

Tulsa Employee Benefits Group Legislative Update

September 23, 2021

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No Surprises Act/Transparency Relief



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NO SURPRISES ACT/TRANSPARENCY RELIEF

- FAQs issued on August 20, 2021 provided implementation relief and guidance.
- <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-49.pdf>

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NSA/TRANSPARENCY AUGUST FAQs

- Machine-Readable Files:
 - Enforcement for Transparency in Coverage (TiC) Rules for Rx pricing delayed until regulations issued.
 - Enforcement for remaining TiC reqts (machine-readable files for in-network rates; OON allowed amounts; billed charges) deferred until 7/1/22.
 - Plan years beginning after 7/1/22 – files must be posted in first month of plan year.

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NSA/TRANSPARENCY AUGUST FAQs

- Price Comparison Tool:
 - Rulemaking likely to add telephone requirement to TiC Rules.
 - Enforcement delayed for CAA rules until plan years beginning on or after 1/1/23.
- ID Card Requirements:
 - No delay – use good faith reasonable interpretation.
 - FAQ lists items the departments would consider when analyzing if compliant (e.g., deductible; OOP max; contact information).

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NSA/TRANSPARENCY AUGUST FAQs

- Good Faith Estimates and Advance EOBs:
 - Enforcement delayed until regulations issued.
 - Data transfer standards are expected to be addressed in rulemaking.
- Gag Clause Restriction on Price and Quality Data:
 - No delay – use good faith reasonable interpretation.
 - Attestations to begin in 2022.
 - Guidance expected for how to submit.

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NSA/TRANSPARENCY AUGUST FAQs

- Provider Directory:
 - No delay – use good faith reasonable interpretation.
 - Not deemed out of compliance if plan treats as participating for cost-sharing and out-of-pocket maximum application when inaccurate information is provided by provider.

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NSA/TRANSPARENCY AUGUST FAQs

- Balance Billing Notice:
 - No delay – use good faith reasonable interpretation.
 - Model Notice – good faith compliance.
- Continuity of Care – Change in Provider Status:
 - No delay – use good faith reasonable interpretation.

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NSA/TRANSPARENCY AUGUST FAQs

- Pharmacy Benefits/Drug Cost/Health Cost Reporting:
 - Pending regulations or other guidance, enforcement delayed until 12/27/22.
 - Plans/issuers should start working to ensure they are able to report 2020 and 2021 data.
- Clarification that CAA requirements apply to grandfathered plans.

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American Rescue Plan Act

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COBRA PREMIUM SUBSIDY

- COBRA premium subsidy ends 9/30/21.
- Notice to AEIs re expiration due 15-45 days prior to end of subsidy (9/15/21 deadline).
- Payroll tax credit to employer/insurer against employer portion of Social Security and Medicare taxes.
 - Credit is equal to premium charged to AEI in absence of ARPA subsidy (does not include subsidy that employer would have otherwise provided).

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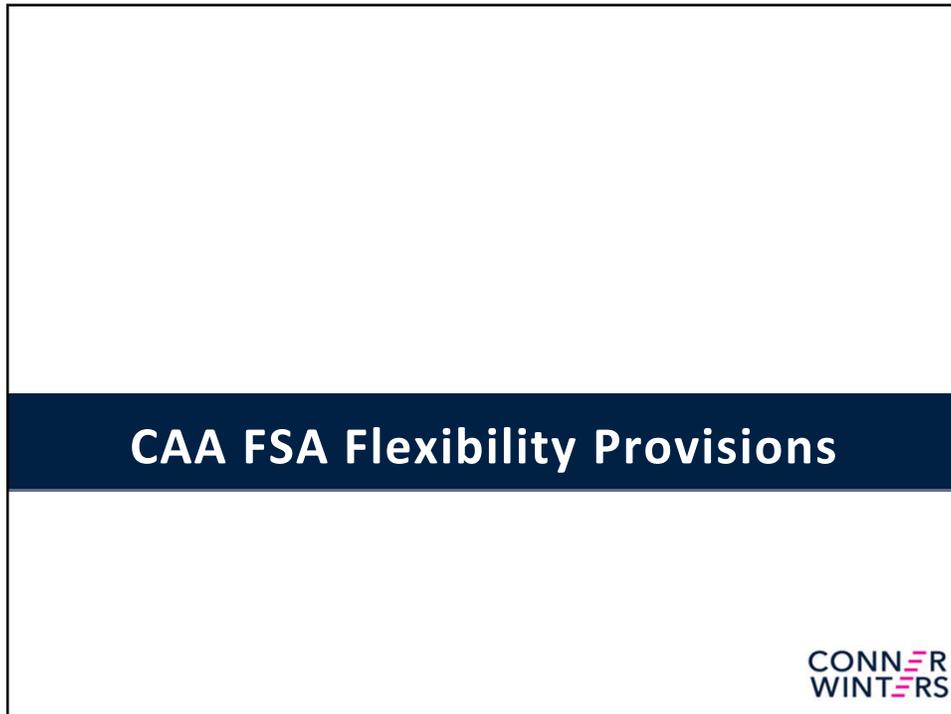
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DEPENDENT CARE FSA MAXIMUM

- New dependent care FSA maximum option for 2021 calendar year \$10,500 (\$5,250 for married participants filing separately).
- Amendment required by 12/31/21 for calendar year plan.
 - Plan language may automatically provide increase.
 - Amendment may be required if increase not desired but plan document incorporates Code provision.

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TEMPORARY FSA FLEXIBILITY

- Employers could elect to offer all, some, or none:
 - Increased carryover
 - Extended grace period
 - Post-termination reimbursements from health care FSAs
 - Increase in age limit from 13 to 14 for dependent care FSAs
 - FSA change in election amount without qualifying status change event

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TEMPORARY HEALTH PLAN FLEXIBILITY

- IRS Notice 2021-15 added option to amend health, dental and vision plans for the 2021 plan year to allow new elections without change in status event.

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TEMPORARY FSA FLEXIBILITY AMENDMENTS

- Amendment required if optional relief adopted.
- Amendments can be retroactive if:
 - Adopted no later than the last day of the calendar year beginning after the end of plan year with change, and
 - Plan must be administered consistent with any change (communications needed).
- For example, a calendar year plan that allowed increased carryover amounts from 2020 into 2021 would require an amendment by 12/31/21.

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Title VII and ACA Section 1557

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TITLE VII AND ACA SECTION 1557

- *Bostock v. Clayton County, Georgia*, No. 17-1618 (S. Ct. June 15, 2020) – case involving the firing of an individual because of their sexual orientation or transgender status.
- Supreme Court held that the prohibition against discrimination “on the basis of sex” under Title VII included sexual orientation and gender identity.

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TITLE VII AND ACA SECTION 1557

- HHS announced May 10, 2021, it will interpret and enforce Section 1557 and Title IX’s prohibitions on discrimination based on sex to include discrimination on the basis of sexual orientation or gender identity.
- EEOC interprets Title VII to prohibit sexual orientation and gender identity discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

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CAA Mental Health Parity

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MENTAL HEALTH PARITY

- Group health plans and insurers must provide to federal and state agencies – upon request – a comparative analysis of nonquantitative treatment limitations (“NQTLs”) related to mental health and substance abuse disorder benefits (“MH/SUD”).
 - NQTLs – generally, a limitation on the scope or duration of benefits for treatment that is not expressed by number.
- DOL, HHS, and Treasury Departments must request at least 20 comparative analyses per year.

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MENTAL HEALTH PARITY

- Analysis must include specific findings and conclusions of compliance.
- FAQs guidance issued April 2, 2021:
 - General statement of compliance and conclusory references are not sufficient.
 - Large production of documents without clear descriptions and relevant analysis not sufficient.
 - If carefully apply guidance in Self-Compliance Tool, then in “strong position” for compliance.

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MENTAL HEALTH PARITY

- If Departments conclude comparative analysis provided is not sufficient or compliant, plan/insurer must:
 - Specify actions will take to make compliant, and
 - Provide follow-up corrected comparative analysis within 45 days.
 - 2nd review by Departments is final determination and if again determined to be noncompliant, then required to notify all enrolled of noncompliance with MHPAEA within 7 days.

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MENTAL HEALTH PARITY

- Departments have broad discretion to request NQTLs comparative analyses in any situation.
- FAQ example: may request a comparative analysis if receive a complaint of a prior authorization requirement for prescriptions to treat opioid use disorders.

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MENTAL HEALTH PARITY

- FAQs: In “near term” DOL expects to focus on the following NQTLs in its enforcement efforts:
 - Prior authorization requirements for in-network and out-of-network inpatient services.
 - Concurrent review for in-network and out-of-network inpatient and outpatient services.
 - Standards for provider admission to participate in a network, including reimbursement rates.
 - Out-of-network reimbursement rates (plan methods for determining usual, customary, and reasonable charges).

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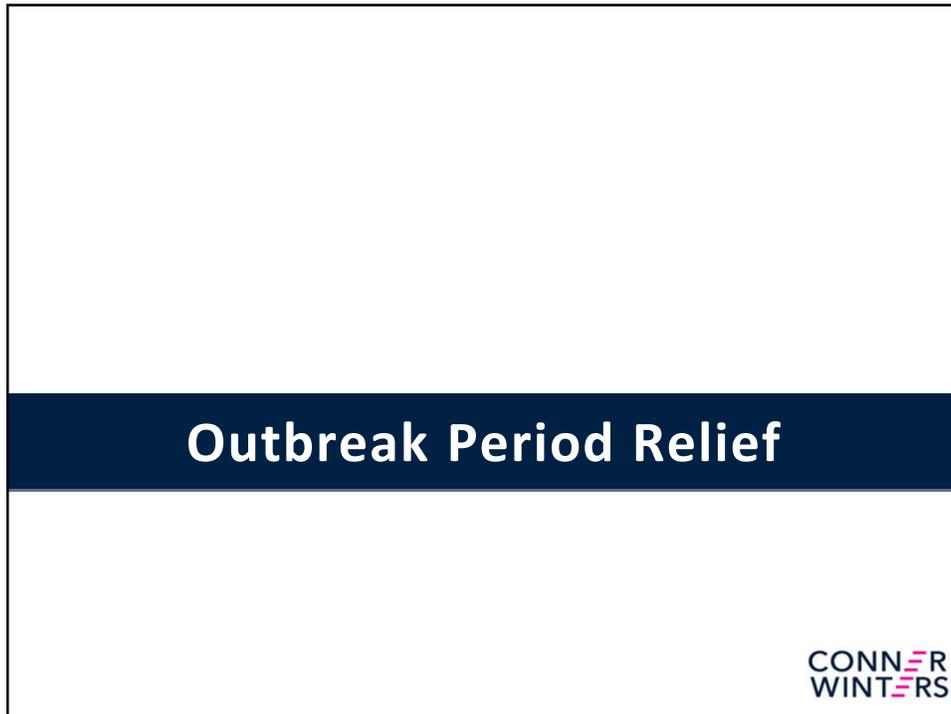
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MENTAL HEALTH PARITY

- Plans and insurers must, upon request, provide NQTLs comparative analyses to participants, beneficiaries or enrollees, or their authorized representative, including providers.
- Claimants (or their authorized rep) may request comparative analysis, free of charge, upon the appeal of a denied claim or a final internal adverse decision, if relevant to claim.

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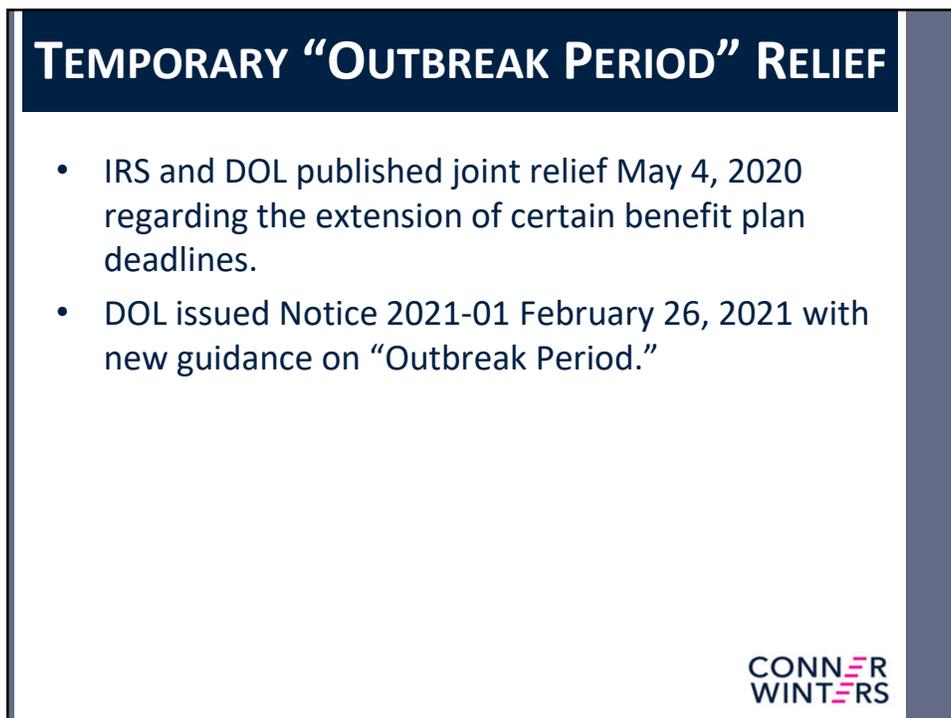
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Outbreak Period Relief

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TEMPORARY “OUTBREAK PERIOD” RELIEF

- IRS and DOL published joint relief May 4, 2020 regarding the extension of certain benefit plan deadlines.
- DOL issued Notice 2021-01 February 26, 2021 with new guidance on “Outbreak Period.”

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TEMPORARY “OUTBREAK PERIOD” RELIEF

- Deadline extension began as early as March 1, 2020, on *person by person/event by event basis* beginning once the person is eligible for the relief and continuing until the earlier of:
 - 60 days after the announced end of the national emergency, or
 - one year from when the person was first eligible for the relief.

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TEMPORARY “OUTBREAK PERIOD” RELIEF

- Relief applies to:
 - HIPAA special enrollment
 - COBRA elections
 - COBRA qualifying event / disability notice
 - Initial and monthly COBRA payments
 - Claim and appeal deadlines
 - External review deadlines

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TEMPORARY “OUTBREAK PERIOD” RELIEF

- The presidentially declared “national emergency” regarding COVID-19 is ongoing.
 - March 13, 2020 President Trump issued the “national emergency” with respect to COVID-19 effective as of March 1, 2020.
 - February 24, 2021 declaration by President Biden to continue the “national emergency.”

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TEMPORARY “OUTBREAK PERIOD” RELIEF

- Notice 2021-01 discusses potential participant communications:
 - “Consider affirmatively sending notice” for those losing coverage.
 - “Consider” updating prior communications regarding Outbreak Period timing (i.e., explain person by person application).

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Welfare Plans - Miscellaneous

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CARES ACT – FSA EXPENSE CHANGES

- CARES Act permits FSA/HSA/HRA reimbursement of:
 - OTC drugs (previously excluded)
 - Menstrual care products (treated as incurred for medical care under §213(d))
- Expenses incurred beginning on or after 1/1/20.
- Retroactive amendment allowed (clarified by IRS Notice 2021-15).

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PPE EXPENSES - FSA/HSA/HRA

- IRS Announcement 2021-7 – COVID-19 PPE (masks, hand sanitizer, sanitizing wipes) treated as paid for medical care under § 213(d) for FSAs/HSAs/HRAs.
- Does plan incorporate Code § 213(d)?
- If amendment needed, may adopt retroactive amendment if:
 - Adopt by last day of 1st calendar year beginning after end of plan year in which it is effective,
 - Prospective amendments required after 2022, and
 - Plan operated consistently with amendment starting with effective date.

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COVID TESTING - FSA/HSA/HRA

- IR 2021-181: IRS reminded taxpayers that the cost of home COVID-19 testing is an eligible medical expense for reimbursement under health FSAs/HSAs/HRAs.

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EEOC – WELLNESS PROGRAMS

- EEOC issued proposed wellness regulations under ADA and GINA on 1/7/21.
 - Limited participatory wellness programs (that involve disclosure health info) to “de minimis” incentive (e.g., a water bottle or a modest gift card).
 - Health contingent programs offered through a health plan would be subject to HIPAA incentive limits (30%/50% for tobacco).
- EEOC withdrew the proposed regulations on 2/12/21.

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CLAIMS PROCEDURE

- EBSA Information Letter issued 6/14/21.
- Call center claim-related audio recordings and transcripts must be provided, upon request, to a claimant (or authorized representative) under claims procedure rules.
- Must be provided even if:
 - The recording/transcript was created for “quality assurance”; or
 - The plan or claims administrator did not include the recording or transcript in the administrative record.

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ACA EMPLOYER MANDATE

- IRS Revenue Procedure 2021-36 (Aug. 30, 2021)
- Affordability percentage adjusted to 9.61% for plan years beginning in 2022.
 - 2021 percentage was 9.83%.
- For (b) penalty purposes, self-only coverage is not “affordable” if the employee contribution exceeds the affordability percentage with respect to household income.
- Safe harbors available for employers.

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Retirement Plan Amendments

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RETIREMENT PLAN AMENDMENTS

- Final hardship withdrawal amendments required by 12/31/2021 for calendar year plans.
 - Initial amendment for suspension period may not have addressed new events.
- Collectively bargained cash balance/hybrid DB plans must be amended for market rate of return rules by 12/31/21.

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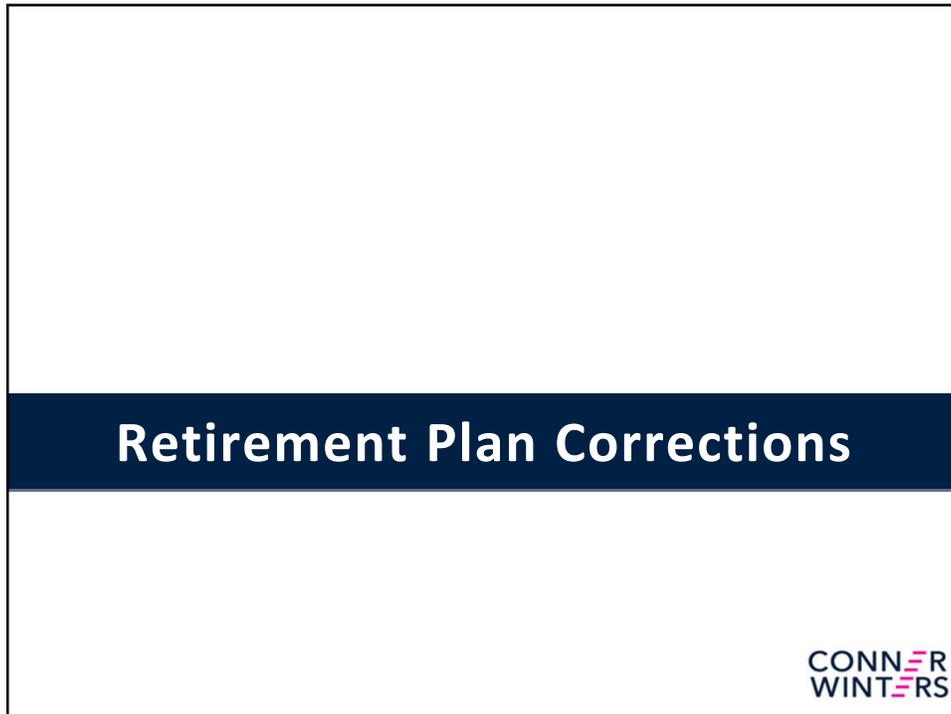
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RETIREMENT PLAN AMENDMENTS

- CARES Act and SECURE Act amendments required by 12/31/2022 for calendar year plans.
- Pre-approved defined contribution plans must be restated by July 31, 2022.

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A presentation slide with a dark blue header bar containing the text "NEW CORRECTION GUIDANCE" in white. Below the header is a white area with a list of four bullet points. The slide is framed by a thin black border and a vertical grey bar on the right side. In the bottom right corner, there is a logo for "CONNOR WINTERS" with a stylized red and blue graphic element.

- IRS Rev. Proc. 2021-30 issued July 20, 2021.
- De minimis threshold increased from \$100 to \$250 for return of overpayments and distribution of "excess amounts."
- Corrective distributions of \$75 or less not required.
- Flexibility re correction of overpayments.

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NEW CORRECTION GUIDANCE

- Self-Correction
 - Time period to self-correct significant operational failures extended to end of third plan year after failure occurred.
 - Retroactive amendment correction expanded.
 - Extension of missed deferral correction for automatic contribution plans extended to 12/31/23.

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NEW CORRECTION GUIDANCE

- Anonymous submission procedure eliminated as of 1/1/22.
- Replaced by pre-submission conference option, but subject to IRS discretion.
 - IRS will provide oral feedback about failures and proposed correction.
 - Conference is advisory only and not binding on IRS.

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Possible Future Changes - Retirement



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BUILD BACK BETTER ACT

- Budget reconciliation - \$3.5 trillion “infrastructure”
- Automatic 401(k)/IRA:
 - All companies (with limited exceptions for certain small or new companies) will be required to offer a retirement plan or payroll deduction IRA.
 - Automatic enrollment and automatic escalation required.
 - Employer contributions not required.
 - Grandfather for plans in existence on date of enactment.



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BUILD BACK BETTER ACT

- New required distribution for high-income taxpayers with aggregate IRA/retirement plan balances over \$10 million.
 - Not based on age.
 - \$450,000 taxable income threshold for joint filers.
 - Must distribute 50% of defined contribution accounts over \$10 million (separate rule for accounts over \$20 million).

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BUILD BACK BETTER ACT

- Expanded and refundable Saver's Credit
 - Payable to a retirement plan or IRA, to be credited as a Roth contribution.
- Possible revenue raisers:
 - Accelerate expansion of Code § 162(m) rules from 5 to 10 employees to 2022 from 2027.
 - \$10 million cap on IRAs/defined contribution accounts.
 - Eliminating Roth conversions (2032) and back-door Roth contributions.

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BUILD BACK BETTER ACT

- Universal Paid Family and Medical Leave
 - Up to 12 weeks during a 12-month benefit period.
 - Available in as few as 4 “caregiving” hours per week.
 - Broader than current FMLA leave in some respects (expanded family relationships; applicable to employees not eligible for FMLA)
 - Employers can provide and recover up to 90% of cost.
 - Also available to independent contractors.

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SECURE 2.0

- Securing a Strong Retirement Act (Rep. Richard Neal and Rep. Kevin Brady).
- Auto-enrollment required in new plans.
- 403(b) plan investment expansion (CITs).
- Increase in required beginning date age (eventually to age 75).
- Reduction of RMD excise tax from 50% to 25% (further reduction to 10% if corrected within 2-year window).
- Increase catch-up limit to \$10,000 for age 62-64.

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SECURE 2.0

- Matching contributions based on student loan payments.
- Small, immediate financial incentives for plan contributions won't violate contingent benefit rule.
- Harmonize hardship rules for 401(k) and 403(b) plans.
- Long-term, part-time employees (reduction of consecutive year requirement from 3 to 2).
- Eliminate 25% limitation for qualified longevity annuity contracts.

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SECURE 2.0

- Relief regarding recovery of retirement plan overpayments.
- Retirement savings "lost and found" registry.
- Expanded use of self-correction for inadvertent failures.
- Reduced notice obligations for unenrolled participants.

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RETIREMENT SECURITY AND SAVINGS ACT

- Sen. Rob Portman and Sen. Ben Cardin.
- Many provisions similar to Secure 2.0, though some additional provisions such as:
 - Mergers of 401(a) and 403(b) plans.
 - New automatic enrollment safe harbor.
 - Expanded rollovers for non-spouse beneficiaries.
 - Contributions permitted based on severance payments.
 - RMD exemption for balances under \$100,000.

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Retirement Plans - Miscellaneous

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PENSION FUNDING RELIEF GUIDANCE

- American Rescue Plan Act provided for:
 - Extension of underfunding amortization period from 7 to 15 years.
 - Extension of interest rate smoothing until 2026.
- Notice 2021-48 provides guidance.
 - Election can be made by 12/31/21 to apply extended amortization period to 2019-2021.
 - Flexibility regarding use of prefunding balances; election required by 12/31/21.

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CYBERSECURITY

- DOL released three guidance items during April 2021.
 - Tips for Hiring a Service Provider: “to help business owners and fiduciaries meet their responsibilities under ERISA to prudently select and monitor such service providers...”
 - Cybersecurity Program Best Practices: “for use by recordkeepers and other service providers responsible for plan-related IT systems and data, and for plan fiduciaries making prudent decisions on the service providers they should hire.”

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CYBERSECURITY

- DOL released three guidance items during April 2021
 - Online Security Tips: “Offers plan participants and beneficiaries who check their retirement accounts online basic rules to reduce the risk of fraud and loss.”
- DOL has confirmed that cybersecurity inquiries have become a routine part of investigations.
 - Requests for cybersecurity and information security program policies, procedures, and guidelines – for plan sponsors and recordkeepers.

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LIFETIME INCOME DISCLOSURES

- SECURE Act added requirement for retirement plans to provide a disclosure regarding annuity income streams that could result from participant account balances.
 - Applies to 401(k), 403(b), profit sharing plans and ESOPs.
 - Applies even if plan does not provide for annuity forms of distribution.

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LIFETIME INCOME DISCLOSURES

- Must be provided annually.
- Must show estimated payments based on single life annuity and qualified joint and survivor annuity.
- Interim final rule requires certain assumptions for annuity calculations.

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LIFETIME INCOME DISCLOSURES

- First statement required:
 - Plans that issue quarterly statements (participant-directed plans) must incorporate lifetime illustration on any quarterly statement no later than the second quarter of 2022 (ending June 30, 2022).
 - Non-participant directed plans: lifetime illustration must be on statement for first plan year ending on or after 9/19/21.
 - For most plans, will be the 2021 statement; required by 5500 due date.

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REMOTE NOTARIZATION

- Physical presence requirement relief extended to June 30, 2022.
- IRS Notice 2021-40 extends relief originally provided in Notice 2020-42 and then extended in Notice 2021-3.
- Relief from physical presence requirement for participant election witnessed by a notary public of a state that permits remote electronic notarization or by a plan representative.
- Subject to requirements listed in Notice 2021-3 regarding interaction between participant and witness.

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INVESTMENT CONSIDERATIONS

- November 2020: DOL issued final rule regarding fiduciary duties related to investment selection.
 - “[E]valuation...must be based only on pecuniary factors...”
 - “[M]ay not subordinate the interests of the participants and beneficiaries ... to other objectives, and may not sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or goals.”

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INVESTMENT CONSIDERATIONS

- March 2021: DOL announces it will not enforce the final rule.
- May 2021: Biden issues executive order directing DOL to consider issuing a proposed rule that suspends, rescinds or revises the November 2020 rule.

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STUDENT LOANS

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STUDENT LOANS

- Private Letter Ruling 201833012 (401(k) plan).
 - If employee made student loan repayment equal to at least 2% of compensation for a pay period, employer would make a 5% nonelective contribution.
 - If employee made 2% elective contribution instead of student loan repayment, employer would make a 5% matching contribution.
 - Employees who made student loan repayments could still make elective contributions.
 - Nonelective contribution subject to plan qualification requirements (e.g., vesting, distribution limits, nondiscrimination).

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STUDENT LOANS

- Private Letter Ruling 201833012 (401(k) plan).
 - IRS concluded that arrangement did not violate “contingent benefit” rule.
 - Perhaps different conclusion if:
 - Nonelective contributions made only to employees who did not make elective contributions, or
 - Student loan assistance provided outside the plan only to those who make elective contributions.

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STUDENT LOANS

- Proposed legislation: Secure 2.0 and RSSA:
 - Employers can make matching contributions under 401(k) and 403(b) plans based on student loan payments.
 - Will not cause 403(b) universal availability failure.
 - Matching rate for student loan payment must be same as matching rate for elective deferrals.
 - Matching for student loan payments only available to employees otherwise eligible to receive regular matching.
 - All employees eligible for regular match must be eligible to receive match on student loan payments.

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The foregoing presentation is a summary of certain legislation and guidance. As with any summary, some details are omitted.

This summary should not be relied upon for legal or tax advice for particular situations.

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