Second Quarter 2020

Aon Quarterly Update

Retirement Legal Consulting & Compliance

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Editor's Note

The second quarter of 2020 finds us and our readers amid a global pandemic. As it seems that the coronavirus has impacted every aspect of our lives in some way, we hope that our readers, families, and communities are well and safe, now and in the coming weeks.

We open this edition of the *Quarterly Update* with five articles focused on benefit-related concerns raised by the pandemic, as well as legislative and regulatory efforts to address its impact. Our first article discusses the concerns that plan sponsors may have regarding market volatility and economic slowdown issues, both of which impact the financial health of employers and their employees. The article includes a discussion of recent concerns regarding death forecasts and their potential financial impact on mortality tables and pension funding. Our second article discusses some steps employers can take to understand and minimize long-term impacts on both employer and employee financial health.

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), signed into law in late March, is one of several legislative responses to the pandemic. In the first of two articles discussing the CARES Act, we discuss the limited funding relief for single-employer defined benefit (DB) plans provided by the Act, as well as enhanced flexibility for accessing benefits from both DB and defined contribution (DC) plans. The second CARES Act article discusses a modification to the Internal Revenue Code Section 127 rules governing employer educational assistance plans. This modification permits an exclusion from federal taxable income for employer student loan repayment assistance through the end of 2020, subject to certain other requirements.

Our pandemic coverage closes with an article on new federal legislation providing temporary paid sick leave and expanding the provisions of the Family and Medical Leave Act for the remainder of 2020. Specifically, the article discusses the Families First Coronavirus Response Act which added the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act, effective from April 2, 2020 through December 31, 2020.

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE) offered a game-changer for small business owners and their employees looking to save for retirement: the value-added open multiple employer plan (Pooled Employer Plan or PEP). In a first of a series of articles, we report on the considerations and processes that plans sponsors should consider in deciding whether to join a PEP.

We end this edition with two litigation-related articles. First, we provide an update on a Supreme Court decision that provides plan sponsors with a procedural path to make disclosures to participants in a manner designed to allow retirement plans to make effective use of the three-year limitation period for claims to be made against plan fiduciaries. While plan fee litigation has been ongoing for some time, we include an article on an interesting fiduciary case that challenged an employer's gift acceptance policy as part of a case alleging excessive plan fees.

If you have any questions or need any assistance with the topics covered, please contact the author of the article or Tom Meagher, our practice leader.

Susan Motter

Susan Motter
Associate Partner
Aon

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COVID-19 Impact on Pension Plans

by Grant T. Martin

As of this publication, **The Center for Systems Science and Engineering at Johns Hopkins** is reporting 854,490 cases and 47,178 deaths in the U.S. resulting from COVID-19. Experts forecast the total number of deaths will be between 80,000 and 1 million, with a central estimate of around 240,000. Some of the more pessimistic forecasts have been as high as 2.2 million. Retirement plan sponsors are appropriately asking how those numbers should be interpreted, whether they should be concerned for plan participants, and what the ultimate financial impact will be on pension funded status.

In 2018 there were around 2.8 million deaths in the U.S.—the two leading causes of death being heart disease and cancer, both of which were responsible for around 600,000 deaths. If COVID-19 causes 240,000 additional deaths, that would be equivalent to increasing the total number of deaths by about 9%, or roughly a return to the mortality rates of the mid-2000s.

We are still learning how the virus affects the body, but one clear pattern has emerged—older people seem to be most at risk. Data from multiple countries has shown a clear pattern of increased fatality as patients age. The numbers vary by country depending on testing strategy and health system capacity, but older cohorts seem to be the most susceptible group.

Plan sponsors should expect that funded status will be more heavily impacted by changes in capital markets than by changes in life expectancy. Even in the relatively severe scenarios outlined above, the anticipated actuarial gains from shorter life expectancy are small (e.g., 1-3%). Discount rates and asset valuations should continue to be the primary drivers of pension funded status.

For more plan-specific estimates, please reach out to your Aon consultant for additional information.

CARES Act Coronavirus Relief: Impact on DB and DC Plans

by Melissa Elbert and Eric Keener

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) into law. The CARES Act represents “Phase 3” of the U.S. legislative response to the coronavirus pandemic, following the enactment of the Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (signed into law on March 6, 2020) and the Families First Coronavirus Response Act (signed into law on March 18, 2020). Among other provisions, the CARES Act includes limited funding relief for single-employer defined benefit (DB) pension plans as well as enhanced flexibility for accessing benefits from both DB plans and defined contribution (DC) retirement plans (in addition to IRAs).

Funding options available to DB plan sponsors under the CARES Act include:

- Deferring quarterly or final cash contributions that would otherwise have been due during calendar year 2020 until January 1, 2021 (deferred contributions would be increased with interest during the deferral period); and
- For purposes of the benefit limitations under Section 436 of the Internal Revenue Code, electing to treat the funded status for the last plan year ending before 2020 as the funded status for plan years which include calendar year 2020.

In addition, the CARES Act provides certain employees with enhanced flexibility regarding retirement plan distributions through:

- An increase in the qualified DC plan loan limit from $50,000 to $100,000 (or up to 100% of the vested accrued benefit) for loans initiated during the 180-day period beginning on the date of enactment and ending September 23, 2020 for qualified individuals;
- A temporary waiver of required minimum distributions (RMDs) from qualified DC plans in 2020 (generally applies to those RMD payments that were not paid in 2019 and would have been due by April 1, 2020); and
- Relief from the 10% excise tax on early withdrawals from qualified DB and DC plans for qualified individuals taking coronavirus-related distributions of up to $100,000; DC plans may be amended to provide in-service distributions to active or former employees for this purpose or may rely upon existing plan withdrawal features.

A qualified individual for purposes of the CARES Act relief is someone diagnosed with the coronavirus by means of a test approved by the Centers for Disease Control and Prevention, whose spouse or dependent is so diagnosed, or who otherwise experiences adverse financial consequences due to layoff, furlough, reduction of hours, lack of child care, or other causes identified by the Treasury Department (Treasury). A plan sponsor may rely on an individual’s self-certification that he or she meets these requirements.

While additional guidance will be needed from Treasury, the Internal Revenue Service, and the Department of Labor (DOL) regarding these changes, plan sponsors will want to understand the changes now and consider whether to amend their DB and DC plans for this enhanced plan flexibility. In addition, certain changes to federal and state income tax withholding and other administrative processes may be needed. Sponsors of DB plans will want to consider how/whether to coordinate these changes with the ability to offer in-service distributions beginning at age 59½, as permitted by separate 2019 year-end budget legislation.

Beyond the DB- and DC-specific changes discussed above, the CARES Act also provides the DOL with additional authority to delay certain administrative deadlines applicable to retirement plans and other employee benefit plans to the extent that the Secretary of Health and Human Services declares a public health emergency. While a public health emergency was declared retroactive to January 27, 2020, as of this writing, the DOL has not yet extended such deadlines.

Please contact your Aon consultant for additional information on the CARES Act and how we can provide further assistance with your retirement programs.

The Market's Down: Now What?

by Melissa Elbert and Beth Halberstadt

Given the nature of the COVID-19 crisis, medical experts are understandably focused on physical health and the resulting impact of the crisis on communities. As the U.S. works to contain the spread of the virus, the financial impacts are becoming acutely felt with market volatility and an economic slowdown impacting financial health.

Employees are likely seeing big losses in their retirement savings. With only one in three full-career employees expected to be prepared for a comfortable retirement at age 67[1] prior to the market downturn, we may see many employees who are approaching retirement delaying their plans for a timely retirement.

While younger employees have more time to recover from investment losses, the coronavirus situation may have broader, more lasting impacts on retirement plan savings. Many employers are taking workforce actions such as furloughs, reductions in force, and/or suspending employer contributions to retirement plans. The recent Coronavirus Aid, Relief, and Economic Security Act (CARES Act) recently signed into law gives employees much needed flexibility in accessing their retirement savings to cover more immediate needs, perhaps at the cost of future retirement readiness.

As employees and employers alike are forced to choose between short-term needs and long-term sustainability, the answer will often be clear. But employers can take steps to understand and minimize long-term impacts.

- **Understand Workforce Impacts.** A good rule of thumb is that a 10% reduction in projected retirement savings means an employee will need to work a year longer to make up for the loss. Delayed retirements can lead to increased costs for employers.
- **Review Investment Options.** No two Target Date Funds (TDFs) are the same. Employers should review their TDFs to ensure they have appropriate diversification[2] built in versus a more traditional allocation of stocks and bonds. It's also a good time to verify that your plan is accessing the lowest cost share class available for your plan's asset levels.
- **Take Steps to Improve Retirement Income Security.** Recent retirement legislation (the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act)) lowers some of the barriers to providing lifetime income options in defined contribution plans. Employees have been asking for more guaranteed income in retirement, and employers will now be better positioned to deliver. Remember to highlight the benefits that the plan offers to participants regardless of their employment status—benefits such as lower cost investment solutions, strong oversight by the company, and access to the same plan features such as advice or managed accounts.
- **Focus on Financial Well-being.** Most employers want to help employees with their financial well-being but have yet to develop a strategy and implement programs. Addressing financial well-being immediately can help weather this current storm and build resiliency for the future.
- **Take Actions to Minimize Risks.** One thing we learned from the 2008 financial crisis is that loss of retirement assets can increase litigation risk as plan sponsors saw a huge increase in the number of 401(k) complaints. Litigation became a real risk during that time and could increase again. It is more important than ever to have a sound governance structure in place and follow it diligently. Another option is to offload some of this risk. The SECURE Act supports creation of pooled employer plans that will lower certain fiduciary risks for plan sponsors.

We'd be happy to discuss your specific workforce issues and how to best support employee and employer financial health going forward. Reach out to your Aon consultant to set up a discussion.

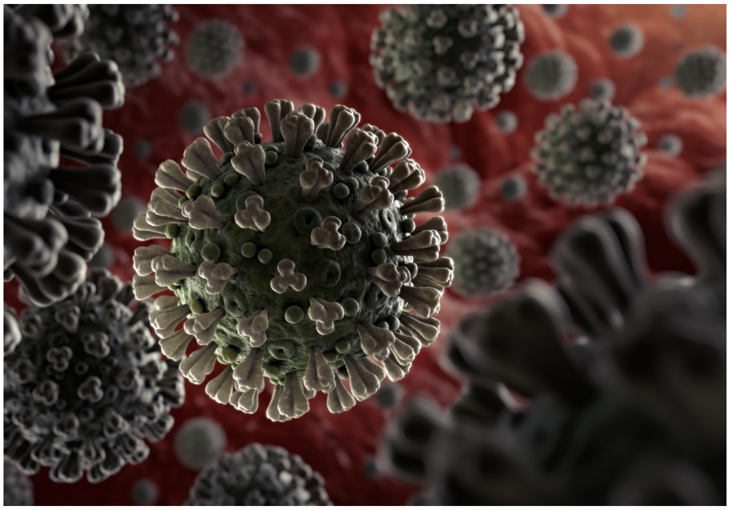
Please see the applicable Disclosures and Disclaimers on page 11.

1 Source: *The Real Deal: 2018 Retirement Income Adequacy at U.S. Plan Sponsors*.

2 Diversification does not ensure a profit, nor does it protect against loss of principal. Diversification among investment options and asset classes may help to reduce overall volatility.

Temporary Paid Sick Leave and Expanded FMLA Provisions

by Jennifer Ross Berrian



Prompted by the many questions being asked by employers about COVID-19, the Department of Labor (DOL) issued a series of frequently asked questions about employee leaves during the pandemic. After that guidance was issued, the federal government passed new legislation providing temporary paid sick leave and expanding the provisions of the Family and Medical Leave Act (FMLA) for the remainder of 2020.

Under FMLA, certain employers must provide qualifying employees job-protected, unpaid leave of up to 12 weeks during any 12-month period for specified reasons. Employees on FMLA leave are entitled to continue their employer-provided health insurance coverage under the same terms that existed before they started their leaves.

The Families First Coronavirus Response Act (FFCRA) added two new temporary provisions to deal with the pandemic. These include the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA), effective from April 2, 2020 through December 31, 2020.

COVID-19—How Does FFCRA (EPSLA and EFMLEA) Work?

The provisions of the two acts, how they interact with each other, and how they impact FMLA are very detailed and should be analyzed by each employer to determine whether they apply and how the employer will be impacted. Employers should also determine whether any applicable state or local laws may have been enacted on this topic. At a very high level, the two federal acts do the following:

- **Employer Size.** The two acts apply to private employers with less than 500 employees and to governmental employers with at least one employee.
- **Employment Term.** EPSLA applies to all employees of employers described above while employees must have been employed for at least 30 calendar days to be eligible for EFMLEA.
- **Eligibility.** Both acts provide multiple COVID-19 related reasons for eligibility, some of which apply directly to the employee and some of which apply to employees caring for others.
- **Paid Sick Leave Payments.** EPSLA requires two weeks of paid sick leave for employees who satisfy eligibility requirements, paid at their regular rate if employees need time off from work due to their own situation and at two-thirds of regular pay if employees need time off to care for someone else. Payments are capped at $511 per day or $5,110 in the aggregate if the leave is related to themselves while, the limit is $200 per day or $2,000 in the aggregate if the leave is to care for someone else.
- **Extended Family Leave Payments.** EFMLEA requires two weeks of unpaid leave at the beginning of the leave period and then paid leave for the remaining 10 weeks at two-thirds of regular pay. This is capped at $200 per day or $10,000 total.
- **Carve-out for Small Employers.** There are special provisions for employers with less than 50 employees if compliance would jeopardize the ongoing viability of the business.
- **Expiration Date.** These provisions expire on December 31, 2020 and do not impact the terms of FMLA after that date.

As FMLA continues to be an important part of the rules governing human resources, particularly after the temporary acts described above cease to be effective, the DOL guidance issued before FFCRA was enacted will continue to impact employers. This guidance doesn't change the terms of FMLA leave but clarifies some outstanding questions. Please note that this only applies to federal law; each state may provide its own requirements regarding employee leaves.

COVID-19—How Will FMLA and Other Leave Policies Now Work?

- **FMLA Eligibility.** The eligibility requirements for regular FMLA leave (as opposed to the extended leave provisions in EFMLEA) have not changed. Employees are generally still required to have worked for their employers for at least 12 months, have earned at least 1,250 hours of service over the previous 12 months, and work in a location where at least 50 people within 75 miles are employed by the same employer.
- **Serious Health Condition.** Workers who have COVID-19 or need to take care of a family member who has the virus may qualify as having a "serious health condition" defined by FMLA. The DOL encourages employers to consider flexible leave policies in this situation to minimize the spread of the pandemic.
- **Leave to Avoid Infection.** Leave taken to avoid getting COVID-19 is not protected under FMLA. Either the employee or a family member who the employee needs to care for must be incapacitated by a serious health condition for the time off to qualify as FMLA leave.

- **Absence Due to Lack of Childcare/Closed Schools.** Taking time off to care for children who are not sick would not qualify as FMLA leave. However, the DOL recommends that employers review their leave policies to provide increased flexibility to their employees.
- **Paid Sick Leave.** Other than as described in the two temporary acts above, in general employers are not required to provide employees with paid sick leave under federal law.
- **Mandated Sick Leave.** Employers may require employees to take sick leave so long as the policy is not discriminatory.
- **Fitness-for-Duty Certifications.** While employers can require a doctor's note before allowing employees to return to work, the DOL urges employers to recognize that the healthcare system is overwhelmed, and it may be difficult for employees to obtain fitness-for-duty certifications.
- **Amended Sick Leave Policies.** Federal laws do not prohibit employers from changing their paid sick leave policies if it's done in a nondiscriminatory manner. While there may be a contractual right to already accrued paid sick leave, future accruals are not protected. However, the terms of collective bargaining agreements regarding sick leave may not be unilaterally amended by employers.

These rules are complex and will be applied based upon the facts and circumstances of each employer and employee. Aon recommends that all employers analyze these requirements and ensure compliance. Please contact your Aon consultant for additional information and how we can provide further assistance.

Someone CARES: Tax-Free Employer Payment of Student Loans

by Dan Schwallie

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provides an exclusion from federal taxable income for employer student loan repayment assistance through the end of 2020. Section 2206 of the CARES Act modifies Section 127 of the Internal Revenue Code (Code), which provides an exclusion of up to $5,250 of employer educational assistance from employee income, to also exclude employer-paid student loan assistance. The $5,250 annual cap applies to the combined amount of employer educational assistance and employer-paid student loan repayments for an employee. Code Section 127 employer assistance is not available to an employee's spouse, children, or other dependents. Interest paid by the employer cannot be deducted from the employee's federal taxable income under the student loan interest deduction. Although this CARES Act provision is temporary, the expectation is there will be lobbying to make the provision permanent.

The federal taxable income exclusion applies to the payment by an employer, *whether* paid to the employee or to a lender, of principal or interest on any qualified education loan (as defined in Code Section 221(d)(1)) incurred by the employee for the employee's education during the period beginning March 28, 2020 (the day after enactment of the CARES Act) through December 31, 2020. As required by Code Section 127, such a program must be administered under a written plan for the exclusive benefit of the employer's employees and not discriminate in favor of highly compensated employees. Reasonable notice of the availability and terms of the program must be provided to eligible employees, and the program must not provide a choice between the assistance and other remuneration includible in gross income. Aon's Retirement Legal Consulting & Compliance consultants are available to assist plan sponsors in understanding the implications of these changes and complying with them in application.

Deciding to Join a Pooled Employer Plan: The Process

by David Alpert

In our recent **Special Edition** of the *Quarterly Update*, we included an article—"A True Value-Added Employee Retirement Savings Plan: Open MEPs"—that discussed the potential value to employers and participants from a pooled employer plan (PEP). A PEP is a new type of plan permitted by the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) and can be effective as early as January 1, 2021. A PEP is a defined contribution (DC) "open" multiple employer plan (MEP), qualified under the Internal Revenue Code (Code) and treated as a single employee pension benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA), in which two or more unrelated employers participate. This article explores some important considerations for employers when deciding whether to join a PEP.

PEP Selection

The employer should establish a prudent process for determining if a PEP is the appropriate vehicle for delivering DC plan benefits for its employees. This process will involve selecting the appropriate PEP and its pooled plan provider (PPP) (the entity responsible for administering the PEP), as well as any optional provisions that may be available under the PEP. The selection process typically will require a diligent review of (i) all standard and optional provisions of the PEP, including those that apply to participating employers, mergers of employer plans, and termination of participation in the PEP; (ii) the trust agreement; (iii) the service providers and their responsibilities under the PEP; and (iv) all fees and expenses that may apply under the PEP. The evaluation process also should confirm that the PPP has registered as such with the Internal Revenue Service (IRS) and the Department of Labor (DOL) and that the PEP is qualified under Code Section 401(a).

Merger of Existing Employer Plan

If the employer intends to transfer all or any portion of the assets and liabilities under its existing qualified DC plan to the PEP, such a transfer is treated as a merger of that plan (or portion of that plan) into the PEP. In evaluating whether to move forward, the employer should (i) review the terms of its plan and the PEP to ensure that any plan features required to be protected are preserved by the PEP; (ii) address any known plan document and/or operational issues prior to the merger; and (iii) gather a copy of all relevant plan documents that the PPP will want before it can approve the merger. The employer may need to amend its plan prior to the merger to modify, delete, or add certain provisions, depending on the PEP (and subject to any required preservation of protected benefits).

Joining the PEP

The employer will need to approve its participation in the PEP (e.g., by formal action by its board of directors or other authorized person); obtain any necessary union approval with respect to collectively bargained employees who may be permitted to participate in the PEP; sign any documentation required by the PPP to accept the employer's participation in the PEP and to confirm the employer's agreement with all PEP terms; and provide any information that the PPP, IRS, and/or DOL may require in connection with its participation.

Ongoing Employer Responsibilities

The employer should understand its ongoing obligations with respect to PEP participation. For example, it will need to provide certain information to the PEP, including payroll feeds, employee census and coverage data, and other information that may be required to comply with PEP rules and regulatory requirements (yet to be issued). This will enable the PPP to administer the PEP and satisfy its obligations under the Code and ERISA. The employer also should establish a prudent process for complying with all PEP and PPP requirements. Failure to satisfy its obligations could result in the involuntary withdrawal of the employer from the PEP, transfer of its portion of the PEP to another plan or arrangement, and responsibility of the employer (and not the PEP or other participating employers) with respect to PEP liabilities attributable to its employees and their beneficiaries.

Other participating employer obligations include (i) reviewing information that the PPP will periodically provide and (ii) monitoring the PEP's operational and investment performance on a periodic basis to ensure, among other things, that the PEP remains an appropriate vehicle for its participants and that all fees and expenses under the PEP are reasonable for the services provided. The employer should establish a prudent process for its ongoing review of the PEP and document any related decisions it may make. For example, that process should address whether the PPP will provide (in addition to periodic information about the PEP) regular meetings (at least annually) with the employer to discuss PEP operations for the preceding period, including any issues that may have occurred and their resolution.

In addition, the employer will need to ensure that it satisfies its responsibilities, in accordance with the SECURE Act, as the plan sponsor with respect to its portion of the PEP (other than the administrative duties of the PPP). Such responsibilities should include complying, on a continuing basis, with those qualification requirements of the Code and ERISA obligations that apply separately to that employer.

Fiduciary Responsibilities

The PPP will be taking on many of the fiduciary responsibilities associated with the PEP. To the extent that any employer-related obligations with respect to the employer's portion of the PEP involve fiduciary considerations, the fiduciary (e.g., a designated committee) of the employer should satisfy its responsibilities and appropriately document any related decisions.

Other Matters

There may be various other matters to address depending on the particular employer, PEP, and (if applicable) employer plan to be merged into the PEP. Aon would be pleased to assist employers in understanding and navigating the new world of the PEP and how Aon's PEP (which is anticipated to be effective January 1, 2021) can increase efficiency, reduce risks, and create better outcomes for their participants.

Employer Gift Acceptance Challenged in Plan Fee Litigation

by Bridget Steinhart

An interesting set of strategies transpired between plaintiffs and defendants in the excessive investment and recordkeeping fees litigation involving the $2 billion 401(k) plan sponsored by Banner Health (Banner). *Ramos v. Banner Health* underscores the importance of vetting service providers, avoiding real or perceived conflicts of interest, and ensuring competitive plan fees.

As part of their litigation strategy, the plaintiffs questioned a prior Securities & Exchange Commission Order (SEC Order) which required remedial sanctions on Jeffrey Slocum & Associates, Inc., the investment advisor to the plan, related to misleading marketing materials issued in 2011 through 2014 with respect to its gift policy (unrelated to the *Banner* case). Of relevance to this case, the plaintiffs alleged, that Banner's and Slocum's regular attendance at dinners and major sporting events paid for by the plan recordkeeper caused substantial harm to the 401(k) plan. This scenario, according to plaintiffs, allowed plan fiduciaries to accept (or tolerate) uncapped, asset-based fees and underperforming funds.

At this stage in the proceedings, the court determined that the SEC Order didn't make Slocum more or less likely to be influenced by the recordkeeper's gifts. While the outcome regarding Slocum may have been resolved differently in another court, this court indicated that Banner would have been hard-pressed to discover the SEC Order in its due diligence of Slocum as a service provider.

In Aon's experience, some Department of Labor audit information requests have included gift policies that may apply to the benefits or fiduciary committee for the plan; the *Banner* case serves as a reminder that "gifts" include entertainment and meals, and such items may be perceived as influencing the recipients. We believe that effective fiduciary training should include dialogue about real, potential, or perceived conflicts of interest. For some clients, we are drafting conflict of interest disclosures and gift policies for review by clients and their legal counsel. We believe these policies may be necessary in the event the fiduciary committee has not prohibited gifts or adopted a gift policy with a maximum annual gift limit (as determined by the fiduciary committee and its legal counsel).

While plans paying flat per-participant fees may be able to adequately assess plan fees every few years (depending on particular facts and circumstances), plans paying asset-based fees do not have the luxury of time, and may need to benchmark annually, particularly with headcount and asset growth that contribute to recordkeeper revenue. Additionally, a vendor search may be warranted in the event the incumbent recordkeeper has been in place for five years or more; clients often find that its outsourcing needs have expanded, or that certain service enhancements should be explored. Aon recommends that fiduciary committees address fee structure (i.e., flat fees, per-participant fees, à la carte fees, etc.) and all revenue streams (e.g., revenue sharing, transaction fees, float income, managed accounts) as part of fee benchmarking or vendor search negotiations, as warranted. In either scenario (benchmarking fees or a vendor search), fiduciaries should be able to demonstrate a thorough and thoughtful diligence process with appropriate documentation describing the process and the results. It is noteworthy that any review of fees does not necessarily require that the fiduciary change recordkeepers or advisors, but rather permits the plan fiduciary to evaluate the reasonableness of the fees and the services provided and to make any needed adjustments under the circumstances then prevailing. Aon's experts in fiduciary matters are happy to assist with any questions you may have about these or other plan governance processes. *Ramos v. Banner Health, No. 1:15-cv-02565-WJM-NRN (D. Colo. Nov. 26, 2019)*.

Please see the applicable Disclosures and Disclaimers on page 11.

Intel Decision Provides Procedural Path for Plan Sponsors

by Hitz Burton

On February 26, 2020, the U.S. Supreme Court, in *Intel Corp. Investment Policy Committee v. Sulyma*, addressed what constitutes "actual knowledge" on the part of a participant who alleged that plan fiduciaries breached their obligations under the Employee Retirement Income Security Act of 1974 (ERISA) when they replaced certain mutual funds with higher-expense "alternative investments." Under ERISA Section 413, participants can generally bring a fiduciary breach claim provided they do so within six years of the alleged breach. The general six-year limitation period can be shortened to a three-year period (from the date when the plaintiff has actual knowledge of the breach or violation) if a plan sponsor can show that the plaintiff obtained information constituting "actual knowledge" of the breach.

Christopher Sulyma worked at Intel between 2010 and 2012 and participated in two company-sponsored defined contribution plans. Concerned by how certain plan-designated investment options had performed during the financial crisis of 2007-2008, plan fiduciaries for those retirement plans decided to move certain trust assets out of more traditional mutual fund investments and into hedge fund, private equity, and commodity investments in 2010 hoping that the move would result in a portfolio that was better hedged against a possible future market downturn. Sulyma filed suit in 2015.

In *Intel*, the plan fiduciaries sought to assert the shorter three-year limitation period by providing evidence that the Intel retirement plans had provided various disclosures, including, for example, providing a summary plan description in 2011 and a qualified default investment notification in 2010. Intel argued that both disclosures provided Sulyma with "actual knowledge" of the change in plan investments. Sulyma responded by saying that, while he may have received various email disclosures regarding changes in the designated investment alternatives available under the plans, he did not specifically remember reading those disclosures. In agreeing with Sulyma, the Supreme Court held that, by the phrase "actual knowledge" in ERISA Section 413, Congress clearly meant real knowledge or knowledge in fact rather than some lesser standard where knowledge could be inferred.

While siding with Sulyma in the instant decision, the Court acknowledged that nothing in its decision allowed for plaintiffs to defeat arguments that their claims were not timely brought by "willful blindness" or where a plaintiff's denial of actual knowledge is strongly contradicted by the record. And the Supreme Court provided plan sponsors and fiduciaries with a path to document actual knowledge in the future. This path likely includes not only making required disclosures, as the Intel fiduciaries did, but using electronic records to track that participants have opened and read the actual disclosure. For example, electronic disclosures could be delivered to a workplace computer or laptop where employees need to self-certify that they have read the actual contents of the disclosure before being allowed to proceed with their daily log-in. Similarly, these same or similar disclosures could be made in a plan's intranet site where a participant will need to acknowledge that he has received and read the disclosure before proceeding to check a 401(k) balance or to access other wanted plan information.

If you would like to evaluate your existing disclosure practices or address how to make disclosures to participants in a manner designed to allow your retirement plans effective use of the three-year limitation period afforded plan fiduciaries under ERISA, please contact a member of Aon's Retirement Legal Consulting & Compliance group or other Aon consultants with whom you regularly work.

Quarterly Roundup of Other New Developments

by Teresa Kruse, Jan Raines, and Bridget Steinhart

Fiduciary Committees Part 2—Committee Formation
A well-formed retirement plan committee can help lighten an employer's fiduciary responsibilities that result from sponsoring a retirement plan. A critical step in this process is to be able to demonstrate a direct line of authority from the employer, typically by the Board of Directors or other governing authority to the committee. Why is this important? A committee must be able to demonstrate that it was given authority to act as a plan fiduciary. Documentation is key to a successful governance structure and committee activities; therefore, committee designations and acceptances should be in writing.

Once the authority for the committee is granted, the next step would be to designate committee members. Committees should be made up of people with the right skill sets to meet the "prudent expert" standard provided in the Employee Retirement Income Security Act of 1974 (ERISA). This requirement states, among other things, that a fiduciary must perform its duties "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use. . . ." Simply stated, committee members should have the skill and aptitude of a person expert in such matters as may come before the committee.

In our experience, there are a number of considerations that should go into the selection and makeup of committee members including the following:

- Select an odd numbered group for voting tiebreakers;
- Senior level individuals and individuals who may know the business make sense, but not necessarily C-suite; and
- Individuals who will understand their fiduciary role, are willing to participate, attend meetings, and able to challenge their committee peers.

Defining a solid governance structure and identifying appropriately skilled committee members are important steps when developing and documenting a prudent process. Aon has fiduciary experts who can help committees review their governance structure and understand fiduciary responsibilities through training, along with the investment consulting services to assist committees in meeting their fiduciary duties.

This article is the second in a series that will highlight Fiduciary Committees over the course of this year. The first article was published in the **First Quarter 2020** issue of the *Quarterly Update*. Stay tuned next quarter as we delve into best practices regarding documentation.

Hilton Still Wrestling Vesting
In late February 2020, after 20 years of litigation, Hilton Hotels Retirement Plan participants asked the court to certify a class of Hilton employees who claimed that Hilton fiduciaries failed to calculate vested benefits according to remedies outlined in a September 2010 court order. What complexities have contributed to 20 years of

litigation? For many Hilton employees, hours worked data was not available. Other issues include failure to count union service and service prior to a Hilton employer's participation in the Hilton plan, disagreement as to whom death benefits are payable, and the Hilton plan's pre-1976 use of "elapsed time"—a vesting and service crediting method where no hours are explicitly counted. While "equivalency methods" could be used in instances when hours worked data is insufficient or not available, pre-planning can often help mitigate vesting calculation issues in mergers and acquisitions, employee and group transfers from related employers or from ineligible groups, and when vesting methods are changed. Aon's experts in tax and ERISA service crediting methods and plan consulting can coordinate with clients, plan recordkeepers, and clients' legal counsel to help address any questions or concerns—including possible approaches to addressing any needed corrective action. *White v. Hilton Hotels Retirement Plan, No. 1:16-cv-00856 (D.D.C. Jan. 24, 2018).*

No Match? No Problem!

Although recent market and pandemic issues have led some organizations to suspend or eliminate matching contributions, some organizations may never offer a match on employee deferrals. A case study addressing an organization's approach to plan design and compensation was recently featured in *Pensions & Investments*. In this example, the company's plan—which does not provide a match—enjoys an 83% participation rate and 11% average deferral rates. A company's reasons for not offering a match could include a total rewards approach that prioritizes company retirement contributions lower on the spectrum of offerings, employee interests focused elsewhere (just as on healthcare costs), and many more. The Plan Sponsor Council of America's 62nd Annual Survey notes that 31.7% of plans with less than 1,000 participants and 12% of plans with 1,000 or more participants made no match in 2018. In what instances might a reduction or removal of matching contributions be successful? The case study noted above indicates that the organization focuses on wages to skilled trades people, and attributed plan participation and deferral rates in part to employee education, and automatic enrollment and escalation.

Supreme Court Sends Back IBM Stock Drop Case

The U.S. Supreme Court vacated the decision by the Second Circuit Court of Appeals, sending it back to the Second Circuit to decide whether plan fiduciaries, who are also insiders under federal securities laws, can be liable under ERISA for failing to disclose company struggles that led to a 7% drop in the company's stock price. The justices said they wouldn't address arguments that involved federal securities laws—requiring that the lower court address the new securities law issues raised in Supreme Court briefs but not in the lower courts. *Ret. Plans Comm. of IBM v. Jander, 589 U.S. __ (2020).*

Private, not Private

In late January 2020, we saw yet another lawsuit filed against a large employer regarding its 401(k) plan. A lot of the claims are similar as to what we've seen before—excessive recordkeeping fees, failure to monitor the investments, and excessive fee arrangements with outside third parties. So, what's different this time? The recordkeeper has also been named in the lawsuit—with many claims regarding how the firm and its affiliated companies use participant data.

Participants claim that confidential data, including social security numbers, assets, investment choices, etc., were shared with recordkeeper-affiliated companies, which allowed sales personnel to aggressively market non-plan related retail financial products and services. The claim goes on to note that these practices ultimately benefited the recordkeeper and continued well after the participant was no longer employed or "protected" by the plan's fiduciaries.

It's not explicit in ERISA, nor is there guidance from the DOL, on whether participant data is considered a "plan asset" and whether it needs to be protected just like the actual investment assets in the plan. There have been two settlements (and one case pending in the U.S. Court of Appeals) that seem to support this idea of treating all plan data as a "plan asset" subject to protections under ERISA. In these settlements, the recordkeeper was required to include in the service agreement that participant data will not be used for anything beyond actual recordkeeping activities and will not be shared with other parties; however, we have no actual judgments issued from the courts taking a similar position.

The California Consumer Privacy Act of 2018, effective January 1, 2020, also addresses issues of privacy and how participant data is utilized—final regulations are pending. Other states may follow California's model and adopt similar rulings.

Fiduciaries need to understand how participants' data is being used and if it is being shared with other affiliated or non-affiliated third parties, and perhaps the revenue generated from the sharing of that information—and address the use in service agreements, as applicable. Aon's fiduciary consultants can assist plan sponsors in developing a strategy to oversee participant data and to manage risk.

Retirement Plan Litigation Update

Retirement plan litigation has been prevalent over the past decade impacting corporate plan sponsors, financial institutions that are also plan sponsors, and universities sponsoring 403(b) plans. Defined contribution plan cases generally fall into the following three areas: inappropriate or imprudent investment choices; excessive fees; and self-dealing. Recently several cases involving financial institutions and universities have been dismissed (in full or in part) or settled, including:

- *In re Fidelity ERISA Fee Litig.* – Case dismissed
- *In re M&T Bank Corp. ERISA Litig.* – Case settled for $20.9 million
- *Schultz v. Edward D. Jones & Co.* – Case settled for $3.1 million

Plan sponsors seeking to reduce their litigation risk liability use a variety of strategies including increasing the number of passive funds in their plans and implementing better fee transparency. *In re Fidelity ERISA Fee Litig., No. 1:19-cv-10335-LTS (D. Mass. Feb. 14, 2020); In re M&T Bank Corp. ERISA Litig., No. 1:16-cv-00375 (W.D.N.Y. Dec. 26, 2019); Schultz v. Edward D. Jones & Co., No. 19-2158, 2020 BL 34196 (8th Cir. Jan. 31, 2020).*

Please see the applicable Disclosures and Disclaimers on page **11**.

Recent Publications

Roth Trends Revisited: Divergence Between Plan Sponsors and Participants
By Daniel Schwallie
Benefits Magazine (April 2020)

The percentage of defined contribution plan sponsors offering Roth contributions continues its upward trend. Will employee participation rates follow?

Click here to read the article.

Defined Benefit Plan Termination: Exorcising the Excise Tax on Reversions
By Daniel Schwallie
Journal of Pension Planning & Compliance (Summer 2020)

A reversion of assets from a terminating tax-qualified defined benefit plan terminates is subject to a 50% excise tax in addition to employer income taxes. However, the excise tax rate can be reduced to 20% of the reversion amount if the employer either increases benefits in the terminating plan or establishes a qualified replacement plan or both. This article describes possible ways to reduce the reversion amount and the requirements to reduce the excise tax rate to 20%, based on the available guidance.

Click here to read the article.

Aon's Retirement Legal Consulting & Compliance Consultants

Tom Meagher, Senior Partner/Practice Leader
thomas.meagher@aon.com

David Alpert, Partner
david.alpert@aon.com

Hitz Burton, Partner
hitz.burton@aon.com

Ron Gerard, Partner
ron.gerard@aon.com

Elizabeth Groenewegen, Associate Partner
elizabeth.groenewegen@aon.com

Clara Kim, Associate Partner
clara.kim@aon.com

Linda M. Lee, Project Coordinator
linda.lee.2@aon.com

Susan Motter, Associate Partner
susan.motter@aon.com

Beverly Rose, Partner
beverly.rose@aon.com

Jennifer Ross Berrian, Partner
jennifer.ross.berrian@aon.com

Dan Schwallie, Associate Partner
dan.schwallie@aon.com

John Van Duzer, Associate Partner
john.van.duzer@aon.com

Guest Authors

Thank you to the following colleagues who contributed articles to this quarter's publication.

Melissa Elbert, Partner
Retirement Solutions
melissa.elbert@aon.com

Beth Halberstadt, Senior Partner
Aon Investments USA Inc.
beth.halberstadt@aon.com

Eric Keener, FSA, Senior Partner
Retirement Solutions
eric.keener@aon.com

Teresa J. Kruse, Senior Consultant
Aon Investments USA Inc.
teresa.kruse@aon.com

Grant T. Martin, Senior Consultant
Retirement Solutions
grant.martin@aon.com

Jan Raines, Associate Partner
Aon Investments USA Inc.
jan.raines@aon.com

Bridget Steinhart, Associate Partner
Aon Investments USA Inc.
bridget.steinhart@aon.com