Fiduciary Hot Topics

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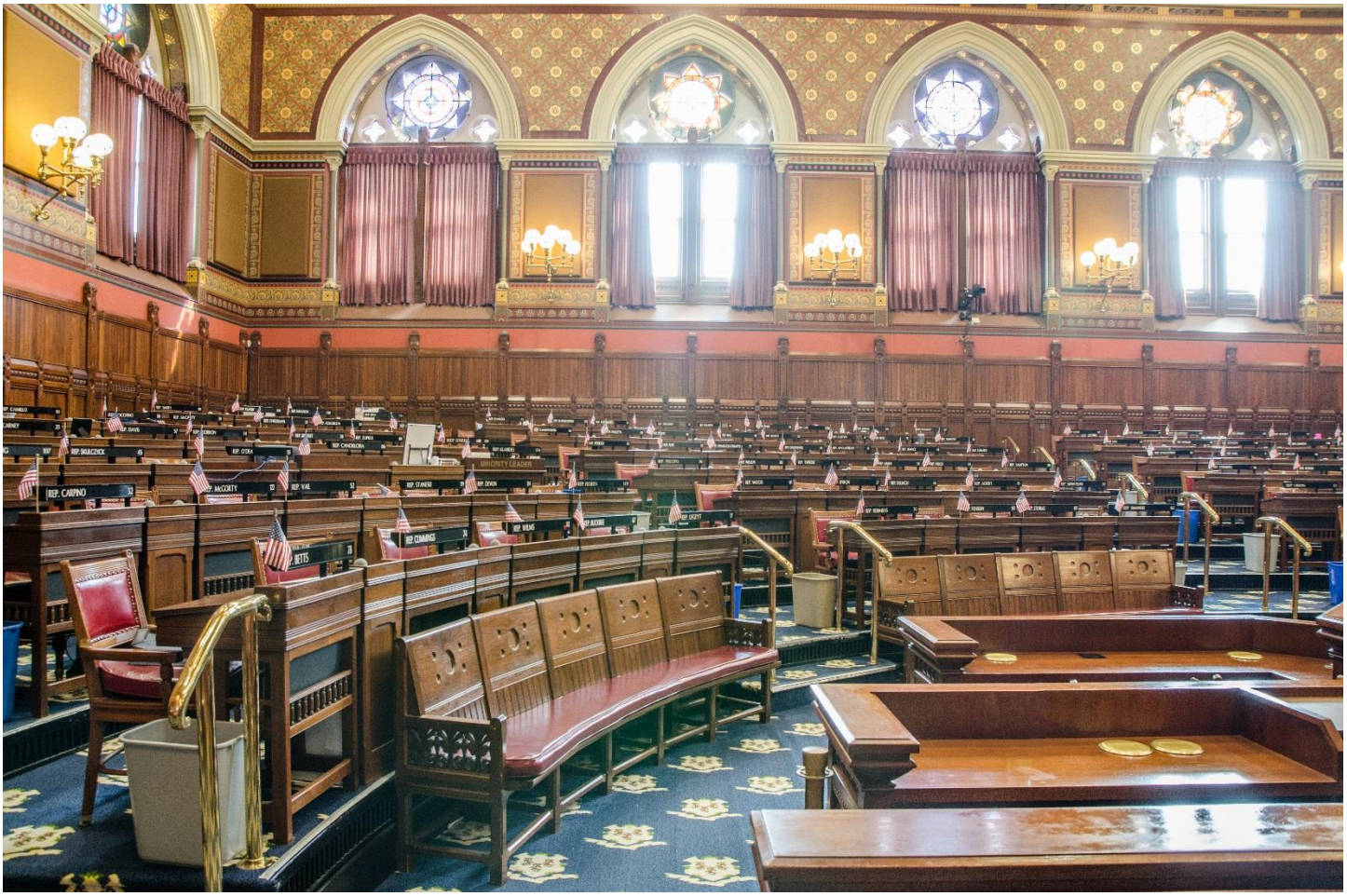
FiduciaryAdvisors LLC
A Corporate Retirement Plan Advisory Firm

Proposed DOL Rule Makes Electronic Delivery the Default Method for Plan Participant Required Notices

- Electronic delivery has become the norm in the 17 years since the Department of Labor promulgated its safe harbor rules for electronic delivery of required notices under ERISA. It is estimated that eliminating paper notices altogether across the industry would reduce administrative costs by $750 million annually.
- According to the US Census Bureau, almost 80 percent of households now have a desktop, laptop and/or a hand held device, plus an internet subscription. This compares to 1984 when fewer than 10 percent of households had a computer of any type.
- Current law mandates delivery of required notices by a means “reasonably calculated to ensure receipt.” In 2002, the DOL issued two safe harbors known as “wired at work” and “affirmative consent” describing the circumstances under which electronic delivery meets this standard. Following these safe harbors is not a legal requirement but has been industry practice.
- Under the “wired at work” safe harbor, notices may be delivered electronically to participants on company email. For employees not on company email and former employees, consent is required. In practice, this has meant electronic delivery for active employees on company email and the U.S. mail for everyone else.

- The new rule will permit notifying participants how they can access required notices on line. The proposed rule includes standards for maintaining websites.
- Participants will still have a right to paper notices upon request. Once a participant is notified by paper of the right to receive paper all future notices may be electronic.
- The rule is in proposed form. But it appears that going forward the industry standard will be to direct participants to a website where they can view required notices. There will be delivery of a paper notice only at the onset of participation to inform participants of their right to paper notification, or if this is then affirmatively requested by the participant.

Retirement Reform in 2019 is Possible but Unlikely. Three Senators Delay Passage of the SECURE Act

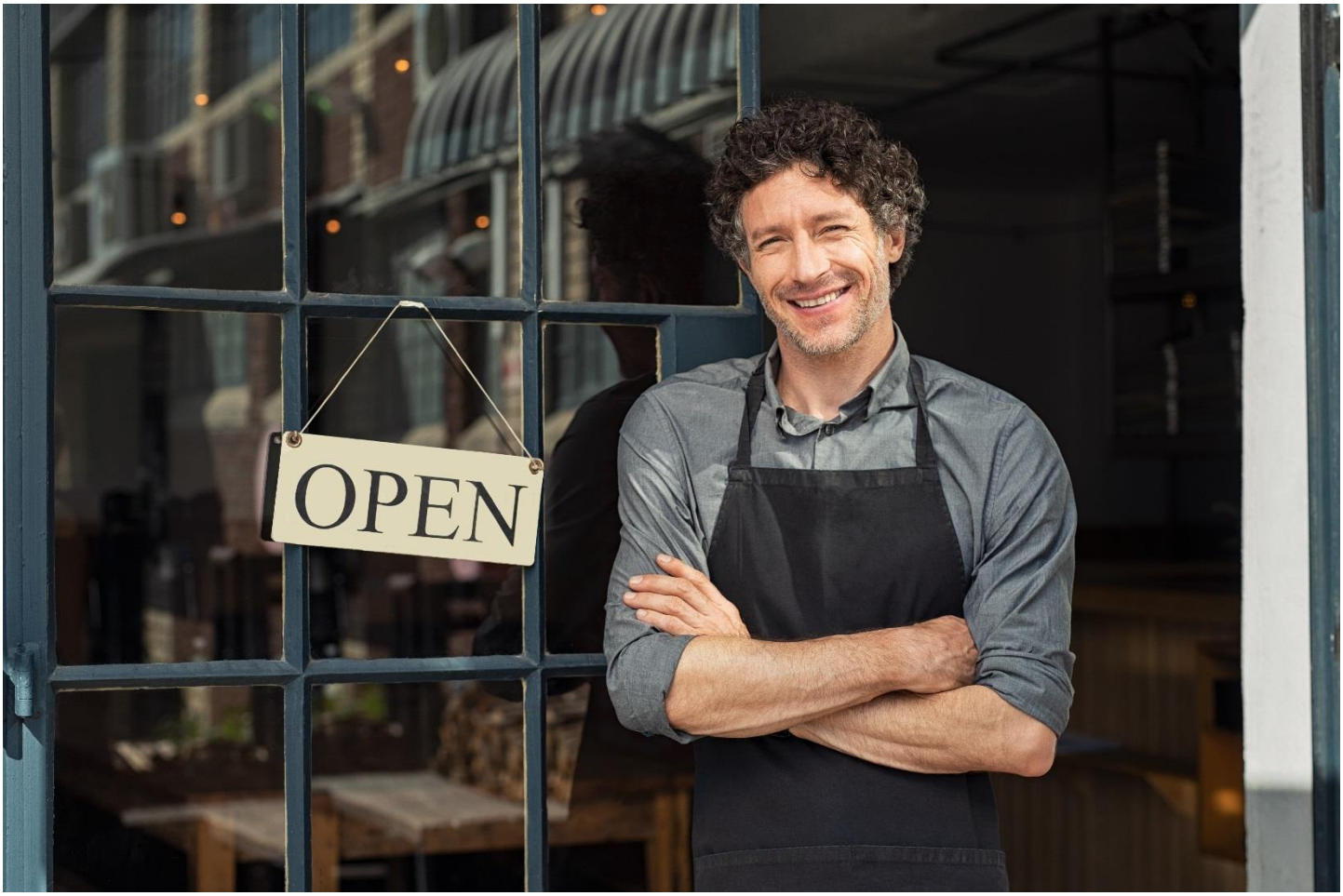


- In May of 2019, the U.S. House of Representatives passed, by a near unanimous vote (417 – 3), the “Setting Every Community up for Retirement Enhancement Act” (The “SECURE Act”). With such strong support in the House, it was believed that this bill had an excellent chance of becoming law this year. However, as the end of the current legislative session

approaches, the chances of passage are fading. Passage is contingent on U.S. Senate action. The President has indicated he will sign this bill if it passes in the Senate.

- Little floor time is left this year and Senate majority leader Mitch McConnell wants most of this devoted to judicial nominations.
- At this point, the best chance for passage this year is through “unanimous consent.” This happens when all Senators support a bill. It can then be voted on without any floor time.
- Three Senators are preventing this from happening. Ted Cruz has concerns about the 529 provisions (allowing 529 funds to be used for home-schooling expenses) while Mike Lee and Pat Toomey have issues with certain technical changes to the Internal Revenue Code unrelated to retirement plans. These concerns are minor and resolvable hopefully allowing passage of the bill.
- Some of the notable provisions of this bill are:
    - Allowing unrelated employers to sponsor “pooled employer plans” (“PEPs”) (previously referred to as “open multiple employer plans”)
    - Requirement of an annual notice to plan participants disclosing the estimated monthly annuity income their account balance could generate at retirement.
    - A safe harbor for plan fiduciaries when selecting an annuity provider for a plan.
    - Removal of the age limit for traditional IRAs currently at 70 ½ and pushing back to 72, the age at which plan participants and IRA holders require distributions.
    - Flexibility for treatment of in-plan guaranteed lifetime income vehicles.
    - Access to qualified plan deferral programs for part-time employees.

US Department of Justice Challenges California's Requirement of Small Employers to Establish Retirement Programs



- A number of states enacted laws either encouraging or requiring small employers to participate in a state retirement program if they do not sponsor one. California, Oregon and Illinois have such programs in place and are enrolling workers. New York, Maryland and Connecticut legislatures appear close to enacting such programs.
- The concern is that, because many small employers do not offer a retirement plan, about 40 percent of the U.S. work force is not covered. Reducing this figure is in the public interest as it this would reduce the number of retirees relying on public services.
- Congress has attempted to address this problem under federal law by creating simple alternatives to the standard retirement plan that are relatively inexpensive such as Self-Employed 401Ks and SEP IRAs. These have met with modest success.
- The California program (CalSavers) is typical of state programs - mandatory for employers that do not sponsor a retirement plan, funded entirely with payroll deducted employee contributions and employee ability to opt-out.

- The Justice Department has joined a law suit brought by a trade association representing small employers in California that is challenging the constitutionality of California's program. The Department's argument relies on a longstanding legal concept known as "preemption." Under this concept, where there is a conflict between federal and state laws, federal law prevails. Both California's and other programs are potentially in conflict with ERISA as they do not comply with many of its requirements. Allowing these state programs to stand may result in patchwork of regulations, something ERISA intended to prevent by having uniform national standards. However, the Ninth Circuit has ruled that CalSavers governs employers not offering ERISA qualified plans, and doesn't seek to govern ERISA plans, thus negating the preemption argument. This will continue to be ongoing battle among the states adopting similar programs that will be impactful to employers in those states, as well as ones conducting business across multiple states.

Cybersecurity – *Berman v. Estee Lauder, Inc*: Who is Responsible When Cyber Theft Occurs

- Cybersecurity concern has grown in recent years as breaches of databases mount. This year, in a breach of Capital One's database, hackers accessed over 100 million credit card applications. This followed a $700 million settlement against Equifax concerning the 2017 breach of its database in which hackers accessed 147 million accounts.
- In the past, when unauthorized withdrawals were made from plan accounts, the record keeper

often was willing to make the participant whole even where it appeared all of its security procedures were followed. However, as the incidence of electronic theft becomes more common, record keepers are less willing to do so.

- A case filed in U.S. District Court in California against Estee Lauder will look at how responsibility, in the event of electronic theft, should be allocated between participants, plan fiduciaries and service providers. In this case, a hacker made three unauthorized electronic transfers to three different banks from a participant's account in the Estee Lauder 401(k) plan. These transactions reduced the balance from $90,000 to $3,800.
- The record keeper, Alight Solutions LLC (formerly Hewitt Associates), refused to take responsibility for the losses. After the participant became aware of the theft through written confirmations and her quarterly statement, she informed Alight's service center, the police and the FBI. She completed an affidavit of forgery required by Alight. Ultimately, she was informed that Alight's investigation of the matter had run its course and no funds had been recovered.
- Interestingly, the Estee Lauder 401(k) plan has not, as yet, been named as a defendant. At this point, when electronic theft occurs from a plan, the responsibilities of plan fiduciaries are not entirely clear. Notwithstanding, at a minimum fiduciaries should review the process and procedures service providers have in place to protect their systems and determine that these measures are up to industry standards. In addition, plan fiduciaries should review service provider contracts to ascertain that these contracts spell out the respective responsibilities of participants, sponsors and the service provider in the event of electronic theft.

Source: https://www.plansponsor.com/new-lawsuit-highlights-importance-cybersecurity-retirement-plans/?email=t

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