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RE: Long-Term, Part-Time Employee Rules Proposed Regulation

To Whom it May Concern:

Ferenczy Benefits Law Center, LLC is a prominent law firm practicing exclusively in the area of employee benefit plans. Our client base ranges from solo plans to employers with 100,000 employees, to third party administrators and large institutions/recordkeepers that support all retirement plan types and sizes. The authors of this letter also provide professional education to other benefits practitioners, with more than 4,000 professionals regularly attending our free webcasts, and we have many subscribers to our books on retirement plan law. This provides us with a unique perspective as to the impact the Long-Term, Part-Time Employee Rules (“LTPT Rules”) will have on plan sponsors and their participants, as well as the professional benefits community. We are writing to outline some of the areas that cause us and our clients concerns, as well as considerations that we hope can be addressed and clarified in the final LTPT regulations.

We appreciate the thoughtful approach the Treasury took in the proposed LTPT regulations issued November 27, 2023 (the “Proposed Regs”). They address many of the key questions practitioners have had and provide several areas of valuable insight and flexibility.

We thank the Treasury for providing this comment period in relation to the Proposed Regs. We offer our thoughts with the hope that they will inspire changes to the Proposed Regs that will make it easier for plan sponsors to administer the LTPT Rules correctly. We offer our time and availability to the Treasury in the event that it seeks further discussion on any of the points contained herein.

Summary of Issues Presented

This comment letter raises the following LTPT questions and issues:

Issue Category #1: Eligibility

1. Is the plan required to have the same definition of eligibility-related provisions (such as computation period, entry date, and hours of service) for LTPT purposes as for general plan eligibility requirements?

2. Can LTPT service be defined in terms of elapsed time, rather than hours of service?
3. What effect does the non-use of an age 21 eligibility requirement have on LTPT status and determination?
4. How does one evaluate whether a classification exclusion is a proxy for an age/service exclusion?

Issue Category #2: Correction of LTPT Enrollment Failures

1. Is there a correction period during which no QNEC needs to be provided to the LTPT in relation to a missed deferral opportunity, as there is (for example) for employees who should have been automatically enrolled?
2. How is the missed deferral opportunity calculated for LTPTs?

Issue Category #3: Nondiscrimination and Coverage Determination

1. How do the special testing rules for “otherwise excludible employees” apply if the employer has elected to include LTPTs in such testing? Is there any impact on these rules if the employer elects not to include them?

Issue Category #4: LTPTs and Automatic Enrollment

1. If the plan contains an EACA, must the LTPTs be covered by the EACA for the employer to use the extended deadline for making corrections of failed ADP and ACP tests? Does it matter whether the LTPTs are included or excluded for testing purposes?
2. Must LTPTs be subject to mandatory automatic enrollment under Code section 414A in 2025?

Issue #1

Clarification of Application of Eligibility Provisions to LTPTs

Plan sponsors and practitioners have asked us several specific questions relating to eligibility-related issues in the Proposed Regs. We and they would welcome clarification of these issues in the final regulations.

1. Issues Related to Eligibility Determination under Code Section 410.

There are several details that must be addressed about determining eligibility and entry of the LTPT employees to the plan, and whether there may be differences between the plan provisions for LTPTs than there are for the other employees.

In particular:

- a. Can a plan use different eligibility computation periods to determine LTPT status than it uses for the plan’s normal eligibility requirements?

For example, many plans use the plan year for eligibility computation periods following the first employment year. However, this provision commonly reduces the waiting period for an employee to enter the plan. Could such a plan define the eligibility computation period for LTPT determination to begin on the anniversaries of the employment commencement date, while maintaining the plan year for subsequent eligibility computation periods for other (non-LTPT determination) eligibility purposes?

We do not see anything in the law or the Proposed Regs that would preclude the plan from providing for different definitions of eligibility computation periods for LTPT and the normal eligibility rules, but we would welcome verification.

- b. Can a plan define “entry dates” for when participants become LTPT Employees and enter the plan than are used for normal eligibility purposes?

For example, can a plan use monthly entry for those who complete a year of service, but use semi-annual entry dates in relation to when LTPT Employees enter the plan?

Again, we believe the plan can use separate entry date systems but would welcome a clarification in the final regulations.

- c. Can a plan use a different method of determining hours of service for the LTPT eligibility rules than is used for other eligibility purposes?

The Proposed Regs helpfully suggest the use of DOL equivalencies to compute hours of service to determine LTPT status. We see no reason why a plan should not be able to use equivalencies for determining LTPT-related hours of service, while using actual hours for the normal eligibility requirements. We would appreciate it if Treasury would clarify that this is acceptable.

2. *Elapsed Time Considerations*

Can a plan sponsor simplify the analysis of who is an LTPT simply by using elapsed time to determine if whether the participant has fulfilled the two- or three-consecutive-year service requirement?

Our main consideration is the service spanning rules. While it seems axiomatic that, if someone needs to have two consecutive years of service in which he or she works at least 500 hours, an eligibility requirement of one or two years of elapsed time (which does not require any baseline hours of service or that the years be consecutive) should be a lesser eligibility requirement.

However, an employee who terminates and is rehired during his or her first several years of service may be an exception to the presumed axiom. For example, consider the following employee of a company that defines a year of service for LTPT purposes to be a year of elapsed time:

- Employee is hired on 1/1/2024.

- Employee works until 6/1/2024, and then terminates employment with 600 hours of service.
- The employee returns to work on 9/1/2025 and completes 501 hours by December 31, 2025.

That employee has two consecutive years (2024 and 2025) during which she has worked at least 500 hours. However, because the time during which the employee was absent from work spans more than 12 months, the service spanning rules do not apply, and the employee fails to have even one year of elapsed time service.

Due to the potential of such a set of facts, we would be inclined to believe that it is impermissible to express the LTPT two- or three-year employment requirement in terms of elapsed time. We would appreciate it if the final regulations would confirm or deny this interpretation and explain how these rules should be applied.

3. Age 21 Eligibility Requirement

The Proposed Regs clarify that the LTPT must be at least age 21 when he or she fulfills the LTPT service requirement. Further, the Proposed Regs make it clear that, if an employee enters the plan faster than he or she would under the LTPT rules, that employee will never be an LTPT.

If the plan permits an employee to enter using the normal LTPT service eligibility rules (two- or three-consecutive years with at least 500 hours), but without the age 21 requirement, will the participant be an LTPT? We would argue that she would not be, because she entered the plan before she would have if the LTPT rules had been applied.

What if the plan has such a provision, but the employee is over age 21 when he or she becomes employed? In that circumstance, although the eligibility requirements are less than the LTPT rules require, that person would enter on the exact date that he or she would have come into the plan had the LTPT rules been fully applicable. Would that person be considered to be an LTPT?

4. Eligibility Category Exclusions

We are very grateful to the Treasury for clarifying that category exclusions, such as job classifications, geographic locations, and certain employers in a controlled or affiliated service group, may be applied to LTPTs in the same manner as they apply for other employees. We also appreciate the Treasury's concern that such classifications can function as a proxy for exclusions directed specifically at the LTPTs, and find the section of the Proposed Regs that outlines some examples of what is impermissible to be very helpful.

Unfortunately, real life is commonly less cut-and-dried than the examples we select, and practitioners require more explanation of how to evaluate – on a practical level – which employee exclusions constitutes a proxy for age/service requirements (“Proxy”). We assume that it is not just the intent of the employer in framing the exclusion that is dispositive, as that creates a significant proof barrier. The question then becomes: how do we weigh the various facts and circumstances in making this determination?

Our concerns are best expressed through two examples.

Example 1: Plan Sponsor A has a company with 100 full-time employees and 10 employees who qualify as LTPTs. We know from the Proposed Regs that, if A placed these employees in their own division and then excluded that division from plan participation, that would be an impermissible Proxy.

Suppose, however, that A has created a division for valid business purposes, unrelated to plan participation or employee hours. This division is unique in the company, as it relies in part on part-time employees, while the balance of the company uses only full-time labor. Therefore, all 10 of the company's LTPT employees are in that division. In addition, 15 of the full-time employees of A are in that division.

In analyzing whether the creation of this division is a Proxy, what weight should be given to these competing considerations:

- There are employees in the division other than the LTPTs;
- The number of non-LTPT employees that are in the division, compared to the number of LTPTs in the division;
- The percentage of non-LTPT employees in the division, compared to the total non-LTPT employees in the company.

Example 2: Plan Sponsor B is a law firm. The 401(k) plan sponsored by B excludes associate attorneys who practice law in the real estate department. Three of the ten affected associates in the real estate department would otherwise be LTPTs under the plan.

B has other LTPTs in the firm that are covered by the plan.

In analyzing whether this exclusion is a Proxy, should we, and how should we, take into account:

- The fact the plan covers other LTPTs in the company;
- The fact that the plan excludes other non-LTPTs in the company;
- The respective percentages or numbers of excluded vs. included non-LTPT employees and/or LTPTs.

Under both of these examples, both LTPT and non-LTPT employees are potentially affected by the exclusion. Is that fact alone (without further analysis) sufficient to rebut any assumption that the exclusion is a Proxy? Is the fact that, in the second example, there are LTPT employees included in the plan, despite the exclusion of some LTPTs, sufficient contradiction of the premise that the exclusion is a proxy? For particularly small employers, how many LTPTs must be in the plan or how many non-LTPTs must be excluded to rebut the Proxy concern?

Issue #2:
Correcting Failures to Enroll LTPTs

1. Correction Period and Required Corrective Contribution for Enrollment Failures

The LTPT rules require that plans using more robust eligibility requirements maintain two sets of rules, thereby complicating administration. Our firm commonly works with plan sponsors to correct failures under the Employee Plans Compliance Resolution System (“EPCRS”) currently embodied in Revenue Procedure 2021-30. We expect that there will be several plan sponsors that will experience failures in ensuring the timely entry of LTPTs to the Plan.

This problem has been exacerbated for the current plan years due to the late release of the Proposed Regs. While understandable given all the changes under SECURE (“S1”) and SECURE 2.0 (“S2”) requiring Treasury attention, the Proposed Regs were released November 27, 2023, a mere 34 days before most plans would have the first LTPT entry date. This requires a quick administrative reaction by plan sponsors, and it is conceivable that errors will be made both this year and in the future.

Off-calendar year plans may have – much to their surprise –already experienced a failure to enroll LTPT employees that they did not anticipate due to a lack of guidance. In particular, while the public believed that the LTPT rules were not effective until January 1, 2024, some employees may have been required to enter the plan as LTPTs in 2023.

Example: A plan has a July 1 through June 30 plan year. The first eligibility computation period is the participant’s employment year, switching for subsequent eligibility computer periods to plan years. An employee was hired January 1, 2021, and worked 600 hours per year. Such an employee would have one year of LTPT eligibility service for his first employment year (January 1, 2021, through December 31, 2021); a second LTPT year of eligibility service for the plan year that began during the first employment year (from July 1, 2021, through June, 30, 2022); and a third year of eligibility service from July 1, 2022, through June 2023. Using the statutory entry dates under Code section 410(a)(5), coupled with the requirements of Code section 401(k)(15)(D), the LTPT employee would be required to enter the plan as of July 1, 2023.

It would be common that, believing that the LTPT rules were not effective until January 1, 2024, the plan sponsor would not have allowed the employee to enter until that date. As a result, without any intention of doing so, this plan sponsor now has an Operational Failure, as defined in EPCRS, risking plan disqualification.

EPCRS (and, subsequently S2 section 350) provides plan sponsors with an amnesty period for correcting automatic enrollment failures that are discovered within a reasonable time. This generous provision permits plan sponsors to discover and correct failures to enroll participants up to 9½ months following the end of the plan year in which the failure occurred (unless the participant so advises the plan sponsor sooner) without requiring that the sponsor deposit any contribution to make up for the participant’s missed deferral opportunity. This has dispelled much of the concern that plan sponsors and practitioners had about the otherwise potentially

expensive ramifications of a missed automatic enrollment and has made automatic enrollment much more accepted by the benefits community.

A similar approach should be implemented in light of the complications of the LTPT Rules, which require a quantum change in enrollment procedures.

We request that the Service offer a similar correction scheme for the failure to properly enroll eligible LTPTs. Under our proposal, the correction window for repairing the failure to enroll LTPTs would end on the earlier of 9½ months following the end of the plan year in which the failure occurred or the last day of the month following the date that the LTPT employee brings the failure to the plan sponsor's attention. As a result, the plan sponsor in the above example would not be required to make a qualified nonelective contribution ("QNEC") in relation to the missed deferral opportunity, provided the proper 45-day notice is provided, but would need to fund any missed matching contribution (assuming such provision applied to LTPT employees), plus earnings.

This proposed correction option would allow plan sponsors who have already had an inadvertent Operational Failure due to the delayed release of the Proposed Regs, to correct the failure without unreasonable financial losses that were incurred through no fault of their own. It would also permit reasonable correction on a going forward basis of relatively short-time inadvertent exclusions of eligible LTPTs.

The modification under S2 of the LTPT eligibility from three years to two as of January 1, 2025, will likely cause further Operational Failures. Having a reasonable and definitive correction in place will be very helpful to practitioners who are dealing with the reality and complications of these new rules.

2. Assumed LTPT Deferral Rate if Failure to Enroll Continues Past Proposed Correction Period

We expect that there will be situations in which a failure to enroll an LTPT extends beyond the 9½ month correction window discussed above. In such situation, we assume that the plan sponsor will be required to make a QNEC to recompense the affected participant for his or her missed deferral opportunity ("MDO").

EPCRS generally requires that, if a participant elected to make deferrals and that election was not properly implemented, the MDO is a percentage of the rate selected by the participant that was not implemented timely. That makes sense if the failure relates to implementation, as opposed to non-enrollment.

However, if the participant was not given an opportunity to make such an election, the presumed deferral rate (called the "missed deferral" rate) under EPCRS is determined in various manners, depending on the surrounding circumstances. The normal default is that the missed deferral rate is equal to the average rate of deferral for similarly situated participants.

It is likely that the deferrals of LTPTs will not align with the deferrals by non-LTPT employees, due to dissimilar incomes and circumstances. Therefore, we recommend that the average rate of deferral, if used to determine the MDO, be calculated with regard only to LTPTs and that it not be inclusive of the deferral rates of non-LTPTs.

Further, the average rate of LTPT deferral generally will not be easily available, as the LTPTs will often not be part of the nondiscrimination testing under which such rate is normally determined. In safe harbor 401(k) plans, where nondiscrimination testing is avoided entirely, EPCRS presumes a missed deferral rate of 3%.

In light of the fact that it is not expected that LTPTs will defer compensation at a rate equivalent to that of the non-LTPT employees and that it will be common that no nondiscrimination testing of LTPT deferrals will be performed, we recommend that the Service adopt a presumed missed deferral rate of not more than 3% for LTPTs in relation to failures to enroll.

Issue #3:
Coverage and Nondiscrimination Testing of LTPTs

The Proposed Regs provide a solid framework for coverage and nondiscrimination testing for LTPT Employees, but questions remain for which clarification would be welcome.

For example, suppose a plan provides that employees are eligible to defer as of the earlier of (a) when they satisfy the eligibility requirements of Code §410(a)(1); or (b) when they become LTPT Employees. Suppose further that the employer elects to permissively disaggregate the plan for coverage and nondiscrimination testing purposes under Treas. Reg. §1.410(b)-7(c)(3), the so-called “otherwise excludable employee” rule. LTPT Employees generally meet the definition of “otherwise excludable employees” in Treas. Reg. §1.410(b)-6(b)(3)(ii), and we assume that they will be included in this group for coverage and nondiscrimination testing, if the employer elects to include LTPT Employees in the nondiscrimination testing.

On the other hand, if the employer elects to exclude LTPT Employees from coverage and nondiscrimination testing, pursuant to Prop. Treas. Reg. §1.401(k)-5(f)(1), the LTPT Employees would be completely disregarded for testing purposes, regardless of the application of the otherwise excludable employee rule.

We respectfully request that Treasury confirm this interpretation or that additional guidance clarifying the Treasury’s position be provided.

Issue #4:
Long-Term Part-Time Employees and Eligible Automatic Contribution Arrangements

Although the Proposed Regs are very comprehensive, they did not discuss the impact of the LTPT Rules on automatic contribution arrangements in general, and on eligible automatic contribution arrangements (“EACAs”) under Code §414(w), in particular. In light of the fact that automatic enrollment will be mandatory for most 401(k), 403(b), and governmental 457(b) plans in 2025, understanding the application of these rules to LTPTs is critical.

This issue encompasses two concerns. The first is: how the EACA rules relating to the extension of the correction period for ADP and ACP testing failures are affected by the presence of LTPT employees. The second question is whether employers will be required to automatically enroll LTPT Employees in accordance with the provisions of Code section 414A, when it becomes effective next year.

1. EACAs and the Correction Window for Failed ADP/ACP Testing

The EACA regulations permit the plan to exclude defined groups of employees from automatic enrollment coverage under the EACA. [Treas. Reg. §1.414(w)-1(c)] However, Treas. Reg. §54.4979-1(c)(1) states that the extended six-month period for an EACA to distribute excess contributions and excess aggregate contributions to affected participants without incurring a 10% excise tax applies only if all the eligible NHCEs and HCEs are covered employees under the EACA. Under this regulatory provision, LTPT Employees must be subject to automatic enrollment under the EACA for the plan to avail itself of the six-month delayed correction rule.

We believe, as a matter of policy, that while the foregoing result makes sense in the context of a plan that includes LTPT Employees in coverage and nondiscrimination testing, it should not be applicable if the employer that elects to exclude LTPT Employees from coverage and other nondiscrimination testing under Code §401(k)(15)(B)(i)(II). This section (and the LTPT rules, in general) is designed to require an employer to offer salary deferrals to a largely uncovered population, while having negligible effect on the normal plan operations. To require that an employer cover the LTPTs under an EACA or risk losing the extended correction period when the LTPTs are disregarded for nondiscrimination and coverage testing would have just such a punitive effect.

2. LTPTs and Mandatory Automatic Enrollment

Both the law and the Proposed Regs are silent as to whether the mandatory automatic enrollment rules of Code section 414A, which become effective in 2025, will be required to apply to the LTPT employee group.

While the benefit community certainly appreciates that automatic enrollment tends to increase savings by employees who might not otherwise volunteer to do so, there is an argument to be made that most LTPTs are lower wage earners who are less able to afford salary deferral contributions than the general population. Further, there is considerable concern by our clients – both service providers and plan sponsors – that automatically enrolling the LTPT workforce may be more difficult administratively, particularly for industries in which the LTPT population is significant. There is also the concern that the result will be small accounts that will be largely eaten by fees when a distribution is processed.

Nonetheless, our firm has no position as to whether mandatory automatic enrollment should or should not be applicable to the LTPT employees. What we are concerned about, however, is the lack of definitive guidance on this topic. We respectfully request that the final regulations address whether LTPTs must be automatically enrolled in accordance with Code section 414A.


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We thank you again for requesting input from the benefits community on these issues. We look forward to augmented guidance in the future.

Very truly yours,



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