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Executive Summary

Secretary of Labor Nomination Status

Following the departure of Department of Labor (DOL) Secretary Marty Walsh on March 23, 2023, Deputy Secretary of Labor Julie Su has been serving as the Acting Secretary of Labor while the Senate considers her nomination to be Secretary. On April 26, 2023, the Senate Health, Education, Labor, and Pensions (HELP) Committee advanced Su's nomination on a party-line vote of 11-10, but her nomination has not received further consideration by the full U.S. Senate since that date. Su is not expected to receive any Republican support for her nomination to become Secretary of Labor, and Democratic Senator Joe Manchin (D-WV) has publicly stated his opposition to her nomination, which could jeopardize a successful confirmation vote.

The White House has publicly stated that Su may "serve as Acting Secretary indefinitely," regardless of the general terms of the Federal Vacancies Reform Act (Vacancies Act), which typically governs interim executive branch succession, because a different statute is applicable to DOL. Congressional Republicans have strongly objected to this position, and on September 14, 2023, the House Education and the Workforce Committee conducted a Committee markup of the Department of Labor Succession Act, H.R. 4957, to align the tenure of an Acting Secretary of Labor with other federal agencies. The bill was approved on a party-line vote of 23-19. However, it is unlikely that the bill will be considered by the Senate, and it would surely be vetoed by President Biden.

Initially, it was expected that the ongoing Senate consideration of Su's nomination might impact high-profile rulemakings at DOL, such as the fiduciary rule. However, this no longer seems to be the case, as DOL has continued to advance its regulatory agenda with Su leading the Department as Acting Secretary.

Bipartisan Retirement Legislation Introduced

After the successful enactment of the SECURE 2.0 Act of 2022 (SECURE 2.0), Members of Congress have started thinking about what should be included in the next bipartisan retirement package. On July 26, 2023, Senator Tim Kaine (D-VA), and Senate HELP Committee Ranking Member Bill Cassidy (R-LA), introduced the Auto Reenroll Act of 2023, S. 2517, to encourage employer adoption of automatic re-enrollment as an optional plan feature. Additionally, they introduced a bill to establish a three-year $500 annual tax credit to serve as an incentive to encourage small employers, under 100 employees, to adopt auto re-enrollment as a voluntary plan feature.

Another proposal that was initially considered during the SECURE 2.0 drafting process, but was never adopted, relates to the rules related to lifetime income options in qualified default investment alternatives (QDIAs). Under current law, QDIA investments must be fully available for withdrawal by a participant, at a minimum, on a quarterly basis. On June 9, 2023, Representative Donald Norcross (D-NJ) and Representative Tim Walberg (R-IN) reintroduced the Lifetime Income for Employees Act, which would direct DOL to amend QDIA rules to permit QDIAs to include annuity components that are not fully liquid.

Both the Lifetime Income for Employees Act, and the Auto Reenroll Act, are possible proposals that could gain bipartisan support to be included in future legislative packages.

Partisan Retirement Legislation Introduced

House Republicans on the House Education and the Workforce Committee recently held a markup of four bills that they stated were intended to ensure retirement plan fiduciaries "are focused on maximizing returns in retirement plans," rather than on environmental, social, and governance (ESG) factors. In general, among a range of topics the Republican bills sought to overturn the Biden Administration's DOL final rule regarding plan investments and exercising shareholder rights (Biden ESG rule) and replace it with the Trump Administration's ESG rule. On September 14, 2023, all four bills were approved on party line votes (23-19) without the support of any Committee Democrats.

House and Senate Democrats, recently reintroduced legislation, initially proposed by former Chair of the Senate HELP Committee Patty Murray (D-WA), to generally require spousal consent for 401(k) plans. The legislation introduced on July 27, 2023, seeks to mirror what the proponents contend are valuable safeguards in defined benefit retirement plans and apply the same spousal consent requirements on defined contribution plans. Similar legislation was rejected as a part of SECURE 2.0 because it lacked bipartisan support.

Given the partisan nature of the anti-ESG and spousal consent legislation, it is unlikely they will advance, or win the bipartisan support they would need to advance in the Senate to be included in future retirement savings packages.

Federal Government Approaches Shutdown with No Clear Offramp

Nearing the end of the Fiscal Year, Congress has few legislative days remaining to advance legislation to fund the federal government past the deadline of September 30, 2023. While activity may occur to keep the government funded, without agreement between the House, Senate, and White House, it is more likely than not that a federal government shutdown will occur.

SECURE 2.0 Guidance on Mandatory Roth Catch-up Contributions

On August 25, 2023, the Internal Revenue Service (IRS) published Notice 2023-62, which relates to section 603 of SECURE 2.0, also known as the Roth catch-up rule. Under the rule, age-based catch-up contributions made by employees with wages in excess of $145,000 in the prior year must be made on a Roth basis. SECURE 2.0 made this effective in 2024, however, with such a short time until the effective date, the mandate would have created significant disruption for plan sponsors to implement the rule. Notice 2023-62 provides relief through a two-year “administrative transition period” to allow time for plan sponsors to implement the rule. Specifically, the guidance states that for tax years 2024 and 2025, catch-up contributions made by individuals with wages in excess of $145,000 will be treated as satisfying the new rule, even if they are not made on a Roth basis, and a plan that does not allow for Roth contributions at all will not be treated in violation of SECURE 2.0.

The Notice also addresses a few technical drafting issues in section 603 of SECURE 2.0, which could have been read as prohibiting all catch-up contributions in 2024 or later for 401(k) and 403(b) plans, and as requiring all employees participating in a governmental 457(b) plan to make catch-up contribution on a Roth basis. The Notice states that it is not intended to provide comprehensive guidance on section 603 of SECURE 2.0.

As part of the Notice, the IRS requested comments on the provision and offered a preview of the IRS’s interpretation of a number of issues related to the Roth catch-up rule. Comments in response to the Notice are due on October 24, 2023.

SECURE 2.0 Guidance on RMDs

The IRS, on July 14, 2023, published Notice 2023-54, which extends prior temporary relief from the IRS’s interpretation of the interaction of the “10-year rule” and the “at-least-as-rapidly rule” for one year, and provides additional time for rollovers of distributions made in 2023 that were mischaracterized as required minimum distribution (RMDs) as a result of SECURE 2.0’s change in the required beginning date (RBD).

DOL Seeks Comments on SECURE 2.0 Reporting and Disclosure Provisions

On August 10, 2023, DOL released a Request for Information (RFI) seeking comments on SECURE 2.0 provisions that impact reporting and disclosure requirements under ERISA. Beginning in 2026, SECURE 2.0 generally requires DOL to update its 2002 affirmative consent, or wired at work, safe harbor to add an initial one-time paper notice, and to the extent necessary, update its 2020 notice-and-access, and direct email, safe harbors. Notably, the RFI asks whether DOL’s electronic delivery safe harbors should require plan administrators to revert to paper delivery if they determine that a participant does not log in to, or visit, plan websites to access their documents. The RFI also requests comments on a number of other SECURE 2.0 provisions related to reporting and disclosure.

DOL Regulatory Agenda

The Biden Administration, on June 13, 2023, released an updated Unified Agenda of Regulatory and Deregulatory Actions (Agenda), which previews federal regulatory activities that are expected to be proposed or finalized in the next six to 12 months. The Agenda includes targeted deadlines, although the deadlines are often missed and timelines are often pushed back.

The portion of the Agenda dedicated to DOL lists a number of projects related to SECURE 2.0 including: improving retirement plan disclosures, pension-linked emergency savings accounts, the new Retirement Savings Lost and Found, guidance on a new employee stock ownership initiative, automatic portability, and DOL’s review of pension risk transfers. For all of the listed SECURE 2.0 related proposals, DOL lists “stakeholder meetings” as the next step.

In an interesting development, the agenda moves a project related to the lifetime income illustrations to the “long-term” list, which suggests that the interim final rule issued in August 2020, which addresses how plans should calculate the illustration, will be the rule that plans need to apply in generating LIIs for the foreseeable future.

Investment Advice Fiduciary Proposal

As part of the rulemaking process, administrative agencies are required to send proposed and final rulemakings to the Office of Management and Budget (OMB) for review prior to their release. On September 8, 2023, DOL sent the latest version of its proposal to address fiduciary investment advice, now titled the "Retirement Security" rule to OMB for review. Under Executive Order 12866, OMB is tasked with completing its review of proposed rules within 90 days, however, it can extend this period for another 30 days if necessary. Following the OMB's review of the fiduciary proposal, assuming that it is approved, it will be released on the Federal Register for public inspection and comment.

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