

TYPES NOT MAPPED YET March 24, 2020 | TTR not mapped yet | Lori W. Jones, Amy Dygert Stansfield

# SECURE Act: What employers need to know for retirement plans

On December 20, 2019, the Setting Every Community Up for Retirement Enhancement Act (the “SECURE Act”), became law. It passed the House with bipartisan support in May 2019, and passed in the Senate as part of the Further Consolidated Appropriations Act, 2020. The SECURE Act implements key retirement legislation reform for plan sponsors and individuals. As many of these changes must be implemented in 2020, we provide a summary of the Act below, with a highlight of the major changes for plan sponsors.

## Major reform for retirement plans

### Required beginning date

Effective for individuals who turn 70½ after December 31, 2019, the SECURE Act increases the age at which individuals must begin taking distributions from their retirement accounts from 70½ to 72.

### Post-death required minimum distributions rules for defined contribution plans (401(k) profit sharing, money purchase pension) and IRAs

The SECURE Act changes the post-death RMD rules for non-defined benefit plans to require that all distributions after death be made by the end of the 10th calendar year following the year of participant's death, unless the designated beneficiary is an “eligible beneficiary.”

An eligible beneficiary is any beneficiary who, as of the date of participant's death is:

1. A surviving spouse of the participant;
2. A child of the participant who has not reached the age of majority;
3. Chronically ill; or
4. Any other individual who is not more than 10 years younger than the participant.

This is effective for distributions due to a participant's death that occurred after December 31, 2019.

### Automatic enrollment QACA safe harbor

Prior to the SECURE Act, the automatic enrollment safe harbor cap was 10% of an employee's pay. Effective for plan years beginning after December 31, 2019, the SECURE Act increases this cap to 15% in the year following an employee's deemed election.

### Nonelective 401(k) safe harbor changes - traditional and QACA

The SECURE Act changes the following rules:

1. Eliminates the safe harbor notice requirement;
2. Permits a plan to be amended to become a nonelective safe harbor 401(k) plan until 30 days prior to the close of the plan year; and

3. Permits a plan to become a nonelective safe harbor 401(k) plan after the 30th day before the close of the plan year if the plan is amended to provide for a nonelective contribution of at least 4% of compensation for all eligible employees and the amendment is adopted by the last day for distributing excess contributions for the plan year (generally by the close of the following plan year).

Note that safe harbor notices are still required for matching contribution 401(k) safe harbor plans.

#### **Long-term part-time employees**

The SECURE Act requires 401(k) plans (other than collectively bargained plans) to permit long-term, part-time employees who worked at least 500 hours in three consecutive 12-month periods to make salary deferral contributions. Employers are not required to make matching contributions or nonelective contributions on behalf of such employees and may continue to impose an age 21 eligibility requirement. For vesting purposes, a year of service is a 12-month period during which the part-time employee earned at least 500 hours of service. These part-time employees are excluded from nondiscrimination and top-heavy testing. This change is effective for plan years beginning after December 31, 2020. For purposes of determining the three consecutive 12-month periods, periods prior to January 1, 2021, do not need to be taken into account.

#### **Child birth or adoption withdrawals**

The SECURE Act permits participants to make penalty-free withdrawals of up to \$5,000 per birth or adoption from their retirement plans within one year of the child's birth or adoption, effective for distributions after December 31, 2019. Subject to certain requirements, these distributions can be recontributed to an applicable retirement plan to which rollovers can be made.

#### **Reduced minimum age for in-service distributions**

Effective for plan years beginning after December 31, 2019, the SECURE Act allows in-service distributions under a pension plan or governmental section 457(b) plan at age 59½ instead of 62 for pension plans or age 70½ for a governmental section 457(b) plan.

#### **Multiple employer plans**

The SECURE Act not only expands the accessibility of multiple employer plans but also protects participating employers from the "one bad apple" rule. Under the Act, a "covered" multiple employer plan is protected from disqualification if one or more of the participating employers fails to qualify. Importantly, a "covered" multiple employer plan is a plan that (a) is maintained by employers that have a common interest (other than the plan itself), or (b) has a pooled plan provider. While the Act sets forth certain requirements for a pooled plan provider, this option allows employers that otherwise do not share any common interest to form a multiple employer plan.

### **Additional reforms for retirement plans**

#### **Limits on loans**

Effective for loans after the date of enactment, the SECURE Act prohibits qualified employer plans from making loans through credit cards or similar arrangements.

#### **Lifetime income provisions**

The SECURE Act requires benefit statements provided to defined contribution plan participants to include an estimate of the amount of monthly income the participant's balance could produce in retirement if benefits were received in a qualified joint and survivor annuity and a single life annuity at least once per 12-month period. The SECURE Act directs the DOL to issue model lifetime income disclosures and prescribe assumptions that may be used. This is effective for benefit statements furnished more than 12 months after the later of the DOL's publication of an interim final rule or model disclosures and assumptions.

Upon enactment, the SECURE Act also creates a new fiduciary safe harbor for employers that opt to include a lifetime income investment option in their defined contribution plan. It also permits participants to make direct trustee-to-trustee transfers (or annuity contract transfers) to an eligible employer plan or IRA of lifetime income investments that are no longer authorized to be held in a qualified defined contribution plan, a 403(b) plan, or a 457(b) plan, without regard to any plan restrictions on in-service distributions, effective for plan years beginning after December 31, 2019.

#### **Plan reporting**

Effective for returns due after December 31, 2019, the SECURE Act increases the penalties for failure to file retirement plan returns, including:

- \$250 per day for failure to file Form 5500 (not to exceed \$50,000);
- \$10 per day for failure to file a registration statement (not to exceed \$10,000);
- \$10 per day for failure to file a notification of change (not to exceed \$10,000); and

- \$100 per failure for failure to provide a required withholding notice (not to exceed \$50,000 for all such failures per calendar year).

Penalties are increased for failure to file to the lesser of \$435 or 100% of the amount of tax due.

Effective for plan years after December 31, 2021, The SECURE Act directs the IRS and DOL to work together to modify Form 5500 so that all members of a group of plans may file a consolidated Form 5500. A group of plans would be eligible if all plans in the group (a) are defined contribution plans, (b) have the same trustee, named fiduciary and administrator, (c) use the same plan year, and (d) provide the same investments or investment options to participants and beneficiaries.

#### **Defined benefit plans**

Provides nondiscrimination, minimum coverage and Code § 401(a)(26) relief for closed or frozen defined benefit plans to permit existing participants to continue accruing benefits.

#### **Plan adoption date**

Effective for plans adopted for taxable year beginning after December 31, 2019, an employer can adopt a qualified retirement plan after the close of the taxable year, provided it is adopted by the filing deadline for the employer's tax return for the taxable year.

#### **Provisions affecting tax-exempt employers**

Effective for years on, before or after the date of enactment, certain employees of a nonqualified, church-controlled organization may be covered under a Code section 403(b) plan that consists of retirement income accounts.

The Secretary of Treasury will issue guidance that provides that if an employer terminates a 403(b) custodial account, the account can be distributed in-kind to a participant or beneficiary. The individual custodial account will be maintained on a tax-deferred basis as a 403(b) custodial account until paid out. This guidance is to be retroactively effective for tax years beginning after 2008.

Effective December 31, 2019 and for one year thereafter, the SECURE Act reinstates the exclusions for qualified State or local tax benefits and qualified reimbursement payments available to qualified volunteer emergency response volunteers and raises the exclusion for qualified reimbursement payments to \$50 per month of service.

The SECURE Act also repeals the provision in the 2017 Tax Cuts and Jobs Act that imposed the unrelated business income tax on the value of qualified parking and transportation fringe benefits provided to employees. The repeal is retroactive to the 2017 law's date of enactment.

#### **Additional reform for small employers and individuals**

The SECURE Act increases the credit limit for small employer pension plan startup costs to the following: the greater of (1) \$500, or (2) the lesser of (a) \$250 multiplied by the number of non-highly compensated eligible employees or (b) \$5,000. It also treats stipends and non-tuition fellowships for graduate and postdoctoral students that are includible in income as compensation for IRA purposes. Finally, it repeals the prohibition on contributions (and deductions) to a traditional IRA for individuals who have attained age 70½ by the end of the year, effective for contributions made for taxable years beginning after December 31, 2019.

#### **Health and welfare changes: Repeal of Affordable Care Act (ACA) health taxes**

Effective December 31, 2019, the SECURE Act repealed the Cadillac tax - the excise tax on high-cost employer-sponsored health coverage enacted as part of the ACA - and the medical device tax, the 2.3% excise tax on medical devices enacted as part of the ACA. It also repeals the health insurance provider tax, the excise tax on insurers of fully insured plan enacted as part of the ACA, effective for calendar years after December 31, 2020.

#### **Plan administration**

While some of the above changes have mandatory effective dates by which plans must operationally comply, plan sponsors have until the end of the 2022 plan year to adopt an amendment (governmental employers have until the end of the 2024 plan year) reflecting the changes. Some plan sponsors may wish to wait for additional guidance from the IRS before amending their plans to align with the SECURE Act, while others may wish to amend their plans as soon as possible.

Thompson Coburn's Employee Benefits attorneys are happy to assist in drafting plan amendments and in determining what timeline is most strategic for each plan.

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