

Legislative and regulatory update bulletin

New year, new administration: What to watch in 2025

Author



Tina Anstett
ERISA Strategist

The 2024 election and Inauguration Day are now behind us. With the new administration expected to take a “de-regulatory” stance, and the 119th Congress in place with a narrow Republican majority, retirement industry professionals and plan sponsors alike are curious as to what this year will bring in terms of retirement plan legislation, regulation and litigation.

Post-election lame duck session recap

The Lame Duck session of the 118th Congress did not provide the desired technical corrections to the SECURE 2.0 Act of 2022 (SECURE 2.0), nor did the necessary changes take place to allow 403(b) plans to invest in collective investment trusts (CITs). With a deadline of December 20, 2024 and a very limited number of days in session, the primary focus was the American Relief Act, 2025 which was enacted on December 21, 2024 to make sure the Federal Government would remain funded through March of 2025. Proposed legislation introduced during the year allowing CITs in 403(b) plans, lowering the minimum age for plan participation from 21 to 18 and the creation of a federal auto-IRA program, unfortunately expired and will need to be reintroduced for future consideration.

SECURE 2.0

SECURE 2.0 included 92 retirement plan provisions to take effect over several years. Implementation of SECURE 2.0 has been challenging without clear guidance for provisions including mandatory Roth Catch-up contributions, increased catch-up contribution limits for older participants and mandatory automatic enrollment. Recordkeeping and payroll system changes have also delayed implementation of some of the new requirements prompting the Internal Revenue Service (IRS) to delay certain implementation effective dates. IRS issued helpful guidance late in 2023 (IRS Notice 2024-2) but did not resolve all questions. Fortunately, both the IRS and the U.S. Department of Labor Employee Benefits Security Administration (DOL) were active at the end of 2024 and early into this year providing helpful clarifications.

From the IRS

IRS released two Proposed Regulations in early January providing welcomed clarification on the following SECURE 2.0 provisions:

- Effective January 1, 2025, mandatory automatic enrollment and contribution escalation for 401(k) and 403(b) plans established after December 29, 2022.
- Effective January 1, 2025, for participants age 60-63, optional increased catch-up contribution limits up to either \$10,000 or 150% of the age 50 catch-up contribution limit (\$11,250 for 2025).

- Effective January 1, 2026, mandatory Roth catch-up contributions for participants earning more than \$145,000 in FICA wages in the prior year.

Public comments are due by mid-March and hearings on each of the Proposed Regulations are scheduled for early April. Plan sponsors may rely on the Proposals in good faith until they are finalized.

From the DOL

As directed under SECURE 2.0, the DOL launched the **Retirement Savings Lost and Found Database** designed to reunite participants with retirement plan benefits from prior employers. At launch, the Database relies on voluntary submission of participant information from plan sponsors and their authorized service providers. Additional participant information will be provided by the IRS over time, but it is still very early in the process.

Another long-anticipated release from the DOL and complementary to the IRS self-correction options required by SECURE 2.0, is the updated **Voluntary Fiduciary Correction Program (VFCP)**, effective March 17, 2025. The most notable changes in the updated VFCP are new self-correction options for delinquent participant contributions and loan repayments. The updates provide relief from formal filing requirements, but plan sponsors are still responsible for maintaining robust processes and documentation as required for a formal filing with DOL. Time will tell if there is expanded plan sponsor use of the Program.

Will 2025 bring SECURE 3.0?

Both the SECURE Act and SECURE 2.0 reflect the overall bipartisan support in Congress for retirement savings. Priorities of increased retirement plan access and participation as well as promotion of lifetime income options in defined contribution plans continue. However, the new administration has emphasized that the extension of the Tax Cuts & Jobs Act of 2017, certain provisions of which are set to expire at the end of 2025, is a high priority. Given the realities of the need for a federal budget, the complex reconciliation process, and the continued implementation of SECURE 2.0, new retirement plan legislation will depend on legislative capacity and political will.

Litigation

Litigation impacts plan sponsors as well as regulators. New theories of liability and decisions that reinforce fundamental fiduciary principles are all important to inform plan sponsors, their advisers and other service providers. Actions that challenge federal regulations are equally important to ensure that regulators continue to act within their granted authority. Litigation also has the potential to define standards for bringing claims to prevent frivolous lawsuits while taking into account the need for appropriate legal protections. A summary of each of these areas follows.

Class action trends

The fear of litigation is of great concern for all retirement plan sponsors, but it is most acute for sponsors of “mega” plans with billions of dollars in assets. Class action lawsuits continue to plague the largest defined contribution plans with claims of excessive fees, poor investment performance and most recently, new fiduciary breach claims related to plan design and operation, namely the “forfeiture cases” as described below. According to Encore Fiduciary,¹ the second half of 2024 saw a 35% increase in excessive fee litigation due in large part to forfeiture cases with 28 new and over 34 filed to date. 2024 saw record settlements totaling \$203.3 million.

Forfeiture lawsuits

Since late 2023, plaintiff’s law firms have been adding this new claim to excessive fee complaints targeting common practices of defined contribution plans for using forfeited contributions. A plan sponsor’s options for using forfeitures are spelled out in the plan document that they have a fiduciary duty to follow. There is regulatory guidance supporting these practices including proposed Treasury regulations issued as recently as 2023. DOL has never objected to these practices.

Common options for using forfeitures include:

- 1) Restoration of the accounts of rehired participants
- 2) Reallocation as additional contributions to active participants
- 3) Offset of future employer contributions
- 4) Payment of eligible plan expenses

¹ <https://www.planadviser.com/401k-excessive-fee-litigation-spiked-near-record-pace-24/?secureweb>

Some plan document provisions clearly specify how forfeitures must be used. Others give the plan sponsor discretion to choose which option to use each year. The forfeiture lawsuits argue that where plan sponsors have discretion, they must always prioritize participant plan expense reduction, and that any other choice is a breach of fiduciary duty.

Thus far, decisions have been mixed among the courts. Many have granted defendant motions to dismiss but allowed plaintiffs to amend their complaints and refile for further consideration. These cases are still in the early stages so stay tuned for further developments.

The latest on ESG? – Spence v. American Airlines

At first glance, a recent Texas District Court decision appeared to be another attack on environmental, social and governance (ESG) factors in defined contribution plan investing. The Plaintiff alleged that American, and its Employee Benefits Committee (American) breached fiduciary duties of prudence and loyalty by hiring and delegating proxy voting authority to a prominent investment manager heavily focused on consideration of ESG factors rather than exclusively on the financial interests of plan participants in its proxy voting practices. The Court held that American fulfilled its duty of prudence but breached its duty of loyalty to participants because the individuals responsible for plan decision making considered corporate interests rather than plan participant interests exclusively. The decision emphasizes the importance of having clear separation between corporate interests and plan fiduciary responsibilities, a fundamental duty under ERISA. At the time of this writing, damages have yet to be determined.

DOL in the defendant's chair

The DOL's attempt to update the Employee Retirement Income Security Act of 1974, as amended (ERISA) to broaden the definition of "investment advice fiduciary" has been a decade-long effort without success and the future does not look bright for its latest iteration. The "Retirement Security Rule" finalized in April of 2024, was suspended nationwide in July of 2024 following stays issued by two Texas District Court decisions. Despite the DOL's appeal in September 2024, the new Administration may decide not to pursue it. Should the District Court litigation proceed on the merits, a DOL victory is not expected.

Litigation reform?

The topic of litigation reform reached the Supreme Court of the United States on January 22, 2025, in the matter of Cunningham v. Cornell, a case originally filed in 2016. The case involves the level of detail a plaintiff must provide in a complaint alleging fiduciary wrongdoing. A decision in favor of Cornell could set precedent that would help to reduce the number of class action lawsuits by requiring more specific information to be presented by a plaintiff. Reports on the hearing indicate that there was no consensus among the Supreme Court justices other than the fact that they need to balance the interests of participants and plan sponsors against the backdrop of ERISA's complexities. The Court has not specified a precise date, but decisions are typically released by late June which marks the end of the current term.

Final thoughts

There is no shortage of issues to keep an eye on in the retirement plan space. The detail and complexity can be overwhelming to those unfamiliar or those with competing business priorities. From the House and Senate to the federal courts, DOL and IRS, we will be watching closely for:

- New bills introduced to further efforts to increase plan access and savings opportunities and to enable 403(b) plans to offer CITs
- Further guidance on the continued implementation of SECURE 2.0
- Potential impact of Tax Cuts and Jobs Act extensions on retirement savings incentives ("pay-fors")
- Forfeiture lawsuit developments and the Supreme Court decision in Cunningham v. Cornell

At this early point in 2025, it is too soon to tell, but rest assured, there will certainly be more to follow!

Next steps

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277 Park Avenue | NY 10172

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