AMERICAN BENEFITS COUNCIL

PUBLIC POLICY RECOMMENDATIONS

Memo to Biden-Harris Administration Transition Teams: Legislative & Regulatory Proposals Related to COVID-19

December 22, 2020

To: Biden-Harris Administration Transition Teams

Fr: American Benefits Council

Re: Legislative & Regulatory Proposals Related to COVID-19

The American Benefits Council (Council) is an employer trade association that advocates for public policy on a wide range of employee benefit matters. The Council's members are major employer sponsors of employee benefits and organizations that support employer sponsors. Collectively, Council members either sponsor directly or provide services to virtually all employer-provided health and retirement plans.

While the Council's policy priorities are far-ranging, we know that the incoming Biden-Harris administration is very appropriately immediately focused on measures to address the COVID-19 pandemic. Accordingly, this document focuses exclusively on legislative and regulatory recommendations that seek to ameliorate the health and economic consequences of the pandemic.

Many proposals for which the Council advocated in 2020 were included in legislation that was either proposed or enacted in the 116th Congress or were regulatory matters proposed or finalized in 2020. Therefore, this document refers in several places to legislative and regulatory proposals that are still very important to be addressed by the Biden-Harris administration and Congress.

In the near future we will share our recommendations on several other matters including:

- ERISA preemption
- Litigation and federal pleading standards
- Stabilization of funding for single-employer defined benefit pension plans
- Economic, Social and Governance (ESG) investing and proxy voting

- Bipartisan retirement policy proposals
- Electronic means to fulfill benefit plan notice requirements
- Supporting/strengthening employer-sponsored health coverage
- Health care cost and quality, including through increased transparency
- Support of behavioral health needs for employees and families
- Social determinants of health and potential inequities in plan design/operation
- Value-based health plan design, including treatment of chronic conditions

HEALTH POLICY RECOMMENDATIONS

GOAL: Support the role of employers in nationwide vaccination efforts.

ISSUE: The remarkable advances toward the development of safe and effective vaccines give us hope that the end of this devasting pandemic may be in reach. Yet the promise afforded by the development of these vaccines will go unrealized without the vaccinations themselves. The distribution and administration of the vaccination for hundreds of millions of people across the country is a daunting task, and employers will play a critical role in the success of this endeavor for their workers and others.

RECOMMENDATIONS:

- Recognize the important role that employers play in vaccination efforts and facilitate those efforts by ensuring that employers are included in outreach and communication by public health entities and that employers' needs are addressed in developing plans for vaccine distribution and administration.

- Maintain the guidance provided in the recent interim final rules issued by the U.S. departments of Health and Human Services (HHS), Labor (DOL) and Treasury implementing the CARES Act requirement that group health plans cover the COVID-19 vaccine without cost-sharing within 15 days of vaccine approval. In particular, maintain the aspect of the rule which provides that when a vaccine is provided out of network, the plan must pay the provider a reasonable amount, which includes the Medicare rate, and that plans need not reimburse providers for the cost of the vaccine if the vaccine has been provided to the provider at no cost, for example, by the federal government.

- Issue guidance confirming that employers may provide COVID-19 vaccination as part of the excepted benefit employee assistance programs they offer, allowing employers to provide the vaccine in this way at no cost to employees who are not enrolled in the employer's major medical health plan. Guidance confirming that COVID-19 vaccines can be provided through excepted benefit on-site clinics would also be helpful. More generally, preserve flexibility for employers regarding how vaccination programs are characterized, including as part of an ERISA plan or outside of an ERISA plan.

- Clarify the extent to which employers may provide incentives to employees who receive the vaccine, including as part of employer provided wellness programs (for example, premium reductions or extra HSA contributions) and outside of employer provided wellness programs. Guidance regarding the application of the HIPAA nondiscrimination rules as well as the American with Disabilities Act and Genetic Information Nondiscrimination Act would be very helpful to stakeholders, who are working to assess options to ensure maximum vaccine uptake.

- Address liability concerns for employers that require or encourage employees to take the COVID-19 vaccine.

- While it appears that for the foreseeable future the federal government will be paying for the cost of the vaccine itself and that employers and plans are not responsible for the cost of the vaccine itself, if at some point that dynamic changes, there will need to be protections for employers and plans to prevent price gouging by providers.

GOAL: Support robust COVID-19 testing and contact tracing capabilities.

ISSUE: Widespread testing and contact tracing continue to be essential to attempting to control community spread and support the nation's transition back to normal. Since the beginning of the pandemic, employers have been making significant efforts to support testing for employees and their families and the Families First Act and CARES Act provisions that provide for group health plans to cover diagnostic COVID-19 testing without cost-sharing was an additional step in the right direction. But further action is needed. The widespread testing needed for public health surveillance purposes and to facilitate returning employees to the workplace safely calls for dedicated federal funding commensurate with the importance of the task.

RECOMMENDATIONS:

- Support policies that enhance the availability of reliable and prompt testing and contact tracing capabilities. As described in a July 21 employer group letter to Congress, to support the efforts of employers to return their employees to work safely, additional federal resources for robust testing are needed, including for employers that choose to use testing as part of a return to work strategy.

- Maintain the current guidance by Treasury, DOL and HHS [see Q5 in the linked document] which provides that under the Families First Act and the CARES Act, group health plans are required to cover diagnostic COVID-19 testing without cost-sharing, as distinct from testing for return to work or public surveillance purposes. Employers are fully in compliance with, and supportive of, these requirements and have made significant efforts to cover diagnostic testing for employees and their families from early in the pandemic, well before it was required. However, as employers are being asked to play a significant public health as well as economic role regarding testing above the requirements in the Families First Act and CARES Act, additional federal resources to support these efforts are needed.

- Protect against price gouging by providers regarding the requirement in the CARES Act that group health plans must reimburse providers the "cash price" for the cost of COVID-19 testing out of network. Providers should be held accountable to charge only the "cash price", meaning the price they would charge to an individual without insurance, which is typically less than the in-network rate, rather than some higher, arbitrary rate. Treasury, DOL and HHS should undertake enforcement efforts to determine whether providers are taking this opportunity to price gouge and as part of those efforts should do widespread enforcement to ensure providers are publicly posting the cash price of the COVID-19 test, as required by the CARES Act. The discussion of these rules in the recent interim final regulations implementing this section of the CARES Act are helpful but robust enforcement will be essential as well.

- Maintain the guidance [Q11 in the linked document] issued by HHS, DOL and Treasury which provides that benefits for diagnosis and testing for COVID-19 may be provided under an excepted benefit employee assistance program. Consider extending this guidance beyond the end of the public health emergency and national emergency, depending on the circumstances at that time.

- Maintain the guidance provided in IRS Notice 2020-15, allowing health savings account (HSA) eligible high deductible health plans (HDHPs) to cover COVID-19 testing and treatment pre-deductible, for the foreseeable future. The guidance provides it is in effect "until further guidance" and it should be maintained indefinitely. In addition, in anticipation of future crises, "screening and treatment

of infectious disease" should be added to the definition of preventive care, under the provision in the Internal Revenue Code allowing preventive care to be provided pre-deductible in an HSA-eligible HDHP.

GOAL: Support continued employer sponsorship of health coverage and continued coverage for employees facing furlough, a reduction in wages, or job loss.

ISSUE: Employer-provided health plans constitute good, reliable coverage that operates more cost-effectively and is widely preferred by Americans to other types of coverage. During the pandemic, many employers are seeking to continue providing benefits to furloughed employees. Millions of other workers have lost their jobs and face the prospect of paying the full cost of COBRA health coverage. At the same time countless employers are continuing to provide health coverage to their remaining employees despite the company's economic distress. Policymakers should help make it possible to maintain employer health plan sponsorship and keep individuals in employer plans, including the many millions who have lost their jobs.

RECOMMENDATIONS:

- For the duration of the pandemic, provide a subsidy of no less than 90% of premiums for COBRA continuation coverage (and continuation of coverage for health plans not subject to ERISA, such as church plans), allowing those who lose their job to retain employer-sponsored health insurance.

- Make clear when the guidance issued by DOL and Treasury, substantially extending the deadlines for COBRA elections and COBRA premium payments, lapses. The relevant statutes indicate the extension period would lapse by the end of February 2021, but stakeholders are looking for confirmation. This guidance has raised significant issues for employers and employees, as it leaves employees in the position of not seeking health care and potentially facing many months of COBRA premiums at once, while it is also likely to significantly increase the adverse selection in group health plans leading to increased costs for plans and participants. The guidance raises significant issues and should not be extended beyond the one-year outer limit set out in the statute. Moreover, the guidance does not address the issue of affordability and therefore does not obviate the need for COBRA subsidies. In fact, it increases the need for COBRA subsidies as the guidance results in individuals facing even more significant, accumulated premium payments.

- Help make it possible for financially distressed employers and multiemployer health funds to continue sponsorship of health coverage for workers still

employed and for furloughed employees whose employers are continuing to pay the employees' share of premiums.

- Reduce the risk of future premium spikes by protecting sponsors of self-funded health plans from extremely high claims costs, through development of risk corridors or reinsurance that would apply if costs exceed a certain threshold.

- Allow HSA balances to pay for health insurance premiums during a federally designated public health emergency.

GOAL: Increase access to and affordability of the individual market for health care coverage.

ISSUE: A stable and affordable individual insurance marketplace is an important complement for employer-sponsored health coverage, since it provides a source of coverage for part-time or seasonal workers or others who may not be eligible for an employer-provided plan. These individuals, as well as people who have no connection to the workforce, should be able to find reliable and affordable coverage in a stable individual health insurance market, including the Affordable Care Act (ACA) marketplaces. This priority predates the current pandemic but is increasingly important in an environment where people are in dire need of medical treatment but have lost job-based coverage. The list of recommendations and issues noted here is focused on actions during the pandemic, rather than broader on-going issues related to the interaction of the employer market and the individual market, which we look forward to discussing with policymakers separately.

RECOMMENDATIONS:

- Increase the number of individuals eligible for premium assistance by raising the income limits above 400% of the federal poverty level.

- Permit uninsured individuals to access coverage in the marketplaces through an additional special enrollment period.

- Eliminate the possibility that individuals may need to repay the premium assistance they receive during the crisis if their household income is ultimately higher than they expected.

GOAL: Provide additional flexibility for employers to offer more robust services at on-site employee clinics.

ISSUE: On-site clinics increase access to primary care and management of chronic diseases by enabling employees to access such care at an on-site employee clinic. This also promotes social distancing by allowing employees to access such care in settings other than a hospital, urgent care center or physician's office. Unfortunately, barriers exist to accessing such care at on-site clinics. Specifically, an HSA-eligible high-deductible health plan (HDHP) has limited ability to offer such care at on-site clinics on a pre-deductible basis and the ability to receive services at such an on-site clinic (even if not part of the HDHP) may otherwise preclude an individual from eligibility to contribute to an HSA.

RECOMMENDATIONS:

- Allow HSA-eligible HDHPs to cover more robust services, including primary care services and management of chronic conditions, at on-site clinics without cost-sharing.
- Allow individuals with access to on-site clinics that provide more robust services (even if not part of the HDHP) to contribute to HSAs.

GOAL: Provide additional flexibility for employers to offer more robust coverage of chronic disease prevention.

ISSUE: Those with chronic underlying conditions are at higher risk for severe illness related to COVID-19 and long-term complications. It is more critical than ever that individuals with chronic conditions have access to care. However, HSA-eligible HDHPs have limited ability to offer services and medications to manage chronic conditions on a pre-deductible basis for the full range of illnesses.

RECOMMENDATION:

- Adopt the bipartisan Chronic Disease Management Act) to address the ongoing COVID-19 pandemic to allow HSA-eligible HDHPs to provide access to health care services and medications that manage chronic conditions on a pre-deductible basis or achieve the same result by expanding guidance provided by the Treasury Department and the Internal Revenue Service.

GOAL: Increase the ability to offer telehealth to employees.

ISSUE: Many employers have expanded telehealth coverage during this crisis to help employees and their families practice social distancing and to protect the public health.

The provision allowing HSA-eligible HDHPs to cover telehealth services without cost-sharing under the CARES Act is an important positive step. In addition, guidance [Q14 in the linked document] from HHS, Labor and Treasury, allowing large employers to offer robust standalone telehealth to non-benefits eligible employees without running afoul of the Affordable Care Act market reforms, was also helpful and responsive to a Council request. However, additional action is needed to continue to support employers and employees as telehealth rapidly expands in availability and usage.

RECOMMENDATIONS:

- Make permanent the CARES Act provision allowing HSA-eligible HDHPs to cover telehealth services on a pre-deductible basis.

- Codify and expand the ability of employers to offer standalone telehealth during the crisis by providing that employers can offer such an arrangement not just to non-benefits eligible employees but also to those who opt out of the employer's major medical plan and by providing that such an arrangement is an excepted benefit, so that it does not undermine affected employees' eligibility for the premium tax credit in the Affordable Care Act Marketplace.

- Remove state barriers to telehealth care and at the same time avoid imposing any mandates relating to telehealth that would impede employers' flexibility to innovate and pursue value-based care. For example, efforts should be opposed that would require group health plans and health insurance issuers to provide coverage for services furnished via telehealth if such services would be covered if furnished in-person during the COVID-19 emergency and requiring plans and issuers to pay the same amount for those services. Such "parity" requirements fail to acknowledge the broad spectrum of services encompassed by the term "telehealth" – from virtual visits with a patient's existing provider to telemedicine services by unknown providers. Furthermore, payment parity requirements ignore the value equation in using telehealth to drive higher-quality, lower-cost care.

GOAL: Increase the ability of individuals to participate in direct primary care (DPC) arrangements.

ISSUE: Access to primary care services is essential for individuals, including during this pandemic, to manage chronic conditions and maintain general health. Direct Primary Care (DPC) arrangements, whereby consumers pay providers a fixed monthly fee in exchange for a set number of visits and basic treatments, are a valuable option for many individuals, generally in addition to major medical coverage. These arrangements typically enable remote care, including telehealth. However, barriers exist, including

that, based on recent regulations proposed by the Treasury Department and the Internal Revenue Service, individuals participating in a DPC arrangement appear to be precluded from contributing to an HSA and using it to pay for the DPC arrangement fees.

RECOMMENDATION:

- Permit individuals with DPC arrangements to contribute to HSAs and to use HSAs to pay for DPC-related fees, along the lines of what is provided in the Primary Care Enhancement Act (H.R. 3708) or through the regulatory process. See August 10, 2020, comments by the Council on the recent DPC proposed regulations.

GOAL: Support health care workers on the front lines.

ISSUE: Hospital workers, health care providers and others making sacrifices on the front lines of this crisis should have the resources they need to do their critical work while maximizing their own safety. Additionally, adequate access to primary care services is necessary to mitigate conditions that not only make individuals more vulnerable to COVID-19, but also to identify and address other conditions that will be more serious and expensive to treat if not detected early because primary care services have been delayed.

RECOMMENDATIONS:

- Ensure that hospitals and frontline workers have the supplies and capacity needed to continue to respond to the pandemic, including, for frontline workers and their families, access to affordable childcare and health coverage.

- Provide financial relief to primary care providers in need to protect access to primary care**.**

- Remove licensing barriers that preclude many health care providers from applying their skills and training in service to patients in vital need of medical care, in hot-spot areas with the highest needs.

- Support flexibility for the use of telehealth and related technologies, including as described above.

PAID LEAVE POLICY RECOMMENDATIONS

GOAL: Help employers offer paid leave on a uniform and consistent basis nationwide.

ISSUE: The development of myriad state and local paid leave laws has been a serious growing problem for employers and employees alike, well before the COVID-19 outbreak. As with all types of employee benefits, Council member companies are at the forefront of comprehensive and innovative programs to provide essential protections to employees and help them balance personal and work responsibilities.

As more states and political subdivisions enact paid leave laws, it has become increasingly difficult for large, multistate employers to consistently offer and administer paid leave. Many state and local mandates use completely different definitions of such things as "family members," "reasons for leave," "eligibility requirements," "funding mechanisms" and other terms. As a result, employers have had to design leave programs to meet numerous administrative and other requirements, rather than to meet employer and employee objectives. This issue is more important than ever, as the pandemic is a national crisis that demands a national response, rather than validating a patchwork of inconsistent and often contradictory state and local requirements.

RECOMMENDATION:

- Consistent with the Council's statement of principles on paid leave, we support federal legislation to expand access to paid family and medical leave and paid sick leave that provides uniformity for nationwide workplaces and leverages private sector solutions.

RETIREMENT POLICY RECOMMENDATIONS

GOAL: Support sponsors of traditional defined benefit pension plans.

ISSUE: Defined benefit pensions provide reliable financial security for participants but single-employer pension funding stabilization is urgently needed. For many companies that maintain defined benefit pension plans the current national health crisis has created the perfect storm. The combination of the continuation of and further drop in already low interest rates, coupled with sharply reduced company revenue that many have experienced, threatens the economic health and even viability of some defined benefit plan sponsors, including those in the supply chain of many other companies. Stabilizing pension funding rules would go a long way to helping the plan sponsors and the participants in the defined benefit pension plans.

In response to concerns about single-employer pension funding, the CARES Act delayed until January 1, 2021, the date by which plan sponsors would need to make 2020 contributions (with interest). Since this would still require companies to make the contribution by December 31, 2020 (the last business day of the year) the date needed to be moved so that the contributions would be due in 2021 to avoid numerous problems. The IRS addressed this in Notice 2020-82 by moving the date to January 4, 2021. However, the underlying pension funding issue still needs immediate attention.

RECOMMENDATIONS:

- Introduce and enact proposals similar to those included in the HEROES Act, passed by the U.S. House of Representatives in May 2020, which would have:
    - Provided interest rate "smoothing," consistent with prior temporary relief set to phase out starting in 2021, by lowering the 10% interest rate corridor to 5%, effective in 2020.
    - Delayed the phase-out of the 5% corridor until 2026.
    - Established a permanent 5% floor for the 25-year interest rate averages.
    - Permanently reduced all shortfall amortization bases to zero for all plan years beginning before January 1, 2020.
    - Allowed all shortfalls to be amortized over 15 years rather than seven years.
- In addition to the provisions which were included in the HEROES Act, legislation should "smooth out" plan asset valuations by recognizing unexpected gains and losses in assets over five years as long as the actuarial value of assets remains within 20% of fair market value.

GOAL: Provide relief from exorbitantly high pension insurance premiums.

ISSUE: Single-employer plan PBGC premiums are too high and are requiring employer plan sponsors to spend significant sums that, due to the economic crisis accompanying the pandemic, would be far better directed to funding the pension plan itself or other efforts to enable employers to retain or rehire workers. In 2006, the flat rate premium was $19. Today, it is $83, more than four times the level 14 years ago. This year the cap on the per-participant total premium owed by a plan will be $644 ($561 for the variable rate premium and $83 for the flat rate premium). And because very different rules govern the determination of a plan's funded status for "funding" versus "PBGC

premium" purposes, this full $644 per participant premium may well be owed by plans that are actually *more than* 100% funded for funding purposes.

Under current law, premiums paid to the PBGC cannot be used for any other government purpose. Yet for *budget* purposes, premium increases are often taken into account to offset other expenditures completely unrelated to pensions (e.g. the Highway Trust Fund). This is not appropriate since premiums could never legally be used to actually pay for such other expenditures. Similarly, reductions in PBGC premiums do not reduce the funds actually available to the government to pay for other expenditures. So there is no legitimate basis to treat either premium increases or decreases in this manner.

RECOMMENDATIONS:

- Reduce the cap on the variable rate premium, to $83 (i.e., the same as the flat rate premium) as of plan years beginning in 2021 so that the maximum per-participant premium would be $166).

- Eliminate the effects of all the indexing and adjustments to the rate during the last 13 years, so that the rate is returned to .9%. This is similar conceptually to the provision in the Retirement Security and Savings Act (S. 1431) eliminating indexing after 2018.

- Single-employer plan premium increases and decreases should not be taken into account for budget purposes.

GOAL: Support defined benefit pension plan participants.

ISSUE: Under the "benefit restriction" rules applicable to private sector single-employer defined benefit pensions, if a plan's funded level is below specified levels, it is restricted from paying lump sums and/or accruing additional benefits. Many employers do not want to be compelled to restrict these valuable benefits for plan participants, especially given the current economic situation.

RECOMMENDATION:

- Extend the CARES Act provision – which allows a plan to use its funded status for the last plan year ending before 2020 for purposes of applying the benefit restrictions to plan years that include 2020 – so that such use is also permitted for plan years that include 2021.

GOAL: Help defined contribution retirement plan participants receive loans and coronavirus-related distributions (CRDs) when necessary.

ISSUE: In a pandemic emergency, especially in light of the corresponding economic downturn, plan beneficiaries facing financial distress should be able to access retirement assets to which they are entitled with minimum administrative delay. The CARES Act included substantial relief from rules related to plan loans and hardship withdrawals, while IRS Notice 2020-42 temporarily eased spousal consent and notarization requirements as requested in a previous version of this document.

Additionally, under the CARES Act, a "qualified individual" (QI) can take a coronavirus-related distribution (CRD) and/or loan of up to $100,000 or the individual's vested balance in their retirement account. In response to the Council's earlier requests for broader CRD and loan eligibility (for individuals who have been affected in ways other than layoffs or furloughs), the IRS expanded this eligibility in Notice 2020-50.

However, additional measures and clarifications are necessary.

RECOMMENDATIONS:

- Clarify when a furloughed employee experiences a *bona fide* "leave of absence" and the extent to which an employee who is unable to work without pay because of a shelter in place order is experiencing a *bona fide* leave of absence. This is important to clarify because the pre-pandemic rules governing loans include the ability to suspend loan repayments for participants who are experiencing a *bona fide* leave of absence. Employers and participants may want to avail themselves of the relief provided by this rule given the current economic crisis.

- Extend the temporary changes to the in-person notarization requirements for spousal consent contained in IRS Notice 2020-42 (which expire December 31, 2020) preferably permanently or at least until the official end of the national health emergency caused by the COVID-19 pandemic.

GOAL: Decrease required retirement plan distributions when retirement accounts have suffered significant losses.

ISSUE: Participants are required to take minimum distributions from their retirement accounts starting at age 72. When the assets in the accounts have significantly decreased due to the economic crisis these required distributions can significantly affect the participant's ability to make the account last through their entire retirement. This problem was recognized in the CARES Act with the elimination of the required minimum distribution for 2020 (and certain 2019 required minimum distributions).

However, other measures as noted below will enable retirement plan accounts to have more time to recover the losses experienced by the current market downturn.

RECOMMENDATIONS:

- Waive minimum required distributions for 2019 as was provided in the HEROES Act. This is still relevant due to the importance of providing retroactive relief to retirees.

- Increase the required minimum distribution age from 72 to 75 to enable many individuals who do not *currently* need the income from the plan to preserve it so that the value of their account has more time to recover to provide retirement income when the individuals *will* need it. This change is included in the Retirement Security and Savings Act, introduced by Senators Rob Portman (R-OH) and Ben Cardin (D-MD) and the Securing a Strong Retirement Act, introduced by House Ways and Means Committee Chairman Richard Neal (D-MA) and ranking Republican Kevin Brady (R-TX).

GOAL: Implement CARES Act provisions relating to retirement plans

ISSUE: The CARES Act contained a number of provisions that have an impact on retirement programs and plan participants. To implement these provisions of law, additional guidance is needed.

RECOMMENDATIONS:

- A good faith standard should be applied with respect to implementation and administration of the law in recognition that additional guidance will be needed on an expedited basis as new issues are uncovered.

- The Council has recommended the inclusion of important retroactive technical corrections to the special coronavirus-related distribution (CRD) options and rollover rules for retirement savings plans and also the expansion of permissible loans from certain retirement plans. Some issues have been addressed like permitting CRDs from money-purchase pension plans. However, other changes still need to be made and we urge their inclusion in legislation early in the 117th Congress. Regulatory agencies should, to the extent to which they have authority to do so, address these concerns. Additionally, temporary distribution and loan relief should be extended into 2021.

GOAL: Support increased "catch up" retirement plan contributions.

ISSUE: The downturn in financial markets has severely affected defined contribution retirement plan accounts. Moreover, many individuals are without work and, therefore, are falling behind in their ability to contribute to an employer-sponsored retirement plan. Once these individuals are again able to participate they should be permitted to supplement their existing retirement plan balances with additional contributions. Higher so-called "catch up" contribution limits for older workers who will not have many years to make contributions will help some of them restore retirement savings assets. Unless and until retirement plan assets recover, more older workers will delay retirement. This will create a further barrier to hire and rehire younger workers who are unemployed.

RECOMMENDATIONS:

- Reduce the age for catch-up contributions to age 45.
- Increase catch-up contribution limit to $10,000 for those over age 60. This provision is included in the Neal/Brady bill and the Portman/Cardin bill.

GOAL: Help individuals manage student loan debt through employer programs.

ISSUE: Even prior to the pandemic, many employees with student loans were experiencing significant financial challenges and the inability to save for retirement. This is even truer now. Employer programs can help these employees pay down their debt while also saving for retirement. The CARES Act allowed employers to help employees pay back student debt tax-free (up to $5,250 per year) until the end of 2020 and this is extended for five years under the year-end Consolidated Appropriations Act, 2021. This is a positive step, but other strategies are also needed.

RECOMMENDATIONS:

- Make permanent the CARES Act provision that allows employers to help employees pay back student debt.
- Enact the provision from the Retirement Parity for Student Loans Act (H.R. 6276/S. 1428), Neal/Brady, and Portman/Cardin, which would permit employer sponsors of 401(k), 403(b), SIMPLE and governmental 457(b) retirement plans to make matching contributions to workers as if their student loan payments were salary reduction contributions.
- The IRS should issue a generally applicable revenue ruling that would clarify for plan sponsors that they are able to make retirement contributions based on an employee's ongoing student loan repayment.

GOAL: Plan sponsors should generally be permitted to self-correct inadvertent plan violations under the IRS' Employee Plans Compliance Resolution System (EPCRS) without a submission to the IRS or a fee payable to the IRS.

ISSUE: With the changes in the rules governing retirement plans in response to the economic crisis created by the pandemic, and the inability of many plan sponsors and service providers to have onsite work during this time, there is a potential for increased inadvertent errors. The process for correcting inadvertent plan violations under the IRS' Employee Plans Compliance Resolution System (EPCRS) is too complicated despite regulatory efforts to simplify it. Many errors can be easily corrected and would, in fact, be able to be corrected more quickly if submission to the IRS and fees could be avoided. Given the current situation, the easiest way to remedy the problem is to allow expanded self-correction.

RECOMMENDATION:

- All inadvertent plan violations could be self-corrected under EPCRS without a submission or fee to the IRS, provided that this rule would not apply if the IRS discovers the violation on audit and the employer has not at that point taken actions that demonstrate a commitment to correct the violation. Support should be given for the proposals included in the Neal Brady bill and the Portman Cardin bill.

GOAL: Provide comprehensive guidance on plan fiduciary responsibilities with respect to unresponsive and missing participants.

ISSUE: Due to the increased number of terminations of employment and the insolvency of many employers, guidance related to missing and unresponsive retirement plan participants is more important than ever. The U.S. Department of Labor has conducted a robust audit program but has not provided guidance for ongoing plans dealing with this challenge. Plan fiduciaries and participants need the certainty of clear guidance that includes a safe harbor so they know how to meet compliance standards and so that participants know what to expect.

RECOMMENDATIONS:

- A safe-harbor for plan fiduciaries should be adopted similar to the one provided in the bipartisan Retirement Savings Lost and Found Act (in the 115th Congress, S. 2474/H.R. 6540) and in Neal/Brady that outlines the steps an employer must take to satisfy the fiduciary responsibility for searching for missing participants

and engaging nonresponsive participants. A plan participant registry should be established that can be searched by plan fiduciaries as well as participants.

- Legislation should also allow ongoing plans, under certain circumstances, to send funds to the PBGC, so that agency can take responsibility for helping missing participants receive the benefits to which they are entitled.

- Agencies should work together to clarify any apparently conflicting guidance such as IRS withholding obligations and PBGC termination procedures (how can plans pay entire benefit to PBGC for a missing participant when withholding has occurred in a prior year).

GOAL: Reform the rules regarding inadvertent overpayments to participants so that plan sponsors do not have to seek repayment from participants.

ISSUE: The complexity of administering a retirement plan can sometimes result in a plan incorrectly calculating benefit payments for a participant, especially in a defined benefit plan. Sometimes these errors result in an overpayment to a participant. IRS correction procedures in some cases require plans to seek to recoup from participants a discovered overpayment, sometimes months or even years after the overpayment was made. This often causes significant distress for participants – many of whom are retirees – who had no idea the plan incorrectly calculated their benefits.

Further complicating matters, in many cases an overpayment was rolled over to an IRA or another plan because the participant incorrectly believed that such amount was eligible for rollover treatment. Additionally, the process for recoupment can be so cumbersome and costly to plan sponsors, that it would be preferable to permit the participant to retain the overpayment. The current economic environment is putting significant pressure on many individuals and plan sponsors. The impact of recoupment on the individual could be particularly harsh and also difficult for plan sponsors to administer.

RECOMMENDATION:

- Reform the recoupment rules to ensure that a plan sponsor does not have to collect an overpayment from the participant and rollovers of inadvertent overpayments are treated as valid rollovers. This is another proposal that helps retirees and is addressed in the Neal/Brady bill. We urge the Biden-Harris administration's support.

GOAL: Extend and modify the provision of law permitting surplus pension assets to be used for retiree health and life insurance benefits.

ISSUE: Current law (Section 420 of the Internal Revenue Code) allows a portion of a generously overfunded defined benefit pension plan's surplus assets to be used to fund retiree welfare benefits (health care benefits and group life insurance coverage) for the plan's retirees. Extending this provision and making it more usable by companies would provide a prudent financial funding resource and protect these important benefits at a time when employers are facing cash liquidity issues resulting from the pandemic.

RECOMMENDATION:

- Reduce the funded status threshold for *de minimis* transfers from defined benefit pension plans to pay for retiree welfare benefits and extend the effective date of the provision. Support should be provided for the proposal included in the Portman/Cardin bill.

GOAL: Simplify communication by eliminating unnecessary notices to employees not enrolled in the retirement plan.

ISSUE: The current economic downturn, has given rise to an enormous amount of communication being sent to plan participants. Under current law, even *non-participants* -- individuals who are eligible to participate in a plan, but have chosen not to do so, must be sent the same reports and disclosures as participants enrolled in the plan. It is confusing and unnecessary to provide materials that do not relate to these employees.

RECOMMENDATION:

- Plan sponsors should not be required to send individuals not enrolled in a plan unnecessary notices they receive under current law. Instead, such individuals should receive an annual reminder of their eligibility to participate in the plan. This would be much more effective in encouraging them to participate. Support should be provided for the proposal in the Neal/Brady bill and the Portman/Cardin bill.

GOAL: Extend the SECURE Act multiple employer plan (MEP) reforms to 403(b) plans.

ISSUE: Given the economic impact of the pandemic there needs to be a concerted effort to help all types of employers maintain retirement plans. The SECURE Act facilitated

broader coverage among small employers by (1) permitting completely unrelated employers to join together in an "open MEP" to achieve greater economies of scale, and (2) eliminating the so-called "one bad apple" rule that punishes compliant employers in a MEP for the violations of another employer in the MEP. These new plan vehicles are commonly referred to as pooled employer plans (PEPs). These reforms, however, did not apply to 403(b) plans, which are particularly prevalent among educational institutions that are among the entities most severely affected by the pandemic.

RECOMMENDATION:

- Make the SECURE Act MEP reforms (including PEPs) applicable to 403(b) plans. Support should be given to the proposal in the Neal/Brady bill and the Improving Access to Retirement Savings Act cosponsored by Senators Charles Grassley, Maggie Hassan and James Lankford (Grassley/Hassan/Lankford bill).

GOAL: Improve access to PEPs by clarifying the service crediting rules.

ISSUE: Under a MEP, if an employee works for one employer in the MEP and then moves to another employer in the MEP, the employee's service with the first employer counts with the second employer and vice versa. The MEP rule makes sense in the context of a closed MEP where employees are moving among closely related employers. But in the context of a PEP, it does not make sense because the employers are not related. The statute is not clear on whether the MEP rule applies to PEPs.

From a policy perspective, the growth of PEPs and the expansion of coverage would be inhibited if the MEP rule applied to PEPs. If an employer knows that, for example, they may need to treat new hires as immediately eligible and immediately vested that could mean fewer employers join PEPs, undermining the extent of the coverage expansion. This is because the potential additional expenses of applying the service crediting rules across the entire PEP could erase the cost savings obtained elsewhere for the PEP through economies of scale, and tracking service crediting based on an employee's previous employers does little to advance administrative simplicity and cost savings. Similarly, many employers would likely be concerned to learn that, under a PEP, a short-term employee who left after a couple of years could become 100% vested later by reason of working for an unrelated employer. Again, this has cost implications.

RECOMMENDATION:

- Clarify that the MEP service crediting rules do not apply to a PEP.

GOAL: Allow small employers joining a multiple employer plan (MEP) to benefit from the small employer start-up credit.

ISSUE: As the economy begins to recover, it will be important to encourage small employers to sponsor a retirement plan for their employees. Currently, the small employer start-up credit related to a Multiple Employer Plan (MEP) only applies for the first three years that the plan is in effect. Consequently, if a small employer joins a MEP that has already been in existence for at least three years, the employer is not eligible for the credit. This is a material disadvantage for MEPs and needs to be addressed if MEPs are to fulfill their full potential in broadening coverage among small employers.

RECOMMENDATION:

- A small employer joining a MEP should be eligible for the start-up credit for the first three years of the employer's participation in the MEP. Support should be given to proposals included in the Neal/Brady bill and the Grassley/Hassan/Lankford bill.

GOAL: Correct the defined benefit pension plan mortality tables to more accurately determine appropriate funding obligations.

ISSUE: Prior to the pandemic, higher PBGC premiums and uncertain plan funding obligations had put enormous pressure on companies to maintain their defined benefit pension plans. The economic crisis caused by the pandemic has made this situation substantially worse because it has resulted in greater funding obligations in the short-term (when plan sponsors may have the least ability to make these contributions), notwithstanding the long-term nature of defined benefit pensions. These obligations can fluctuate depending on interest rates and other factors, such as the mortality table that must be used for calculating a plan's funding obligations.

The Department of Treasury is required to update every ten years the mortality table that defined benefit plans use for these purposes. The most recent update was included in regulations published in 2017 and had the estimated effect of increasing plan sponsor costs by more than $36 billion over 10 years. The mortality tables were flawed inasmuch as they used a higher rate of future mortality improvement than the rate used by the Social Security Administration or any other regulatory organization.

RECOMMENDATION:

- Prohibit the mortality table regulations from assuming future mortality improvements at any age that are greater than 0.78% (i.e., the weighted average used by the Social Security Administration.)

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