginning after December 29, 2022, SECURE 2.0 exempts de minimis financial incentives from the contingent benefit rules and provides related relief from the prohibited transaction rules under the Code and ERISA.

Time-Sensitive Issue:

Although we believe it is clear that Section 113 applies to de minimis financial incentives provided by the employer or the plan, it is less clear whether this provision also exempts de minimis financial incentives from other parties, such as a service provider to the plan.

Guidance Requested

Please confirm whether Section 113 permits service providers to provide de minimis financial incentives to those who elect to participate in the plan.

REASONABLE GOOD FAITH COMPLIANCE STANDARD

As previously requested in our February 7 letter, pending the issuance of guidance on SECURE 2.0, we again ask for confirmation that reasonable good faith compliance constitutes compliance with the new rules.

Sincerely,

A handwritten signature in black ink, reading "Lynn D. Dudley". The signature is written in a cursive, flowing style.

Lynn D. Dudley
Senior Vice President, Global Retirement and Compensation Policy

cc:

Department of Labor

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