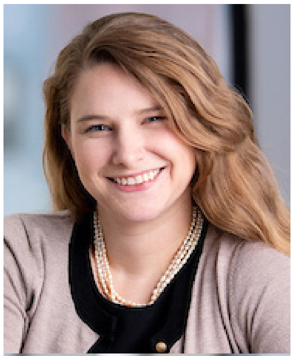
TRUCKER ✦ HUSS

BENEFITS REPORT

CalSavers vs. Qualified Employee Benefit Plans: Choosing the Right Retirement Plan in California



CATHERINE L. REAGAN
and ROBERT R. GOWER

MARCH 2023

For employers operating in California who are considering alternatives to the CalSavers program, there are a number of qualified employee benefit plan options that may be a good fit. CalSavers is a program created by state law to help California residents save money for retirement. Today, most employers with five or more California-based employees are required to register their employees for the CalSavers program unless they offer a qualified plan. In 2022, the California legislature amended the CalSavers program to require employers with one or more California-based employees to either register for the CalSavers program or file an exemption by December 31, 2025. This article provides an overview of the CalSavers program and a summary of the defined contribution qualified plans that employers may offer in lieu of participation in CalSavers.

INDIVIDUAL ARTICLES WILL BE AVAILABLE AT TRUCKERHUSS.COM/PUBLICATIONS

IN THIS ISSUE...

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With more than 30 legal professionals practicing solely in employee benefits law, Trucker Huss is one of the largest employee benefits specialty law firms in the country. Our in-depth knowledge and breadth of experience on all issues confronting employee benefit plans, and their sponsors, fiduciaries and service providers, translate into real-world, practical solutions for our clients.

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ERISA AND EMPLOYEE BENEFITS ATTORNEYS

135 Main Street, 9th Floor
San Francisco, California 94105-1815

15760 Ventura Blvd, Suite 910
Los Angeles, California 91436-2964

329 NE Couch St., Suite 200
Portland, Oregon 97232-1332

Tel: (415) 788-3111
Fax: (415) 421-2017
Email: info@truckerhuss.com
www.truckerhuss.com

Trucker ✦ Huss Welcomes Distinguished Benefits Counsel Scott E. Galbreath to Lead Firm's Equity and Executive Compensation Practice

Trucker Huss, APC is pleased to announce that Scott E. Galbreath, a highly experienced benefits attorney and Fellow of the American College of Employee Benefits Counsel, has joined the firm and will lead its Equity and Executive Compensation practice group.

Galbreath previously led the benefits practice group at a Sacramento-area law firm.

"We are very pleased to have Scott join the Trucker Huss team," said Bob Schwartz, the firm's president. "Scott brings a wealth of experience to the team and will be a great resource for clients on executive compensation as well as other benefits issues." Galbreath is the firm's 9th attorney to have been inducted into the highly prestigious American College of Employee Benefits Counsel, noted Schwartz.

Galbreath's extensive experience includes working with clients on all types of nonqualified deferred compensation plans, supplemental executive retirement plans, 457(b) and 457(f) plans for executives of tax-exempt organizations, equity and synthetic equity plans, such as restricted stock and phantom stock or stock appreciation rights, golden parachutes, and change-in-control and severance arrangements. He also assists clients with Internal Revenue Code section 83(b) and 409A compliance, and correcting qualified plan compliance errors under IRS and Department of Labor remedial programs.

I. What Is the CalSavers Program?

In response to growing concern that many California residents were not adequately saving for retirement, in 2012, the California legislature passed the California Secure Choice Retirement Savings Trust Act, which created the CalSavers program. Studies have shown that individuals are significantly more likely to save for retirement if they are automatically enrolled in a retirement savings program. CalSavers was designed to ensure that all working Californians have a path to financial security in retirement, even if their employers do not offer retirement plans. After the program survived a legal challenge by the Howard Jarvis Taxpayers Association, which alleged CalSavers was preempted by the Employee Retirement Income Security Act of 1974 (ERISA), the CalSavers program took effect in phases, with most employers required to register or file their exemption by June 2022. Under the CalSavers program, Eligible Employees' contributions are held in Roth Individual Retirement Accounts (Roth IRAs). This program is administered by the CalSavers Retirement Savings Board, an agency of the State of California. The CalSavers Retirement Savings Board selects the investment options, which include target date retirement funds, an environmental, social and governance (ESG) fund, a core bond fund, a global equity fund, and a money market fund. As of January 31, 2023, CalSavers included more than 117,000 employers, 403,000 employees, and

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$423,000,000 in total assets. This program is offered to California residents at no cost to taxpayers, as all of the administrative costs are paid by the individual savers through fees allocated proportionally to their assets in the program.

Who Is an Eligible Employer and What Are Their Obligations?

Employers with an average of at least five California-based employees (at least one of whom is over 18) are eligible employers and must register for the CalSavers program or file an exemption. The average number of employees is calculated using the number of employees reported to the Employment Development Department (EDD) on the Quarterly Contribution Return and Report of Wages (DE 9) and the Quarterly Contribution Return and Report of Wages (Continuation) (DE 9C) filings from the prior year, rounding for fractions. Note: Employers with an average of one to four California-based employees must register for CalSavers or file their exemption by December 31, 2025. Employers are exempt from the program if they do not employ any individual other than the owner, they are a government entity, religious entity, or tribal organization, or they offer a qualified retirement plan. The eligible qualified plans that would exempt an employer from CalSavers are discussed further below.

When an employer registers for CalSavers, they must provide information regarding their eligible employees. Eligible employers also have an ongoing obligation to provide information regarding eligible new employees within 30 days of their hire date. Eligible employees are then automatically enrolled in CalSavers, with contributions set at 5% of compensation, after tax. Those contribution amounts increase annually by 1% up to 8% of compensation. The employees can opt out or change their contribution amounts by contacting CalSavers directly. Eligible employers are responsible for deducting contributions each pay period, and must remit those funds within 7 days. Eligible employers do not have to send notices to their employees; CalSavers contacts the employees directly to provide information about the program.

If an employer fails to timely register or file an exemption, they will receive a notice of their failure to comply. If they do not comply or otherwise file an exemption within 90 days of receiving that notice, employers are subject to penalties of $250 per employee. If they do not correct the issue after 180 days or more after receiving the notice, employers are subject to an additional penalty of $500 per employee .

Which Employers Are Exempt from CalSavers?

Employers are exempt from the program if they sponsor an eligible qualified retirement plan, including ERISA plans created under the following Internal Revenue Code (IRC) Sections:

- IRC Section 401(a) — Qualified Plans (including profit-sharing plans and defined benefit plans);
- IRC Section 401(k) plans, including multiple employer plans (MEPs) or pooled employer plans (PEPs);
- IRC Section 403(a) — Qualified Annuity Plans or 403(b) Tax-Sheltered Annuity Plans;
- IRC Section 408(k) — Simplified Employee Pension (SEP) plans;
- IRC Section 408(p) — Savings Incentive Match Plan for Employees of Small Employers (SIMPLE) IRA Plans; and
- Payroll deduction IRAs with automatic enrollment.

For employers that are part of a controlled group of businesses, if one of the controlled group members sponsors a qualified plan, then all of the employers in the controlled group are exempt from CalSavers. This applies even if the employer does not participate in the controlled group plan. However, all employers in the controlled group must independently determine whether they are an Eligible Employer based on their own average number of California-based employees. All employers must also individually register or file an exemption from CalSavers.

TRUCKER HUSS COMMENT ON SECTION I:
Each employer should decide whether CalSavers or another qualified plan alternative is the right choice for their business. There are advantages to enrolling in the CalSavers program; but there are also advantages to offering eligible qualified plans instead. The CalSavers program is easy to enroll in, and there is

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no cost to employers to administer the program. Employers only need to provide information for new employees and remit contributions every pay period. Also, employers may be able to work with payroll providers to remit contributions on their behalf. Unlike qualified retirement plans, there is no fiduciary liability for employers in the CalSavers program and the program is not subject to annual filings, such as the Form 5500. However, in the CalSavers program, employers and their employees are not able to use the tax advantages available with some of the qualified retirement plan alternatives, such as pre-tax contributions, employer contributions (including profit sharing contributions and matching contributions), the small business tax deductions for creating a new retirement plan, and higher contribution and income limits. For example, CalSavers contributions are subject to Roth IRA contribution limits (for 2023: $6,500, and $7,500 for employees over the age of 50). For employers with employees earning more than $153,000 ($228,000 if married, filing jointly), highly compensated employees will not be able to make contributions to the CalSavers program due to IRC compensation limits for Roth IRAs. Employers are also not able to change the investment options available to their employees in CalSavers. For some employers, creating a qualified retirement plan that offers tax advantages to the employer and its employees may be preferrable to participating in CalSavers.

II. What Are the Qualified Retirement Plan Alternatives to CalSavers?

For employers looking for an alternative to the CalSavers program, there are several qualified plan design options available, ranging in complexity from simple and easy-to-administer plans to more complex plans with customizable features, all of which are listed above in Section I. Most qualified retirement plans allow employees to make contributions towards their retirement using both pre-tax and after-tax dollars. Additionally, employers may have flexibility to make employer contributions, depending on the type of qualified plan they choose. There are a number of plan design options available, including various vesting requirement options that promote employee retention.

To help businesses select the qualified retirement plan that works best for them, there is a chart comparing CalSavers with defined contribution plan options on pages 6–7. There are also defined benefit plan options available to employers; however, those types of plans are not specifically addressed in this article.

Employers also gain tax advantages by setting up and maintaining qualified plans. For example, employers with 100 or fewer employees may be eligible for the Credit for Small Employer Pension Plan Startup Costs. This credit was expanded by the SECURE Act 2.0, a new law that became effective in December 2022. The Credit for Small Employer Pension Plan Startup Costs is equal to 100% of eligible startup costs for a qualified plan for the first two years, then 75% in the third year, then 50% in the 4th year and 25% in the fifth and final year for the credit. The credit is equal to a maximum of $5,000 — or $100 per participant for up to 50 participants — and is phased out for employers with between 51 to 100 employees. The costs eligible for the credit include the cost to set up and administer a new retirement plan and the cost of educating employees about the plan. Based on recent changes to the law (effective retroactively for plans created after December 31, 2019), this credit is now available to new employers that join an existing Multiple Employer Plan (MEP) or Pooled Employer Plan (PEP) — where another entity may sponsor the plan, and unrelated employers participate for the benefit of their employees.

There are many reasons to create a qualified retirement plan; however, there are also some risks associated with maintaining a qualified plan. All qualified plans are subject to Department of Labor and Internal Revenue Service regulatory schemes, and the plan fiduciaries are responsible for administering the plan in compliance with applicable federal law and guidance. Employers (as a plan sponsor and/or administrator) are subject to ERISA's fiduciary duties, including the duties of prudence and loyalty. Fiduciaries must act as a reasonably prudent person would, for the exclusive purpose of providing benefits to participants and their beneficiaries, and defraying the reasonable expenses of administering the plan. Plan sponsors and plan fiduciaries also have a fiduciary duty to select service providers for the plan and an ongoing duty to monitor those service providers. To carry out these

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duties, ERISA plan fiduciaries are expected to retain experts, as needed, to help guide them in maintaining and administering an ERISA plan. If a fiduciary breaches their duty, they may be personally liable to restore losses to the plan. It is important to speak to an expert in ERISA before creating a new plan.

Considerations for Choosing an ERISA Plan or CalSavers

When considering the alternatives discussed in this article, there are several important questions to ask:

- **How much do you want to save or to allow your employees to save?** If the goal is to allow employees to save more than $6,500 a year, or to allow high-income employees to save, then an ERISA benefit plan may be preferable to CalSavers.
- **What is the most attractive option for talent retention?** Employers may want to include vesting requirements to encourage employees to stay with the company to maintain institutional knowledge.
- **What are the corresponding set-up and maintenance costs associated with each option?** CalSavers is administered at no cost to employers, but small employers are able to take advantage of the Credit for Small Employer Pension Plan Startup Costs, which has tax advantages CalSavers does not offer.
- **Do you want to make employer contributions?** CalSavers does not allow employer contributions, but many of the ERISA plan options do.
- **What are your employee population considerations?** High-earning employees will not be able to participate in CalSavers, and qualified plan options may provide them with increased savings limits. Therefore, their employers may want to consider an ERISA plan instead.

If an employer is considering which ERISA plan option works best for them, attached to this article is a chart highlighting the key differences between the various ERISA defined contribution plan options and CalSavers (see pages 6–7).

If you would like more information about these options and how they can be tailored to fit your business needs, one of our Trucker Huss attorneys would be happy to guide you in this process.

Please join us for a live discussion of recent developments in employee benefits at our:

Employee Benefits Briefing

April 12th • Four Seasons Hotel • San Francisco

See the invitation and registration link on page 11.

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Type of Retirement/ Plan Program	Administrative Complexity	Type of Contributions	Employee Contribution Limits	Additional Catch-Up Contributions (Over Age 50)	Employee Compensation Limits	Employer Contributions
CalSavers Program	None, state administers	Employee only Roth IRA contributions	Yes, for 2023, limit is $6,500	Yes, for 2023, limit is $1,000	Yes, for 2023, employees that earn more than $153,000 ($228,000 if married, filing jointly) **may not participate at all**	None allowed
Simplified Employee Pension (SEP) Plan	Basic plan design	Employer contributions only	None	N/A	Yes, for 2023, only compensation up to $330,000 may be used for employer contributions	Contributions must be a uniform percentage for every eligible employee. For 2023, lesser of 25% of compensation or $66,000 for employer contributions
Savings Incentive Match Plan for Employees (SIMPLE) IRA	Basic plan design, prototype plans available	Employee pre-tax contributions and employer contributions	Yes, for 2023, limit is $15,500	Yes, for 2023, limit is $3,500	Depends	Must contribute either matching contribution of up to 3% of compensation (not limited by the annual compensation limit); or 2% nonelective contribution for each eligible employee (limited by annual compensation limit, $330,000 for 2023)
SIMPLE 401(k) Plan	Basic plan design, prototype plans available	Employee pre-tax contributions and employer contributions	Yes, for 2023, limit is $15,500	Yes, for 2023, limit is $3,500	Yes, for 2023, only compensation up to $330,000 may be used for employer contributions	Must contribute either matching contribution of up to 3% of compensation or 2% nonelective contribution for each eligible employee
401(k) Plan	Basic plan design, prototype plans, complex plan design available	Employee pre-tax contributions, after-tax and Roth contributions and employer contributions	Yes, for 2023, limit is $22,500	Yes, for 2023, limit is $7,500	Yes, for 2023, only compensation up to $330,000 may be used for employer contributions	Option to include matching contributions, non-elective contributions, and profit sharing contributions. More design flexibility, even with prototype plans
Multiple Employer Plan (MEP)	Group 401(k) plan	Employee pre-tax contributions, after-tax and Roth contributions and employer contributions	Yes, for 2023, limit is $22,500	Yes, for 2023, limit is $7,500	Yes, for 2023, only compensation up to $330,000 may be used for employer contributions	Option to include matching contributions, non-elective contributions, and profit sharing contributions. More design flexibility, even with prototype plans
Pooled Employer Plan (PEP)	Group 401(k) plan	Employee pre-tax contributions, after-tax and Roth contributions and employer contributions	Yes, for 2023, limit is $22,500	Yes, for 2023, limit is $7,500	Yes, for 2023, only compensation up to $330,000 may be used for employer contributions	Option to include matching contributions, non-elective contributions, and profit sharing contributions. More design flexibility, even with prototype plans

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Type of Retirement/ Plan Program	In Service Withdrawal Permitted	Loans Permitted	Reporting Requirements	Employer Size Limits	Other Considerations
CalSavers Program	May take out contributions any time, earnings may be subject to 10% penalty and tax if taken before age 59 1/2	No	Only employee roster information, must report new employees within 30 days of new hires	Must register if more than 5 average employees. If 1 or more eligible employees, must register by 12/31/2025	No employer fiduciary responsibility, not an ERISA plan. CalSavers program provides notices to employees. Optional notices available to employers.
Simplified Employee Pension (SEP) Plan	Yes, but may be subject to 10% penalty if under age 59 ½	No	Simplified reporting requirements, Form 5498	No	Employees are 100% vested in all employer contributions. Requires annual notices to employees. Relatively limited fiduciary responsibility.
Savings Incentive Match Plan for Employees (SIMPLE) IRA	Yes, but may be subject to 10% penalty if under age 59 ½	No	W-2	100 or fewer employees	Employer (including employers in a controlled group) cannot have any other qualified retirement plan. Requires annual notices to employees. Relatively limited fiduciary responsibility. Employees are 100% vested in all employer contributions.
SIMPLE 401(k) Plan	Yes, but may be subject to 10% penalty if under age 59 ½	Yes	Form 5500	100 or fewer employees	Employer (including employers in a controlled group) cannot have any other qualified retirement plan. Employees are 100% vested in all employer contributions. Requires annual notices to employees. Relatively limited fiduciary responsibility. Not subject to non-discrimination rules and testing requirements.
401(k) Plan	Yes, but may be subject to 10% penalty if under age 59 ½	Yes	Form 5500	None	Employer has more design flexibility, including vesting rules. Other qualified plans may be maintained. Safe harbor designs are available. Subject to non-discrimination rules and testing requirements. Greater risk for plan failures and correction costs. Increased fiduciary responsibility and potential liability. Note, for new plans beginning after 2024, they must include an auto-enrollment feature.
Multiple Employer Plan (MEP)	Yes, but may be subject to 10% penalty if under age 59 ½	Yes	Form 5500	None	May be sponsored by: A single entity, industry, professional, or ownership group; professional employer organization (PEO); or association of employers in a geographic region, industry or trade. Plan sponsor takes on most fiduciary duties. Employer has fiduciary duty to evaluate benefits and plan before becoming a participating employer. Lower cost for administering based on group pricing. Note, for new plans beginning after 2024, they must include an auto-enrollment feature.
Pooled Employer Plan (PEP)	Yes, but may be subject to 10% penalty if under age 59 ½	Yes	Form 5500	None	Participating employers do not have to have anything in common with each other. Pooled Plan Provider takes on most fiduciary duties. Employer has fiduciary duty to evaluate benefits and plan before becoming a participating employer. Lower cost for administering based on group pricing. Note, for new plans beginning after 2024, they must include an auto-enrollment feature.

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New Rules Under SECURE 2.0 for Correcting Overpayments Add Protection for Plan Fiduciaries

RYAN KADEVARI and NICHOLAS J. WHITE

MARCH 2023

On December 29, 2022, President Biden signed the SECURE 2.0 Act of 2022 ("SECURE 2.0") into law as part of the Consolidated Appropriations Act of 2023. SECURE 2.0, which builds upon the original Setting Every Community Up for Retirement Enhancement Act, contains numerous developments that affect retirement plans. Significant among these developments are changes to the methods available to plan sponsors for correcting plan overpayments. These new rules provide plan fiduciaries with increased discretion and greater latitude for correcting overpayments, and they emphasize protecting the financial security of participants and beneficiaries.

Plan Overpayments and Historical Correction Methods for Overpayments Under EPCRS

Among retirement plans, a relatively common error occurs when a plan mistakenly pays a participant or beneficiary more money than they are owed, which results in a plan qualification failure. Historically, correction procedures for retirement plans, including defined benefit and defined contribution plans, are contained in the Employee Plans Compliance Resolution System (EPCRS), which is promulgated by the Internal Revenue Service (IRS) through various Revenue Procedures. (See IRS Revenue Procedure 2021-30 for the most recent consolidation statement of EPCRS.) EPCRS contains several approved methodologies for correcting overpayments, including attempts to recover overpayments directly or by offsetting future benefit payments to recoup the overpayment. In certain circumstances, EPCRS permits plan sponsors to correct overpayment failures without seeking recoupment of an overpayment from the participant or beneficiary. However, the plan sponsor (or another person) has been generally responsible for contributing any overpayment amounts that are not repaid to the plan. EPCRS also requires that a plan notify the overpayment recipient that the overpayments are not eligible for favorable tax treatment (i.e., not eligible for tax-free rollover). As discussed in detail below, SECURE 2.0 directly amended the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (the "Code") and codified new rules governing plan fiduciaries' attempts to recover plan overpayments, including liability protection for fiduciaries who choose not to seek repayment of inadvertent overpayments.

SECURE 2.0 Changes to Overpayment Recovery

Effective as of December 29, 2022, new ERISA section 206(h) provides liability protection for plan fiduciaries who choose not to seek recovery of an inadvertent overpayment to a participant or beneficiary. The protection extends to the decision not to seek restoration from the plan sponsor.

In the case of a defined benefit plan, the relief does not permit a failure to recoup inadvertent overpayments if that would adversely affect the ability of the plan to pay benefits due to other participants and beneficiaries. Where a defined contribution plan fiduciary does not seek restoration from the plan sponsor, the fiduciary must be able to restore funds without having to make a contribution to the plan (e.g., a restoration from a forfeiture account).

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The relief also applies when the fiduciary chooses not to seek repayment from another fiduciary whose breach was responsible for the overpayment — but only if the plan has established "prudent procedures" to prevent and minimize the overpayment of benefits, and the relevant plan fiduciaries have followed such procedures.

SECURE 2.0 adds parallel rules under new section 414(aa) of the Internal Revenue Code (the "Code") to maintain a plan's tax-qualified status in the event a fiduciary decides not to seek recoupment of an overpayment or takes alternative corrective actions. Specifically, Code section 414(aa) permits, in lieu of a reduction of future benefit payments to recoup an overpayment, the adoption of a retroactive plan amendment that entitles the participant to the higher payments made (i.e., the overpayment amount). Section 6.06 of EPCRS currently permits an increase in benefits to eliminate an overpayment; SECURE 2.0 now codifies that option. In making such a retroactive amendment, a plan sponsor must still observe any limitations imposed by Code section 401(a)(17) (limiting the amount of annual compensation that can be used to calculate a participant's retirement benefit) and Code section 415 (limiting maximum annual contributions to a plan).

Plan fiduciaries may still qualify for the relief from liability even if they seek recovery of the overpayment

A plan or plan fiduciary will not fail to qualify for relief merely because, after discovering an overpayment, the plan or plan fiduciary takes action to recoup the overpayment, either by reducing future benefit payments to the correct amount or by seeking recovery from the person(s) responsible for the overpayment.

If a plan fiduciary does not seek recovery of the overpayment, the recipient is permitted to continue to treat the overpayment as eligible for a tax-free rollover (if it otherwise qualifies as an eligible rollover dist ribution). Alternatively, if the plan fiduciary decides to recover the overpayment, the portion of the overpayment shall be permitted to be returned to the plan and treated as an eligible rollover distribution transferred to the plan.

A more complicated scenario arises if an overpayment is made to a participant or beneficiary and is subsequently rolled over to another plan. In such an instance, if a plan fiduciary seeks recoupment but the participant or beneficiary who received the overpayment disputes the recoupment, then the dispute is subject to the plan's claims procedures. The plan fiduciary that made the overpayment is tasked with notifying the plan that received the overpayment as a rollover of the dispute. Upon notice, the recipient plan is then required to retain the overpayment pending resolution of the claim.

Limitations on SECURE 2.0's Fiduciary Relief

Under the new law, there are rules in place limiting a plan fiduciary's ability to recover overpayments from participants and beneficiaries. These rules are intended to take into account the burden and potential hardship faced by retirees and their beneficiaries who receive overpayments — typically through no fault of their own. In such instances, the impact of a plan's recovery can be financially significant and jeopardize a retiree's financial security. Accordingly, if a plan fiduciary does decide to recover overpayments from a participant or beneficiary, they must comply with the following new limitation on the recovery:

- no recovery if the first overpayment occurred more than three years before written notification of the overpayment error to the participant or beneficiary, except in the case of fraud or misrepresentation by the participant or beneficiary;
- no attempt to recoup an overpayment to a participant may be made against a beneficiary, including a spouse or former spouse of the participant; and
- no recovery of interest or collection costs or fees on the overpayment.

If the plan seeks to recoup overpayments of an annuity by reducing the participant's or beneficiary's future benefit payments:

- the amount recouped each calendar year may not exceed 10% of the total overpayment amount;
- future benefit payments may not be reduced below 90% of the periodic amount otherwise payable under the plan; and
- the reduction must stop as soon as the full amount of the overpayment is recovered.

If recovery is made via one or more installment payments, the sum of those payments in any calendar year may not

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exceed the amount the plan could recover by reducing future benefit payments. Recoupment of amounts other than annuity payments will be subject to requirements that are to be developed by the Department of Labor.

SECURE 2.0 also makes clear that recoupment of overpayments to a participant cannot be sought from any beneficiary of the participant, including a spouse, surviving spouse, former spouse, or other beneficiary. However, this rule raises a question (which will likely be resolved through future guidance) regarding recoupment of payments made erroneously to a participant after their death and whether these may be recouped through various means, including stop payment orders or reversals of direct deposits. SECURE 2.0's prohibition on recoupment from spouses or other beneficiaries appears to be aimed at preventing recoupment from a spouse or beneficiary receiving benefits as part of a Qualified Joint and Survivor Annuity (QJSA). However, it is currently unclear whether the prohibition also applies in situations involving overpayments made after a participant's death.

In addition, a plan's efforts to recover overpayments may not include threats of litigation unless the responsible fiduciary determines the plan is reasonably likely to recover more than the cost of recovery. The use of a collection agency or similar third party to recover an overpayment is now prohibited under ERISA, unless there is a court judgment or settlement agreement authorizing such recovery and the participant or beneficiary ignores or rejects the plan's recovery efforts short of litigation.

Furthermore, in line with SECURE 2.0's emphasis on taking into account participant and beneficiary financial security, a plan fiduciary may take into account the level of financial hardship that recoupment would likely impose on the participant or beneficiary in determining whether to pursue recoupment (or determining the amount of the recoupment).

Lastly, participants and beneficiaries from whom an overpayment is sought must be permitted to appeal a plan's recovery pursuant to the plan's claims and appeals procedures. Notably, SECURE 2.0 clarifies that these limitations don't apply to recovery of overpayments from third parties (e.g., the third-party administrators or recordkeepers).

Although SECURE 2.0 creates additional protections from overpayment recovery, the new law does not provide blanket protection to all participants and beneficiaries. The foregoing limitations on a plan's right to recover overpayments — other than the right to file a claim or appeal — do not apply to protect a participant or beneficiary who is "culpable" with respect to an overpayment. A participant or beneficiary is "culpable" if the individual bears responsibility for the overpayment (such as through misrepresentations or omissions that led to the overpayment) or knew the benefit payment or payments were materially in excess of the correct amount.

However, an individual is not culpable with respect to an overpayment if:

- they merely believed the benefit payment or payments were or might be in excess of the correct amount,
- they raised that question with an authorized plan representative, and
- they were told the payment or payments were not in excess of the correct amount.

Effective Date of SECURE 2.0 Overpayment Relief

The amendments made by these provisions of SECURE 2.0 are effective immediately (i.e., December 29, 2022, the date SECURE 2.0 was signed into law). However, the relief is retroactive for certain actions taken prior to December 29, 2022. Specifically, plans, fiduciaries, employers, and plan sponsors are entitled to rely on:

- a reasonable good faith interpretation of then-existing administrative guidance for inadvertent benefit overpayment recoupments and recoveries that commenced before December 29, 2022; and
- determinations made before enactment by the responsible plan fiduciary, in the exercise of its fiduciary discretion, not to seek recoupment or recovery of all or part of an inadvertent benefit overpayment.

In addition, any recovery of overpayments that was in place prior to the enactment of SECURE 2.0 may continue after the effective date. Please contact one of our attorneys if you have any questions regarding correction of benefit overpayments.

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Employee Benefits Briefing

April 12, 2023
8:00 a.m. – 12:00 p.m.
(Breakfast provided during registration 8–8:30)

The Four Seasons Hotel
757 Market Street
San Francisco, CA 94103

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Trucker Huss invites you to attend our complimentary annual Employee Benefits Briefing, covering recent developments including:

- **ISSUES IMPACTING QUALIFIED RETIREMENT PLANS**
  The latest developments regarding SECURE 2.0, ESG investing, EPCRS, plan amendments and other hot topics.
- **THE LATEST IN HEALTH & WELFARE**
  The landscape is ever-changing; stay current on fiduciary duties under the Consolidated Appropriations Act, 2021.
- **LITIGATION LESSONS AND MINIMIZING RISKS**
  Recent developments in ERISA litigation and tips on fulfilling your fiduciary duties.
- **EXECUTIVE COMPENSATION** — Recent trends.

FIRM NEWS

On February 10, **Brian Murray** and **Brad Huss** addressed *Hot Topics in ERISA Litigation* at the ABA Tax Section Employee Benefits Committee meeting in San Diego.

On March 30, **Angel Garrett** will participate in an ABA JCEB webinar panel presentation, *The End of the Federal Covid-19 Emergency Declarations.* This webinar will address the ways termination of these pandemic measures will impact employee benefit plans and their participants.

Brad Huss and **Nick White** will be speaking at the NIPA Annual Forum and Expo (NAFE), held April 23–26, in Nashville. Brad will be providing an ERISA litigation update, including recent trends in 401(k) fee litigation and ERISA preemption. Nick will be speaking on missing participant issues, including related Internal Revenue Service and Department of Labor guidance, and best practices for implementing an effective missing participant policy.

Two articles by Trucker Huss attorneys are featured in the Spring 2023 newsletter of the ABA Tort Trial and Insurance Practice Section (TIPS) of the Employee Benefits Committee:

> **Nicolas Deguines** and **Kevin Nolt** wrote on *SECURE 2.0 Provisions Impacting Employer-Sponsored Retirement Plans*, outlining substantive changes and key provisions affecting employer-sponsored retirement plans.
>
> **Joe Faucher** and **Brian Murray** wrote on *Indemnity and Contribution in ERISA Litigation*, addressing the question of whether fiduciary defendants in cases brought under the Employee Retirement Income Security Act of 1974 (ERISA) can sue other fiduciaries for indemnity and/or contribution to compel others to bear responsibility for alleged breaches of duty.

The Trucker ✦ Huss Benefits Report is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of Benefits Report are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

Editor: Nicholas J. White, nwhite@truckerhuss.com

In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this Benefits Report.

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TRUCKER ✦ HUSS

Jahiz Noel Agard
jagard@truckerhuss.com
415-277-8022

Mia Butzbaugh
mbutzbaugh@truckerhuss.com
415-277-8073

Sarah Bowen
sbowen@truckerhuss.com
415-277-8059

Adrine A. Cargill
acargill@truckerhuss.com
415-277-8012

Nicolas D. Deguines
ndeguines@truckerhuss.com
415-277-8036

Joseph C. Faucher
jfaucher@truckerhuss.com
213-537-1017

Angel Garrett
agarrett@truckerhuss.com
415-277-8066

Scott E. Galbreath
sgalbreath@truckerhuss.com
415-277-8080

Robert R. Gower
rgower@truckerhuss.com
415-277-8002

Alaina C. Harwood
aharwood@truckerhuss.com
(415) 277-8047

R. Bradford Huss
bhuss@truckerhuss.com
415-277-8007

Zachary T. Isenhour
zisenhour@truckerhuss.com
415-277-8005

Ryan Kadevari
rkadevari@truckerhuss.com
415-788-3111

Clarissa A. Kang
ckang@truckerhuss.com
415-277-8014

Sarah Kanter
skanter@truckerhuss.com
415-277-8053

T. Katuri Kaye
kkaye@truckerhuss.com
415-788-3111

Elizabeth L. Loh
eloh@truckerhuss.com
415-277-8056

Brian D. Murray
bmurray@truckerhuss.com
213-537-1016

Kevin E. Nolt
knolt@truckerhuss.com
415-277-8017

Yatindra Pandya
ypandya@truckerhuss.com
415-277-8063

Barbara P. Pletcher
bpletcher@truckerhuss.com
415-277-8040

Mary E. Powell
mpowell@truckerhuss.com
415-277-8006

Catherine L. Reagan
creagan@truckerhuss.com
415-277-8037

Dylan D. Rudolph
drudolph@truckerhuss.com
415-277-8028

Robert F. Schwartz
rschwartz@truckerhuss.com
415-277-8008

Charles A. Storke
cstorke@truckerhuss.com
415-277-8018

Joelle Tavan
jtavan@truckerhuss.com
415-277-8030

Jennifer Truong
jtruong@truckerhuss.com
415-277-8072

Nicholas J. White
nwhite@truckerhuss.com
213-537-1018

PARALEGALS

Jenna McHenry
jmchenry@truckerhuss.com
415-277-8020

Susan Quintanar
squintanar@truckerhuss.com
415-277-8069

TRUCKER ✦ HUSS
A PROFESSIONAL CORPORATION
ERISA AND EMPLOYEE BENEFITS ATTORNEYS

135 Main Street, 9th Floor
San Francisco, California 94105-1815

15760 Ventura Blvd, Suite 910
Los Angeles, California 91436-2964

329 NE Couch St., Suite 200
Portland, Oregon 97232-1332

Tel: (415) 788-3111
Fax: (415) 421-2017
Email: info@truckerhuss.com
www.truckerhuss.com