SECURE 2.0 PASSES!

MAKES MORE KEY CHANGES TO RETIREMENT PLANS

January 6, 2023

Passed by Congress on December 23, 2022 as part of the Consolidated Appropriations Act, 2023, the SECURE 2.0 Act of 2022 (SECURE 2.0) contains a number of provisions that affect qualified retirement plans. In this client advisory, we have provided an overview of certain key retirement plan provisions of SECURE 2.0, as well as a summary list of additional retirement plan provisions included in SECURE 2.0. Unless otherwise specified, all provisions described below are generally effective as of the first day of the plan year beginning after December 31, 2023.

Required Automatic Enrollment and Escalation

SECURE 2.0 requires that new 401(k) plans and 403(b) plans provide for an automatic enrollment feature for plan years beginning after December 31, 2024. The initial automatic enrollment rate must be at least 3%, and no more than 10%, of compensation. These plans must also provide for an automatic escalation of 1% to be applied to an automatically enrolled participant's deferral rate each year up to a total deferral rate of at least 10%, but no more than 15%.

As with all automatic enrollment features, the participant may elect to opt out of the automatic enrollment and escalation. The automatic enrollment feature must be set up as an eligible automatic contribution arrangement (EACA) and permit participants who are automatically enrolled to opt out of the automatic deferrals within 90 days of the first deferral.

Retirement plans in existence prior to the date of enactment of SECURE 2.0 (the "Date of Enactment") are exempt from the new automatic enrollment and escalation requirement. In addition, there are certain exemptions from the requirement for employers that have been in existence less than 3 years or that have fewer than 10 employees and for church plans and governmental plans. However, employers that adopt an existing multiple employer plan after the Date of Enactment are not exempt from the requirement.

Required Minimum Distribution Age Increased Again

As we noted in our client advisory on the initial SECURE Act **found here**, SECURE 1.0 increased the age at which required minimum distributions (RMDs) must commence from age 70 ½ to age 72 for individuals who attain age 70 ½ after December 31, 2019 (i.e., individuals born after June 30, 1949). SECURE 2.0 increases the RMD age again: to 73 for individuals who turn age 72 on or after January 1, 2023, and to age 75 for individuals who turn 74 on or after January 1, 2033.

Emergency Expense Distributions

A 401(a) plan, a 403(b) plan, a 401(k) plan, or a governmental 457(b) plan may permit participants to receive one emergency distribution of up to $1,000 per calendar year to cover unforeseeable or immediate financial needs relating to personal or family emergency expenses. This emergency distribution is exempt from the 10% early distribution penalty tax. A plan may rely on an employee's written certification that the employee has such an unforeseeable or immediate financial need. Distribution recipients have the option to repay the distribution amount into the plan within 3 years, but may not take another emergency expense distribution within 3 years unless the earlier distribution has been repaid.

Distributions for Victims of Domestic Abuse

A 401(a) plan, a 403(b) plan, a 401(k) plan, or a governmental 457(b) plan may permit a participant who is a domestic abuse victim to take a distribution up to the lesser of $10,000 (indexed) or 50% of the participants vested account balance. The distribution must be taken during the 1-year period beginning on any date on which the individual is a victim of domestic abuse by a spouse or domestic partner. A participant may self-certify that he or she is eligible to receive such a distribution. The distributions are exempt from the 10% early distribution penalty tax and may be repaid to an eligible retirement plan over 3 years. Any income taxes will be refunded on the distributed money that is repaid to the plan.

Emergency Savings Accounts

Plan sponsors may offer an emergency savings account linked to their defined contribution retirement plan. Participants who are not highly compensated employees may contribute (on a post-tax, Roth basis) a maximum of $2,500 (indexed), or such lower amount that may be set by the plan sponsor. The account must allow for withdrawal by the participant at least once per calendar month, and the first 4 distributions per year from the account cannot be subject to fees or charges. Distributions from an emergency savings account are exempt from the 10% early distribution penalty tax.

Catch-Up Contributions

All catch-up contributions made to 401(a) plan, a 403(b) plan, a 401(k) plan, or a governmental 457(b) plan by employees making greater than $145,000 (indexed) in the prior year must be made on a Roth basis, effective for taxable years beginning after December 31, 2023. Additionally, for taxable years beginning after December 31, 2024, for participants aged 60 through 63, the catch-up contribution limit for retirement plans (other than SIMPLE plans) is increased to the greater of $10,000 (indexed) or 150% of the then-applicable regular catch-up limit.

Treatment of Employer Contributions as Roth

A plan sponsor may permit employees to designate employer matching contributions or non-elective contributions as Roth contributions, effective for contributions made after the Date of Enactment. Such contributions must be 100% vested when made.

Starter 401(k) Plans

Employers that do not currently sponsor a retirement plan may establish a new type of simplified retirement plan (a “Starter 401(k)” or “Safe Harbor 403(b)”) that is generally exempt from nondiscrimination and top-heavy testing requirements. The new plan must include automatic enrollment of at least 3% and no more than 15% of compensation. Annual deferrals under the new plan are limited to the IRA limit of $6,000, with an additional $1,000 in catch-up contributions (both limits are indexed). Employer contributions to the plan are not required.

National Retirement Savings Database

The Department of Labor is tasked with creating a national online database (i.e., Retirement Savings Lost and Found) within 2 years of the Date of Enactment that contains information on qualified retirement plan benefits owed to missing, lost, or nonresponsive participants and beneficiaries. The database will assist participants and beneficiaries in finding benefits in both defined contribution and defined benefit plans.

Matching Contributions Permitted on Student Loan Payments

Plan sponsors may treat “qualified student loan payments” as elective deferrals for purposes of matching contributions under a 401(k) plan, a 403(b) plan or a governmental 457(b) plan. The ADP test may be applied separately to employees who receive matching contributions on student loan payments. The plan sponsor may rely on the employee’s self-certification of the student loan payments.

Notice Requirements for Unenrolled Participants

Effective for plan years beginning after December 31, 2022, with certain exceptions, participant notices required under ERISA and the Internal Revenue Code are generally no longer required to be provided to unenrolled retirement plan participants as long as an annual notice of eligibility to participate in the plan is provided to the unenrolled participant, and any notice document is provided upon request.

QUICK HITTERS - ADDITIONAL PROVISIONS OF NOTE IN SECURE 2.0

- **Start-up Credit Increased**: The existing credit for small employer pension plan start-up costs is increased from 50% to 100% of qualified start-up costs for employers with 50 or fewer employees, effective for taxable years beginning after December 31, 2022.

- **Small Financial Incentives to Defer**: Plan sponsors may provide small immediate financial incentives, such as low dollar amount gift cards, to employees who elect to contribute to a 401(k) or 403(b) plan, effective for plan years beginning after the Date of Enactment.

- **Automatic Portability**: Services providing for the automatic transfer of a participant's default IRA balance from a previous qualified plan's automatic IRA rollover into the participants new employer's retirement plan are permitted, effective as of one year following the Date of Enactment.

- **Long-Term, Part-Time Workers Rule ("LTPT Rule") Changed**: The 3-consecutive years of service (with at least 500 hours) requirement under the original SECURE Act LTPT Rule is reduced to 2 consecutive years of service. Pre-2021 service is disregarded for vesting purposes under the new LTPT Rule. The new LTPT Rule is extended to 403(b) Plans as well. For more information on the LTPT Rule, please see our client advisory on the original SECURE Act here.

- **Recovery of Retirement Plan Overpayments**: Plans will not be disqualified if the plan sponsor chooses not to seek recovery of inadvertent benefit overpayments to participants and, in certain cases, such overpayments may be treated as eligible rollover distributions, effective immediately and retroactively in certain situations.

- **Mandatory Distribution Threshold Increased**: The limit on involuntary distributions (i.e., the automatic IRA rollover limit) is increased from $5,000 to $7,000 for distributions occurring after December 31, 2023.

- **SCP Under EPCRS is Expanded**: Additional types of failures are allowed to be corrected under the Self-Correction Program under the IRS Employee Plans Compliance Resolution System, including participant loan errors, effective immediately. SECURE 2.0 also extends the period during which a failure may be self-corrected generally, so long as certain requirements are satisfied.

- **Governmental 457(b) Plan Deferral Elections**: Deferral contribution elections in governmental 457(b) plans no longer must be made prior to the first day of the month in which the contribution will be made, but, instead, must be made before the compensation to which the deferral is being applied is available to the individual, effective for taxable years beginning after the Date of Enactment.

- **Otherwise Excludable Rule Permitted for Top Heavy Testing**: Plan sponsors may perform the top-heavy test separately for non-excludable and excludable employees.

- **QBAD Repayments Limited to 3 Years**: The repayment of Qualified Birth or Adoption Distributions (QBADs) to retirement plans is limited to a period of 3 years from the date of the QBAD, effective for QBADs made after the Date of Enactment.

- **Hardship Self-Certification**: Plan sponsors may rely on the participant's self-certification of a hardship event when processing hardship distributions, effective for plan years beginning after the Date of Enactment.

- **Discretionary Amendments Deadline**: The deadline for the adoption of a discretionary amendment to a retirement plan that increases benefits (other than matching contributions) is revised to be the due date of the employer's tax return for the immediately preceding taxable year in which the amendment is effective.

- **Penalty Tax Exemption for Terminal Illness**: Distributions to a terminally ill individual (with physician certification of the illness that is reasonably expected to result in death in 84 months or less) are exempt from the 10% early distribution penalty tax, effective immediately as of the Date of Enactment.

- **Reduction in Excise Tax on RMD Failures**: The penalty for failure to take required minimum distributions is reduced from a 50% excise tax to a 25% excise tax, and is further reduced to 10% if the failure is corrected in a 2-year window, effective for taxable years beginning after the Date of Enactment.

- **Pre-Death Required Minimum Distribution Requirement Removed for Roth Accounts**: Pre-death required minimum distributions are no longer required for Roth accounts in employer-sponsored retirement plans, generally effective for taxable years beginning after December 31, 2023, but not for distributions which are required with respect to years beginning before January 1, 2024, but which are permitted to be paid on or after such date.

403(b) PLAN SPECIFIC PROVISIONS OF NOTE IN SECURE 2.0

- **403(b) Plan MEPs and PEPs**: 403(b) plans may be operated as multiple employer plans (MEPs) and pooled employer plans (PEPs), effective for plan years beginning after December 31, 2022.

- **Expanded Investment Options**: Investment options permitted under 403(b) plans are expanded to include collective investment trusts, effective immediately. However, current securities law prohibits 403(b) plans from investing in collective investment trusts and SECURE 2.0 did not amend applicable securities law to eliminate this prohibition.

- **403(b) Plan Hardship Rules Conformed to 401(k) Rules**: In a case of hardship, 403(b) plans may distribute qualified non-elective contributions (including earnings), qualified matching contributions (including earnings), and earnings on elective deferrals and participants are not required to first take all available participant loans prior to taking a hardship distribution.

SECURE 2.0 PLAN AMENDMENT DEADLINE: Plan sponsors are generally required to amend their plans for changes made by SECURE 2.0 no later than December 31, 2025 (for calendar year plans).

If you have any questions or would like additional information, please contact a member of our Employee Benefits & Executive Compensation Practice Group.

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