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# Fiduciary Governance Calendar

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4Q 2022

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## Fiduciary Governance Calendar



# Fiduciary Governance Calendar



Fiduciary Trail<sup>®</sup>

Fiduciary Lockbox<sup>®</sup>

<sup>1</sup> Plan Sponsors should prudently select *and* monitor participant advice and managed accounts providers.



# SECURE 2.0 Act

In 2022, the Securing a Strong Retirement Act (SECURE 2.0 Act), the Enhancing American Retirement Now Act (EARN Act) and the Retirement Improvement Savings Enhancement to Supplement Healthy Investments for the Nest Egg Act (RISE & SHINE Act) were consolidated and attached to an end-of-year spending bill that went into effect in 2023. There are 92 provisions included in this piece of legislation. The table below illustrates some of the key provisions intended to help Americans save more for retirement.

| Mandatory Provisions  |   |   |   |
|---|---|---|---|
| Required Minimum Distributions <sup>1</sup>   | Roth Catch-Up Contributions <sup>1</sup>  | Increase in Catch-Up Contributions <sup>1</sup>   | Long-Term Part-Time Workers <sup>2</sup>  |
| <ul style="list-style-type: none"> <li>• <b>Effective after 12/31/2022</b></li> <li>• The RMD beginning age (currently set at age 72) will expand further to age 73. starting in 2023 and to age 75 starting in 2033</li> <li>• The penalty for not withdrawing the full amount of an RMD will decrease from 50% to 25%, with a further reduction to 10% for taxpayers who correct the error in a timely manner.</li> </ul> | <ul style="list-style-type: none"> <li>• <b>Effective for taxable years beginning after 12/31/2023</b></li> <li>• Participants taking advantage of catch-up contributions and whose wages exceeded \$145,000 in the prior calendar year, must make those catch-up contributions on a Roth (after-tax) basis.</li> </ul> | <ul style="list-style-type: none"> <li>• <b>Effective for taxable years beginning after 12/31/2024</b></li> <li>• This provision allows those within the age range of 60-63 to make additional catch-up contributions – the greater of \$10,000 for eligible plans (\$5,000 for simple plans) or 150% of the current year catch-up contribution limit (indexed for inflation).</li> </ul> | <ul style="list-style-type: none"> <li>• <b>Effective after 12/31/2024</b></li> <li>• This provision reduces the years of service required for part-time workers to become eligible to contribute from 3 years to 2 years.</li> <li>• Eligible employees will enter under the first SECURE Act’s 3-year rule in 2024 and begin entering under the 2-year rule in 2025.</li> </ul> |

<sup>1</sup> Source: SECURE 2.0 Act Paves the Way for Big Changes as of January 2023

<sup>2</sup> Source: Special Legislative Update: SECURE 2.0 Act of 2022 as of January 2023



# SECURE 2.0 Act

| Optional Provisions   |   |  |  |
|---|---|--|--|
| Student Loan Matching Contributions   | “Rothification” of Employer Matching  | Emergency Savings Account  | Withdrawals for Emergency Expenses   |
| <ul style="list-style-type: none"> <li>• <b>Effective for plan years beginning after 12/31/2023</b></li> <li>• Plan Sponsors of qualified retirement plans may provide matching contributions on qualified student loan payments</li> <li>• Student loan match must be subject to the same vesting schedule as the regular match</li> </ul> | <ul style="list-style-type: none"> <li>• <b>Effective after 12/31/2022</b></li> <li>• Allows plans to offer participants the ability to take some or all of matching and/or non-elective employer contributions as Roth contributions, the employer Roth contribution would be includable in employee income; such contributions must be fully vested at the time they are made.</li> </ul> | <ul style="list-style-type: none"> <li>• <b>Effective for plan years beginning after 12/31/2023</b></li> <li>• Allows employers to establish a Plan-Linked Emergency Savings Account (“PLESA”)</li> <li>• Participants may make Roth contributions until the account balance reaches \$2,500</li> <li>• Distributions are not subject to early withdrawal penalties and are not taxable</li> </ul> | <ul style="list-style-type: none"> <li>• <b>Effective for withdrawals made after 12/31/2023</b></li> <li>• Participants may take in-service distributions up to \$1,000 for emergency expenses once per year (not subject to tax on early distributions)</li> <li>• These distributions may be repaid within three years or future withdrawals may be limited</li> </ul> |

**Collective Investment Trusts (“CITs”):** Although it was anticipated that SECURE 2.0 would eliminate the barrier preventing 403(b) plans to invest in CITs, modifications are still needed to applicable securities laws.



# Department of Labor Final Rule on ESG and Proxy Voting

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On November 22, 2022, The Department of Labor issued its final ruling, “Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights.” The final rule reframes how fiduciaries may consider ESG factors in their investment decisions. The final rule also gives clarity on how fiduciaries can satisfy their duties while voting proxies for plan investments.

## Non-Pecuniary Factors and Participant Preference

The final rule explains that fiduciaries can reasonably determine which factors they believe to be relevant to a risk and return analysis. The final rule also reverses previous regulation that Qualified Default Investment Alternatives may not have investment objectives or strategies that are non-pecuniary in nature, such as ESG or climate change focused. The final rule adds an additional provision that states Plan Sponsors are allowed to consider participant preferences while constructing the plan’s fund menu.

**Key Observation: Fiduciaries will have more flexibility to consider non-pecuniary factors when evaluating investments for their Defined Contribution Plans.**

## Proxy Voting

The final rule also eliminates the previous regulation’s statement that a Plan Sponsor should only vote proxies if the fiduciaries prudently determine the matter will have an economic impact on the investment. The final rule also eliminates the two proxy non-voting safe harbors implemented by the previous administration, along with special monitoring and specific records requirements.

**Key Observation: Sponsors who do not pass proxy voting to participants should vote the proxies unless voting would be deemed to have a material cost involved.**

## Moving Forward

New regulations are generally effective 60 days from publication in the Federal Register. Plan Sponsors should take this time to discuss what, if any, approach they may consider on ESG investments, and review their Investment Policy Statement (IPS) to see if any applicable changes may need to be made for either ESG Investments or proxy voting procedures.





# Litigation Landscape

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## Litigation Background

- In January 2022, The U.S. Supreme Court revived a class action lawsuit challenging the fees and investment options in Northwestern University's retirement plan, citing a former ruling in the case of *Tibble v. Edison International*. Under *Tibble*, a fiduciary has an ongoing duty to monitor investments and remove imprudent ones within a reasonable time. The U.S Supreme Court reminded lower courts that when reviewing fee claims they must consider that there are a range of reasonable decisions a fiduciary may make without violating the duty of prudence.<sup>1</sup>
- A recent wave of suits has targeted more than ten plan sponsors utilizing BlackRock's passively managed target date funds. The complaints allege the funds have underperformed and accuse the fiduciaries of chasing low fees in passively managed funds in exchange for inferior returns.<sup>1</sup>

## Plan Sponsor Takeaways

- Recently *Hughes v. Northwestern University* was applied by three Courts of Appeal when upholding dismissal of excessive fee complaints:
  - Plaintiffs must allege a “a sound basis for comparison –a meaningful benchmark” when alleging plan fees are excessive.
  - The cheapest investment option is not necessarily the one a prudent fiduciary would select.<sup>1</sup>
- Fiduciaries have won summary judgment in three recent fee cases. To prevail in the summary judgement phase of a suit, it is crucial for fiduciaries to document and follow a prudent process when making fiduciary decisions regarding fees and investments<sup>1</sup>
- Two of the suits challenging the prudence of plans holding the BlackRock target date funds have been dismissed. The suits were both dismissed following oral arguments, when a U.S. District Judge rejected arguments that the BlackRock funds could be compared to other target date funds without considering different strategies, glidepaths and investments.<sup>2</sup>

<sup>1</sup> Source: Update on Target Date Fund ERISA Litigation as of November 2022

<sup>2</sup> Source: Federal Judge Dismisses Two of the BlackRock TDF as of December 2022



# Fiduciary Best Practices Review

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## Governance Related

- Periodically review all governance documents, including Investment Policy Statement, plan documents/amendments, and summary plan description.
- Schedule periodic meetings and establish a quorum.
- Consider periodic updates to committee or governing body.
- Review required plan bonding annually and consider other non-required coverages that may help protect plan fiduciaries (e.g., Fiduciary Liability Insurance).
- Contact counsel prior to disseminating information about your processes and procedures.

## Participant Related

- Periodically evaluate participant communications, education and advice services.
- Discuss automatic or other plan design features that may benefit participant retirement readiness.
- Consider periodic communications to participants concerning the process related to restricted/closed funds.
- Periodically ensure that all eligible employees have the opportunity to elect deferrals, and deferrals are limited to 402(g) limits and deposited in a timely manner.
- Periodically review the plan's procedures for locating lost participants.

## Plan Related

- Periodically review and document all plan related fees to ensure reasonableness.
- Periodically evaluate Plan Recordkeeper(s).
- Periodically ensure you are operating according to all plan documents.
- Ensure that all required plan related disclosures are sent to participants.
- Ensure the plan is acting in accordance with the plan's protocol on proxy voting.
- Periodically review service provider cybersecurity protocols.



# Disclosures

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