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EMPLOYEE BENEFITS

DECEMBER 2025

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State Laws Emerge to Regulate Pharmacy Benefit Managers

In 2025, a total of 26 states enacted legislation regulating pharmacy benefit managers ("PBMs"). Although the content of the legislation varies among states, there is a consensus to increase transparency and lower prescription drug costs. This article explains current state legislative trends affecting PBMs.

Prohibition on Gag Clauses

A gag clause is a contract provision that prevents disclosing cost information and the availability of lower-cost prescription drug alternatives to individuals. The Consolidated Appropriations Act, 2021 is a federal law that eliminated the use of gag clauses in PBM agreements with group health plans. State laws aim to expand the prohibition to all PBM contracts. These provisions aim to increase price transparency by allowing patients to compare prices and make informed healthcare decisions.

States: AK, AL, AR, AZ, CA, CO, CT, DE, FL, GA, IA, ID, IL, IN, KS, KY, LA, MD, ME, MI, MN, MO, MS, MT, NC, ND, NE, NH, NJ, NM, NV, NY, OK, OR, PA, RI, SC, SD, TX, UT, VA, VT, WI, WV, WY

Prevents or Prohibits Spread Pricing

Spread pricing occurs when a PBM charges a health plan more than the amount paid to the pharmacy for a medication with PBMs retaining the difference, or "spread," as profit. States are enacting transparency laws that prohibit, limit or require disclosure of spread pricing practices, requiring PBMs to make a profit through other methods, such as flat fee schedules.

States: AR, CA, CO, DE, FL, IA, ID, IL, IN, LA, MD, MI, MN, NC, NE, OK, UT, VA, VT, WA, WV

Restricts PBM Steering

Many PBMs have common ownership with pharmacies. Steering is when a PBM directs patients to their affiliated pharmacy and limits or completely restricts access to competitor pharmacies. States seeking to discourage steering have taken different approaches. One common approach prohibits disparate reimbursements to affiliate and nonaffiliate pharmacies. Higher reimbursements incentivize patients to use affiliate pharmacies over nonaffiliate pharmacies.

States: AL, AR, CO, DE, GA, IA, IL, IN, KY, LA, MD, MI, MN, MT, NC, ND, NE, OK, OR, PA, SC, SD, TN, TX, UT, VA, VT, WA, WV

(Pharmacy Benefit Managers CONTINUED ON PAGE 2)

What's Inside

(Pharmacy Benefit Managers CONTINUED FROM PAGE 1)

Rebate Transparency

PBMs negotiate rebates and discounts for prescription drugs with pharmaceutical drug manufacturers. Rebate transparency provisions attempt to clarify the amount of rebate savings retained by PBMs and encourage full rebates to pass through to consumers.

States: AL, AR, CA, CO, CT, IA, IL, ID, IN, KY, LA, ME, MI, MN, MT, NC, ND, NH, NJ, NM, NV, NY, OR, UT, VA, WA, WI, WV

Fiduciary Duty to Insurer

Healthcare insurers have fiduciary duties requiring insurers to act in the best interest of the insured (i.e., plan participants and beneficiaries). States are adding provisions requiring PBMs to act in a similar fiduciary capacity owing a duty to both healthcare insurers and those insured. PBMs with fiduciary duties will have to put the insureds' interest above their own profits.

States: AL, IN, ME, NC, VT

PBM Licensure or Registration

In an attempt to increase transparency, many states require PBMs to be licensed, registered or to have obtained a certificate with the state before operating or conducting business. Typically, a license is renewed annually. Violations of any state PBM law can result in license revocation or denial of renewal.

States: AK, AL, AR, DE, FL, GA, IA, IL, IN, KY, LA, MD, ME, MI, MN, MT, NC, ND, NE, NJ, NM, NY, OK, OR, SD, TN, UT, VA, VT, WA, WI, WV

MAC List Requirements

A maximum allowable cost ("MAC") list is a payment model that sets the highest price a PBM will reimburse pharmacies for medications. MAC list requirements vary by state. Common MAC list requirements include MAC list source disclosures, weekly MAC list updates, and prerequisites for drug placement on the MAC list.

States: AK, AR, AZ, DE, GA, IA, ID, IL, IN, KS, LA, MD, ME, MI, MN, MT, NE, NH, NM, OR, SC, SD, TX, VT, WV

Prohibition on Clawbacks

A clawback is when a PBM retroactively reduces payment to a pharmacy after the point of sale. It often occurs when the plan's copay is higher than the prescription cost. The clawback results in the PBM recovering the difference and retaining the spread as profit. State prohibition on clawbacks are often limited to clean claims, meaning claims that are complete and consistent with plan terms. If a clawback is done as a result of an audit or fraud, a PBM is permitted to retain the clawback. In states where clawbacks are prohibited, the pharmacies retain the full amount.

States: AL, AR, CO, CT, DE, GA, IA, ID, IN, KY, LA, MD, ME, MI, MN, ND, OK, PA, SC, SD, TX, UT, WA, WI, WV

Limitation on Patient Cost Sharing

States that limit patient cost sharing seek to decrease the cost of prescription drugs by reducing patient payments. The amount a patient is required to pay can be reduced by requiring manufacturer rebates to be passed through to patients or applied toward their deductible. Additionally, some states require patients to pay the lesser of the National Average Drug Acquisition Cost or the wholesale acquisition cost.

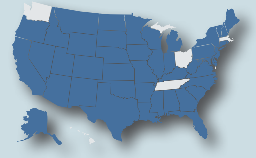
States: AR, AZ, CA, CO, CT, DE, FL, GA, IA, IL, IN, KY, LA, ME, MT, NC, ND, NE, NJ, NM, NV, OK, OR, SD, TX, UT, VA, VT, WA, WI, WV

These provisions are a small sample of current or pending legislation. PBMs are pushing back against these state laws. After two PBMs sued challenging the constitutionality of an Arkansas law prohibiting PBMs from owning pharmacies in the state, a federal court issued a preliminary injunction blocking the enforcement of the legislation. Similarly, Iowa faces a challenge alleging a PBM law recently enacted is preempted by ERISA and in violation of the First Amendment.

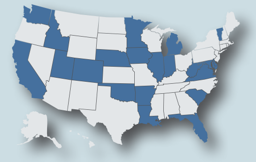
If you have any questions about state laws regulating PBMs, contact a member of our Employee Benefits and Executive Compensation practice group.

State Laws Emerge to Regulate Pharmacy Benefit Managers - Locations At-a-Glance

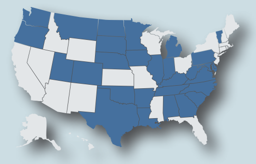
Prohibition Gag Clauses



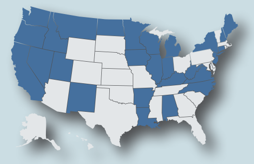
Prevents or Prohibits Spread Pricing



Restricts PBM Steering Pricing



Rebate Transparency



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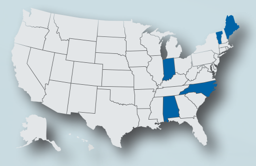
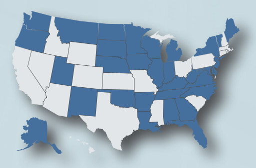


PBM Licensure or Registration



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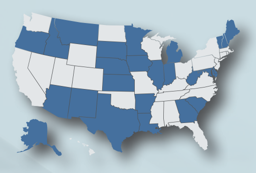

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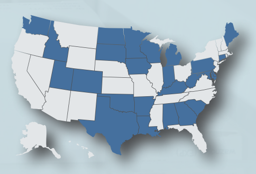
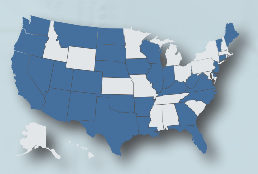


Limitation on Patient Cost Sharing



Mitigating Exposure in ERISA Health and Welfare Fiduciary Litigation Trends

A New Era of Health and Welfare Fiduciary Litigation

In recent years there has been an uptick in litigation targeting fiduciaries of health and welfare employee benefit plans. As regulations promoting transparency and participant access to plan pricing data have expanded, plan sponsors and fiduciaries face heightened scrutiny with their vendor arrangements, plan expenses and compliance with fiduciary standards under the Employee Retirement Income Security Act of 1974 ("ERISA").

ERISA's Fiduciary Obligations

ERISA establishes fiduciary standards for those who manage and administer employee health and welfare plans. The core fiduciary obligations include (1) the duty of loyalty, which requires acting solely in the interest of participants and beneficiaries for the exclusive purpose of providing benefits and defraying reasonable plan expenses, and (2) the duty of prudence, which mandates that fiduciaries exercise care, skill, prudence and diligence in their decision-making, comparable to similarly situated fiduciaries. Plan fiduciaries must also follow plan documents, avoid prohibited transactions, and ensure that all agreements and expenses are reasonable. Breaches of these duties can result in personal liability for losses to the plan, restoration of profits made through improper use of plan assets, and other equitable or remedial relief, including removal from fiduciary roles. Courts have described ERISA's fiduciary duties as "the highest known to the law," underscoring the importance of procedural prudence, ongoing monitoring and independent judgment in all plan-related decisions.

Litigation Trends

Pharmacy Benefit Manager ("PBM") Litigation

Lewandowski v. Johnson & Johnson: Participants allege that J&J and its plan fiduciaries breached their duties by failing to prudently manage the prescription drug plan, resulting in excessive costs and higher premiums. The claims allege that fiduciaries must compare service providers, seek the lowest reasonable costs, and monitor plan expenses. Plaintiffs seek to hold fiduciaries personally liable for unnecessary costs.

Navarro v. Wells Fargo: This class action alleges Wells Fargo's plan fiduciaries engaged in prohibited transactions by paying excessive administrative fees to their PBM, resulting in millions of dollars in losses. Plaintiffs seek removal of fiduciaries and appointment of an independent fiduciary.

Stern v. JP Morgan Chase: Allegations include inflated drug costs, lack of formulary oversight, and failure to follow plan documents regarding manufacturer rebates. The complaint underscores the need for prudent vendor selection and ongoing monitoring.

In each case, courts have either dismissed or are pending requests to dismiss claims because plan fiduciaries had met their obligations of prudently administering the plans, or because participants received the benefits promised under the plans and did not suffer any harm.

Other Health and Welfare Litigation

Cybersecurity and Wellness Program Litigation: A recent Change Healthcare cyberattack exposed participants' personal information to hackers, emphasizing plan fiduciary responsibility for robust vendor oversight and compliance with privacy, security, and nondiscrimination rules. Dozens of lawsuits by participants whose data was improperly shared and by providers whose billing was interrupted have been consolidated and are in early stages of litigation.

Use of Artificial Intelligence ("AI"): In *Kisting-Leung v. Cigna Corp.*, participants sued their health plan claims administrator, Cigna, for imprudently administering the plan's claims procedures by using AI to analyze participant claims for medical necessity without review by a medical director as required by the plan. The AI program wrongfully denied claims and data showed Cigna doctors denied over 300,000 claims while spending an average of 1.2 seconds per review. The court dismissed participants whose claims were not reviewed by AI but denied Cigna's motion to dismiss participants whose claims were denied by the AI program.

(ERISA CONTINUED ON PAGE 4)

Why ERISA Fiduciary Committees Matter

ERISA imposes personal liability on fiduciaries for losses to the plan resulting from breaches of duty. Courts have consistently emphasized that the prudence standard is not about achieving the best possible outcome (hindsight), but about following a prudent process in decision-making. The formation of a fiduciary committee for health and welfare plans establishes this prudent process with best practices that:

- Clearly identify fiduciaries and their responsibilities.
- Enable regular, documented oversight of plan administration, vendor selection and compliance.
- Limit organizational and individual liability through insurance and indemnification.
- Ensure subject matter expertise in areas such as finance, human resources and benefits administration.
- Mirror successful governance structures long used in retirement plan administration.

(ERISA CONTINUED FROM PAGE 3)

How Kutak Rock Employee Benefits Attorneys Can Help

Kutak Rock's Employee Benefits group members offer comprehensive support for plan sponsors seeking to establish or enhance their health and welfare fiduciary committees by:

- Drafting executive summaries, charters and board resolutions.
- Advising on committee formation, member selection and fiduciary training.
- Establishing an annual process for accomplishing committee tasks and goals.
- Assisting with vendor RFPs, contract review, benchmarking, and compliance documentation.
- Providing ongoing legal updates, risk assessments, and best practices for committee governance.
- Offering expertise in ERISA fiduciary litigation, regulatory compliance, and plan administration.

If you have questions about fiduciary governance, committee formation or litigation risk mitigation, contact Kutak Rock's Employee Benefits and Executive Compensation practice group for tailored guidance and support.

New Employees

Will Jennings

Will Jennings is an associate in the Omaha office and joined the firm in September 2025. Will is a graduate of the University of Nebraska College of Law. Prior to law school, Will attended the University of Nebraska-Lincoln, majoring in business administration. In his free time, Will enjoys rooting for the Minnesota Vikings and Pittsburgh Penguins, playing trivia, and spending time with family and friends.

Grace Tracey

Grace Tracey was a law clerk in the Omaha office in Summer 2025 and is a 3L at the University of Nebraska College of Law. Prior to law school, Grace attended Iowa State University, majoring in anthropology and classical studies. Grace will join the Employee Benefits and Executive Compensation group as an associate after graduation in 2026. In her free time, Grace enjoys reading, gardening, and exploring local restaurants.

Alternative Investments: Approach With Caution, For Now…

Few topics in the ERISA realm have received more press over the last few months than alternative investments in retirement plans. With the change in the Trump Administration, a change in tone from regulators is not unexpected; however, a recent case dismissal and industry product developments are adding to the hype. While alternative investments may provide additional diversification opportunities, the guidance surrounding alternative investments, particularly cryptocurrency and private equity, remains sparse. Below we highlight important developments surrounding alternative investments and how a fiduciary should address alternative investments.

2019 Intel case dismissal

After nearly six years of litigation, on May 22, 2025 the Ninth Circuit Court of Appeals affirmed the dismissal of plaintiffs' claims in *Anderson v. Intel Corp. Investment Policy Committee* that Intel's inclusion of private equity and hedge funds in its 401(k) defined contribution plans was a breach of the fiduciary duty of prudence.

In response to the 2008 financial crisis, Intel's Investment Policy Committee sought to increase diversification and strengthen the plans' overall performance through the addition of alternative investments (i.e., hedge funds and private equity) in its custom target date fund suite and by adding global diversified collective investment trust options. Prior to implementing the changes, Intel informed participants of the upcoming changes and the potential impacts they could have on their retirement savings.

The Ninth Circuit noted the prudent process followed by Intel plan fiduciaries in selecting such investments for the plans. In affirming the dismissal, the Ninth Circuit held that merely identifying a fund as holding private equity investments was insufficient to find a breach of prudence. The court acknowledged that investments in private equity involve some unique risks, such as liquidity restrictions. It noted that a successful claim would need to show that the inclusion of alternative investments did not decrease the fund's risk profile through diversification.

(Alternative Investments CONTINUED ON PAGE 5)

(Alternative Investments CONTINUED FROM PAGE 4)

Plan sponsors considering private equity investments for their plans should confirm the investments would further the objective of developing well-diversified plans and focus on serving the best interests of participants through a rigorous, well-documented process.

Empower's back-and-forth with ranking member of Senate Banking Committee

On May 14, 2025, Empower announced that it would "pave the way" for private market investments to be included in defined contribution retirement plans by offering such investments through a managed account product. Empower introduced this product as providing an opportunity for participants to further diversify their portfolios, and because the product involves advice from an Empower advisor, it has the guardrails necessary to ensure a participant's investment in private markets fits their long-term financial goals.

In response to Empower's May announcement, Senator Elizabeth Warren issued a letter to Empower questioning whether the move was truly in the best interests of the participants. Among her concerns are the lack of regulatory oversight, higher fees, and several instances of regulatory violations by private market fund managers. Senator Warren's response concluded with 18 detailed questions aimed at obtaining additional information on how Empower will ensure that participants' retirement savings are adequately protected when investing in private markets. Though Empower did respond to Senator Warren's letter, it was not to a level satisfactory to her, and Senator Warren's questions largely remain unresolved.

The controversy between Senator Warren and Empower puts fiduciaries on notice that managed account products are subject to fiduciary scrutiny and remain a focal point of regulators.

DOL rescinded 2022 compliance release

The U.S. Department of Labor ("DOL") issued compliance release 2025-01, which rescinded its 2022 compliance release directing fiduciaries to exercise "extreme care" before adding cryptocurrency to investment menus. The DOL noted that its previously iterated standard of extreme care is not a standard found under ERISA and that it is restoring its neutral stance on investment type and strategy.

President Trump's August 7, 2025 Executive Order

On August 7, 2025, President Trump signed an executive order ("EO") directing the DOL to review in the next 180 days its position on alternative assets in retirement plans. The EO explained that Americans preparing for retirement should have access to alternative assets when a plan fiduciary determines that such access is appropriate as it provides opportunity for increased investment returns. The EO included private market investments, real estate and digital assets (i.e., cryptocurrency) in its definition of alternative assets. Among other directives, the DOL is to clarify, on or before February 3, 2026, the appropriate fiduciary processes associated with offering funds with underlying holdings in alternative assets.

Although alternative assets in retirement plans is not a new concept, fiduciaries are likely to be confronted with opportunities to offer alternative assets in plan menus due to recent attention. Such opportunities could be bolstered by participant interest, or even demand. As seen in the *Intel* case, and Empower's recently announced managed account product, expect alternative assets to first be available as part of a target date fund product or through a managed account. Fiduciaries should continue to follow a prudent evaluation process understanding that factors reviewed may need to change as new investments and products emerge. As regulatory enforcement priorities fluctuate, documenting a fiduciary's rationale for including and monitoring each investment type remains important. Further, fiduciaries considering adding exposure to alternative assets must identify and incorporate in their processes the relevant features/risks of these investments.

If you have questions regarding your fiduciary responsibilities and/or alternative assets, please reach out to a member of our Employee Benefits and Executive Compensation practice group.

Fiduciaries should continue to follow a prudent evaluation process understanding that factors reviewed may need to change as new investments and products emerge. As regulatory enforcement priorities fluctuate, documenting a fiduciary's rationale for including and monitoring each investment type remains important. Further, fiduciaries considering adding exposure to alternative assets must identify and incorporate in their processes the relevant features/risks of these investments.

Summary of Selected Indexed Employee Benefit Related Limits

	2019	2020	2021	2022	2023	2024	2025	2026
Annual Elective Deferral Limits[1]								
401(k), 403(b) and SEPs	19,000	19,500	19,500	20,500	22,500	23,000	23,500	**24,500**
457 plans	19,000	19,500	19,500	20,500	22,500	23,000	23,500	**24,500**
SIMPLE IRAs and 401(k)s	13,000	13,500	13,500	14,000	15,500	16,000	16,500	**17,000**
Catch-up Contributions (≥ age 50)[1]								
401(k), 403(b), 457 and SEPs	6,000	6,500	6,500	6,500	7,500	7,500	7,500	**8,000**
SIMPLE IRAs and 401(k)s	3,000	3,000	3,000	3,000	3,500	3,500	3,500	**4,000**
Mandatory Roth Catch-up (prior year W-2 wages)[6]						$145,000	$150,000	*
Special Catch-up Contributions (ages 60–63)[1]								
401(k), 403(b), and governmental 457(b)							11,250	**11,250**
SIMPLE IRAs and SIMPLE 401(k)s							5,250	**5,250**
Maximum Annual Compensation[1]								
401(a)(17)	280,000	285,000	290,000	305,000	330,000	345,000	350,000	**360,000**
415 Maximum Annual Additions[1]								
Defined benefit plan dollar limit	225,000	230,000	230,000	245,000	265,000	275,000	280,000	**290,000**
Defined contribution plan dollar limit	56,000	57,000	58,000	61,000	66,000	69,000	70,000	**72,000**
Highly Compensated Employees[1]								
414(q)	125,000	130,000	130,000	135,000	150,000	155,000	160,000	**160,000**
Key Employees (Top Heavy)[1]								
Officers	180,000	185,000	185,000	200,000	215,000	220,000	230,000	**235,000**
1% owner	150,000	150,000	150,000	150,000	150,000	150,000	150,000	**150,000**
Employee Stock Ownership Plans[1]								
Five-year distribution threshold	1,130m	1,150m	1,165m	1,230m	1,330m	1,380m	1,415m	**1,455m**
Step-up	225,000	230,000	230,000	245,000	265,000	275,000	280,000	**290,000**
IRAs[1]								
Annual contribution limit	6,000	6,000	6,000	6,000	6,500	7,000	7,000	**7,500**
Catch-up contributions (≥ age 50)	1,000	1,000	1,000	1,000	1,000	1,000	1,000	**1,100**
PBGC[2, 3]								
Monthly maximum guaranteed benefit	5,607.95	5,812.50	6,034.09	6,204.55	6,750.00	7,107.95	7,431.82	**7,789.77**
Annual maximum guaranteed benefit	67,295	69,750	72,409	74,455	81,000	85,295	89,182	**93,477**
Flat Premium Per Participant (single-employer)	80	83	86	88	96	101	106	**111**
Flat Premium Per Participant (multiemployer)	29	30	31	32	35	37	39	**40**
Transportation Fringe Benefits[4]								
Employer-provided parking (monthly)	265	270	270	280	300	315	325	**340**
Mass transit pass & vanpool (monthly)	265	270	270	280	300	315	325	**340**
Social Security[5]								
Taxable wage base	132,900	137,700	142,800	147,000	160,200	168,600	176,100	**184,500**

Sources: [1] IRS Notice 2025-67, [2] PBGC Maximum Monthly Guarantee Tables available at PBGC.gov (SLA, age 65), [3] PBGC Premium Rates, available at PBGC.gov, [4] Rev. Proc. 2025-32, [5] SSA Press Release (10/24/2025), [6] Catch-Up Contributions (Final Regulation), RIN 1545-BR11 (eff. Nov. 17, 2025).
*The 2026 FICA wage threshold to determine participants subject to the Roth catch-up requirement in 2027 will be announced in 2026.

CONTACT US

We are here to help. Contact a member of our Employee Benefits and Executive Compensation group for questions or advice.

CITs—Not Necessarily a "No Brainer" Fiduciary Decision

CITs—What are they?

A Collective Investment Trust ("CIT"), sometimes called a Common Collective Trust, is a tax-exempt, pooled investment vehicle maintained by a bank or trust company, available only to ERISA-qualified retirement accounts, governmental retirement plans, and church retirement income accounts. CITs are growing in popularity because they offer a low-cost structure—even small, qualified retirement plans are considering and may benefit from CITs as an investment option for participants.

CITs—How are they different from mutual funds?

CITs are generally cheaper investment options than the mutual fund equivalent primarily due to a lighter regulatory burden, and CITs not dealing with retail investors. Additionally, lower administration, marketing, and distribution costs than comparable retail products contribute to their lower cost.

What should you know about CITs before investing?

The decision to move from a mutual fund to a CIT is not as simple as a mutual fund share class change. Fiduciaries must examine and understand the extent to which they are selecting a different investment. Important considerations include:

Plan Documents

Investing in a CIT requires careful review of the plan and its investment policy statement ("IPS"). While CITs offer flexibility to invest in a broader range of alternative assets, a new CIT may lack the long-term performance history that a plan's IPS requires. Further regulatory guidance requires certain language be contained in plans investing in CITs. Therefore, fiduciaries must ensure the plan document and the plan's IPS allow for investments in CITs and that a CIT that may not have an extensive track record can meet the IPS monitoring and selection criteria.

A Collective Investment Trust ("CIT"), sometimes called a Common Collective Trust, is a tax-exempt, pooled investment vehicle maintained by a bank or trust company, available only to ERISA-qualified retirement accounts, governmental retirement plans and church retirement income accounts.

While CITs can be an effective investment option for retirement plans, investing in them is a fiduciary decision that requires thorough due diligence and proactive planning and monitoring.

Securities Lending

A CIT has the option, similar to mutual funds, to lend a portion of its portfolio securities, usually for short sales, to a third party. A CIT is not as limited as mutual funds in how much of its portfolio can be lent out. While lending can boost returns, it introduces additional party risk if borrowers fail to return the securities.

Alternative Investments

CITs have more investment latitude than mutual funds to invest in illiquid alternatives such as private equity. Mutual funds are regulated by the SEC and are limited to holding no more than 15% of their net assets in illiquid investments. CITs, however, are not limited in the proportion of their portfolios that can be allocated to less liquid investments.

This flexibility requires fiduciaries to consider the suitability and risk—such as liquidity risk—associated with these assets.

Tracking Error

CITs are designed specifically for retirement plans and do not have retail investors. CIT tracking error to an index tends to be smaller than the tracking error found in mutual funds with retail investors. However, investment differences described above may create greater tracking error as compared to the actively managed mutual funds originally selected by the fiduciary. Fiduciaries should consider participant expectations and (for CITs with shorter histories) whether measuring the fund using historical performance of the same manager but a different fund is appropriate.

Management Structures

CITs qualify for exemptions from certain federal securities laws, which can reduce costs. However, these exemptions apply only when a bank or trust company has significant control over the investment decisions. In some cases, a CIT may be designed to resemble a mutual fund and use a firm as a subadvisor. If that firm is not the trustee, a separate fiduciary—who can hire and fire the investment manager—must be involved. This added layer can introduce complexity. For smaller retirement plans in particular, using CITs may lead to more parties being involved, including additional fiduciaries that should be evaluated and monitored, creating potential conflicts.

While CITs can be an effective investment option for retirement plans, investing in them is a fiduciary decision that requires thorough due diligence and proactive planning and monitoring. To learn more about fiduciary obligations related to CITs, please contact a member of Kutak Rock's Employee Benefits and Executive Compensation practice group.

State and Local Paid Sick Leave Laws Expand: Trends, Challenges and Questions for Employers

On October 1, 2025, Nebraska joined 19 states and the District of Columbia with state-mandated paid leave laws, which is in addition to the approximately two dozen local paid leave mandates across the United States. Nebraska was one of three states (Alaska and Missouri) to pass a ballot measure in 2024 obligating most employers to provide paid sick leave. See the firm's client alert from November 2024 on the ballot initiatives. Missouri has since repealed the ballot-initiated paid sick leave law, and the Nebraska Unicameral passed an amendment (LB 415) to reduce some of the employer requirements from the initial version of the law. Visit the firm's client alert from July 2025 with further details.

Generally these laws require employers to allow covered employees to accrue paid sick leave at a rate of one hour for every 30 hours worked, up to a specified number of hours each year, carry over unused leave subject to certain caps, and protect employees from adverse employment consequences when using accrued leave. Each state and local jurisdiction has slightly different use reasons, accrual limits, use caps and carryover requirements. These legal differences across jurisdictions present unique compliance issues for multi-state employers that seek to satisfy these multiple laws through one or two paid time off ("PTO") policies enterprise wide.

Considerations for employers in a jurisdiction with a paid leave mandate:

- Whether the employer is exempt from the law based on employee classification or number of employees employed in the jurisdiction;
- Whether current PTO or sick leave policies meet each jurisdiction's minimum requirements to which the employer is subject; and
- How to balance a compliant leave program with costs and employer goals.

If you have questions about state and local paid leave laws, please contact a member of our Employee Benefits and Executive Compensation practice group. We can assist with paid leave policy design, administration, changes, training, and emerging legal or business issues related to paid leave laws.

Stable Value Funds: Anything But Stable in Light of Increased Litigation Risks

Stable value funds are options available to qualified retirement plans that aim to protect principal while delivering steady and stable returns. These characteristics make stable value funds a popular choice for many plan participants, especially those nearing or in retirement. Participants 50 years and older own approximately 85% of stable value assets offered in retirement plans.[1]

Stable value funds can vary in design, but most provide returns through a crediting rate. That rate is either declared at set intervals by an insurer that administers the fund or by using a formula based on the performance of the fund's underlying assets.

The Current Pattern of Stable Value Fund Lawsuits

Stable value litigation has been increasing with most complaints following a similar pattern where plaintiffs identify a period when another fund provided higher returns and argue that the plan's selection and monitoring of its stable value fund was imprudent by comparison. In *Plummer v. Bob Evans Restaurants, LLC et al*, plaintiffs target the stable value fund in Bob Evans' plan, the Prudential Guaranteed Income Fund. This type of fund is known as a general account stable value fund, whereby the retirement plan invests in Prudential's general account and the performance of that general account determines the crediting rate. Plaintiffs argue that general accounts are the riskiest version of stable value because the fund does not own specific assets and would have to compete with other creditors if the insurer experiences financial difficulty.

1. SVIA, Who Invests in Stable Value and Why? (July 7, 2021)

(Stable Value Funds CONTINUED ON PAGE 9)

Action Items

Although the cases discussed in this article have not been resolved on the merits, the complaints offer useful insights for how fiduciaries should select and monitor the stable value funds. In light of recent litigation trends, we recommend that fiduciaries:

- Thoroughly document why the stable value fund strategy is appropriate considering the characteristics of the plan and its participants.
- Determine the relevant characteristics of their stable value funds and the resulting meaningful index(es) and comparison funds (peers).
- Regularly review the aspects of investments that impact risk (e.g., funding, liquidity, credit quality of the insurer, underlying investment strategy of the fund, etc.).
- Seek to negotiate crediting rates with insurance companies.

(Stable Value Funds CONTINUED FROM PAGE 8)

The *Bob Evans* case is one of several recent cases focusing on stable value funds. We believe these cases are motivated in part by recent market conditions. The cases follow the general pattern of cases criticizing fiduciaries for selecting underperforming funds. For example, in *Bob Evans*, the plaintiffs allege other plans using similar Prudential products had significantly higher crediting rates compared to Bob Evans' crediting rate of 1.65% and that large plans, like the Bob Evans plan, should be able to negotiate better pricing, thereby framing the low crediting rate as the result of imprudence rather than an unfortunate market outcome.

Stable Value Investment Association

Like in other underperforming fund litigation, whether the benchmarks used by plaintiffs to allege the fund is underperforming are meaningful likely will enter into the court's analysis. The Stable Value Investment Association ("SVIA"), a non-profit organization, has written several amicus briefs defending stable value funds against allegations of imprudence.

SVIA argues that ERISA evaluates fiduciaries on the quality of their process, not on backward-looking comparisons to funds that later posted higher rates of return. SVIA urges comparing funds that are similar in all material respects, such as product design, the party bearing the credit risk, how the crediting rates are set, and fee structures. SVIA also cautions against penalizing conservative designs that credit less than other investment options available because it could discourage plan sponsors from offering a quality capital preservation option that is valued by many plan participants.

Staples: A New Approach to Identifying Similar Funds

In September 2025, participants in the Staples 401(k) plan filed a lawsuit against Staples. In their complaint, plaintiffs present a new method for identifying meaningful benchmarks with the same core features as the alleged underperforming stable value fund. First, the plaintiffs identify general account products only. Second, they focus on funds where the insurer bears the responsibility for paying benefits at contract value, which means that the insurer must pay the value of a participant's initial deposited principal plus accumulated interest regardless of the performance of the underlying assets. Accordingly, plaintiffs claim that the differences in the crediting rates cannot be explained simply by a different risk allocation. Third, they identify funds with insurer-declared rates that are set on a similar schedule. By screening for these factors, mostly with Form 5500 filings, the plaintiffs argue that the resulting benchmarks share the same structure and risk profile as the alleged underperforming fund and because the fund pays a lower crediting rate, a fiduciary breach occurred.

Action Items

Although the cases discussed in this article have not been resolved on the merits, the complaints offer useful insights for how fiduciaries should select and monitor the stable value funds. In light of recent litigation trends, we recommend that fiduciaries:

- Thoroughly document why the stable value fund strategy is appropriate considering the characteristics of the plan and its participants.
- Determine the relevant characteristics of their stable value funds and the resulting meaningful index(es) and comparison funds (peers).
- Regularly review the aspects of investments that impact risk (e.g., funding, liquidity, credit quality of the insurer, underlying investment strategy of the fund, etc.).
- Seek to negotiate crediting rates with insurance companies.

For additional information on fiduciary obligations related to stable value funds, please contact a member of our Employee Benefits and Executive Compensation practice group.

Cryptocurrency and Other Digital Asset Investments in ERISA Plans

Shortly after taking office on January 20, 2025, President Trump issued an executive order ("EO") outlining his Administration's intent to "support the responsible growth and use of digital assets, blockchain technology, non-fungible tokens, and related technologies across all sectors of the economy" and "secure America's position as the world's leader in the digital asset economy"[1]—a sharp contrast to the Biden Administration's more cautious approach. Cryptocurrency has remained a major focus for the Trump Administration in its first year, with President Trump signing the "GENIUS Act"[2] into law (regulating "stablecoins") and issuing additional EOs directing the creation of a "United States Digital Asset Stockpile"[3] and "democratizing access" to alternative and digital assets in 401(k) plans.[4]

Despite the Administration's general enthusiasm for digital assets, uncertainty among retirement plan sponsors remains. This article focuses on describing the Administration's position on digital assets, explaining how plan sponsors should approach the topic from a compliance perspective, and predicting what comes next. In general, we expect interest in digital assets to increase and recommend that sponsors exercise the same prudence and thoughtful process when considering digital asset investment vehicles as they would in evaluating any potential investment, while also considering the aspects of digital assets that make them unique in the investment space.

Digital Assets in the Trump Administration

The U.S. Department of Labor ("DOL") has historically articulated a neutral, context-specific approach to evaluating investment types and strategies. The Biden Administration's DOL modified this neutral approach in 2022 and cautioned plan fiduciaries to exercise "extreme care" before adding a cryptocurrency option to a 401(k) plan's investment menu.[5] On May 28, 2025, in response to President Trump's January 23 EO, the DOL rescinded the Biden-era Release and reverted to the DOL's neutral approach, which neither endorses nor disapproves the inclusion of cryptocurrency in plan menus.[6]

President Trump's August 7, 2025 EO, "Democratizing Access to Alternative Assets for 401(k) Investors," went further, directing the DOL to clarify its position on alternative assets, including "holdings in actively managed investment vehicles that are investing in digital assets," and the appropriate fiduciary process for evaluating such investments via proposed rules, regulations, safe harbors, or other guidance. The DOL has noted that it is working toward issuing proposed regulations[7] but specific guidance on digital asset investments remains pending as of the date of this article.

Plan Sponsor Considerations

A return to a neutral, context-specific approach to investment evaluations means that plan fiduciaries must act as "prudent experts" and give "appropriate consideration" to the facts and circumstances relevant to the investment. Notably, neither the EO nor the DOL's subsequent actions purport to alter the substantive requirements under ERISA, and in fact reaffirmed that retirement plan fiduciaries are held to high standards. "Appropriate consideration" of a given investment strategy generally includes a determination that the particular investment is reasonably designed to further the purposes of the plan, after evaluating factors such as the risks of loss and opportunities for gain, portfolio composition, liquidity, diversification, valuation, projected returns, manager capabilities, and indicia of ownership.

Although all of the above factors should be evaluated, digital asset investments have unique elements and considerations. For example, the liquidity of the digital assets in the portfolio will depend on what kind of digital asset is being purchased (cryptocurrency versus a non-fungible token, or "NFT") and its related exchange platforms. The relative security or availability of the trading platforms may vary, as may the platforms' custodial location or indicia of ownership. Information about the volatility and risk/return profiles of popular cryptocurrency (like Bitcoin-BTC or Ethereum-ETH) may be readily available, while newer coins may have little to no information at hand.

(Investments CONTINUED ON PAGE 11)

[1] See Executive Order #14178 dated January 23, 2025 ("Strengthening American Leadership in Digital Financial Technology"), available here, and associated Fact Sheet, available here.
[2] GENIUS Act, Public Law 119-27 (July 18, 2025).
[3] Executive Order #14233 dated March 6, 2025 ("Establishment of the Strategic Bitcoin Reserve and United States Digital Asset Stockpile"), available here.
[4] Executive Order #14330 dated August 7, 2025 ("Democratizing Access to Alternative Assets for 401(k) Investors"), available here, and associated Fact Sheet, available here.
[5] DOL Compliance Assistance Release No. 2022-01 (March 10, 2022), available here.
[6] DOL Compliance Assistance Release No. 2025-01 (May 28, 2025), available here.
[7] DOL Advisory Opinion 2025-04A (September 23, 2025), available here; news release available here.

(Investments CONTINUED FROM PAGE 10)

Defined benefit plan fiduciaries may have different considerations (or give different weights) than defined contribution plan fiduciaries. For example, fiduciaries of a defined benefit plan could reasonably determine to limit the size of the plan's digital asset investment based on their evaluation of the liquidity, volatility, and platform security considerations. In contrast, a defined contribution plan fiduciary will need to determine whether the available information about the digital asset investment is enough to comply with the ERISA 404(c) safe harbor, which shields plan fiduciaries from liability for losses caused by participants' investment choices, provided the participants receive sufficient information to make informed investment decisions (among other things).

Ultimately, plan fiduciaries must understand what form the asset takes, the methods of exchange or transfer, and how the asset is valued in determining whether the digital asset investment is appropriate to add or retain in an investment lineup. Irrespective of plan or asset type, plan fiduciaries unfamiliar with the nuances of digital asset investments should consider retaining an investment advisor with knowledge of and experience with digital asset investments and investing ERISA-covered plan assets before adding digital assets as a designated investment option.

Future Expectations

Although we do not expect digital assets to become a common designated investment option, digital asset investments are already here. Fidelity offers direct cryptocurrency investments in its IRA accounts, while Charles Schwab offers IRA access to crypto ETFs, and most self-directed brokerage accounts allow investments in digital assets. According to a recent survey, 10% of U.S. adults with retirement accounts say they hold at least some cryptocurrency assets, with 18% of millennials and 14% of Gen Zers reporting a crypto retirement holding. We expect that offerings of digital asset investment options in retirement plans will continue to increase, both as designated investment options and as components of other investments. Whether digital assets investments or investments with digital asset components are appropriate additions to a retirement plan involves application of a prudent evaluation process and appropriate consideration of the facts and circumstances. For plan fiduciaries, that means consideration of factors relevant to any investment, as well as the aspects that make digital assets unique.

For more information about the fiduciary standards relating to selecting and monitoring designated investment options and other plan investments, or assistance with the associated fiduciary risks of adding or permitting digital assets in your plan or plan investment options, please contact a member of the Kutak Rock Employee Benefits practice group.

Revised Annual Funding Model Notices and Guidance for Defined Benefit

Section 101(f) of the Employee Retirement Income Security Act of 1974 requires that defined benefit plans furnish participants with an annual funding notice ("AFN") disclosure that provides participants with information about the plan and its financial health. The contents of these disclosures were expanded by the SECURE 2.0 Act of 2022, with the first expanded disclosures applying for plan years beginning after December 31, 2023. Plans with 100 or more participants must distribute AFNs no later than 120 days after the close of each plan year (April 30, 2025 for calendar year plans); smaller plans may furnish AFNs by their Form 5500 filing deadlines.

On April 3, 2025 the United States Department of Labor's Employee Benefits Security Administration ("EBSA") division released Field Assistance Bulletin No. 2025-02 (the "bulletin"), which provides general instructions on how retirement plan administrators can comply with the new disclosure requirements, as well as model notices for both single employer and multiemployer plans, which reflect the updated guidance. These are the first major updates to the 101(f) regulations since 2015. Key changes to the AFN include:

- Additional disclosures regarding plan funding status and the consequences of underfunding.
- More detailed information concerning returns, participant counts, funded liabilities, and material events affecting plan funding.
- Statement describing guarantees offered by the Pension Benefit Guaranty Corporation.
- Plain language revisions to facilitate understanding by the average plan participant.

The bulletin also contains technical guidance and methodology for plan consultants and actuaries to calculate funding percentages and the average return on assets.

Since this guidance does not address *all* SECURE 2.0-related issues, EBSA is permitting plan administrators to rely on a reasonable and good-faith interpretation of the bulletin (and on FAB 2023-01) until further guidance is issued. However, administrators may *not* continue to rely on prior model notice versions.

Therefore, we recommend that plan administrators partner with their plan professionals to develop and issue AFNs that comply with the guidance and updated model notices. If the plan has already issued its 2024 AFNs, the AFNs should be evaluated and revised as necessary to comply with the bulletin, particularly if they were distributed before the release of the updated guidance.

For more information about compliance with this revised AFN guidance, please contact a member of the Kutak Rock Employee Benefits Practice Group.

Summary of Selected Health & Welfare Benefit Plan Limits

	2019	2020	2021	2022	2023	2024	2025	2026
Health Savings Account (HSA) Contributions[1]								
Contribution limit – individual coverage	3,500	3,550	3,600	3,650	3,850	4,150	4,300	**4,400**
Contribution limit – family coverage	7,000	7,100	7,200	7,300	7,750	8,300	8,550	**8,750**
Catch-up contributions (≥ age 55)	1,000	1,000	1,000	1,000	1,000	1,000	1,000	**1,000**
High-Deductible Health Plan (HDHP): Minimum Deductible[1]								
Individual coverage	1,350	1,400	1,400	1,400	1,500	1,600	1,650	**1,700**
Family coverage	2,700	2,800	2,800	2,800	3,000	3,200	3,300	**3,400**
HDHP – Out-Of-Pocket Maximum[1]								
Individual coverage	6,750	6,900	7,000	7,050	7,500	8,050	8,300	**8,500**
Family coverage	13,500	13,800	14,000	14,100	15,000	16,100	16,600	**17,000**
Health Flexible Spending Arrangements (FSAs)[2]								
Contribution limit	2,700	2,750	2,750	2,850	3,050	3,200	3,300	**3,400**
Maximum carryover limit	500	550	550	570	610	640	660	**680**
Affordable Care Act								
PCORI Fee (due July 31)[3]								
PYE ending Jan.-Sept. PYE ending Oct., Nov., or Dec.	2.45 pp 2.54 pp	2.54 pp 2.66 pp	2.66 pp 2.79 pp	2.79 pp 3.00 pp	3.00 pp 3.22 pp	3.22 pp 3.47 pp	3.47 pp 3.84 pp	**3.84 pp** **---**
ACA Employer-shared Responsibility Payments (a.k.a. "assessable payments" or penalties)[4]								
Code § 4980H(a)	2,500	2,570	2,700	2,750	2,880	2,970	2,900	**3,340**
Code § 4980H(b)	3,750	3,860	4,060	4,120	4,320	4,460	4,350	**5,010**
Out-of-Pocket Limit (Non-Grandfathered)[5] ^								
Individual	7,900	8,150	8,550	8,700	9,100	9,450	9,200	**10,600**
Family	15,800	16,300	17,100	17,400	18,200	18,900	18,400	**21,200**
Group Health Plan Affordability								
Federal Poverty Line (FPL)* – Single Individual[6]	12,140	12,490	12,760	12,880	13,590	14,580	15,060	**15,650**
Affordability Percentage[7] **	9.86%	9.78%	9.83%	9.61%	9.12%	8.39%	9.02%	**9.96%**

Sources: [1] Rev. Proc. 2025-19 [2] Rev. Proc. 2025-32, [3] IRS Notice 2025-61 [4] Rev. Proc. 2025-26 [5] HHS Final Rule, Marketplace Integrity and Affordability (RIN 0938-AV61) [6] HHS Poverty Guidelines [7] Rev. Proc. 2025-25

HIPAA Reproductive Health Rules Simplified

On June 18, 2025, the U.S. District Court for the Northern District of Texas vacated nearly all of the 2024 HIPAA Reproductive Health Care Privacy Rule ("2024 Rule") holding that the Department of Health and Human Services exceeded its statutory authority by creating special privacy protections for reproductive health information. This decision in *Purl v. United States Department of Health and Human Services* eliminated the 2024 Rule's prohibitions on disclosing reproductive health data and the requirement for providers to obtain attestations for valid disclosures containing reproductive health information. A separate provision requiring modifications to Notices of Privacy Practices ("NPPs") involving substance use disorder ("SUD") information was upheld.

The 2024 Rule compliance deadline for NPP modifications is February 16, 2026. Material changes to the NPP prompt redistribution of the NPP that must be completed within 60 days of the modification. If you would like assistance navigating NPP requirements under the 2024 Rule, please contact a member of our Employee Benefits and Executive Compensation practice group.

NPPs for covered entities with SUD records will need to include:

- Descriptions of uses or disclosures that reflect the most stringent applicable law.
- Descriptions that contain sufficient detail to place an individual on notice of the uses and disclosures permitted by applicable law.
- A description of the types of uses and disclosures that require authorization.
- A statement that uses disclosures not described in the NPP will be made only with individual written authorization, which may be revoked by the individual.
- If a covered entity holds SUD records, a separate statement that such records will not be used or disclosed in a civil, criminal, administrative, or legislative proceeding without written consent or court order.
- Contact information for a designated person or office to provide further information and receive complaints.

"Self-Correctors" Beware: Expanded DOL Correction

Effective March 17, 2025, the U.S. Department of Labor ("DOL") finalized several changes to its Voluntary Fiduciary Correction Program ("VFCP"). The DOL highly recommends that all late deposits of salary deferrals or loan payments be corrected under the VFCP and monitors these errors that are required to be reported on Form 5500 filings. The changes include a new VFCP self-correction component ("SCC") that can be used to correct late deposited contributions and loan payments. The DOL also notes that certain participant loan failures, even if self-corrected under the IRS' correction program (EPCRS), must be corrected under the VFCP as well. While the introduction of the SCC was a welcome change, it accompanies limitations and requirements. The SCC program is quite limited compared to the self-correction options available under the IRS' correction program.

To be eligible for the SCC, as opposed to a full VFCP filing, late deposited contributions or loan repayments must be corrected within 180 days from the applicable paycheck date, and the aggregate amount of lost earnings associated with the late deposits must be $1,000 or less. In addition, an SCC notice and Record Retention Checklist must be filed with the DOL. For certain loan failures correctable under the SCC (which must also be correctable under the IRS' correction program), an SCC notice, but not the Checklist, is required. For all corrections under the SCC, detailed documentation of the error and related correction must be compiled and retained, and the Plan Administrator must sign a statement that such correction was complete and correct. The signed statement is subject to a penalty of perjury.

Plan sponsors should be aware that in connection with these changes, the DOL announced that fiduciaries have an obligation to implement a program to monitor, on at least a quarterly basis, that withholdings of deferrals and loan payments are timely deposited. Waiting for such errors to be identified as part of the annual audit process does not align with a fiduciary's duty of prudence. To take advantage of the correction flexibility under the SCC, plan sponsors should also:

1. Communicate with all staff responsible for participant loan deductions that all corrections associated with participant loans need to be evaluated for accuracy and timeliness; and
2. If late deposits are identified, engage an ERISA expert to assist with verifying that representations made under the SCC Record Retention Checklist and the SCC Notice are accurate and to assist with filing under the SCC.

If you have any questions about corrections through the VFCP or the SCC, please contact a member of our Employee Benefits and Executive Compensation practice group.

General Deadline to Amend for SECURE 2.0 and Other Legislative Changes Approaches

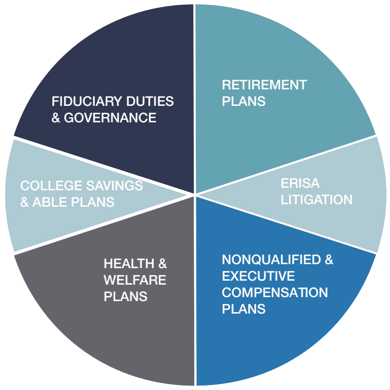
The deadline to amend most retirement plans for SECURE 1.0, CARES Act, SECURE 2.0 is December 31, 2026. However, nongovernmental 457(b) plans must be amended by December 31, 2025. Later deadlines apply to other types of plans. For example, collectively bargained plans are generally required to amend by December 31, 2028, and governmental plans and 403(b) plans sponsored by public schools by December 31, 2029. If you have questions about SECURE 2.0 compliance, please reach out to a member of our Employee Benefits and Executive Compensation practice group.

The One Big Beautiful Bill and its Impact on Employee Benefit Plans

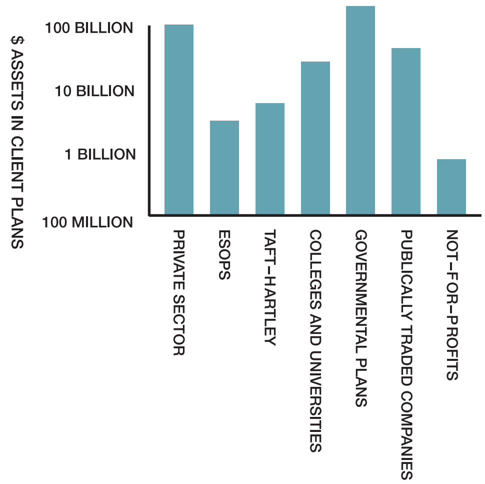
On July 4, 2025 the One Big Beautiful Bill Act, 2025 ("OBBBA") was enacted. Among other provisions, the OBBBA includes major changes to high-deductible health plans and health savings accounts, fringe benefits, Affordable Care Act premium tax credits, executive compensation, and 529 College Savings and Achieving a Better Life Experience accounts. Many of these changes are effective beginning January 1, 2026. Employers should determine how the OBBBA impacts their employee benefits plans and consider whether amendments or other changes need to be made to their plans. Please refer to our July 8, 2025 client alert for a comprehensive summary of these changes and recommended employer actions. If you have any questions about the OBBBA, please contact one of the members of our Employee Benefits and Executive Compensation practice group.

About Us

What We Do



Whom We Represent



Where We Are

In Case You Missed It

January 6 | New Legislation Allows Forms 1095-C to Be Distributed Only Upon Request

February 3 | Was the Johnson & Johnson Win a Win for Other Health and Welfare Plan Fiduciaries? Maybe Not.

March 27 | An Update on the Wells Fargo, Johnson & Johnson, and JP Morgan Chase Lawsuits

April 22 | Supreme Court Unanimously Upholds Bare-Bones Pleading Of ERISA Prohibited Transaction Claims

May 16 | New Nonenforcement Policy for Portions of the Final Mental Health Parity Rules

July 8 | The "One Big Beautiful Bill Act, 2025" Makes Major Employee Benefits Changes

October 7 | SECURE 2.0 Update: Final Roth Catch-Up Regulations, More Decisions to Make

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