

## 3 Areas Retirement Plan Sponsors Should Evaluate When Choosing an Advisor

*Ryan Barnett, JD*

The House of Representatives recently passed legislation that would make it easier for small companies to offer retirement plans —and that means a new wave of business owners, finance executives and HR managers will soon be learning about the nuances between 3(38) and 3(21) fiduciary services.

The House legislation, called the Secure Act, includes a provision to simplify the process for small businesses to band together and offer defined contribution plans. It also opens the door for part-time workers to become eligible for retirement benefits.

Improving access to retirement plans is a pressing issue for our country, especially for employees working at small businesses. The [Bureau of Labor Statistics](#) estimates that 36 percent of full-time employees at companies with fewer than 50 workers are enrolled in a retirement plan. That number drops to 23 percent for part-time employees. Overall, 71 percent of non-government workers have access to a retirement plan, but only 55 percent participate.

With new legislation on track to become law, more workers than ever before will have an opportunity to save for retirement. Here are three tips for sponsors to work with retirement plan advisors to create a plan that best meets the needs of their most valuable resource – their employees.

### 1. Know the different advisor responsibilities

Under the Employee Retirement Income Security Act (ERISA), retirement plan advisors generally fall under two categories: 3(21) advisor and 3(38) investment manager. The main difference is the fiduciary role of the advisor.

A **3(21) advisor**, for example, can provide plan sponsors with a list of funds, make recommendations as to which funds to use and document processes. A 3(21) advisor, however, does not have discretion (the ability to make choices) on plan investments. The plan sponsor acts in a fiduciary role by selecting investment options for the company.

A **3(38) investment manager**, on the other hand, can perform the same functions as a 3(21) advisor, but can take it one step further. A 3(38) investment manager, as a fiduciary, has discretion, and the authority, to make investment decisions on behalf of your company.



## 2. Understand plan sponsor liability

ERISA requires that plan sponsors serve in a fiduciary capacity and always act in the best interests of participants. When working with a 3(21) advisor, plan sponsors share fiduciary duties with the advisor. The advisor can act as a co-fiduciary and recommend options for your retirement plan, but the plan sponsor is responsible – and liable – for fund selection.

A 3(38) investment manager assumes all fiduciary responsibility for fund selection and monitoring investments. Plan sponsors, though, aren't completely off the hook. They are still responsible for monitoring the manager's performance to ensure it meets the policies and procedures included in the plan's investment policy statement.

In our experience, most company executives responsible for retirement plans do not understand their obligation as a fiduciary. But the [Department of Labor](#), which enforces ERISA, is spending [more time scrutinizing](#) retirement plans to make sure they are in compliance with federal law. Education, therefore, is critical to helping sponsors select the appropriate role the advisor will play in managing and administering the plan.

## 3. Evaluate company and participant needs

For plan sponsors who want to hand over control of selecting investment options for their employees – and the corresponding due diligence to evaluate fund suitability for participants – hiring a 3(38) investment manager is often the best option.

Establishing a company retirement plan, however, is more than just finding a partner to pick investment options. It involves picking the right type of plan (a 401(k) or SIMPLE IRA, for example), writing an investment policy statement, helping select qualified recordkeepers and third party administrators and overseeing quarterly investment committee meetings. While a 3(38) investment manager certainly can provide those services, so can most 3(21) advisors.

Launching and managing a company retirement plan is one of the most important decisions a company can make for its employees. Sponsors who correctly balance the resources of the company with the needs of their employees will have a win-win plan that helps participants save for retirement, while mitigating fiduciary risk.



*About the Author, Ryan Barnett*

*Ryan is the VP of Retirement Plan Services at Heritage Retirement Plan Advisors in Oklahoma City. Ryan is a graduate of Tulsa University where he earned his Juris Doctorate.*

## **The SECURE Act**

*Legislation to help Americans save more for retirement*

It's no secret that Americans are not saving enough for retirement. The U.S. Government Accountability Office (GAO) recently reported that 48 percent of households aged 55 and over have no retirement savings.

To address this issue, a new retirement-related bill is making its way through Congress, The Setting Every Community Up for Retirement Enhancement (SECURE) Act. Its purpose is to help Americans save more for retirement by creating new rules to expand and preserve retirement savings, improve the administration of retirement plans, provide additional benefits and create revenue provisions.

Highlights of the Act include:

### **Increase Auto Enrollment Safe Harbor Cap**

Qualified automatic enrollment arrangements (QACAs) would be able to auto increase employee deferrals up to 15 percent instead of the currently required 10 percent cap.

### **Pooled Employer Plans (aka Open MEPs)**

The legislation will allow for a new type of plan whereby unrelated employers could pool their resources to optimize buying power in a new type of plan called a "pooled employer plan" (PEP). By and large, the PEP is what was previously referred to as an open multiple employer plan (open MEP). Open MEPs were an issue that PEPs are designed to remedy. PEPs would be treated as a single plan under ERISA. The legislation also purports to eliminate the "one bad apple" rule whereby the qualification issue of one adopting employer would not taint the qualified status if the entire PEP for the remaining adopting employers.

### **Increase Credit Limit for Small Employer Plan Start-Up Costs**

To make it more affordable for small businesses to implement retirement plans, the legislation will increase the credit for small businesses by changing the calculation of the flat dollar amount limit on the credit to the greater of (1) \$500 or (2) the lesser of (a) \$250 multiplied by the number of nonhighly compensated employees of the eligible employer who are eligible to participate in the plan or (b) \$5,000. The credit applies for up to three years.

### **Child Birth or Adoption Withdrawals**

The SECURE Act would allow participants to take up to \$5,000 from their plan or IRA for birth, or adoption, related expenses incurred within a year of the action. These could be taken on a penalty-free basis.

### **Small Employer Automatic Enrollment Credit**

The legislation will create a new tax credit of up to \$500 per year to small employers to provide for startup costs for new 401(k) plans and SIMPLE IRA plans that include automatic enrollment.

### **Allowing Long-Term and Part-Time Workers to Participate In 401(k) Plans**

Under current law, employers are not required to include part-time employees (those working less than 1,000 hours per year) in their defined contribution plan. The legislation will require employers maintaining a 401(k) plan to have at least a dual eligibility requirement under which an employee must complete either one year of service (with the 1,000-hour rule) or three consecutive years of service where the employee completes at least 500 hours of service, except in the case of collectively bargained plans. For employees that are eligible based solely on the second new rule, employers may exclude those employees from testing under the nondiscrimination and coverage rules and from the application of top-heavy rules. In addition, those employees that are eligible based solely on the second new rule may be excluded from employer contributions.

### **Other Changes**

Other changes such as increased filing failure penalties, PBGC premiums, 529 plans, some tax implications to certain identified individuals, and church plans are also included in the legislation.

It's important to note that the SECURE Act is not yet finalized and has not been signed into law. As always, we will stay abreast of the legislation and will inform you when any significant changes are made.



# Hey Joel!



## Hey Joel! – Answers from a recovering former practicing ERISA attorney

Welcome to *Hey Joel!* This forum answers plan sponsor questions from all over the country by our in-house former practicing ERISA attorney.

Hey Joel,

**One of my current employees recently received a notice from Social Security saying that they might be entitled to a retirement benefit. Is it my responsibility to track this money down?**

*-Investigating in Illinois*

Dear Investigating,

Employers are required to file Form 8955-SSA with the IRS each year to report former participants with balances remaining in the plan. The information is provided to the Social Security Administration, which in turn notifies retirees of benefits.

While the form does allow employers to “un-report” these participants once they take distributions, it is common practice to only list newly terminated employees without ever removing those who have received their benefits.

I suspect that the employee in question here recently filed a claim for Social Security benefits and that the Social Security Administration (SSA) sent them a letter stating that they MAY be entitled to pension benefits under the plan. But, I also suspect that the plan paid the employee their account balance back when they terminated employment. But, without clear records showing that the employee already received their benefits, it may be difficult for the employer to convince the employee that the letter they received from the SSA is incorrect.

So, what is an employer to do? Here are my general thoughts.

1. Check and see if someone at the employer has kept Form 1099Rs for plan distributions.
2. Check with the prior recordkeepers and see if they still have any participant records for the plan that would show distributions.
3. I don't think the Form SSA is available to look up online, and as noted earlier, most employers do not “un-report” participants after they have received their benefits. But, if the employer does have past Form SSAs they can access, it would not hurt to at least take a look and see if the form lists previously reported participants who have received their benefits.

4. If the employer cannot come up with any records that show the employee previously received their benefits from the plan, the employer could advise the employee that a) the employer has no records showing that the employee is owed money from the plan, b) they may have been listed on a Form SSA way back in 2003 showing that they had an account balance under the plan, and c) the employee likely previously received their benefit from the plan sometime following termination of employment. The employer should include a copy of the plan's SPD along with the following note: "Attached is a copy of the plan's Summary Plan Description, which includes a description of the plan's claims procedure. The claims procedure outlines what the plan requires for you to file a claim and information on where to file, what to file, and who to contact if you have questions."
5. Going forward, the employer should put in place a system to retain all participant distribution forms and Form 1099Rs.

Always Scrutinizing,

*Detective Joel Shapiro*



*About the Author, Joel Shapiro, JD, LLM*

*As a former practicing ERISA attorney Joel works to ensure that plan sponsors stay fully informed on all legislative and regulatory matters. Joel earned his Bachelor of Arts from Tufts University and his Juris Doctor from Washington College of Law at the American University.*

If you have a question for Joel, please send it to your plan advisor. It may be featured in a future issue!

## **Participant Corner: Summer Homework for Participants**

This month's employee memo gives participants "Summer Homework" encouraging them to do routine checks on their plan details to ensure that everything is in line. Download the memo from your Fiduciary Briefcase at [fiduciarybriefcase.com](http://fiduciarybriefcase.com) and distribute to your participants. Please see an excerpt below.

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Summer can serve as a preview of your retirement — long days in the sun and spending time with your loved ones! So, what better time to do a routine check-up on your retirement plan! Protect your loved ones and ensure you are keeping up to date with your retirement plan with our summer homework assignments!

### **Update / Assign Beneficiaries**

Did you experience a major life change this year, such as marriage, divorce, birth or death? It's important to consider updating your beneficiaries when you go through a major life change.

### **Review Cyber Security Best Practices**

Retirement plans are a major target for cyber attacks. Retirement plan participants often have weak passwords and can unknowingly fall for phishing schemes. It's important to educate yourself on cyber security best practices to ensure you are keeping your information and assets safe



### **Increase Contribution**

Raise your plan contributions once a year by an amount that's easy to handle, on a date that's easy to remember—for example, 2 percent every Fourth of July. Thanks to the power of compounding (the earnings on your earnings), even small, regular increases in your plan contributions can make a big difference over time.



### **Revisit Asset Allocation**

Rebalance your portfolio back to the original asset allocation that took into account your risk tolerance and time horizon, this ensures you adhere to your investment strategy. You rebalance by selling assets that make up too much of your portfolio and use the proceeds to buy back those that now make up too little of your portfolio.



### **Remember Sunscreen!**

Wearing sunscreen reduces your risk of developing skin cancer, it keeps your skin looking younger and protects you from UVB rays. What other reasons do you need to wear it?

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