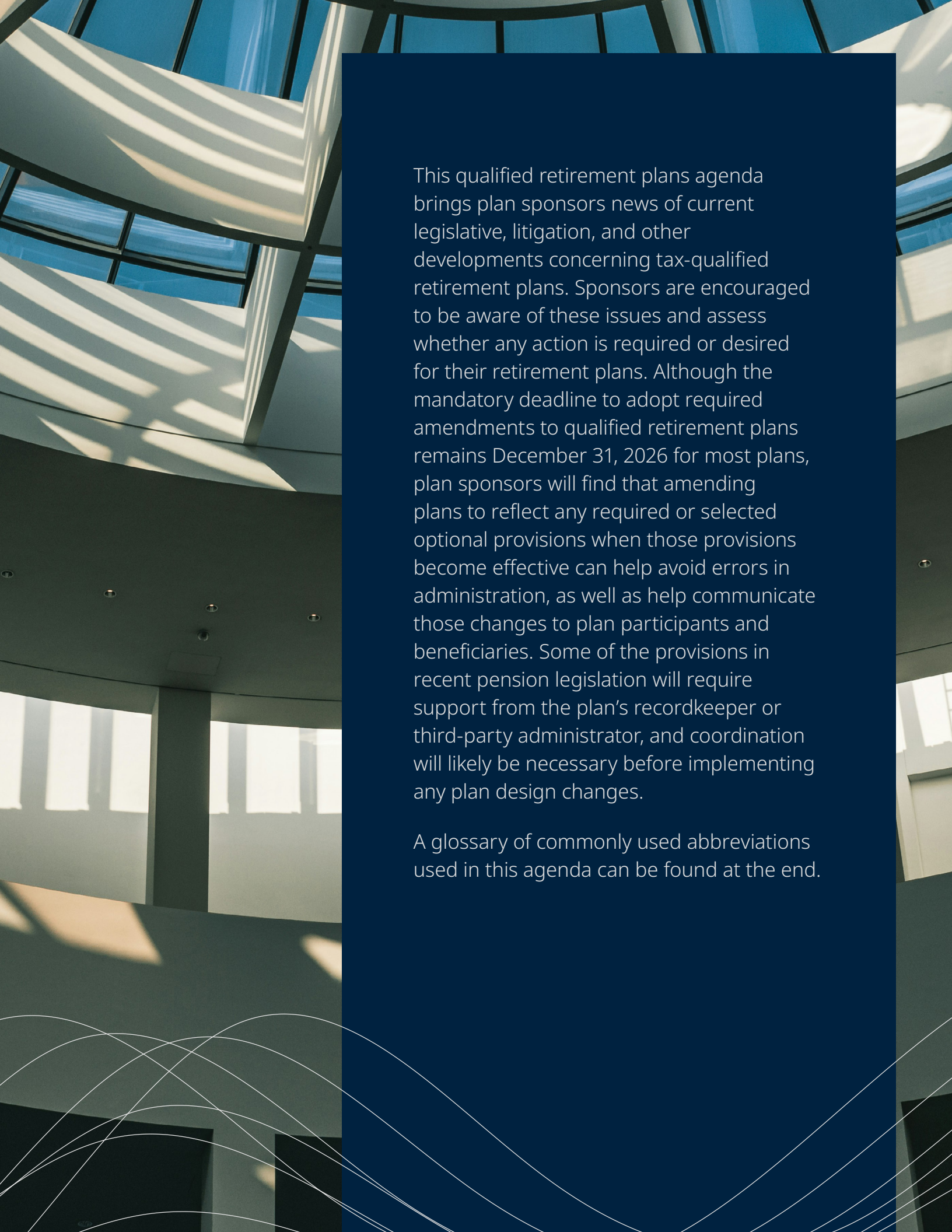
UPDATED SEPTEMBER 2025

Qualified retirement plans agenda

DLA PIPER



This qualified retirement plans agenda brings plan sponsors news of current legislative, litigation, and other developments concerning tax-qualified retirement plans. Sponsors are encouraged to be aware of these issues and assess whether any action is required or desired for their retirement plans. Although the mandatory deadline to adopt required amendments to qualified retirement plans remains December 31, 2026 for most plans, plan sponsors will find that amending plans to reflect any required or selected optional provisions when those provisions become effective can help avoid errors in administration, as well as help communicate those changes to plan participants and beneficiaries. Some of the provisions in recent pension legislation will require support from the plan's recordkeeper or third-party administrator, and coordination will likely be necessary before implementing any plan design changes.

A glossary of commonly used abbreviations used in this agenda can be found at the end.

All qualified retirement plans

Important developments at the Department of Labor for plan fiduciaries

With the change in administration, plan sponsors and fiduciaries are already seeing significant changes coming to the DOL.

President Donald Trump's nominee to head the EBSA, Daniel Aronowitz, has been confirmed. Prior to his nomination, Aronowitz had been critical of the DOL's "regulation by litigation" policy. He believes that the DOL should instead provide clear rules for fiduciary compliance to encourage plan sponsors to expand retirement and health care benefits to their workers. Aronowitz has also stated that he wants to put an end to abusive litigation under ERISA.

EBSA has already taken action to revoke some Biden-era guidance that discouraged the use of certain investments in ERISA-covered retirement plans. In May 2025, the DOL rescinded its 2022 guidance that cast doubt on the efficacy of cryptocurrency and other digital assets as appropriate for 401(k) plan investing. In August 2025, the DOL rescinded its 2021 private equity guidance that sought to discourage fiduciaries of small plans without experience in private equity from even evaluating these investments for 401(k) plan inclusion.

In addition, the DOL has submitted a brief in a forfeiture litigation pending before the Ninth Circuit Court of Appeals in support of allowing plan fiduciaries discretion to use forfeitures to offset employer contributions or pay plan administrative expenses. The DOL has also reemphasized its opinion letter program under which EBSA provides written, informal guidance on how the rules EBSA administers apply to certain factual situations posed by the ERISA community. This signals an intent by the DOL to provide the public with more information on how the DOL believes the rules should be applied.

Congress is looking to expand oversight of the DOL and, more specifically, EBSA as well. In September 2025, the House Education and Workforce Committee approved two oversight bills. The first bill would require the DOL to issue an annual report to Congress identifying ongoing investigations and any enforcement backlogs. The annual report would require the DOL to specifically identify any investigations that have extended more than 36 months, explain the reason for each lengthy investigation and provide a projected end date.

The second bill seeks more disclosure of the DOL's recently discovered practice of entering into "common interest agreements" with plaintiffs' law firms, which the bill refers to as "adverse interest agreements". Under these agreements, the DOL has shared information the DOL obtained from plan sponsors through its audit and regulatory function with plaintiffs' law firms. The proposed legislation would require that a copy of the adverse interest agreement be disclosed to any "adversely impacted" plan sponsor, and would further require that the DOL file an annual report with Congress identifying any adverse interest agreements in effect for the prior year.

IRS issues guidance on uncashed distribution checks

The IRS has issued another installment of guidance on a plan's reporting and withholding obligations when it issues a benefit distribution check to a participant that is never cashed. When a plan issues the first benefit check, it is required to withhold applicable taxes and report and transmit those withholdings to the IRS. The guidance clarifies that if the check for which this withholding and reporting has been completed goes uncashed, generally the plan will not be required to withhold and report again when the check is reissued, provided the amount of the reissued check does not exceed the amount of the prior check.

Inadvertent benefit overpayments

As we previously noted, the IRS released guidance in October 2024 addressing how "inadvertent benefit overpayments" impact qualified retirement plans and how such payments may be treated as eligible rollover distributions if certain conditions are met. As a follow-up, many overpayments from qualified retirement plans – other than payments that result from errors exceeding the annual compensation limits in Code section 401(a)(17) or the annual addition limits in Code section 415 – do not need to be corrected. For most overpayments, plans do not have to notify participants that the overpayments are not eligible for favorable rollover treatment, and employers do not need to make up the overpayment with an additional plan contribution (except in cases where the overpayment to one participant resulted in a reduced allocation to another participant). Plans are still allowed to attempt to recoup any benefit overpayments, but there are limits to who can be pursued, the amount of recoupment, and the time frame for doing so.

Defined contribution profit sharing and 401(k) plans

Catch-up contributions

Mandatory Roth catch-up contributions for certain participants

Beginning in 2026, all 401(k) plan participants who are eligible to make catch-up contributions under a plan and whose FICA wages (as reported in Box 3 on Form W-2) for the prior year exceed a specified threshold (currently $145,000 for 2025) may only designate their catch-up contributions as Roth contributions. The IRS issued proposed regulations earlier this year and final regulations in mid-September. However, the final regulations will not be mandatory until January 1, 2027. For 2026, plans will need to be administered in reasonable, good faith compliance with the statutory requirements reflected in the final regulations. Many payroll providers and in-house payroll departments are still working out solutions for administering these requirements because many vendors did not want to reprogram their systems until the rules were finalized. Now that the rules are final, it will take some time for vendors to digest the requirements and design and test system updates.

Under the final regulations, plan sponsors may institute a "deemed Roth election" that automatically converts the pre-tax deferral election of a participant subject to the Roth catch-up restriction to a Roth catch-up election. Plan sponsors will need to decide whether the deemed Roth election will apply either when the participant's total deferrals (pre-tax and Roth) reach the annual deferral limit ($23,500 for 2025), or just when the participant's pre-tax deferrals reach that limit. For example, if a restricted participant elects to contribute $20,000 in pre-tax deferrals and $3,500 in Roth deferrals, will the deemed election occur at this point when the annual deferral limit is reached such that all future catch-up contributions will be designated as Roth? Or alternatively, will the participant be allowed to make up to an additional $3,500 in pre-tax deferrals until the total pre-tax deferral amount reaches the $23,500 annual deferral limit before all future catch-up contributions will be deemed to be designated Roth contributions? Under the final regulations, either alternative is permitted.

Of note, the final regulations update the two correction procedures outlined in the proposed regulations for purposes of treating elective deferrals as Roth catch-up contributions to provide some greater flexibility in making these corrections. However, the requirement remains that these corrections are only available to plans if amendments are made to the plan document specifying the options that will apply, including the deemed Roth provision.

Plans will also need to communicate to participants how the Roth election procedures will be applied, whether any default provisions will apply, and how to opt out of the default so that participants can make their deferral elections accordingly.

The IRS provided in the proposed regulations that – for purposes of determining whether a participant is above the wage threshold and therefore required to designate catch-up contributions as Roth – if a participant is employed by two or more common law employers that are participating in the same plan, the participant's wages do not need to be aggregated, even if the common law employers are in the same controlled group. Many sponsors asked the IRS to clarify in the final regulations that they may, nevertheless, aggregate wages in certain circumstances because some payroll systems aggregate wages automatically. Accordingly, in the final regulations, the IRS provides options for aggregating among common law employers in certain circumstances, such as when the common law employers have a common paymaster or are members of the same controlled group or affiliated services group.

Finally, as with the proposed regulations, the final regulations clarify that a plan is not required to include a qualified Roth contribution program, but that plan could not allow participants who are subject to the Roth catch-up restriction to make any catch-up contributions. Further, the IRS clarified in both the proposed and final regulations that plans may not require that all catch-up contributions be designated as Roth for participants who are not subject to the Roth catch-up restriction as a solution to avoid tracking participants who are subject to the Roth catch-up restriction.

Litigation against 401(k) plans

In April 2025, the US Supreme Court handed down a unanimous opinion in *Cunningham v. Cornell University* that made it much easier for plaintiffs to survive a motion to dismiss when raising prohibited transaction allegations. The majority opinion clarified the pleading standard for a prohibited transaction claim, holding that a plaintiff is required to allege only that a prohibited transaction existed with any party-in-interest – "no more, no less." The majority rejected arguments that would have required plaintiffs to plead facts beyond the mere existence of a service provider relationship, such as self-dealing, fraud, or an intent to benefit the party in interest.

Instead, a plaintiff does not need to address available exemptions in pleading a prohibited transaction claim because the exemptions are considered "affirmative defenses" that "defendant fiduciaries bear the burden of pleading and proving." Please see our full summary of the *Cunningham* case here.

Use of forfeitures litigation

Litigation against plan fiduciaries concerning the use of forfeitures to pay certain plan expenses that would otherwise be paid by the plan's sponsor has continued. Forfeitures arise when participants leave employment before becoming fully vested in employer contributions credited to their account. Under traditional IRS guidelines that were recently updated in early 2023, DC plans may use forfeitures to reduce – or offset – other employer contribution amounts, pay administrative expenses of the plan, or be allocated to participants.

Most courts that have reviewed forfeitures claims have dismissed them on the grounds that using forfeitures to reduce employer contributions is a well-established practice permitted for many years under existing regulations. However, a handful of courts have allowed these cases to proceed past the motion to dismiss stage into discovery. One closely watched case, *Hutchins v. HP Inc*. in which the district court dismissed the forfeiture claims, has been appealed and is currently pending before the Ninth Circuit Court of Appeals. The DOL submitted an amicus brief noting that permitting forfeitures to offset employer matching contributions is a well-established practice. While acknowledging that the decision to allocate forfeitures is a fiduciary decision, the DOL brief emphasized that this decision is constrained by settlor functions that designed the plan to provide specific uses for forfeitures. A decision in this case is expected later this year.

Adding alternative investments to 401(k) plan investment options

For many years, alternative investments have been utilized in DB plan investment strategies to enhance overall investment returns, and, to a lesser extent, in some investment options within DC plans. With the change in administration this year, proponents of alternative investments have sought the Trump Administration's assistance in making alternative investments more widely available to DC plans, particularly participant-directed 401(k) plans. Introducing alternative investments into 401(k) plans offers opportunities for diversification and enhanced returns but also presents significant fiduciary challenges. Plan fiduciaries must carefully evaluate these investments for prudence, transparency, liquidity, fees, and regulatory compliance to protect participants and meet ERISA's fiduciary requirements.

In August 2025, President Trump issued an Executive Order directing the regulators to reexamine existing guidance and issue new guidance clarifying the rules for offering alternative investments in 401(k) plans. While that guidance may take some time to offer fiduciaries firm reliance, fiduciaries may want to consider whether alternative investments, and what types of alternative investments, might be introduced to their plan's investment lineup. Introducing alternative investments onto a 401(k) investment platform creates significant opportunities and challenges for 401(k) plan fiduciaries and fund sponsors. The goal for fund sponsors will be to design and implement products for a broader investor class through offerings that permit 401(k) plan participants to diversify their retirement investments and seek greater overall investment returns, while at the same time maintaining an appropriate level of liquidity.

Some 401(k) plans have already begun offering certain types of alternative investments. In May 2025, the Ninth Circuit Court of Appeals endorsed as prudent a fiduciary committee's decision to offer an investment option designed as a hedging strategy against market downturns. Although plaintiffs alleged that the fund was expensive and underperformed market gains, the fund provided greater protection from downside market exposure. The court found that this was exactly the investment strategy the fiduciaries sought to offer their participants, and plaintiffs failed to allege facts that the fiduciaries' decision-making process was flawed.

Required SECURE provisions (beginning in 2026)

Beginning January 1, 2026, all catch-up contributions must be designated as after-tax Roth contributions for employees whose wages for the prior year exceed a specified limit (currently $145,000). The IRS had issued an administrative transition period for two years from the original SECURE 2.0 effective date to provide time for plans to implement these new requirements, but this transition period expires December 31, 2025.

Optional provisions (can be adopted anytime)

For sponsors of ***dual qualified plans under the federal and Puerto Rico tax codes***, the Puerto Rico Treasury Department released guidance in August 2025 declaring that dual qualified plans that are amended solely to adopt provisions of SECURE 2.0, whether optional or mandatory, do not need to be submitted for an updated determination letter. Under prior guidance, Puerto Rico qualified plans generally need to be submitted for an updated determination letter anytime qualification amendments are adopted. The new guidance clarifies that SECURE 2.0 amendments are not qualification amendments.

Defined benefit pension plans

Changes to annual funding notice requirements

Shortly before the April 30, 2025 deadline for calendar year DB plans to issue their annual funding notices, the DOL issued guidance required by changes made in SECURE 2.0 concerning the annual funding notice required content under ERISA section 101(f). The new guidance includes model notices for both single-employer and multiemployer plans. The guidance makes clear that prior model notices are insufficient to meet the changes required by SECURE 2.0. While acknowledging that the guidance comes late in the process, the DOL expects plans to take the new guidance into account in evaluating whether the disclosures made in 2025 were consistent with a reasonable, good faith interpretation of section 101(f), as amended by SECURE 2.0, and to take appropriate corrective action to the extent the plan concludes that the disclosures did not meet that standard.

Pension derisking litigation

Plaintiffs in pension derisking suits allege that transferring pension obligations to an insurance company makes them less secure in their benefits and causes them to lose ERISA and PBGC protections. In a number of these cases, motions to dismiss have been filed. On the same day in March 2025, two separate courts handed down decisions on the defendants' motions to dismiss, reaching opposite conclusions. A magistrate judge has issued a report in a third case recommending that the case be dismissed.

Sponsors who are considering derisking transactions are encouraged to explore the full range of fiduciary factors relevant to selecting an insurance company as an annuity provider.

Plan-specific mortality tables

The IRS released final rules for approving a plan's use of mortality tables based on the plan's own mortality experience in the wake of the COVID-19 pandemic, as well as an updated Revenue Procedure for obtaining approval of these plan-specific mortality tables and rules for early termination of substitute mortality tables when there is a significant change in mortality. In May 2025, in response to the President's Deregulatory Initiative Executive Order 14219, the IRS issued an additional Revenue Procedure providing an exception to the early termination rules for plans using mortality tables determined with combined genders. The intended result is that fewer plans will need to request IRS approval of new plan-specific substitute mortality tables.

Please refer to our 2024 Qualified Retirement Plans Agenda for a discussion of these additional topics:

Monitoring controlled group compliance

Litigation against 401(k) plans

Plan design changes resulting from SECURE and SECURE 2.0

Actuarial assumption litigation against DB plans

Next steps

Although the pace of guidance has slowed, and we await final guidance in many key areas, current legislative and regulatory developments allow plan sponsors greater clarity in making plan design decisions. 2026 will be a busy year for all retirement plans to adopt any amendments to implement either required or optional changes from recent legislation, as well as settle on implementation of required Roth catch-up contributions. It is never too early to start consulting with internal decision makers and external plan service providers.

Glossary

- Code – Internal Revenue Code
- DC plans – Defined contribution plans, which can include profit sharing, 401(k), and 403(b) plans
- DB plans – Defined benefit plans, or traditional pension plans, that are subject to the minimum funding requirements of the Code
- DOL – US Department of Labor
- EBSA – The DOL's Employee Benefit Security Administration
- ERISA – The Employee Retirement Income Security Act
- ESG – Environmental, social, and governance
- IRS – Internal Revenue Service division of the US Department of Treasury
- PBGC – Pension Benefit Guaranty Corporation, a US government agency
- QSLP – Qualified student loan payment
- RMD – Required minimum distributions from qualified retirement plans under Code Section 401(a)(9)
- SECURE Act – The Setting Every Community Up for Retirement Enhancement Act of 2019 (Division O of the Further Consolidated Appropriations Act, 2020, Pub. Law 116-94)
- SECURE 2.0 Act – The SECURE 2.0 Act of 2022 (Division T of the Consolidated Appropriations Act, 2023, Pub. Law 117-328)

For more information

For more information or to discuss any of the issues in this agenda, please contact:

Rita Patel
Partner
Chair, US Employee Benefits and Executive Compensation practice
Co-Chair, Transactions Specialists practice
T +1 202 799 4242
rita.patel@us.dlapiper.com

Todd Castleton
Of Counsel
T +1 202 799 4416
todd.castleton@us.dlapiper.com

About us

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa, and Asia Pacific, positioning us to help companies with their legal needs around the world.

Our Employee Benefits and Executive Compensation team advises national and multinational corporations, boards, private equity funds, pension plans, and financial institutions on matters across the benefits landscape.

dlapiper.com

Sept 29 2025 | MRKT0036715 EBEC Retirement Plans Agenda PDF_v5LD