



# The Beat Goes On; Legal Update

WP&BC Spring Seminar

Liz Deckman

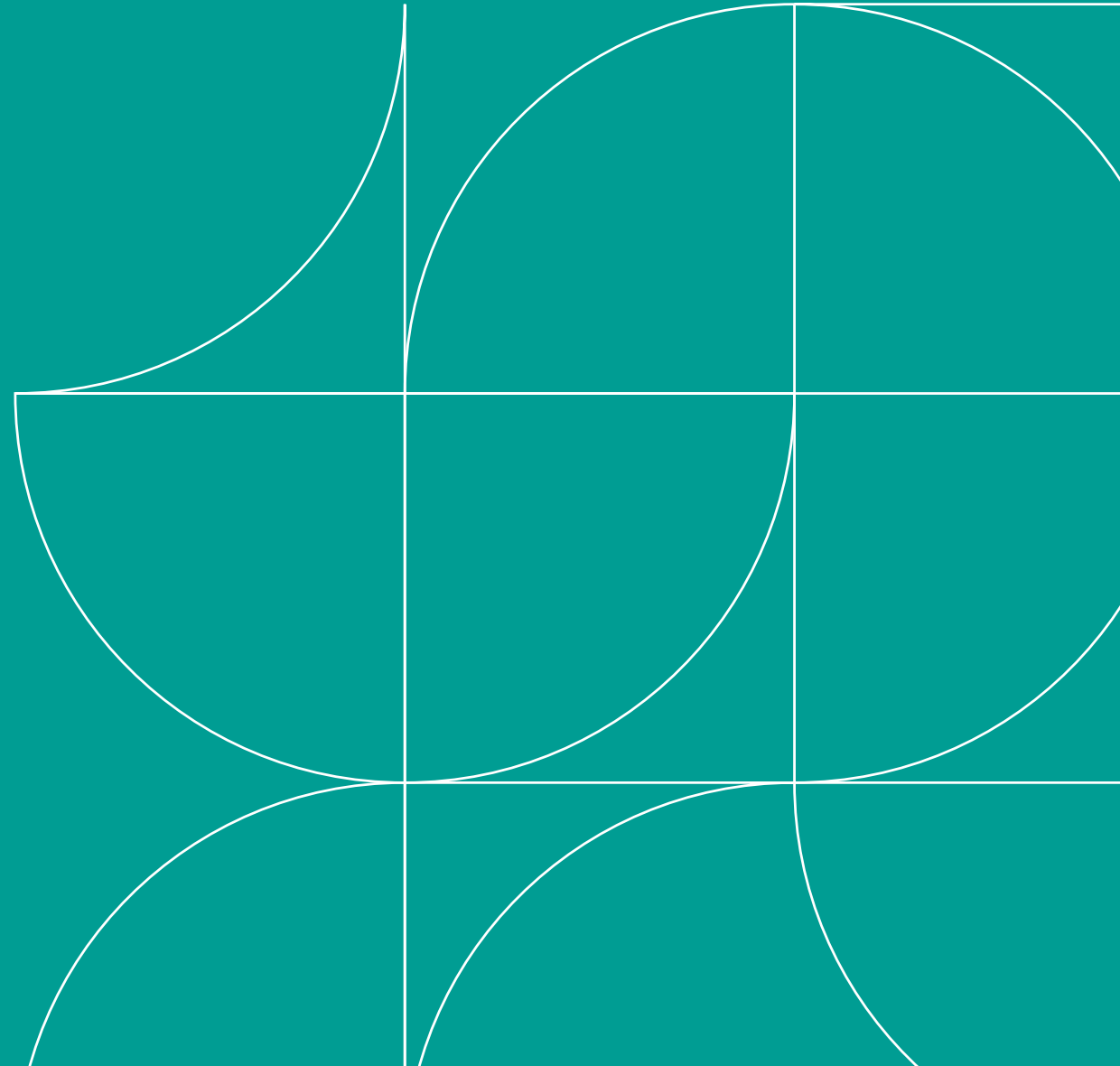
Ben Conley

April 2022

**Seyfarth Shaw LLP**

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# Drums keeping pounding a rhythm to the brain

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- Health and Welfare Plan Topics
  - NSA and Telehealth Updates
  - MPHAEA
  - Unwinding COVID Protections
  - Welfare Plan Compensation Disclosure Guidelines
  - COBRA Class Action Litigation



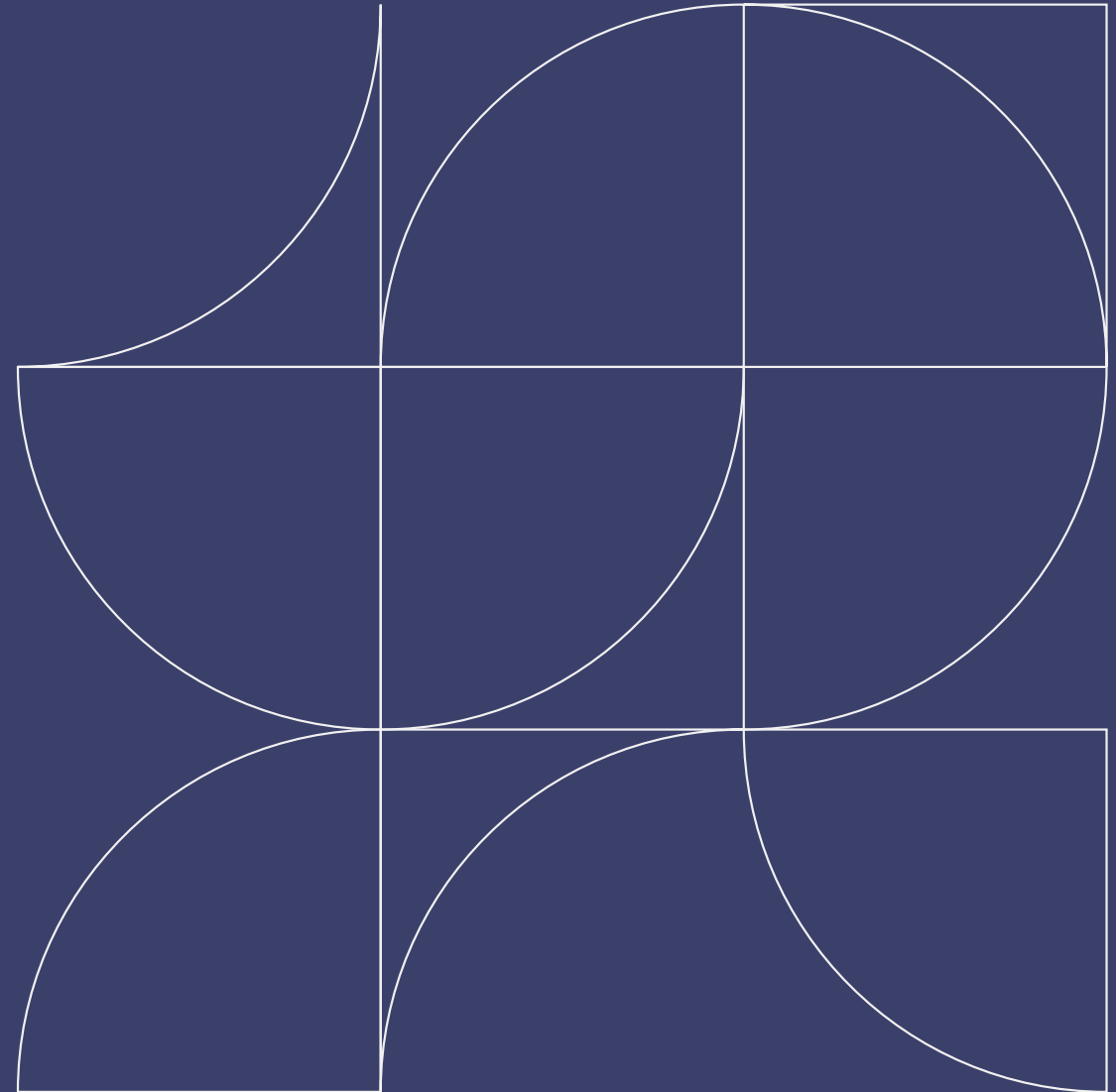
# La de da de de, la de da de da

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- Retirement Plan and Fiduciary Topics
  - Secure Act I
  - Secure Act II
  - DOL Cybersecurity Guidance
  - Plan Fiduciary Case – Hughes et al. v. Northwestern
  - Cryptocurrency in Retirement Plans
  - DOL Proposed Regulation on ESG



# NSA & Telehealth Updates



# No Surprises Act Updates

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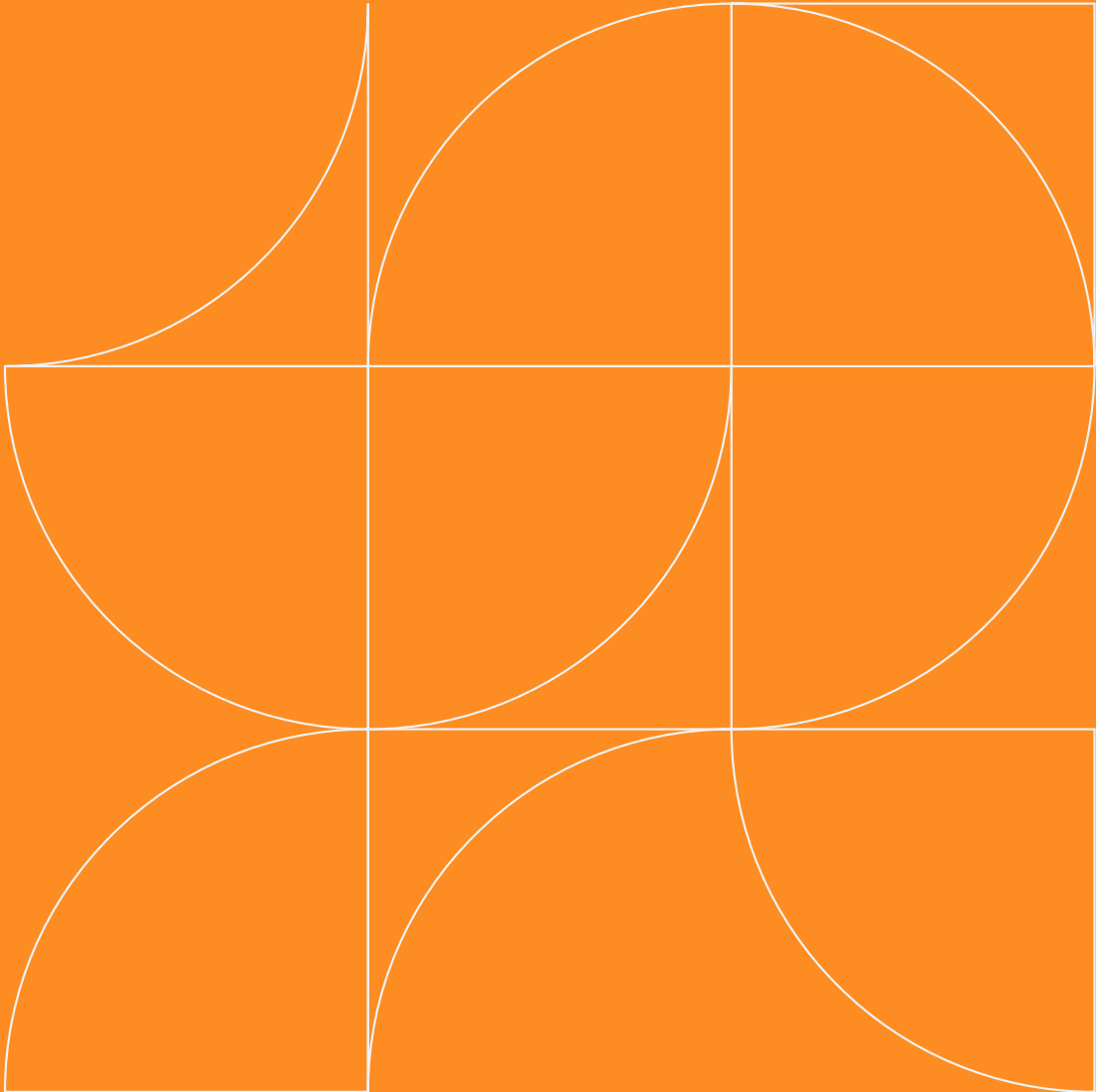
- What Services are Impacted?
  - Emergency Services
  - In-network Services by Non-Network Providers
  - Air Ambulance
- What's New?
  - Independent Dispute Resolution process
  - Net result: Worse for plan sponsors

# Telehealth Updates

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- Current Law
  - DOL: Telehealth is major medical coverage
  - IRS: If provided at “no cost” pre-deductible, impacts HSA eligibility
- What’s New?
  - Congressional budget bill allows no-cost telehealth pre-deductible
  - Problem? Only takes effect 4/1/2022
  - Will IRS offer retro-fix?

# MHPAEA



# MHPAEA - Background and Key Takeaways

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- Background
  - MHPAEA requires that plans offering mental health/substance use disorder services impose quantitative and non-quantitative limits on those benefits that are no more restrictive than limits on medical/surgical services
- What's New?
  - CAA required plans to perform & document a “comparative analysis” of plan NQTLs no later than Feb. 10, 2021\*
  - DOL issued FAQs identifying “at a minimum”, 9 elements required to be included in comparative analysis
  - DOL’s 2022 enforcement report to Congress identified widespread noncompliance (100% fail rate)
  - DOL lists MHPAEA as a 2022 regulatory priority...



# Key Findings from DOL 2022 Report to Congress

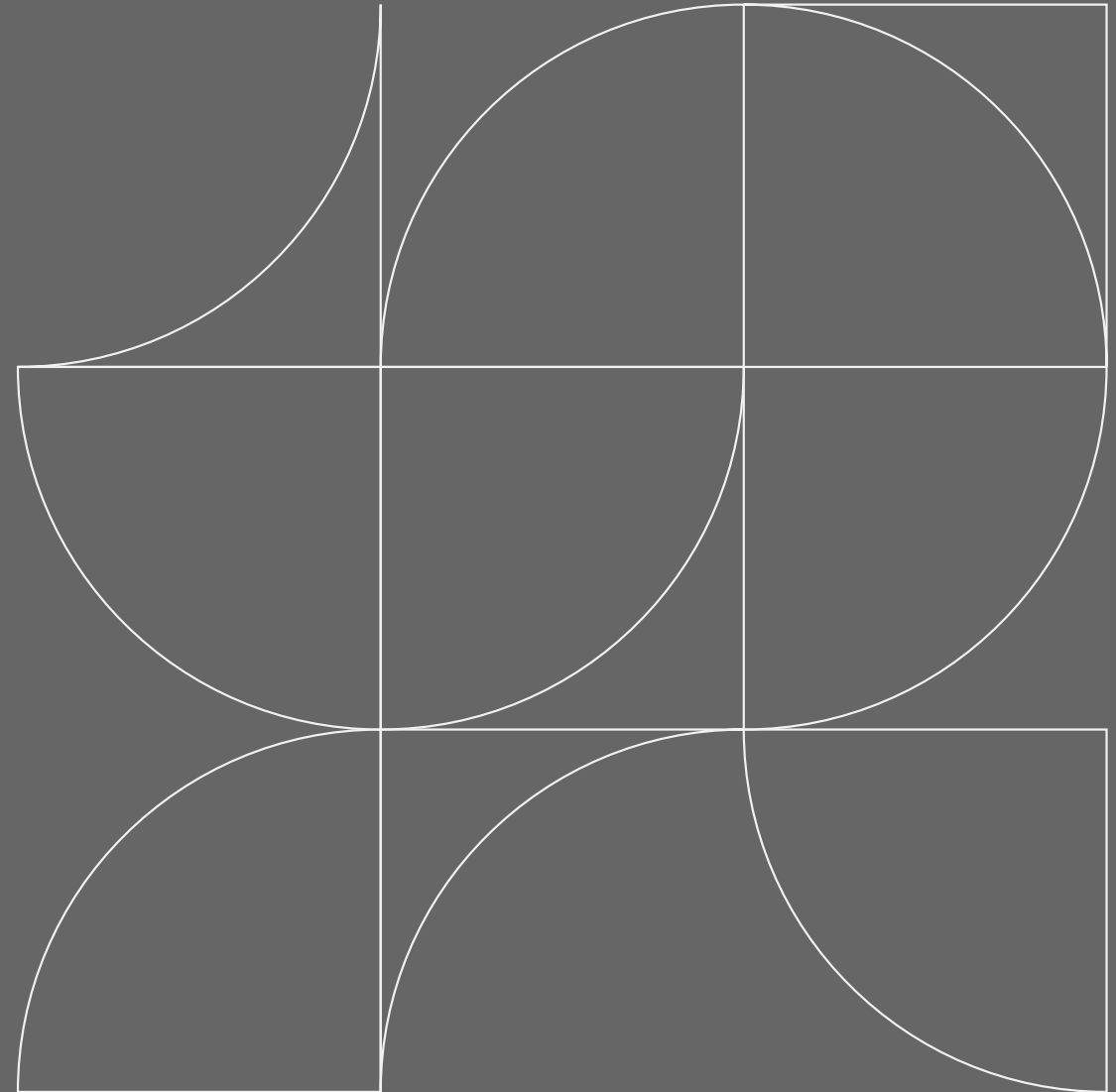
Common Deficiencies in Review	Problematic NQTLs
Failure to document comparative analysis before designing and applying the NQTL;	Preauthorization or precertification requirements
Conclusory assertions lacking specific supporting evidence or detailed explanation;	Network provider admission standards
Lack of meaningful comparison or meaningful analysis;	Concurrent care review
Non-responsive comparative analysis;	Limitations on applied behavior analysis or treatment for autism spectrum disorder
Documents provided without adequate explanation;	Out-of-network reimbursement rates
Failure to identify the specific MH/SUD and medical/surgical benefits or MHPAEA benefit classification/s affected by an NQTL;	Treatment plan requirements
Limiting scope of analysis to only a portion of the NQTL at issue;	Limitations on medication assisted treatment for opioid use disorder
Failure to identify all factors;	Provider qualification or billing restrictions
Lack of sufficient detail about identified factors.	Limitations on residential care or partial hospitalization programs

# Recommendations and Plan Sponsor Roadmap

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- Use DOL's list of common issues as a guide
- Leverage (but do not rely exclusively on) vendor analysis
  - Consider TPA's fully-insured analysis as simply a starting point
- Be sure to consider ancillary vendors
  - Carve-out EAP, Behavioral Health, Prescription Drug, Telehealth
- Consider engaging consultant with medical/mental health expertise to assist with analyzing evidentiary standards
- Be mindful of both written and *operational* compliance
- Work toward compliance...but not too quickly
  - Balance risk of DOL audit/participant litigation against lack of guidance and forthcoming regulations
  - Address low hanging fruit (each NQTL is its own independent analysis)

# Unwinding COVID Protections



# Unwinding COVID Protections

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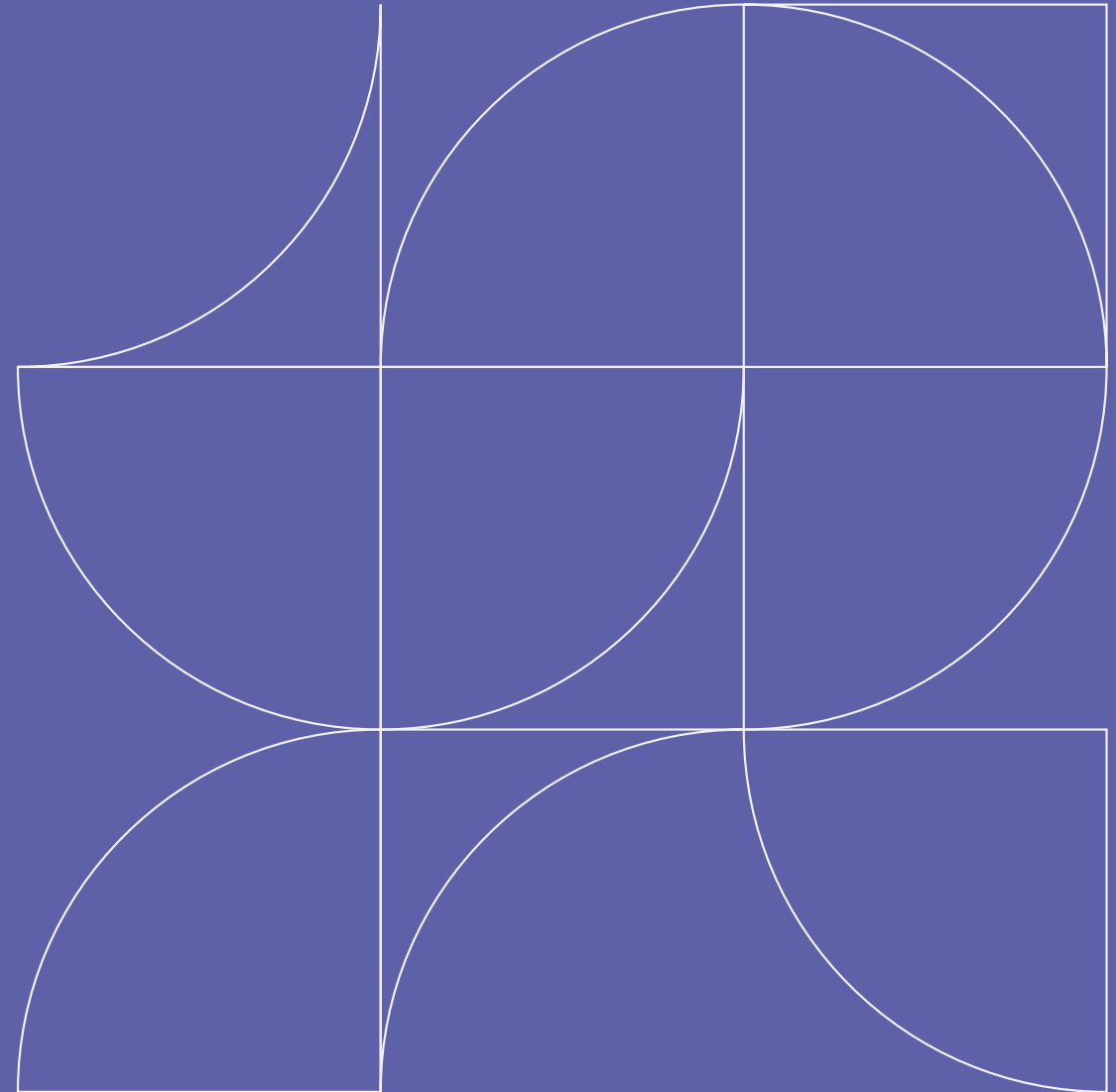
- Due to National Health Emergency, various deadlines extended through March 1, 2023, including:
  - COBRA election deadline
  - COBRA premium due date
  - Special enrollment deadline
  - Claims filing deadline
- Recently extended through March 1, 2023
- Extends deadline through earlier of (a) one year or (b) end of Outbreak Period + 60 days
- Other COVID relief (FSA election change flexibility, grace period/carryover extension) has expired (or is expiring)

# Unwinding COVID Protections

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- Public Health Emergency expires in mid-April (unless renewed for another 90 days).
- Provisions tied to this deadline:
  - COVID-19 Testing.
    - No cost-sharing whether in-network or non-network
  - COVID-19 vaccines.
    - No cost non-network until end of PHE
  - Expanded telehealth.
  - Relaxed SBC requirements.

# Welfare Plan Compensation Disclosure Guidelines

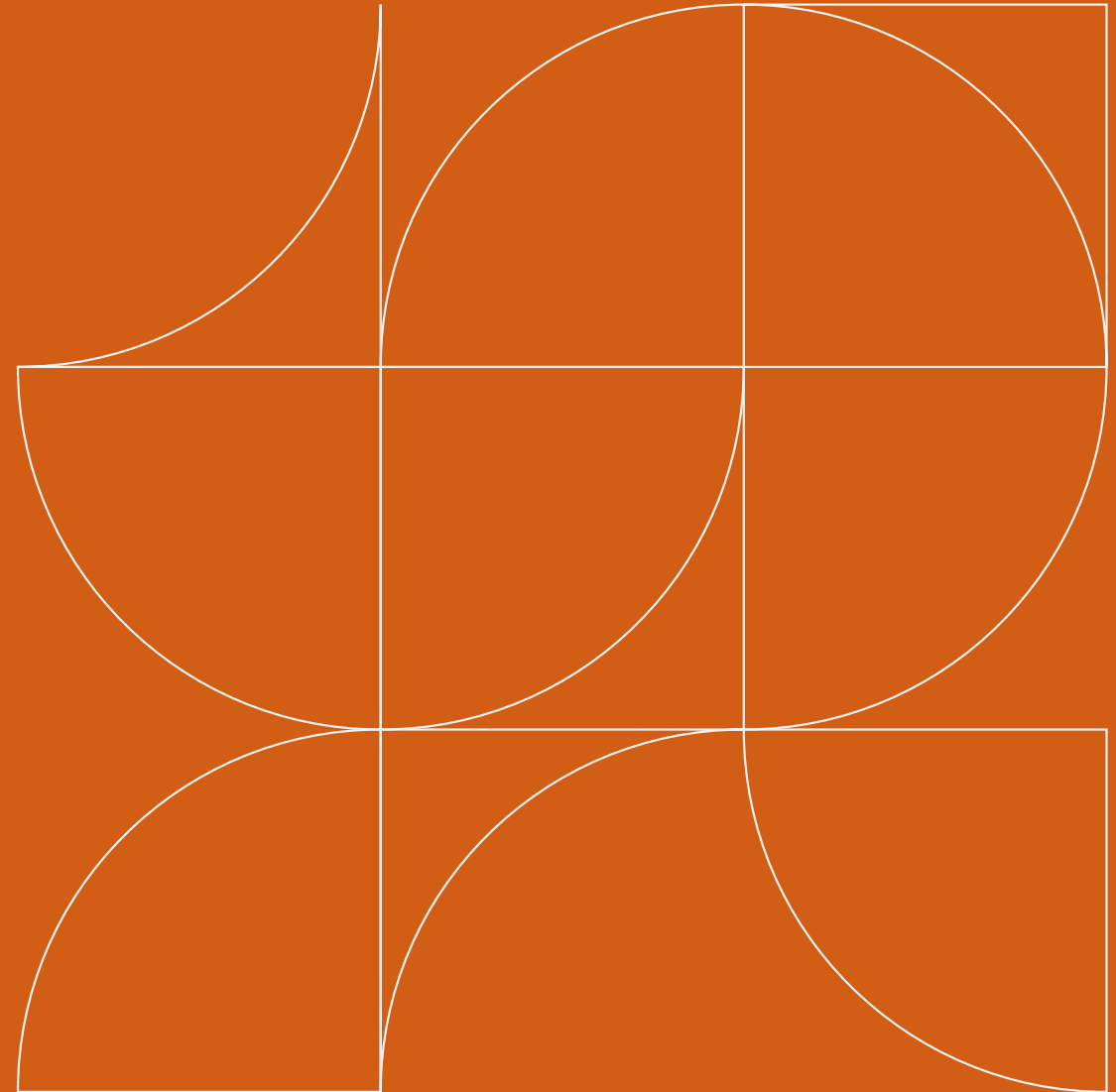


# Welfare Plan Compensation Disclosure Guidelines

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- Background
  - Requires “brokers and consultants” expected to earn at least \$1,000 in direct or indirect compensation to disclose compensation (or estimate of compensation) at engagement/renewal
- DOL’s “Temporary Enforcement” Guidelines
  - No regs forthcoming, until then look to pension guidance
  - Covers medical, dental, vision
  - Fully-insured & self-funded plans
  - What should health plans do with these disclosures?

# COBRA Class Action Litigation



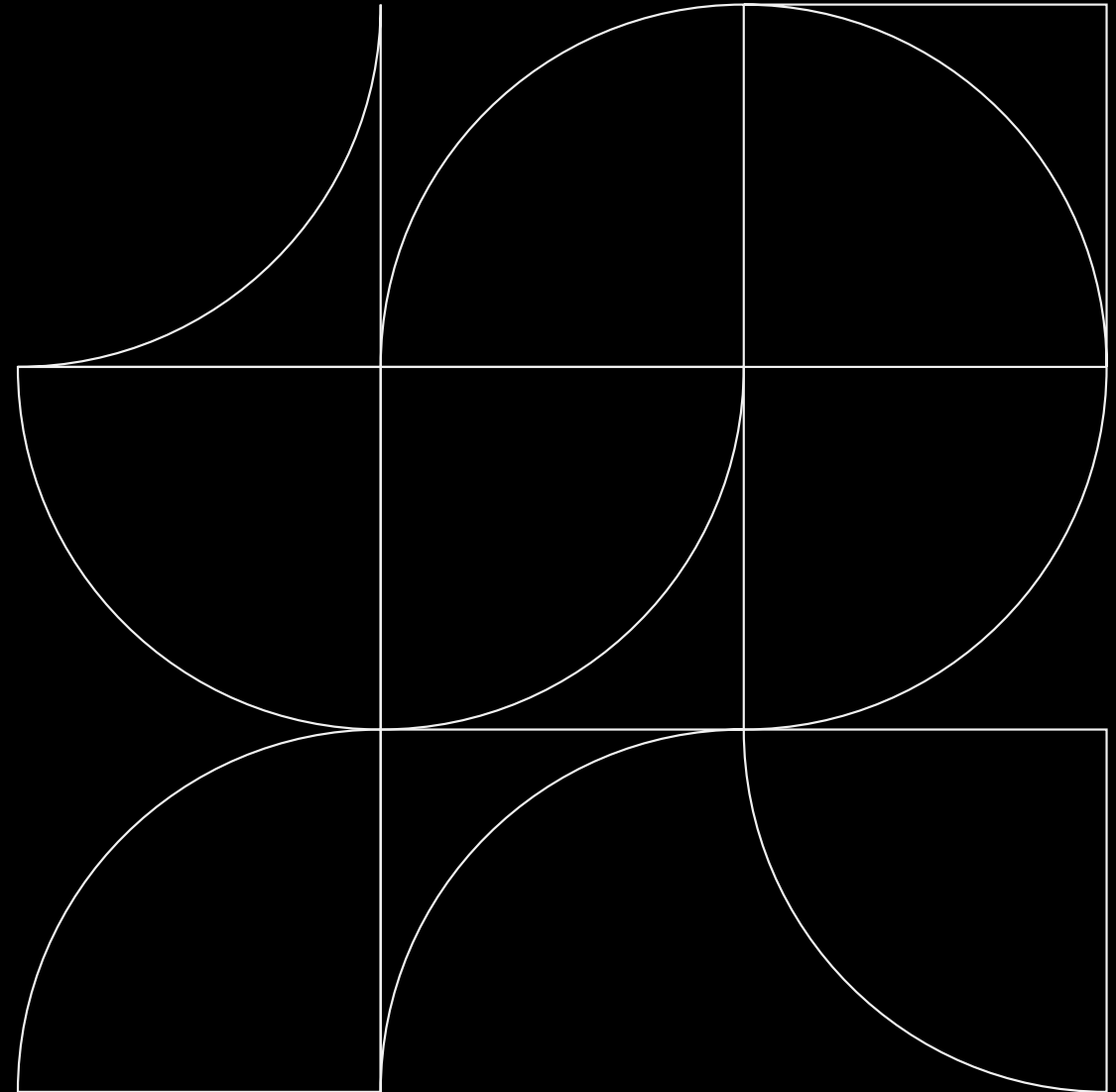


# COBRA Class Action Litigation

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- Plaintiffs attorneys continue to file class action lawsuits alleging COBRA notice deficiencies:
  - No Spanish Language Translation.
  - Failure to Name Plan Administrator.
  - Failure to Name the COBRA Administrator.
  - No Statement of Independent Election Rights.
  - No Explanation of Consequences for Failing to Elect COBRA or Provide Notice of Second Qualifying Event.
  - Failure to Describe Election Process.
  - Failure to Clearly Identify COBRA Termination Date and Events that Cause Early Termination.
  - Threatening Tone.
  - Failure to advise of Outbreak Period amended deadlines.

# SECURE ACT I



# SECURE Act I Basics

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- Setting Every Community Up for Retirement Enhancement (SECURE) Act
- Signed into law December 20, 2019
- Most provisions effective for plan years beginning on or after January 1, 2020
- No formal amendments are required until the last day of the plan year beginning on or after January 1, 2022
- Most significant pension legislation since PPA 2006

# Required Minimum Distributions (“RMD”)

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- Age 70½ is replaced with age 72
  - Required Beginning Date (“RBD”) now April 1<sup>st</sup> after year participant reaches age 72 or retires, whichever is later
- Applies to employees who turn age 70½ after December 31, 2019
- Applies to all plan types, including 401(a), 403(b) and 457(b) plans
- Old rule continues for employees who turned age 70½ prior to January 1, 2020

# Death RMDs – Elimination of Stretch Payments in DC Plans

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- Effective for deaths after 12/31/2019
- Current law allows non-spouse designated beneficiaries to receive distributions over their life expectancy
- Under new rules, distributions to most death beneficiaries limited to 10 years

# DC Plan Death RMDs – Elimination of Stretch Payments

- 3 Categories of Payees

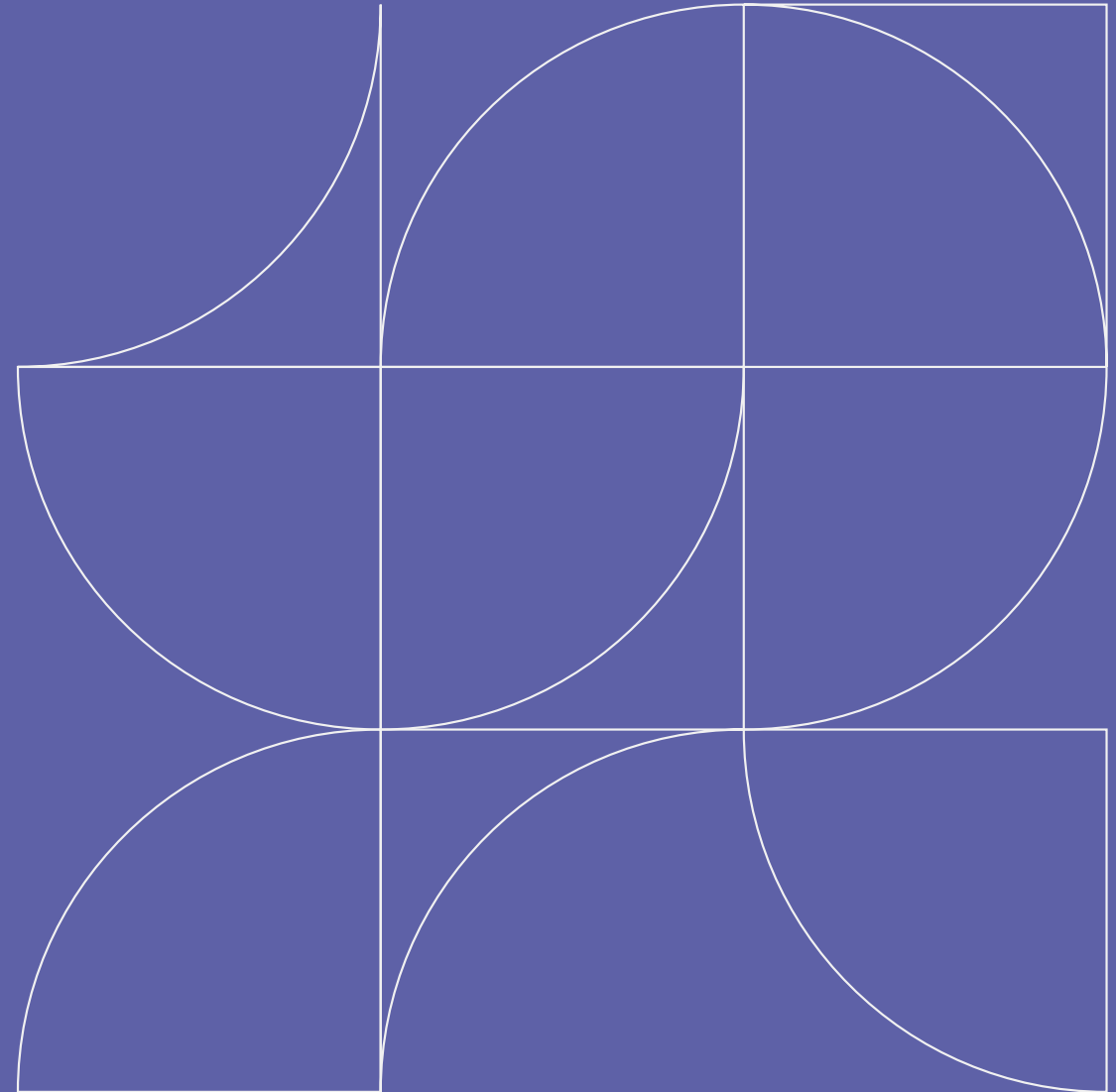
	Eligible Designated Beneficiaries	Designated Beneficiaries	Non-Designated Beneficiaries
Who?	<ul style="list-style-type: none"> <li>• Surviving Spouse</li> <li>• Minor Child of Participant</li> <li>• Permanently disabled individual</li> <li>• Chronically ill individual</li> <li>• Individual who is not more than 10 years younger than the participant</li> </ul>	<ul style="list-style-type: none"> <li>• Any individual not included in the Eligible Designated Beneficiary category</li> </ul>	<ul style="list-style-type: none"> <li>• Estates, trusts, or other entities (i.e., charitable organization)</li> </ul>
Payment Method?	“Stretch RMDs” <ul style="list-style-type: none"> <li>• Life Expectancy of Beneficiary; or</li> <li>• 10 Years</li> </ul>	<ul style="list-style-type: none"> <li>• 10 Years</li> </ul>	<ul style="list-style-type: none"> <li>• 5 Years</li> </ul>

# Participation by Part Time Workers

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- 401(k) plans must allow employees to make 401(k) contributions if they have attained age 21 and worked at least 500 hours in 3 consecutive 12-month periods
- Not required to receive employer contributions (i.e., profit sharing or matching contributions)
- Excluded from nondiscrimination testing and top-heavy benefits
- Service prior to 2021 is disregarded (except for vesting purposes); so earliest employee would enter would be 1/1/2024

# SECURE ACT II





# SECURE Act II - Basics

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- The Securing a Strong Retirement Act of 2021 was considered by Congress but never passed
- The bill was revised and renamed the Securing a Strong Retirement Act of 2022 (“SECURE II”)
- The bill was passed by the House on March 29, 2022 and has been referred to the Senate
- Bipartisan support
- More than 50 new provisions aimed at helping people save for retirement

# SECURE Act II – What's In It?

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- Raising the RMD age from 72 to 75
  - To age 73 on 1/1/22 (born in 1950-1955)
  - To age 74 on 1/1/29 (born in 1956-1958)
  - To age 75 on 1/1/32 (born in 1959 or later)
- Matching contributions in 401(k), 403(b) and governmental 457(b) plans for student loan payments
  - Allow individuals to pay down a higher ed student loan instead of contributing to a plan and still receive an employer match in their retirement plan
  - Same rate of matching contributions for regular salary deferrals and student loan payments

# SECURE Act II – What's In It? Continued

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- Catch up contribution limits increased
  - For employees age 62 – 64, the limit in a 401(k) plan goes from \$6,500 to \$10,000
  - Increased limit n/a if age 65 or older
  - Increased for cost of living adjustments
- Long term part time employees in 401(k) and 403(b) plans
  - Definition same as SECURE Act I
  - Lower number of consecutive years with at least 500 hours of service required to participate from 3 to 2

# SECURE Act II – What's In it? Continued

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- Hardship Withdrawals
  - Plans could rely on an employee's self-certification that the employee has incurred a hardship
- 403(b) Investment in Collective Investment Trusts
  - Investment in Collective Investment Trusts (CITs) is currently permitted in various plans, including 401(k) plans, and is often used as a lower cost investment option for participants
  - 403(b) plans have historically been prohibited from investing in CITs, but SECURE II allows this beginning in 2023

# SECURE Act II – More Provisions

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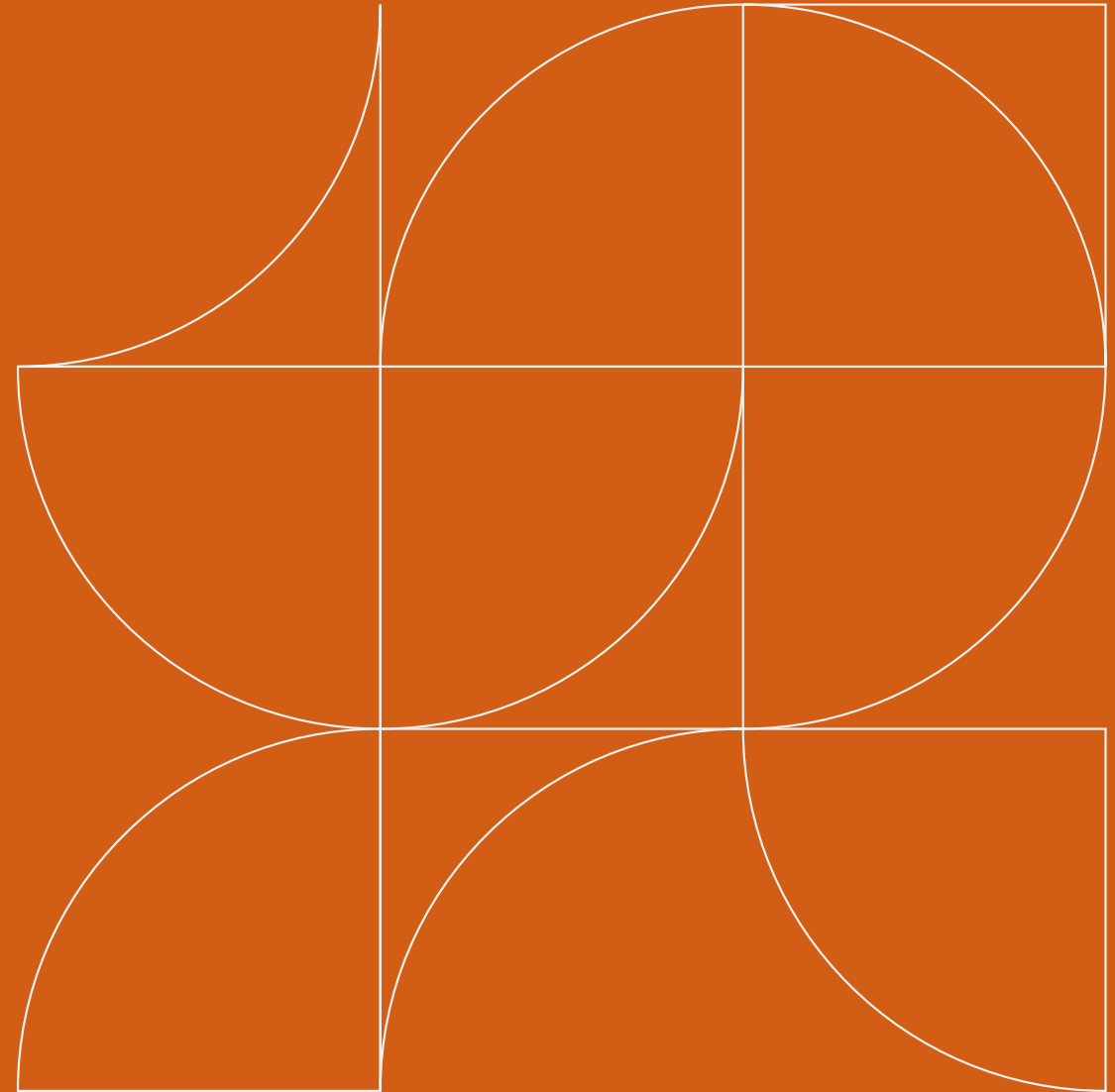
- Rewards for 401(k) plan participation
  - Permit de minimis financial incentives to employees to contribute to a 401(k) plan
  - For example, employees who defer at least 2% of pay get a gift card
- Roth catch up contributions to 401(k), 403(b), and governmental 457(b) plans
  - Beginning next year, catch up contributions can only be after-tax Roth money
  - Matching contributions could also be made on an after-tax Roth basis
- Expanding auto-enrollment, auto-escalation
  - Requires all new 401(k) and 403(b) plans to automatically enroll participants
    - Initial automatic enrollment amount is at least 3% but no more than 15%
    - Auto-escalation of 1% percent each year up to 10%
    - Only applies to plans established after date of enactment, with some exceptions

# SECURE Act II – Plan Amendments

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- Bill would be generally effective on the first day of the plan year following enactment
- Deadline for conforming amendments if adopted this year would be 12/31/23
- May change amendment deadline so that SECURE 1.0 and CARES Act amendments to be done at the same time

# DOL Cybersecurity Guidance



# New Cybersecurity Guidance

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- In 2021, the DOL announced new guidance for plan sponsors, plan fiduciaries, record keepers and plan participants on best practices for maintaining cybersecurity, including tips on how to protect the retirement benefits
- First time the DOL has issued cybersecurity guidance
- DOL website has new topics for plan fiduciaries
  - Cybersecurity Program Best Practices
  - Tips for Hiring a Service Provider with Strong Security Practices
- Now seeing DOL investigations include questions regarding cybersecurity issues



# Best Practices Include:

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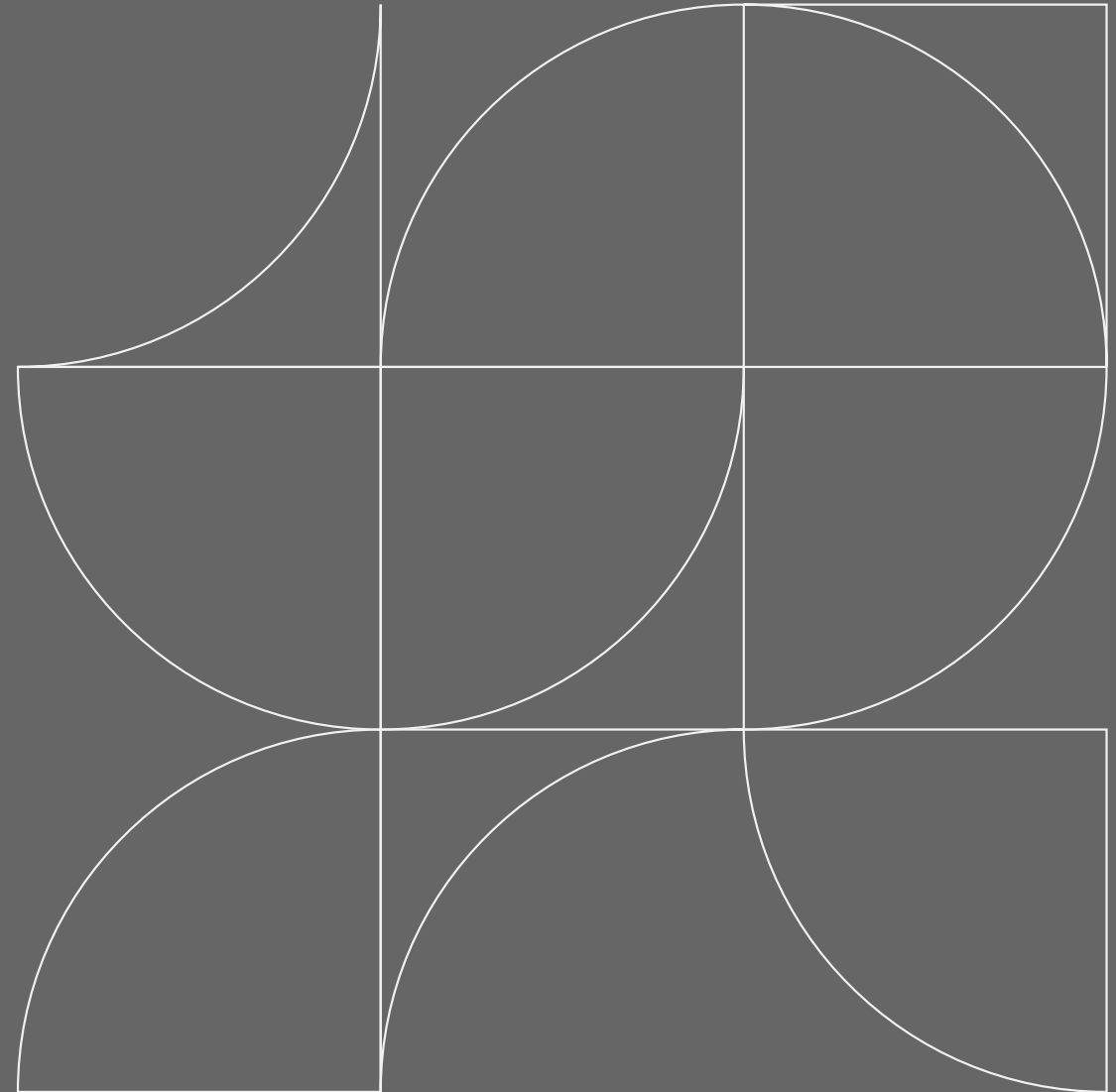
- Maintain a formal, well documented cybersecurity program
- Conduct prudent annual risk assessments
- Implement a reliable annual third-party audit of security controls
- Follow strong access control procedures
- Ensure that any assets or data stored in a cloud or managed by a third-party service provider are subject to appropriate security reviews and independent security assessments
- Conduct periodic cybersecurity awareness training
- Have an effective business resiliency program addressing business continuity, disaster recovery, and incident response
- Encrypt sensitive data, stored and in transit

# Selecting and Monitoring Service Providers

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- Ask about the service provider's information security standards, practices and policies, and audit results
  - Compare them to the industry standards adopted by other financial institutions
- Ask the service provider how it validates its practices, and what levels of security standards it has met and implemented
  - Ask for contract provisions that provide the right to review audit results demonstrating compliance with the standard
- Ask whether the service provider has experienced past security breaches, what happened, and how the service provider responded
- Investigate whether the service provider might have cyber insurance that would cover losses caused by cybersecurity and identity theft breaches, including misconduct by the service provider's own employees or contractors, or a third party hijacking a plan participant's account
- Is the service provider will to include contract terms requiring ongoing compliance with cybersecurity, clear rules concerning use and disclosure of personal information, responsibility for security breaches, and other key terms addressing exposure to the plan, plan sponsor, and participants

# Plan Fiduciary Case – Hughes et al. v. Northwestern University

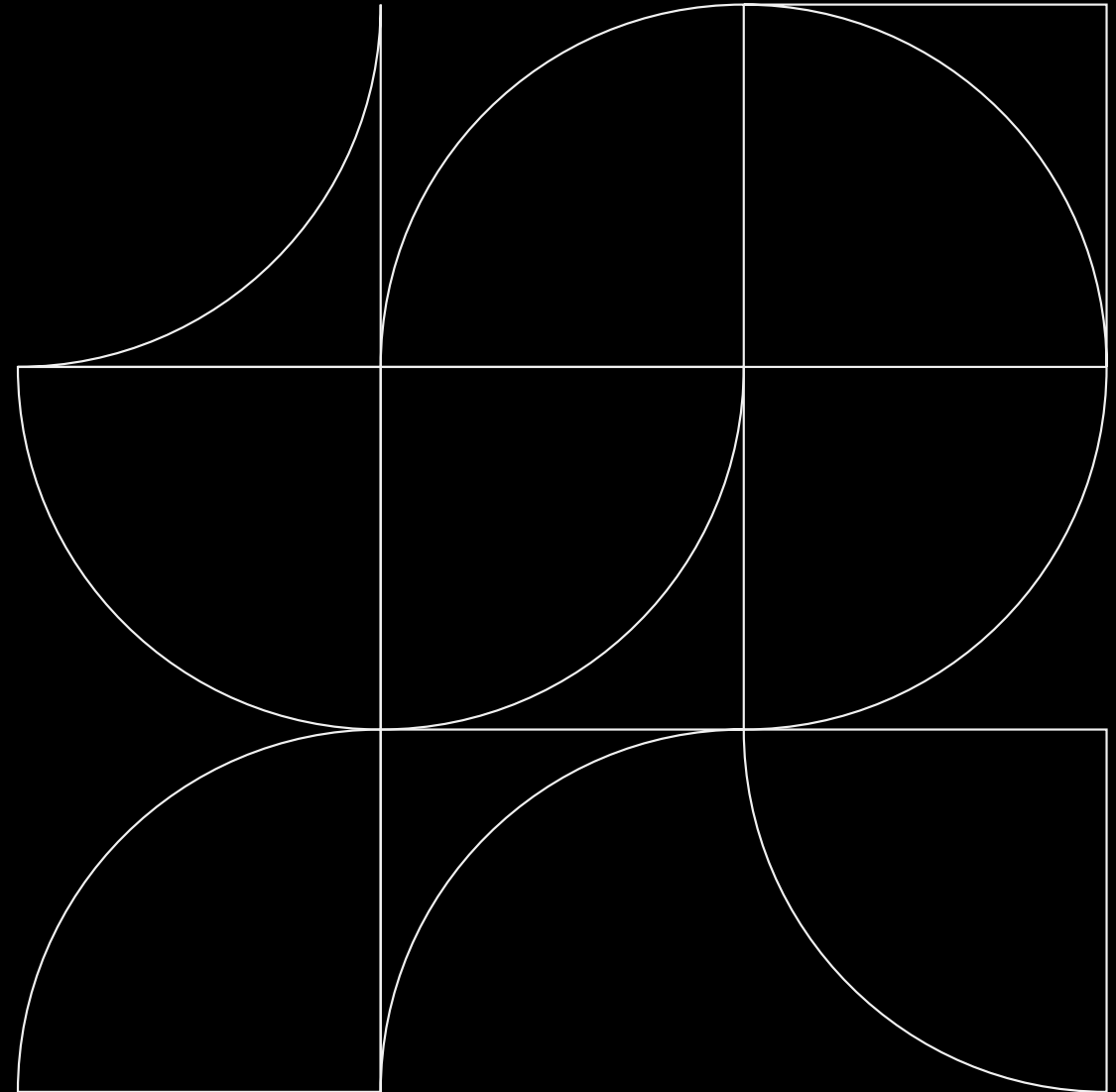


# Supreme Court Addresses Duties of Retirement Plan Fiduciaries

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- In January, 2022, the Supreme Court rejected the reasoning of the Seventh Circuit that offering enough good investment options satisfies ERISA's fiduciary duty of prudence
  - ERISA's duty of prudence requires fiduciaries to monitor investment options and remove imprudent ones
- Hughes alleged that Northwestern “failed to monitor and control” certain fund recordkeeping fees; listed mutual funds that “carried higher fees” than otherwise identical mutual funds; and offered “too many investment options,” thereby causing “participant confusion”
- Remanded the case for the Seventh Circuit to reconsider complaint
  - Limit, monitor and curate the plan's menu of investment options
  - Pay particular attention to sales loads, management fees and administrative charges

# Cryptocurrency in Retirement Plans



# Crypto Investments

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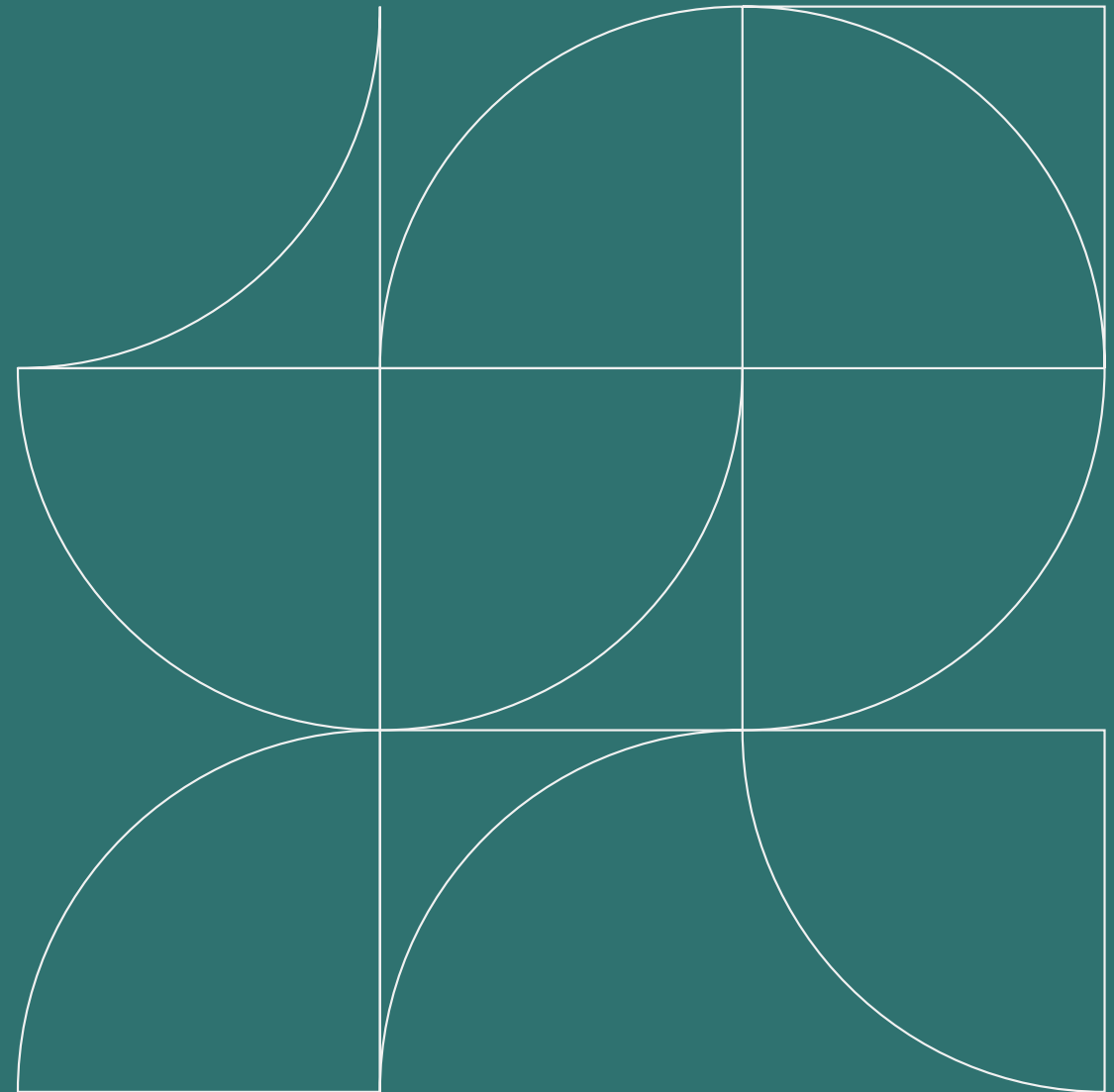
- DOL's Compliance Assistance Release No. 2022-01 on March 10, 2022 warns plan sponsors to use extreme caution before adding a cryptocurrency option (e.g., Bitcoin) to a 401(k) plan's investment menu
  - In response to President Biden's March 9, 2022 order directing federal agencies, including the DOL, to develop a national policy that promotes the "responsible development and use of digital assets"
- In an accompanying blog post, the DOL warned about cryptocurrency investments due to:
  - Volatility and speculative nature of crypto investments
  - Difficulty of enabling informed decisions
  - Custodial and record-keeping concerns
  - Valuation concerns
  - Unstable regulatory environment

# Crypto Investments

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- The DOL expects to investigate plans that offer participants cryptocurrency products, warning that:
  - “plan fiduciaries responsible for overseeing such investment options or allowing such investments through brokerage windows should expect to be questioned about how they can square their actions with their duties of prudence and loyalty in light of the risks described above.”

# DOL Proposed Regulation on ESG





# DOL Proposed Regulations – ESG

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- Shifting guidance on ESG factors
  - Under Biden, ESG factors are material to risk-return analysis
- Proposed regulations authorize fiduciaries to consider any factor that is material to the risk-return analysis, and provides the following ESG factors as examples:
  - Climate change related factors
  - Governance factors
  - Workplace practices
- Consideration of projected returns of the portfolio may often require fiduciary to evaluate the economic effect of climate change and other ESG factors of the particular investment or investment course of action

# DOL Proposed Regulations – ESG

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- Default Investments
  - Eliminates strict prohibition of use or consideration of ESG factors in QDIAs
  - Applies same standard to QDIAs as applies to other investment options
- Duty of Loyalty
  - Continues to prohibit fiduciaries from (i) subordinating the interest of participants and beneficiaries in their retirement income or financial benefits under plan to other objectives, and (ii) sacrificing returns or taking on additional risk to promote unrelated interests

thank  
you

**contact information**

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