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Fifty Years of ERISA-Reflections on ERISA's Impact on Securing Retirement Income

Many detours are set forth on the road to a financially secure retirement. There is not one guaranteed approach that can provide a secure lifetime retirement benefit to every American worker. That being said, on the 50th anniversary of the US federal law known as ERISA, it is fair to say that ERISA has positively impacted the retirement income security for many American workers.

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A 50th anniversary is a milestone, a golden achievement, a jubilee year, a time of celebration when wisdom is achieved. It also may be a time of reflection on the achievements made to date, and a time to address pain points so that it is possible to continue on the road ahead and secure a lasting legacy. As the Employee Retirement Income

Security Act of 1974 (ERISA) celebrates its 50th year, many American workers still find themselves questioning whether they will have retirement income security, even if they have been employed throughout their careers and have participated in employer-sponsored employee benefit plans governed by ERISA. This does not mean that ERISA has not had a positive impact on retirement income security. It is important to recognize that, even though ERISA was originally enacted to protect employee benefit rights and the soundness of private pension plans, ERISA does not require that an employer establish a retirement plan, nor does it require that any such plan provide a particular type or amount of retirement benefit. Rather, ERISA provides requirements for those employers subject to its rules that establish employee benefit plans to meet certain minimum standards to protect benefits.

As set forth in Section 2 of ERISA, the policy goals of ERISA were grounded in the recognition that it was in the best interest of employees and their beneficiaries that adequate safeguards be established concerning the operation and stability of pension plans to pay promised benefits. Section 2 of ERISA provides that "the continued well-being and security of millions of employees and their dependents are directly affected by these plans." Further, it provides that the policy of ERISA is to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, "by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts," and "to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance." Yet, ERISA has been criticized for creating too many burdens on employers that voluntarily sponsor defined benefit pension plans. Over time, and as a result of applicable provisions under the Internal Revenue Code of 1986 (Code), employers began to offer their employees tax-qualified defined contribution retirement plans, such as 401(k) plans, which are not subject to minimum funding requirements or plan termination insurance, in lieu of defined benefit pension plans.

While ERISA's policy goals are critically important, ERISA alone cannot provide American workers with secure retirements. Over the last 50 years, ERISA has been amended by subsequent federal legislation to address a wide array of issues affecting retirement plans, as well as those affecting multiemployer pension plans and group health plans, making its reach quite broad and not singularly focused on retirement income security. In addition, guidance has been issued under ERISA in many forms including hundreds of labor regulations, federal case law, and Department of Labor (DOL) Advisory Opinions and Field Assistance Bulletins. All of this guidance demonstrates that the application of ERISA's tenets is often subject to interpretation and not always easily understood, which does not necessarily lead to secure retirements. In the simplest terms, absent a government-mandated pension scheme for all public and private sector workers, the key drivers of retirement income security include increased worker access to and eligibility to participate in retirement benefit plans, sufficient wages from which to save for retirement, and overall well-managed retirement plans by responsible fiduciaries. This includes making appropriate educational and investment advice resources (as applicable) available to participants to aid them in the accumulation of suitable levels of retirement savings and management of plan distributions, as well as cybersecurity protections for retirement accounts. The more recent trends in legislation that have amended both ERISA and the Code with respect to retirement plans, and the issuance of modern-day ERISA-related guidance, provide needed support for these key drivers of retirement income security, more than ERISA could have provided when originally enacted (aside from the increased wages issue, which is not within the ambit of ERISA).

Upon reflection, ERISA has evolved over 50 years to provide employers who are subject to its rules an important rubric to follow when sponsoring employee benefit plans. Furthermore, ERISA's principles are broad enough to adapt to modern times and it has been, and may continue to be, amended and interpreted in significant ways to support the goals of assisting workers in attainment of retirement income security. This column merely highlights a few of ERISA's contributions to facilitating secure retirements, including its positive impact on American workers' ability to access and participate

in prudently managed retirement plans that provide meaningful benefits.

Access to Retirement Savings Plans

Disparities in access to retirement plans certainly contribute to the lack of retirement preparedness for American workers. According to the US Bureau of Labor Statistics' Employee Benefits in the United States News Release of September 21, 2023, retirement benefits were available in March 2023 to 94 percent of private industry union workers but only 68 percent of private industry nonunion workers. Sixty-six percent of private industry union workers had access to defined benefit plans and 63 percent had access to defined contribution plans, but 10 percent of private industry nonunion workers had access to defined benefit plans and 68 percent had access to defined contribution plans. Full-time workers and higher wage earners also are more likely to have access to a retirement savings plan than part-time workers or lower wage earners. Long-term part-time employees obtained further access to 401(k) retirement plans, for example, with the passage of Section 112 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), and further access to 401(k) and ERISA-governed 403(b) plans with Sections 125 and 401 of the SECURE 2.0 Act of 2022 (SECURE 2.0). Effective for plan years beginning in 2025, SECURE 2.0 improved on the prior SECURE Act rules and amended Section 202 of ERISA to require that employees who provide at least 500 hours of service over two consecutive years must be eligible to contribute their own salary deferrals to a 401(k) plan or ERISA-governed 403(b) plan, and therefore ensured these are enforceable rights.

Additional reasons contributing to lack of retirement preparedness were cited in the Advisory Council on Employee Welfare and Pension Benefit Plans (ERISA Advisory Council) December 2021 Report to the US Secretary of Labor Martin Walsh, entitled Gaps in Retirement Savings Based on Race, Ethnicity and Gender (2021 Report), which examined the extent of gaps in retirement savings by people of color, ethnic minorities, and women. The 2021 Report found that these groups face many challenges impacting their accumulation of retirement savings, which include unequal access to retirement plans, wage inequities, breaks in service due to caregiving responsibilities, and financial literacy. In the 2021 Report, the ERISA Advisory Council recommended that the DOL encourage more employers to offer retirement plans by promoting models such as multiple employer plans (MEPs) and pooled employer plans (PEPs).

Guidance under ERISA has evolved to support expanded access to retirement plans through the meaning of an employer under Section 3(5) of ERISA impacting who can establish or maintain a plan. In order to accommodate modern work realities and retirement plan designs, and to allow expanded circumstances under which employees of different private-sector employers could participate in a single retirement plan, the 2019 regulations entitled Association Retirement Plans and Other Multiple-Employer Plans (2019 ARP Rule) provided that a MEP that is a bona fide group or association of employers or a bona fide professional employer organization (PEO) can constitute a single employee benefit plan for purposes of Title I of ERISA. MEPs may streamline obligations of employers associated with sponsoring a plan, such as plan administration and reporting and disclosure requirements. [84 Fed Reg 37508 (July 31, 2019)] With these rules, the DOL expanded access to affordable retirement saving options for Americans working in small and mid-sized businesses. Even though, effective as of July 1, 2024, the DOL rescinded its 2018 rule entitled Definition of Employer Under Section 3(5) of ERISA-Association Health Plans (2018 AHP Rule), the DOL specifically did not rescind the 2019 ARP Rule noting that, among other things, there are different policy considerations for the retirement rules and that the 2019 ARP Rule extends coverage to PEO arrangements. Thus, it remains to be seen whether the DOL will make further modifications to the 2019 ARP Rule or rescind it.

In addition, effective for plan years beginning after December 31, 2020, Section 101(a) of the SECURE Act added Section 413(e) to the Code, creating a statutory exception to the unified plan rule for certain types of MEPs that are Section 413(c) defined contribution plans, as described in Section 401(a) of the Code, or that consist of individual retirement accounts described in Section 408 of the Code, in two circumstances. These circumstances include (a) the MEP is maintained by employers that have a common interest other than having adopted the plan, and (b) where MEPs are not maintained for employers with a common interest, but they do have a "pooled plan provider" (a plan to which Section 210(a) of ERISA applies (which is the parallel provision to Code Section 413(c)). These types of plans that satisfy the statutory conditions are not treated as failing to meet the

tax-qualification rules merely because one or more employers using the arrangement fail to take actions needed to satisfy those rules, thus eliminating the so-called one-bad-apple-rule.

ERISA was also amended by the SECURE Act with the addition of Section 3(43) of ERISA (pooled employer plan) and Section 3(44) of ERISA (pooled plan provider). Thus, PEPs can provide a way for unrelated employers with no common interest or other organizational relationship to participate in a multiple employer defined contribution retirement plan, such as a 401(k), and offer a retirement savings option to their employees. A PEP also allows many of the administrative and fiduciary responsibilities of sponsoring a retirement plan to be transferred to a pooled plan provider. Although PEPs are not without their complexities, well-run PEPs have potential to offer employers, especially small employers, a workplace retirement savings option with reduced burdens and costs compared to sponsoring their own separate retirement plan.

Employers do need to commit to ways to provide their employees with meaningful access to retirement plans to address retirement savings gaps. As the proliferation of State-mandated retirement programs requiring payroll contributions to individual retirement accounts by employers that do not sponsor retirement plans demonstrates, retirement security is an important societal concern. These State-mandated retirement programs were developed to fill in gaps where workers do not have access to retirement savings programs at work. However, given their contribution limitations, the State-mandated plans were not designed to fully solve the retirement savings gap problem and they create varying rules that are cumbersome for multi-state employers. Government-mandated retirement programs will likely increase and evolve if voluntary solutions to fix the retirement savings gap are not found. In fact, the Automatic IRA Act of 2024, H.R. 7293, was introduced in the House of Representatives on February 7, 2024, proposing that, for plan years after 2026, private sector employers with more than 10 employees auto-enroll employees in either an automatic Individual Retirement Account (IRA) or other types of automatic contribution plans. Employers would be exempt from this requirement if they already maintain any qualified retirement plan before enactment of the bill, participate in an automatic IRA program enacted before 2027 under state law that requires certain employers to facilitate automatic IRAs, or have been in existence for fewer than two full years.

As these developments illustrate, employers will need to provide employees with access to retirement plans that allow them to acquire meaningful benefits in order to preserve a voluntary, employer-provided model for retirement plans. Employers should explore the many different types of defined benefit and defined contribution retirement plan designs that they can offer to employees in order to determine the type of design(s) that make sense for their organization, including plans that offer lifetime income options and financial education and advice tools, which can serve to motivate and retain employees, and assist them in securing their retirements. ERISA provides employers with the framework to prudently do so.

Prudently Managed Retirement Plans

One of the hallmarks of ERISA is the fiduciary responsibility of the plan fiduciaries and the prudent man standard of care, as set forth under Section 404 of ERISA. ERISA plan fiduciaries must follow the prudent man standard in discharging their duties with respect to the plan solely in the interests of the participants and beneficiaries. This prudent standard of care applies to all plan fiduciaries including plan sponsors, plan administrators, trustees, investment advice fiduciaries, and all of those who have been delegated fiduciary responsibilities (such as benefit committee members). All plan fiduciary decisions are guided by the prudence standard, including managing the operation of plans in compliance with applicable law; selecting and monitoring plan service providers, plan investment menus, and investment advice services; reviewing reasonableness of service provider fees and investment options fees; meeting reporting and disclosure requirements; and implementing settlor decisions.

In effect, ERISA requires and catalyzes an interconnected mode of checks and balances in an effort to ensure that ERISA-governed employee benefit plans such as retirement plans are prudently managed. For example, plan fiduciaries can be held personally liable for breach of their duties pursuant to Section 409 of ERISA, and plan fiduciaries can be subject to criminal penalties for embezzlement under the federal criminal code 18 U.S.C. Section 664. Pursuant to Section 406 of ERISA, fiduciaries must not cause a plan to engage in a prohibited transaction, and a fiduciary may not engage in self-dealing with respect to a plan, or civil penalties under ERISA (and excise taxes under the Code) can be imposed. Under ERISA Section 502(a)(2),

a civil action can be brought against a fiduciary for breach of fiduciary duty by participants, beneficiaries, co-fiduciaries, or the Secretary of Labor, and a body of case law has evolved resulting from fiduciary breach litigation. An action for benefit claims can be brought under Section 502(a)(1)(B) of ERISA, and an action for equitable relief can be brought under Section 502(a)(3) of ERISA. Section 412 of ERISA also requires that a fidelity bond be in place with respect to those who handle plan assets to protect against theft or fraud. Various penalties under ERISA may be assessed against the plan administrator for such events as failure to provide plan documents and failure to file Forms 5500. Fiduciary liability insurance is also commonly obtained by plan sponsors for their in-house plan fiduciaries to provide coverage for plan errors that did not result from negligence or willful misconduct. Moreover, the DOL, through the Employee Benefits Security Administration, issues rules for reporting and disclosure obligations and guidance for fiduciary responsibilities, and other government agencies, such as the Internal Revenue Service and the Pension Benefit Guaranty Corporation, have oversight and enforcement powers for applicable plans. This regime serves to protect the benefits of plan participants and beneficiaries.

The scope of fiduciary responsibilities under ERISA has also evolved over the last 50 years pursuant to the issuance of related guidance and best practices to address modern times, while remaining at their core a constant guide from which to manage new issues. For example, the meaning of an investment advice fiduciary continues to evolve as reflected in the April 25, 2024 regulatory amendments to the definition of an investment advice fiduciary in the Retirement Security Rule: Definition of an Investment Advice Fiduciary (Rule), seeking to further protect retirement investors and their decisions (such as those relating to rollover transactions) which could impact their retirement income security, provided the Rule survives various court challenges. [89 Fed. Reg. No. 81 (April 25, 2024)]

With respect to the emergence of digital assets, the DOL issued Compliance Assistance Release No. 2022-01 (March 10, 2022) (Release), setting forth its concerns regarding 401(k) plan investment in cryptocurrencies, to remind plan fiduciaries to engage in prudent analyses before adding a cryptocurrency option to a 401(k) plan investment menu. The Release also warns fiduciaries that the DOL intends to conduct investigations aimed at plans that offer investments in cryptocurrencies, including as investment options or through brokerage windows, to question plan fiduciaries regarding their decision making to allow such investments in light of the prudence and loyalty standards of ERISA. With respect to cybersecurity, the DOL issued cybersecurity best practices for plan sponsors, plan fiduciaries, recordkeepers, and plan participants on April 14, 2021, including steps that plan fiduciaries should take to mitigate cybersecurity risks in connection with ERISA-covered plans, retirement assets, and participant data. The issuance of this guidance spurred increased attention to the issues concerning security of benefit plan data and account assets and serves to positively impact plan participants and beneficiaries. As the use of artificial intelligence in employee benefits evolves, including with respect to review of benefit claims, communications with plan participants, and delivery of investment advice, the issuance of DOL guidelines or best practices for plan fiduciaries selecting plan services, and service providers, that use artificial intelligence is just a matter of time.

There are many fiduciary responsibilities that plan fiduciaries must undertake in order to prudently manage an employee benefit plan. It is necessary for plan fiduciaries to be organized and to establish and adhere to strong plan governance practices. It is unfortunate that many plan fiduciaries have had to defend their actions in various types of fiduciary breach litigation over the years, including over such issues as reasonableness of plan fees and plan investments, before large-scale changes would be realized for retirement plans, including through retirement industry-wide improvements, as well as fiduciary oversight practices. Ultimately, these changes better serve plan participants and beneficiaries and reflect the positive impact of ERISA's checks and balances regime. Plan fiduciaries acting diligently to serve a voluntary system of employer-provided benefits should also be protected through appropriate levels of insurance and by the employer plan sponsors for their prudent efforts made in good faith on behalf of plan participants and beneficiaries.

Concluding Thoughts

In many ways, ERISA's original standards and minimum requirements set the bar for protection of employee benefit plans subject to its rules, and spurred the creation of the employee benefit plan industry replete with plan service providers and plan fiduciaries. For many American workers,

ERISA facilitated a paved road to retirement with appropriate tools and safeguards available along the way to foster achievement of a secure retirement. Fortunately, as often comes with age, ERISA has evolved over the last 50 years, and may continue to evolve through amendments and related guidance, to better protect ERISA-governed employee benefits and support some of the key drivers of retirement security through provisions that facilitate access to retirement plans that provide meaningful benefits and its principles of fiduciary responsibilities. Employers should embrace ERISA and avail themselves of the related tax benefits under the Code by sponsoring retirement plans (and other employee benefits) for their workers that provide meaningful benefits and assist workers in securing their retirements, lest the entire employer-provided system of employee benefits fall to an unwieldy government-managed system. ■

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