FREQUENTLY ASKED QUESTIONS:
PENSION-LINKED EMERGENCY SAVINGS ACCOUNTS

The SECURE 2.0 Act of 2022, enacted Dec. 29, 2022, as Division T of the Consolidated Appropriations Act, 2023, P.L. 117-328, (SECURE 2.0) authorizes plans to include a new "pension-linked emergency savings account" (PLESA) feature. The PLESA rules are found in new sections 801 through 804 of the Employee Retirement Income Security Act of 1974 (ERISA), and in section 402A(e) of the Internal Revenue Code (Code), which include provisions that are largely parallel to the new ERISA provisions. The PLESA provisions are effective for plan years beginning after December 31, 2023.

These frequently asked questions (FAQs) provide general compliance information under ERISA regarding PLESAs. These FAQs have been prepared by the Department of Labor (Department) in consultation with the Department of the Treasury and Internal Revenue Service (IRS). These FAQs are designed to help employers, plan sponsors, and plan fiduciaries of ERISA plans, as well as participants and beneficiaries in such plans, understand and benefit from the new law.

A. ELIGIBILITY AND PARTICIPATION

Q 1: What is a PLESA?

In general, PLESAs are short-term savings accounts established and maintained within a defined contribution plan. Under section 801(b) of ERISA, a PLESA allows employees who are not highly compensated employees to make Roth contributions (a type of after-tax contributions) to a PLESA.[1] Employees who contribute to a PLESA may draw from the PLESA as frequently as monthly without reducing their retirement savings in their accounts within the linked defined contribution plans and without incurring the tax penalties ordinarily associated with early withdrawals from a retirement account. All of ERISA's protections apply to the PLESA regardless of whether the employee participates in the retirement savings portion of the plan.

Q 2: Who must be eligible to participate in a PLESA?

ERISA section 801(b)(1) provides that an individual must be eligible to participate in a plan's PLESA if they meet any age, service, and other eligibility requirements of the plan, and if they are not a highly compensated employee.

[1] Generally, highly compensated employees are defined under section 414(q) of the Code. The IRS has authority over section 414(q) of the Code.

Q 3: Can a plan sponsor establish eligibility criteria for a PLESA that are different from the criteria for eligibility to participate in the retirement savings portion of the plan?

ERISA section 801(b)(1) establishes statutory minimums for eligibility to participate in a PLESA.

Q 4: May employers automatically enroll employees in a PLESA?

Yes. An employer may decide to automatically enroll its employees into its PLESA program.[2] Once enrolled, a percentage of an employee's wages may be withheld and contributed to a PLESA. However, automatic enrollment is not the same as mandatory participation. Employees must be given written notification before they are automatically enrolled into a PLESA program, and they have the right under federal law to opt out and withdraw their money at no charge. *See* Question 17 below for discussion of notice requirements.

Q 5: Can the plan establish a minimum amount for opening a PLESA or a minimum balance requirement?

No. ERISA section 801(c), in relevant part, provides that a PLESA "shall not have a minimum contribution or account balance requirement." Thus, a plan cannot impose a minimum requirement on the amount required to open a PLESA or a minimum balance to be maintained in a PLESA. For example, in the Department's view, ERISA section 801(c) prohibits (a) any policy requiring closure and distribution of a PLESA based on a minimum balance requirement; (b) imposition of any penalty (*e.g.*, fees or suspension of withdrawal rights) for PLESAs that fall below a specified account balance; and (c) any policy requiring a minimum contribution amount per pay period.

Notwithstanding the above, a requirement that PLESA contributions be made in whole dollars is not an unreasonable administrative practice. Nor would it be unreasonable for a plan to require that percentage-based contributions be no less than one percent (1%) or be made in whole percent increments if (a) such requirements are applied uniformly to other participant contributions to the plan; and (b) participants are allowed to elect to have contributions made in whole dollar amounts as an alternative.

B. CONTRIBUTIONS

Q 6: What are the contribution rules that apply to PLESAs?

All contributions to a PLESA must be Roth contributions. ERISA section 801 provides that the portion of a PLESA attributable to participant contributions may not exceed the $2,500 maximum (as periodically indexed for inflation). Plan sponsors may choose to implement a PLESA with an automatic enrollment/automatic contribution feature, but the automatic contribution percentage must be at a rate of 3% or less of the compensation of the eligible participant unless the participant affirmatively elects a higher or lower percentage. In addition, contributions to a PLESA count toward the Code section 402(g) limit on elective deferrals

[2] The IRS also has interpretive authority over this automatic contribution provision.

($23,000 for 2024). For plans that provide a matching contribution, an employee's contributions to a PLESA must be eligible for matching contributions at the same matching rate established under the plan as for non-PLESA elective deferrals. All such matching contributions, including those attributable to PLESA contributions, will be allocated to the retirement savings portion of the plan and not the PLESA.

Q 7: Should the $2,500 limit be based on contributions or include earnings too?

In applying ERISA section 801's contribution limitation, plans have flexibility to either include or exclude earnings on the participant's contributions, so long as the portion of the account balance attributable to participant contributions does not exceed the express statutory limits set forth in ERISA section 801(d)(1)(a) under either distinct approach. For instance, if a plan applies the $2,500 limit in ERISA section 801(d)(1)(a)(i) and caps participant contributions at that amount, earnings credited to the account in excess of $2,500 would not constitute a violation of the $2,500 limit in ERISA section 801(d)(1)(a)(i) (the "exclusion approach" because earnings are excluded from calculation of the limitation). Alternatively, plans may focus on a participant's total account balance (both contributions and earnings) and prohibit contributions if the total account balance would exceed $2,500 (the "inclusion approach" because earnings are included in calculation of the limitation). The inclusion approach is permissible because ERISA section 801(d)(1)(a)(ii) allows the plan to limit the portion of a participant's account attributable to PLESA contributions to an amount less than $2,500.

Q 8: Can a plan include an annual limit for participant contributions to the PLESA in addition to the account balance limit?

No. ERISA section 801(d)(1) provides the applicable limits to participant contributions by an eligible PLESA participant. The imposition of an annual limit on participant PLESA contributions could restrict a participant from replenishing funds in the PLESA following a withdrawal. The statutory scheme implies an ability to make periodic withdrawals and replenishing contributions, in keeping with the emergency-savings nature of the account. A participant's contribution rights under ERISA section 801(d)(1), however, are subject to tax qualification contribution limits under the Internal Revenue Code and IRS guidance on anti-abuse constraints and other issues under Code section 402A(e).

Q 9: By when must an employer remit participant contributions to a PLESA?

The rules that apply with respect to contributions to individual account pension plans also apply to contributions to PLESAs. Thus, an employer or other plan sponsor should remit amounts withheld from wages to the PLESA as of the earliest date that such contributions can reasonably be segregated from the employer's general assets but in no case later than the 15th business day

of the month immediately following the month in which the contribution is either withheld or received by the employer. *See* 29 CFR §2510.3-102.

Q 10: What are the accounting and recordkeeping requirements for a PLESA?

ERISA section 801(c)(2)(A) requires plans to separately account for participant contributions to PLESAs and any earnings allocable to those contributions. It also requires plans to maintain separate recordkeeping with respect to each PLESA. PLESA funds may be held in a segregated omnibus account so long as the requirements in ERISA section 801(c)(2)(A) are satisfied.

C. DISTRIBUTIONS AND WITHDRAWALS

Q 11: Do participants need to demonstrate an emergency before making a withdrawal from their PLESA?

No. Nothing in ERISA section 801 requires a participant to demonstrate or certify the existence of an emergency or other need or event in order for a participant to obtain a withdrawal from a PLESA. Rather, ERISA section 801(c)(1)(A)(ii) states that withdrawals are made at the discretion of the participant. See also, Code section 402A(e)(7).

Q 12: Can a plan impose limitations or fees for withdrawals from a PLESA?

ERISA section 801(c)(1)(A)(ii) provides that PLESAs must allow for "withdrawal by the participant of the account balance, in whole or in part at the discretion of the participant, at least once per calendar month and for distribution of such withdrawal to the participant as soon as practicable from the date on which the participant elects to make such withdrawal[.]" Plans have the discretion to allow PLESA withdrawals more, but not less, frequently than once per calendar month.

Under ERISA section 801(c), PLESAs cannot be subject to any fees or charges, direct or indirect, solely on the basis of a withdrawal of funds from the PLESA for the first four withdrawals in a plan year. However, PLESAs may be subject to reasonable fees or charges in connection with any subsequent withdrawals, including reasonable reimbursement fees imposed for the incidental costs of handling of paper checks for payment of a withdrawal. Fees for subsequent withdrawals, whether called a "withdrawal fee," "account maintenance fee," or other similar term, would not be permissible if the amount exceeded a reasonable fee for the individual withdrawal or otherwise effectively constituted a fee or charge for one or more of the first four withdrawals.

Q 13: Are there administrative restrictions on how PLESA distributions are made?

ERISA section 801 does not include explicit restrictions on the manner in which plan administrators distribute withdrawals to PLESA participants, *e.g.*, via check, debit card, or electronic transfers.[3] Although the Department has statutory authority to impose "reasonable

[3] *Compare* Code section 72(p)(2)(D) (imposing restrictions on qualified plans' use of credit cards or other similar arrangement for loans).

restrictions" on PLESA administration, *see* ERISA section 801(c)(1)(B), the Department does not, at this time, intend to establish restrictions on the manner in which PLESA funds may be distributed to PLESA participants.

D. ADMINISTRATION AND INVESTMENT

Q 14: With respect to the designated investment option for a PLESA, what types of investment products are permissible? For example, money market funds, certificates of deposit, stable value funds, guaranteed insurance contracts, etc.

ERISA section 801(c)(1)(A)(iii) requires that PLESA contributions be held as cash, in an interest-bearing deposit account, or in an investment product designed to "maintain over the term of the investment the dollar value that is equal to the amount invested in the product and preserve principal and provide a reasonable rate of return, whether or not such return is guaranteed, consistent with the need for liquidity[.]" The investment product also must be offered by a state-regulated or federally-regulated financial institution and may be subject to, as permitted by the Department, reasonable restrictions.

Plan fiduciaries may select any prudent investment product that satisfies the statutory criteria in ERISA section 801(c)(1)(A)(iii), regardless of the type of financial institution that issues or underwrites the investment product, the industry in which the institution operates, or the principal regulators of the investment product or its issuer or underwriter.

An overall objective of the statute and the predicate for the ERISA section 404(c) relief set forth in SECURE 2.0 section 127(d) is capital preservation and liquidity consistent with immediate access to savings to respond to unexpected financial needs. Investment products that contain liquidity constraints, such as surrender charges at the participant or plan level, are generally incompatible with this objective.

Q 15: Can the investment option designated for PLESAs be the same as the plan's qualified default investment alternative (QDIA) under 29 CFR §2550.404c-5(e)(4)(i)?

Generally, no. Contributions to a PLESA must be invested in products designed to preserve participants' contributions while providing liquidity and a reasonable rate of return, as discussed in Question 14. However, if a plan fiduciary has designated a limited duration QDIA pursuant to 29 CFR §2550.404c-5(e)(4)(iv), that QDIA also may be designated for the investment of PLESA contributions.

Q 16: Separate from fees charged solely on the basis of a withdrawal, discussed in Question 12, can a plan impose fees on PLESAs for general account administration?

Yes. Reasonable fees, expenses, or other charges associated with administration may be imposed directly on PLESAs. Alternatively, reasonable fees, expenses, or charges associated with the administration of PLESAs may be imposed against accounts in the individual account plan of which the PLESA is a part. Under either approach, imposition of such fees, expenses or other

charges would be subject to ERISA's fiduciary standards. *See* Field Assistance Bulletin No. 2003-03 for guidance on charging plan assets and allocation of fees.

Q 17: Do plan administrators have to make disclosures to participants in a plan offering a PLESA?

Yes. Section 801(d)(3) of ERISA, in relevant part, states "[w]ith respect to an individual account plan with a [PLESA] feature, the administrator of the plan shall, not less than 30 days and not more than 90 days prior to date of the first contribution to the [PLESA], including any contribution under an automatic contribution arrangement . . ., or the date of any adjustment to the participant contribution rate . . ., and not less than annually thereafter, shall furnish to the participant a notice describing (i) the purpose of the account, which is for short-term, emergency savings; (ii) the limits on, and tax treatment of, contributions to the [PLESA] of the participant; (iii) any fees, expenses, restrictions, or charges associated with such [PLESA]; (iv) procedures for electing to make contributions to or opting out of the [PLESA], for changing participant contribution rates for such [PLESA], and for making participant withdrawals from such [PLESA], including any limits on frequency; (v) as applicable, the amount of the intended contribution to such [PLESA] or the change in the percentage of the compensation of the participant of such contribution; (vi) the amount in the emergency savings account and the amount or percentage of compensation that a participant has contributed to the [PLESA]; (vii) the designated investment option . . . for amounts contributed to the [PLESA]; (viii) the options . . . for the account balance of the [PLESA] after termination of the employment of the participant or termination by the plan sponsor of the [PLESA]; and (ix) the ability of a participant who becomes a highly compensated employee . . . to . . . withdraw any account balance from a [PLESA] and the restriction on the ability of such a participant to make further contributions to the [PLESA]."

Section 127(f) of SECURE 2.0 grants the Departments of Labor and Treasury authority to issue a model notice for plan administrators to satisfy their obligations under ERISA section 801(d)(3). Although a model notice is not contained in these FAQs, the Departments are evaluating whether, and the extent to which, a model notice is feasible and may be helpful in future guidance.

Q 18: Does ERISA address whether plan administrators may combine the PLESA notices with other notices required by ERISA?

Yes. ERISA section 801(d)(3)(C) states that the initial and annual notices that must be furnished to PLESA participants "may be included with any other notice under [ERISA], including under section 404(c)(5)(B) or 514(e)(3), or under section 401(k)(13)(E) or 414(w)(4) of the Internal Revenue Code of 1986, if such other notice is provided to the participant at the time required for such notice."

The Department previously issued guidance permitting consolidation of the four notices referenced in ERISA section 801(d)(3) – ERISA's qualified default investment alternative (ERISA section 404(c)(5)(B)) and related preemption (ERISA section 514(e)(3)) notices and the Code's qualified automatic contribution arrangement (Code section 401(k)(13)(E)) and eligible

automatic contribution arrangement (Code section 414(w)(4)) notices.[4] The Department later extended this flexibility to include the Code section 401(k)(12)(D) notice required for safe harbor defined contribution plans, a fifth notice that may be combined with the four referenced above.[5] The Department retains its position on consolidation as stated in this prior guidance. The Department is treating this FAQ's restatement of its position in prior guidance on consolidation as satisfying SECURE 2.0 section 341, which directs the Department and the Department of the Treasury to adopt regulations providing that a plan "may, but is not required to, consolidate 2 or more of the notices required under sections 404(c)(5)(B) and 514(e)(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1104(c)(5)(B) and 29 U.S.C. 1144(e)(3)) and sections 401(k)(12)(D), 401(k)(13)(E), and 414(w)(4) of the Internal Revenue Code of 1986 into a single notice[.]"

Q 19: Must the individual's PLESA account balance be included in the individual's periodic pension benefit statement under ERISA section 105 or in the investment disclosures required by ERISA section 404 and 29 CFR §2550.404a-5?

In light of the statutory disclosure requirements for PLESAs that duplicate other statutory disclosure requirements generally applicable to individual account plans under Title I of ERISA, and in the absence of additional guidance by the Department, the Department will not require pension benefit statements under ERISA section 105 or disclosures furnished under 29 CFR §2550.404(a)(5) to address a plan's PLESA feature, provided that the plan administrator satisfies the notice requirements of ERISA section 801(d)(3)(A) and (B).

Q 20: What are a plan's annual reporting (Form 5500) responsibilities for PLESAs?

The 2023 Form 5500 does not have specific reporting requirements for PLESAs because the relevant statutory provisions do not authorize plans to offer PLESAs until January 1, 2024. With respect to the 2024 Form 5500, the Department is working on adding a PLESA feature code for plans to indicate on the Form 5500 and Form 5500-SF that the plan offers a PLESA feature and instructions that would tell filers that information on PLESAs should be aggregated and reported in relevant line items, *e.g.*, contributions, investments, fees and expenses, and distributions, on the forms, schedules, and attachments.

In addition, the Department is evaluating what changes should be made to the annual return/reports to collect data needed to comply with its obligations under ERISA section 804(1) to conduct a study and report to Congress on whether the amount of the dollar limitation under ERISA section 801(d)(1)(A) is sufficient; whether the limitation on the contribution rate under ERISA section 801(d)(2)(A) is appropriate; and the extent to which plan sponsors offer such accounts, and participants participate in such accounts, and the resulting impact on participant retirement savings. The Department's evaluation will include the impact on retirement savings

[4] *See* 29 CFR 2550.404c-5(f)(3) and 72 FR at 60455. *See also* *http://www.irs.gov/pub/irs-tege/sample_notice.pdf* (model notice issued jointly with the Internal Revenue Service for plan administrators to satisfy each of these four notice requirements).

[5] *See* Field Assistance Bulletin 2008-03 (April 29, 2008) at Question 10.

leakage and the effect of such accounts on retirement plan participation by low- and moderate-income households.

Questions concerning these FAQs can be directed to Stephen Sklenar at (202) 693-8500.