



ERISA & Employee Benefits Specialists  
Winter 2023 Newsletter

## What Plan Administrators Need to Know Now About SECURE 2.0

By Doll Lank

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Late last year, Congress passed significant retirement plan legislation, The SECURE 2.0 Act of 2022 (the Act). Signed into law on December 29, 2022, the Act is 120 pages long, with 90 provisions that affect a broad array of qualified retirement plans and individual retirement accounts (IRAs).



The laudable goal of the Act is to increase American retirement readiness; to this end, the Act expands coverage of part-time employees, mandates auto enrollment, boosts employer incentives to offer a plan, and delays required minimum distributions (RMDs). Another positive aspect of the Act is the creation of new permissible benefits, rights, and features that are likely to be popular with employees, such as several new distribution options and employer matching of student loan payments. The Act also has some goodies for plan administrators, including simplification of participant notice delivery requirements and a helpful expansion of the Self-Correction Program under the IRS Employee Plans Compliance Resolution System (EPCRS).

As is often the case in retirement plan legislation, IRS guidance will be essential to provide employers and service providers needed clarification of the Act's numerous mandates and options. No doubt, plan administrators, recordkeepers, and third-party administrators will encounter many challenges in implementing new withholding and recordkeeping requirements arising from this extensive legislation.

An article discussing the entire Act, even in summary form, would be too long. Therefore, this article only summarizes:

- The provisions that became effective immediately, and
- The changes in the coverage of long-term, part-time employees made by the Act to the original provisions created by the SECURE Act in 2019.

(Note that this article does not describe any of the changes that apply only to governmental plans, 457(b) plans, ESOPs and defined benefit plans.)

Many provisions with later effective dates will be discussed in future newsletters and blogs.

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## **Defined Contribution Provisions That are Already in Effect**

Some of the provisions in the Act were immediately (and even retroactively) effective. The provisions are in some cases mandatory for all applicable plans, and in other cases optional, as indicated below.

### **Plan Corrections Under EPCRS**

#### ***OPTIONAL***

The Act addresses several long-standing issues related to correction of qualification failures under the IRS procedures, summarized as follows:

- Correction of Overpayments. The Act relieves plan fiduciaries of the obligation to zealously and indefinitely pursue full recovery of overpayments to participants and/or beneficiaries, by providing welcome clarity and limitations on fiduciary actions in this situation. The key points of this change are as follows:
  1. The Plan and fiduciaries are permitted to decide not to recover inadvertent overpayments made from a plan; in most cases, the plan sponsor is not required to restore those overpayments to the plan.
  2. If a plan decides to seek a return of an overpayment, various restrictions apply.
  3. A fiduciary may not threaten litigation as a means to recoup the overpayment, or engage a collection agency to recover the overpayment, except under certain limited conditions.
  4. Overpayments may not be recouped after their death from a spouse or other beneficiary, although presumably the fiduciary could still make a claim against the participant's estate.
  5. Any overpayments that are more than three years old may not be recouped, unless caused by the individual's fraud or misrepresentation.

The Act also provides that inadvertent overpayments that are rolled over will no longer be considered to be ineligible rollovers.

- Expansion of Self-Correction Options

The IRS is mandated by the Act to revamp, within two years, its Employee Plans Compliance Resolution System (EPCRS) to permit self-correction of most inadvertent operational and document failures.

### **Incentives—Small Employer Credits**

#### ***OPTIONAL***

- Plan Startup Costs. For employers with up to 50 employees, the Act provides a plan startup credit equal to 100 percent of plan expenses for the first 3 years, plus an additional credit for the first five years. This is effective for taxable years beginning after December 31, 2022.
- PEPs and MEPs. Small employers joining a pooled employer plan (PEP) or a multiple-employer plan (MEP) for the first time qualify for the credit, even if the PEP or MEP is in

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existence before December 31, 2022. *This is retroactive to tax years beginning after December 31, 2019.*

- **Military Spouse Eligibility Credit.** Small employers are eligible for a tax credit with respect to their defined contribution plans, up to \$500, for 3 years with respect to each military spouse that participates in the plan—and does not apply to highly compensated employees. An employer may rely on an employee's certification that such employee's spouse is a member of the uniformed services.

### **De Minimis Employee Incentives**

#### **OPTIONAL**

Employers may offer employees *de minimis* financial incentives, such as low-dollar gift cards, to make salary deferrals to 401(k) and 403(b) plans. Payments may not be made from plan assets. IRS guidance is urgently needed for important clarification of this rule, which provides an exemption from the Prohibited Transactions rules under the Code.

### **Roth Employer Match and Non-Elective Contributions**

#### **OPTIONAL**

401(k) and 403(b) plans may permit participants to elect to receive employer matching and non-elective contributions as Roth contributions. Such contributions must be non-forfeitable upon contribution. IRS guidance is a must, for employers to correctly implement payroll withholding, and for affected participants to correctly report their income.

### **Increased Age for Start of RMDs**

#### **MANDATORY**

The required beginning date for Required Minimum Distributions increases from age 72 to age 73, for people turning age 72 after December 31, 2022 and turning age 73 before January 1, 2033.

The required beginning date increases to age 75 for people turning age 74 after December 31, 2032. (This provision contains a drafting error that must be corrected.)

### **QBADs—3-year Repayment Period**

#### **MANDATORY**

A participant wishing to repay a Qualified Birth or Adoption Distribution (QBAD) must do so within 3 years after receipt of the payment. For QBADs made on or before December 29, 2022, the repayment deadline is December 31, 2025. (This is a change to the SECURE Act of 2019, which gave participants the option to repay, with an unlimited time period).

### **Self-Certification for Hardship Distributions**

#### **OPTIONAL**

Administrators of 401(k) and 403(b) plans may rely on the self-certification by the participant regarding the amount and the need for a hardship distribution. Treasury is authorized to issue regulations providing exceptions to this rule with the administrator has actual knowledge contradicting the facts stated in the participant's self-certification.

### **Terminal Illness Withdrawals—Penalty Free**

#### **OPTIONAL**

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Plans may offer the option to withdraw funds, without incurring the early-withdrawal penalty, to participants who are certified by a physician to have a condition reasonable expected to result in death within 84 months of the certification. The Act does not limit the number of distributions, and permits the option to repay the distributions within 3 years.

### **Federally Declared Disasters**

#### *OPTIONAL*

The Act institutes permanent rules relating to the use of retirement funds in the case of a federally declared disaster. Up to \$22,000 may be distributed from employer retirement plans or IRAs for affected individuals. Such distributions are not subject to the 10 percent additional tax and are taken into account as gross income over 3 years. Certain related loan and repayment options may be utilized as well. The effective date is for disasters occurring on or after January 26, 2021.

### **403(b) PEPs and MEPs**

#### *OPTIONAL*

403(b) plans may now be a PEP or a MEP, subject to the same rules as those applied to qualified PEPs and MEPs. Church plans are excluded from this provision.

### **403(b) Custodial Accounts Invested in Group Trusts**

#### *OPTIONAL*

403(b) plan custodial accounts may now invest in group trusts with qualified plans and IRAs.

### **Elimination of RMD Penalty on Partial Annuities**

#### *OPTIONAL*

Participants in 401(k) or 403(b) plans receiving a portion of their individual account as an annuity may count annuity payments received during the year toward the RMD amounts due for the year. The Treasury Department must amend its RMD regulations to reflect this; meanwhile, taxpayers may rely on a reasonable, good-faith interpretation of this provision.

### **Removal of RMD Barriers for Life Annuities**

#### *OPTIONAL*

Plans may offer annuities with the following features without violating the RMD rules:

- Annual increases of less than 5%
- Lump sum payments that shorten the payment period or result in a full or partial commutation or acceleration of future payments
- Dividends and similar distributions
- Return of premium payments upon death

### **Flexibility for QLACs**

#### *OPTIONAL*

The Treasury Department must amend its Qualified Longevity Annuity Contract (QLAC) regulations to:

- Eliminate the requirement that premiums do not exceed 25% of a participant's account balance;
- Increase the dollar limitation on premiums to \$200,000, and provide for indexing starting in 2024;

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- Allow ex-spouses to receive spousal benefits pursuant to a QDRO or similar divorce or separation instrument;
  - Allow “free look” rescission periods of up to 90 days.

Until the regulations are amended, taxpayers may rely on a reasonable, good-faith interpretation of this provision.

### **Roth Contributions for SEPs and SIMPLE IRAs**

#### ***OPTIONAL***

These plans may now offer Roth contributions.

### **Auto-Portability PT Exemption Requirements**

A new prohibited transaction exemption under the Internal Revenue Code is provided to auto-portability service providers that hold involuntary cash-out IRAs and then subsequently roll the funds into a new employer plan account for the benefit of the IRA owner. Many conditions must be met to qualify for the exemption. Within one year of enactment of the Act, the Department of Labor must issue regulations and guidance to implement the exemption.

### **Automatic Enrollment and Automatic Escalation**

#### ***MANDATORY***

New plans will be required to provide auto-enrollment and escalation of employee deferrals as follows:

- *Automatic enrollment of 3% – 10%*
- *Automatic escalation of 1% per year up to at least 10% (with a ceiling of 15%).*

Although the effective date is January 1, 2025, the requirements will apply to all 401(k) and 403(b) plans established after December 29, 2022 (that are not exempt, as described below). Employers adopting a multiple-employer plan (MEP) for the first time are also subject to the provisions, even if the MEP itself pre-dates December 29, 2022.

Exemptions for Very Small and New Employers. The auto-enrollment provisions do not apply while an employer has 10 or fewer employees; nor do they apply until after a business has been in existence for at least 3 years. Church plans and governmental plans are totally exempt from these provisions.

### **Long-Term Part-Time Employees—Changes to the 2019 SECURE Act Provisions**

Although these provisions are not yet in effect, they will be mandatory as of plan years after December 31, 2023, and they require employers to track hours starting in 2021. Therefore, it’s worth revisiting the key provisions enacted in the SECURE Act of 2019 and how the new Act has altered them.

The original SECURE Act, passed in 2019, required that, as of January 1, 2024, existing 401(k) and 403(b) plans would have to permit long-term part-time employees (performing 500 hours/year for 3 consecutive years) to make salary deferrals.

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The Act changes the relevant provisions of SECURE by reducing the service condition from 3 to only 2 consecutive years; specifically, the Act now defines these “long-term part-time employees” to be those who perform either:

- One year of service (i.e., working 1,000 or more hours in a twelve-month period); or
- 500 hours of service in each of two consecutive years.

The Act requires employers to count service for existing employees going back to January 1, 2021; it permits employers to ignore pre-2021 service for vesting as well as for eligibility purposes.

#### **Due Date of Interim Amendment**

SECURE 2.0 document amendments (except for governmental and collectively bargained plans) must be adopted by the end of the remedial amendment period ending on the last day of the first plan year beginning on or after January 1, 2025 (i.e., for calendar year plans, December 31, 2025). In the meantime, plans must be administered in compliance with provisions that are mandatory, and those optional provisions that are elected, as of their respective effective dates.

- ❖ **THE TAKEAWAY.** Plan Administrators need to make decisions about optional provisions of SECURE 2.0 that are effective now, and, along with their service providers, make administrative changes for optional and mandatory provisions as soon as possible, keeping an eye on the horizon, when other provisions will be coming into play.

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