Q4 2024 Regulatory Update

IRS Notice 2024-63 Gives Guidance on Student Loan Matching Contributions

On August 19, 2024, the IRS released Notice 2024-63, providing guidance under the SECURE 2.0 Act of 2022 ("SECURE 2.0 Act" or "SECURE 2.0") on an employee's Qualified Student Loan Payment (QSLP) matching contributions in 401(k), 403(b), governmental 457(b) and savings incentive match plans for employees (SIMPLE) IRA plans. Among other items, the guidance, written in Q&A format, covers

- QSLP qualification requirements,
- Payment certification requirements,
- Actual deferral percentage (ADP) testing,
- Timing of payments, and
- Tax year attribution.

The notice applies to plan years beginning after December 31, 2024. For plan years beginning prior to January 1, 2025, plan sponsors may rely on a good faith, reasonable interpretation of Section 110 of the SECURE 2.0 Act. Further guidance in the form of regulations and a model amendment is expected.

Q4 2024 Regulatory Update

DOL Clarifies Application of 2021 Cybersecurity Guidance

On September 6, 2024, the DOL issued the EBSA's Compliance Assistance Release No. 2024-01, clarifying that the cybersecurity guidance it issued in April, 2021, applies to all employee benefit plans subject to the Employee Retirement Income Security Act of 1974 (ERISA), including both employee pension benefit plans, (e.g., tax-qualified defined contribution and defined benefit retirement plans), and health and welfare plans. Consequently, employers, plan sponsors, fiduciaries and plan participants of employee pension benefit plans and health and welfare plans should follow the guidance and maintain strong cybersecurity practices.

In addition, the 2024 guidance references the following U.S. Department of Health and Human Services publications which are targeted to help health plans, and their service providers maintain good cybersecurity practices:

- Health Industry Cybersecurity Practices: Managing Threats and Protecting Patients
- Technical Volume 1: Cybersecurity Practices for Small Healthcare Organizations
- Technical Volume 2: Cybersecurity Practices for Medium and Large Healthcare Organizations

As a best practice, plan sponsors may also want to consider adding cybersecurity matters as a regular item to their plan committee meeting agendas moving forward, analogous to processes in place with respect to adopting, following, and monitoring the terms of investment policy statements and the like. Further, vendor selection processes may also need to be adapted accordingly.

Q4 2024 Regulatory Update

DOL Celebrates ERISA's 50th Anniversary with a New Webpage

It was Labor Day 1974 when then-President Gerald Ford signed the Employee Retirement Income Security Act (ERISA) into law to help protect the health, retirement and other benefits of U.S. workers. In honor of ERISA's 50th anniversary, the Department of Labor, the federal agency charged with enforcing ERISA, launched a website focused on the accomplishments of ERISA through the years. The website traces the history of ERISA and its protections of the health, retirement savings and other benefits plans of America's workers. It also details how the department's Employee Benefits Security Administration assists retirement plan beneficiaries and their families in claiming their benefits or reporting alleged violations.

Q4 2024 Regulatory Update

IRS Issues Numerous Disaster Relief Notices in Wake of Devastating Events

Taxpayers and plan sponsors need to be aware of the many disaster relief news releases issued by the Internal Revenue Service (IRS) recently. These releases often provide individuals and business owners more time to file tax returns, make tax payments and complete required reporting such as filing the various versions of IRS Form 5500, Annual Return/Report of Employee Benefits Plan. A cumulative list of these disaster relief notices can be found here Tax Relief in Disaster Situations.

For example, News Release FL-2024-10, issued on October 11, 2024, grants tax relief for individuals and businesses in parts of Florida that were affected by Hurricane Milton that began on October 5, 2024. These taxpayers now have until May 1, 2025, to file various federal individual and business tax returns and make tax payments, including 2024 individual and business returns normally due during March and April 2025 as well as 2023 individual and corporate returns with valid extensions and quarterly estimated tax payments. This tax relief also includes the filing of Form 5500 series returns, which are postponed for the affected areas through May 1, 2025, according to the notice.

Q4 2024 Regulatory Update

IRS Provides 403(b) Plan Sponsors with Guidance on Long-Term, Part-Time Employee Rules

IRS Notice 2024-73 provides guidance for ERISA-covered 403(b) plans related to the long-term, part-time (LTPT) coverage rules introduced by the SECURE Act of 2019 ("SECURE 1.0") and updated by the SECURE 2.0 Act. An ERISA 403(b) plan is one where the employer provides contributions or in some other manner controls the plan. Non-ERISA 403(b) plans as well as governmental and nonelecting church plans are not subject to the LTPT rules.

Among other items, the notice clarified an ERISA 403(b) plan

- Must give any LTPT-qualified employee the ability to make salary deferrals;
- May retain an exclusion for part-time employees (e.g., employees who normally work less than 20 hours per week, who do not qualify as ERISA LTPT employees);
- May exclude student employees from making elective deferrals; and
- May exclude LTPT employees when determining whether the plan satisfies nondiscrimination requirements for matching contributions.

The IRS plans to issue additional guidance for LTPT rules, including proposed regulations for ERISA 403(b) plans. Notice 2024-73 also states the now proposed LTPT regulations for 401(k) plans, when finalized, will apply no earlier than to plan years beginning on or after January 1, 2026.

Q4 2024 Regulatory Update

IRS Private Letter Ruling Allows Contribution Choice Among 401(k) and Other Benefit Arrangements

On August 23, 2024, the IRS released a private letter ruling (PLR202434006) that found no fault with an arrangement under which a sponsor allows employees to choose to have an employer contribution allocated among four employee benefit accounts it offers: A 401(k) plan, a health reimbursement arrangement (HRA), a health savings account (HSA), and an educational assistance program (EAP, that, among other things, permits student loan repayments through December 31, 2025). Importantly, a PLR may be relied on only by the taxpayer who requested it and cannot be cited as authority or precedent by another taxpayer. Nevertheless, a PLR may provide insight into the IRS's thinking on a particular issue.

The proposal

In general, as described in the PLR, the plan sponsor was proposing to reduce its 401(k) plan discretionary contribution and allow eligible employees to make an annual irrevocable election to allocate an additional employer contribution, presumably funded out of the reduction to the 401(k) discretionary contribution, among the four benefit plans/programs described above [401(k), HRA, HSA, and EAP]. Critically, "… employees would not be permitted to receive the (additional employer contribution) in the form of cash or as a taxable benefit."

Employees "… would make the annual irrevocable election during open enrollment. [The plan sponsor] would make the Employer Contribution in accordance with the employee's election (or if no election has been made, the Employer Contribution would be made to the 401(k) plan) by March 15th of the following year."

Q4 2024 Regulatory Update

The IRS's ruling

The IRS ruled that the "additional discretionary contribution" would not be treated as an employee 401(k) elective deferral. Further, the election by the employee to allocate the additional discretionary contribution between the four programs would not affect the favorable tax treatment of those programs.

Takeaways for plan sponsors

- Generally, the features that make this program work (under the IRS Tax Code) are: 1) the employee's inability to receive the additional discretionary contribution in cash; 2) the employee election being irrevocably made in the year prior to the allocation of the benefit; and 3) the nontaxability of the four allocation alternatives;
- Nondiscrimination testing would apply, ostensibly; however, the PLR does not address the topic; and
- Any plan sponsor considering adopting a similar program will want to discuss the option with their own legal counsel and consider applying for a PLR.

Q4 2024 Regulatory Update

IRS Notice 2024-77 Addresses SECURE 2.0 Changes to Plan Overpayments

On October 15, 2024, the IRS published Notice 2024-77, providing guidance with respect to SECURE 2.0 changes to the treatment of "Inadvertent Benefit Overpayments" under the Internal Revenue Code. The guidance in the notice applies with respect to overpayments and rollovers (regardless of the date of overpayment), on the date of issue. For overpayments/rollovers prior to that date plan sponsors and participants may "rely on a good faith, reasonable interpretation" of the statute.

Background

An inadvertent benefit overpayment is a payment that exceeded the amount payable under the terms of the plan or a limitation provided in the Internal Revenue Code (IRC) or regulations, and

- Occurs despite the existence of established practices and procedures,
- Is not egregious,
- Does not relate to the diversion or misuse of plan assets, and
- Is not directly or indirectly related to an abusive tax avoidance transaction.

Q4 2024 Regulatory Update

Regarding plan overpayments, SECURE 2.0 changes permit 1) plan fiduciaries (subject to certain exceptions) to pursue recoupment/make corrective payments with respect to inadvertent benefit overpayments, and 2) plan participants receiving overpayments (in certain circumstance) to treat them as eligible rollover distributions.

Generally, where recoupment is either not sought or not obtained, the corrective payment previously required under the IRS's Employee Plans Compliance Resolutions System (EPCRS) no longer applies. The exceptions to this rule include where the payment results in a

- Payment that violates a defined benefit plan funding-based benefit restriction (IRC §436),
- Compensation limit failure [IRC. §401(a)(17)], or
- Contribution/benefit limit failure (IRC §415).

Q4 2024 Regulatory Update

There will also be circumstances in which a corrective payment must be made with respect to a "related error." The notice provides the following example: If a plan participant received an inadvertent benefit overpayment due to an incorrect allocation of a profit-sharing contribution under a plan, another plan participant may have received a benefit underpayment. In this case, the benefit underpayment would be considered an additional failure in need of correction, which may require a corrective payment.

Recoupment, self-correction still allowed

The new rules, however, still permit a plan to seek recoupment, subject to applicable restrictions under ERISA (e.g., no interest charged, recoupment is not sought from any beneficiary (including a spouse) and limits on reductions of future payments, threats of litigation, and use of collection agencies).

Moreover, a plan may "self-correct" by increasing past benefits if certain requirements are met, including compliance with applicable correction procedures and, provided that the correction does not violate the IRC compensation limit and benefit limits.

Q4 2024 Regulatory Update

Rollovers

Generally, if the plan does not seek recoupment, the overpayment is treated as an eligible rollover distribution ("… if the payment would have been an eligible rollover distribution but for being an overpayment"). This treatment does not apply to an overpayment that is an IRC § 401(a)(17) or 415 failure" (as described previously). Where recoupment is sought, the participant must be notified that any unreturned portion is not eligible for tax-free rollover treatment.

Summary

Notice 2024-77, effective as of October 15, 2024, provides additional guidance on the changes related to how plan sponsors may handle inadvertent benefit overpayments. More guidance is still needed, and interested parties were able to submit comments on the notice to the IRS through December 16, 2024. Key points of understanding for plan sponsors:

- Processes and procedures regarding recoupment/no recoupment of overpayments,
- The current correction methods offered under EPRCRS if recoupment is sought,
- What restrictions now apply if recoupment is sought, and
- If the plan does not seek recoupment, the overpayment is treated as an eligible rollover distribution.

Q4 2024 Regulatory Update

Plan Sponsors Win Two More Forfeiture Decisions

Plaintiffs have filed several cases in the past several months claiming the use of 401(k) plan forfeitures to reduce employer contributions, rather than to reduce participant-paid plan expenses, violates the ERISA fiduciary duty to act solely in the best interests of plan participants and beneficiaries. To date, in these cases, there have been three decisions granting defendants' motion to dismiss – Hutchins v. HP Inc., US District Court for the Northern District of California (June 17, 2024), Naylor v. BAE Systems, Inc., US District Court for the Eastern District of Virginia (September 5, 2024) and Dimou v. Thermo Fisher, US District Court for the Southern District of California (September 19, 2024). Conversely, we have seen two decisions denying defendants' motion to dismiss – Perez-Cruet v. Qualcomm Incorporated, US District Court for the Southern District of California (May 24, 2024) and in Rodriguez v. Intuit Inc., US District Court for the Northern District of California (August 12, 2024).

Except for Naylor (in which the court found that the plan document mandated the plan use forfeitures to reduce employer contributions), all of these cases involve plan documents that give the plan sponsor/ fiduciaries discretion to use forfeitures either to reduce employer contributions or to pay plan expenses. Bottom line: The courts are divided on what rule should apply under those circumstances.

Q4 2024 Legislative Update

Legislative Update

Many provisions of the 2017 "Tax Cuts and Jobs Act" (TCJA) are set to expire in 2026, which would result in a tax increase for many individual taxpayers. The Joint Committee on Taxation estimates that extending current individual tax rules for another 10 years (the "budget window") would increase "primary deficits" by $3.3 Trillion.

Given that, 2025 will bring a tax/fiscal challenge: Allow some or all of the TCJA cuts to expire (resulting in increased taxes for many individuals), find some new sources of revenue, or face a significant increase in the federal deficit.

In response, Congress may look for "revenue raisers" in the qualified plan system to offset the cost of continuing/making permanent the TCJA tax cuts, including further "Rothification" of 401(k) contributions, capping total account balances in qualified retirement savings vehicles, and closing the door on back door Roth conversions.

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