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SECURE Act Becomes Law as Part of the New Budget Deal

Authored by Alisha Sullivan

The "Setting Every Community Up for Retirement Enhancement Act of 2019" (SECURE Act) was approved by Congress and signed into law by the President on December 20, 2019, as part of the Further Consolidated Appropriations Act, 2020 (Budget Bill). The SECURE Act is the largest sweeping retirement reform to occur in more than a decade. The SECURE Act remained largely unchanged from the version of the bill that passed the House of Representatives earlier this year. Most of the provisions described below will be effective for plan years beginning after December 31, 2019, unless otherwise noted.

A number of changes were made that will affect plan sponsors that sponsor a safe harbor 401(k) plan:

- **Increased Maximum for Safe Harbor Automatic Contribution Withholding Limit.** For those plan sponsors with a 401(k) plan that provides for an automatic enrollment, the safe harbor maximum automatic contribution limit will increase from 10 percent to 15 percent, effective for plan years beginning after December 31, 2019.

- **Elimination of Safe Harbor Notice Requirement for Plans with Non-elective Contributions**. For those plan sponsors that are providing for a 3 percent non-elective contribution, the safe harbor notice requirement is eliminated for plan years beginning after December 31, 2019; however, employees still must be permitted to make or change a deferral election at least once per year.

- **Plan Amendments to Become a Safe Harbor Plan.** A plan sponsor that is currently sponsoring a non-safe harbor 401(k) plan but that wishes to become a safe harbor 401(k) plan by making a non-elective contribution may do so by amending the plan and making such contribution any time before the 30th day before the close of the plan year. Amendments that are made after that time are still permitted if the amendment (i) provides non-elective contributions of at least 4 percent (previously, 3 percent) of compensation; and (ii) the plan is amended not later than the close of the following plan year. This change is effective for plan years beginning after December 31, 2019.

Several changes affecting required minimum distributions, including how and when such distributions must be paid, were also part of these changes:

- **Increased Age for Participants to Begin Taking Required Minimum Distributions.** The required minimum distribution rules were initially enacted to promote the use of retirement plans for retirement planning and not for estate planning, however, the age at which participants must begin taking distributions has not been updated to reflect the fact that more of the population is working until a later age. The age at which participants must take a required minimum distribution is increased under the new rules from 70 ½ to 72. This provision applies only with respect to individuals who attain age 70 ½ after December 31, 2019.

- **Payment of Required Minimum Distributions to Certain Beneficiaries Following the Death of a Participant in a Defined Contribution Plan.** With respect to defined contribution plans, the required minimum distribution rules following the death of an employee have been modified to provide that distributions made to individuals other than the employee's spouse, disabled or chronically ill individuals, individuals who are not more than 10 years younger than the employee, or a child of the employee who has not reached the age of majority, are generally required to be distributed by the end of the 10th calendar year following the year of the employee's death, so that such amounts can no longer be paid over such individual's life expectancy. This provision is effective for distributions made with respect to employees who die after December 31, 2019.

Finally, the new rules also make the following changes affecting retirement plans:

- **Trustee-to-Trustee Transfers.** Defined contribution plans, 403(b) plans, and governmental 457(b) plans will be permitted to make direct trustee-to-trustee transfers to another employer-sponsored retirement plan or IRA of lifetime income investments if such option becomes no longer authorized to be held as an investment under the terms of the plan.

- **Inclusion of Certain Part-Time Workers in Defined Contribution Plans.** Part-time workers (e.g., those employees who work less than 1,000 hours per year) will now be eligible to participate in a defined contribution plan if their employer offers a plan upon completing (i) 1 year of service (1,000 hour rule); or (ii) three (3) consecutive years of service where the employee completes more than 500 hours of service each year. Those employees who become eligible under (ii) will be permitted to be excluded from testing under the nondiscrimination and coverage rules, as well as top-heavy rules. This provision is effective for plan years beginning after December 31, 2020; however, 12-month periods beginning before January 1, 2021, shall not be taken into account for purposes of determining eligibility.

- **Distributions for Birth or Adoption of a Child.** If the plan is amended to permit it, employees will now be permitted to take a distribution from an "applicable eligible retirement plan" (e.g., defined contribution plan, 457(b) deferred compensation plan, or 403(b) plan) that permits such withdrawals of up to $5,000 within the one-year period following the birth or adoption of a child and avoid the 10 percent penalty. If the plan permits these withdrawals, the plan must permit these amounts to be repaid. (Amounts will be subject to federal income tax if not repaid.)

- **"Difficulty of Care" Payments Now Included in Compensation.** Those employees receiving compensation in the form of "difficulty of care" payments (e.g., home healthcare workers) who were previously excluded from participating in plans for this reason will now be eligible to participate. The definition of "compensation" under Code Section 415(c) is amended to include these payments for years beginning after December 31, 2015.

- **Ability to File Consolidated Form 5500s.** Certain defined benefit plans may be able to file consolidated Form 5500 if the plans have the same trustee and plan administrator, the same one or more fiduciaries, the same investments or investment options, and have plan years beginning on the same date. This provision will become effective following the issuance of a new consolidated Form 5500, but no later than January 1, 2022, for filings due for plan years beginning after December 31, 2021.

- **New Notice Requirement for Lifetime Income Options.** The rules impart a new notice requirement on those employers sponsoring defined contribution plans regarding lifetime income

disclosures. The Department of Labor is tasked under the new rules with developing final rules and a model disclosure for this notice requirement, at which point the provision will become effective.

- **Safe Harbor for Prudence Requirement of Fiduciary Duties.** Plan sponsors will now be permitted to follow a new safe harbor to satisfy the prudence requirement of their fiduciary duties regarding the selection of insurers, and will be protected from liability and/or losses sustained by participants and beneficiaries. There is no effective date for this provision; therefore, it appears to become effective as of the date the SECURE Act was signed into law (December 20, 2019).

- **Nondiscrimination Testing Relief for Frozen Defined Benefit Plans.** Certain defined benefit plans that were previously frozen to new participants, but which still allow current participants to accrue benefits, will not fail nondiscrimination testing if certain conditions are met and the class was closed before April 4, 2017. While these "soft" frozen defined benefit plans generally met the nondiscrimination testing requirements as of the date of the freeze, over time the plans can face nondiscrimination testing issues as they tend to cover an older, longer service, and often more highly-compensated employee population. This provision becomes effective as of the date of enactment (December 20, 2019).

- **Plan Loans on Credit Cards or Similar Arrangements Prohibited.** Plans will be prohibited from making plan loans through credit cards and similar arrangements.

Among other changes, the SECURE Act also: makes significant changes to "open" multi-employer plans (MEPs), also known as "pooled employer plans;" increases the credit limitation for small employer pension plan startup costs; increases penalties for failure to file Form 5500, withholding notices, and annual registration of certain plans; extends the deadline for employers to adopt a new retirement plan for the preceding taxable year to the due date of the employer's tax return; and puts in place special disaster-related rules that permit participants to access retirement funds in the event of disasters.

The remedial amendment period, or the period during which plan amendments may be made retroactively to meet Internal Revenue Code qualification requirements with respect to these changes, is the later of either the end of the 2022 plan year or when the Treasury Department provides for any model plan amendments.

Separate from those changes made in the SECURE Act, the Budget Bill also repeals the "Cadillac" tax that was set to take effect in 2022 for plan years beginning after December 31, 2019, and extends Patient-Centered Outcomes Research Institute (PCORI) fees that must be paid by insured and self-insured health plans until 2029.

Most, if not all retirement plans will need to be amended to account for some or all of these changes. Since the majority of the changes will take effect for plan years beginning after December 31, 2019, a plan sponsor may want to consider what changes it wishes to make, or may be required to make, to its retirement plans.

FOR MORE INFORMATION

For more information or if you have questions about how the issues raised in this legal update affect your policies, practices, or other compliance efforts, please contact one of the following lawyers in the firm's Employee Benefits Group.

Bruce B. Barth | Virginia E. McGarrity | Jean E. Tomasco

Alisha N. Sullivan | Emily A. Zaklukiewicz

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