Update
Compliance News
March 4, 2020

Retirement Plan Sponsors May Need to Take Action in Response to the SECURE Act

Retirement plan sponsors will need to consider the many changes included in the Setting Every Community Up for Retirement Enhancement Act (SECURE Act or Act). The Act, which is the first comprehensive pension legislation passed by Congress in more than a decade, is intended to expand and preserve retirement savings and simplify plan administration.[1]

Some of the SECURE Act changes require immediate attention from plan sponsors, including the minimum required distribution age increase to 72, new 10-year limit on death benefit distributions, available distributions following births and adoptions, and clarifications on plan credit card loans.

Many of the SECURE Act provisions are effective January 1, 2020. However, other deadlines apply depending on the change. Plans have until 2022 (2024 for collectively bargained and governmental plans) to make necessary plan document amendments so long as they comply with the Act's provisions. [Section 601][2]

This *Update* summarizes highlights of the most significant changes for retirement plans.[3]

Retirement Compliance News Highlights

- The minimum required distribution age increased to 72.
- "Stretch" beneficiary payments from DC plans are now limited to 10 years for many non-spouse beneficiaries.
- DB plans may provide for in-service distributions at age 59½.
- Many new provisions are aimed at increasing contributions to DC plans.

Changes requiring immediate action

Minimum required distribution delay

Effective January 1, 2020, a plan's lifetime minimum required distribution is delayed from age 70½ to age 72. This means that distributions from the plan must be made by April 1 following the year the participant turns 72 (or, if later, retires and is not a 5 percent owner). This change also applies to identifying the latest benefit commencement date for annuity (or life expectancy) benefits paid to a surviving spouse beneficiary. [Section 114]

The Act kept age 70½ for the actuarial adjustment requirement. As a result, plans in which the required beginning date is the later of 70½ and retirement must actuarially increase, and may not suspend (and permanently forfeit), the benefits of participants from age 70½ to the time the benefit is distributed (age 72 or, if the plan so provides, retirement).

[1] The SECURE Act is part of a law providing appropriations for the 2020 federal fiscal year, the Further Consolidated Appropriations Act, 2020 (P.L.116-94) (2020 Appropriations Act).

[2] This and other bracketed section references are to the SECURE Act unless otherwise indicated.

[3] The SECURE Act also includes changes that apply to small plans, IRAs, and non-retirement benefits. Those changes are not included in this document. In addition, another part of the 2020 Appropriations Act, Division Q, provides retirement plan related disaster relief changes, and those changes also are not included in this document.

10-year limit on death benefit distributions from DC plans

The Act limits the death benefit distribution period (sometimes referred to as the "stretch payment" period) available for beneficiaries in DC plans to 10 years after the death of the participant. This accelerates the period, which was measured by the designated beneficiary's life or life expectancy. Distributions can still be made using the beneficiary's life or life expectancy if the beneficiary is a surviving spouse, minor child of the participant, disabled or chronically ill, or no more than 10 years younger than the participant.

The new rules apply to distributions made with respect to participants who die after December 31, 2019.[4] Governmental plans may delay implementation of these rules to December 31, 2021. Collectively bargained plans may delay implementation so they apply only with respect to participants who die after the earlier of two dates: the first date is the later of the date the last collective bargaining agreement expires, or December 31, 2019; the second date is December 31, 2021. Special rules apply when the participant died before January 1, 2020 and for certain commercial annuities. [Section 401]

New DC plan withdrawals for birth or adoption

DC plans may now permit in-service withdrawals of up to $5,000 made within one year after the birth or adoption of a child, without incurring the 10 percent early withdrawal tax. Special rules provide that the withdrawals are not to be treated as "eligible rollover distributions" for purposes of direct rollovers, the IRC §402(f) "Special Tax Notice," or 20 percent withholding. Special rules also allow repayment of the distribution to the plan or in the form of a rollover contribution to an IRA. This new rule is effective for distributions made after December 31, 2019. [Section 113]

Plan credit card loans

The Act prohibits plans from making loans through credit or debit cards or similar arrangements by amending IRC §72(p), governing plan loans, to provide that any such loans will be treated as taxable distributions. This provision is effective for loans made after December 20, 2019. [Section 108]

Action items

While all of the items above are already in effect, plan sponsors may wish to give priority consideration to the increase in the required beginning date age to 72 and to the new limitation on the designated beneficiary distribution period. These changes will have an impact across a wide variety of plan documents, procedures and operations, and will take time to identify and address. Plan sponsors should begin their review and, in consultation with plan counsel, determine what actions should be taken at this time, if any. The change to the required beginning date does not affect required payments due April 1, 2020.

While offering qualified birth or adoption distributions appears to be optional, details about how the option and its repayment provisions are intended to work are not yet available. In addition, it is not clear if a participant could take a regular in-service distribution (if offered by the plan), and treat all or a portion of it as a qualified birth or adoption distribution, even if the plan does not provide for such a distribution. DC plan sponsors that might be interested in this option should certainly begin to consider it, but

[4] Special rules apply to the beneficiaries of participants who died on or before December 31, 2019, if the beneficiary dies after December 31, 2019, and to certain commercial annuity contracts.

might wish to delay action until more is known, particularly about the impact of these distributions on other plan distributions and related plan sponsor responsibilities.

Plans that offered plan loans via credit or debit cards should not have made any such loans after December 20, 2019, and might wish to consider if corrective action should be taken at this time.

DC plan rule changes

DC multiple-employer plans

The SECURE Act encourages the formation of DC multiple-employer plans (DC MEPs). The "one-bad-apple rule" — under which the IRS can disqualify an entire MEP if one participating employer violates a qualification rule — is eliminated for DC MEPs, including a MEP that is a "pooled plan." A pooled plan is a MEP that does not satisfy the ERISA "interest-in-common" rule for multiple-employer plans but instead satisfies newly specified requirements, including registering with the Secretaries of the Treasury and Labor, and being the ERISA named fiduciary and plan administrator. The provider must also perform all administrative duties with respect to the plan and the employees of each employer who is a member of the pooled plan. The agencies will publish model amendments.

These rules apply to plan years beginning after December 31, 2020.[5] [Section 101]

Long-term part-time employees

A 401(k) plan must allow employees with 500 hours of service for three consecutive 12-month periods to participate in the plan if they have reached age 21. Twelve-month periods beginning before January 1, 2021 are not taken into account. No employer contributions are required. The employees will not be counted in nondiscrimination and top-heavy testing. The rule does not apply to employees covered by a collective bargaining agreement.

The provision applies for plan years beginning after December 31, 2020. [Section 112]

10 percent automatic enrollment cap

The Act increases the 10 percent cap to 15 percent for the automatic enrollment nondiscrimination safe harbor for 401(k) plans in IRC §401(k)(13). The limit remains at 10 percent for the participant's first year of eligibility.

The change is effective for plan years beginning after December 31, 2019.[6] [Section 102]

Non-elective contributions

The Act changes both the non-automatic enrollment nondiscrimination safe harbor of IRC §401(k)(12) and the automatic enrollment nondiscrimination safe harbor of IRC §401(k)(13). In both cases, the Act eliminates notice requirements if the plan is providing only non-elective contributions and extends the date by which the plan has to be amended with respect to the addition of non-elective contributions.

The changes apply to plan years beginning after December 31, 2019.[7] [Section 103]

[5] This provision has limited application to governmental plans; however, government entities may be interested in MEPs as a retirement savings program for private sector workers that is an alternative to auto IRA programs.

[6] Although this provision is not applicable to governmental plans, it will be of interest to plans that have auto enrollment.

[7] This provision is not applicable to governmental plans.

Safe harbor for selection of a lifetime-income provider

To encourage sponsors of DC plans to offer annuity options, the Act provides a statutory safe harbor for ERISA plan fiduciaries for the selection of annuity providers. Generally, this safe harbor follows and expands upon the existing regulatory safe harbor.[8] The new safe harbor requires an objective, thorough and analytical search and consideration of each insurer's financial capability. The selected insurer does not have to be the one offering the lowest cost, but the cost must be reasonable in relation to product features and administrative services. Once selected, an insurer can be reused for future contracts as long as it has not advised the plan that its original representations are no longer true and the fiduciary has no other facts suggesting differently.

The provision is effective December 20, 2019.[9] [Section 204]

Portability of lifetime-income options

One of the perceived reasons that sponsors do not include a contribution to an annuity contract as a permissible investment option for a participant in a self-directed 401(k), 403(b) or 457(b) plan is confusion over what happens if, in the future, the plan wishes to eliminate annuities as investment options. The Act provides rules under which the plan can distribute the annuity to an IRA or to another qualified plan.

These rules are effective for plan years beginning after December 31, 2019.[10] [Section 109]

Lifetime-income disclosure

The Act requires DC plan individual benefit statements under ERISA §105 to include a projection of the annuity value of the participant's DC plan account at least once a year. The law requires the Secretary of Labor to specify assumptions and provide model language. It also relieves the sponsor from fiduciary liability with respect to the disclosure. The provision is effective with respect to statements provided more than 12 months after the Secretary issues the last piece of guidance required under the Act (interim final rules, model statement, assumptions).[11] [Section 203]

403(b) custodial account plan termination

The Act solves the difficult issue of how to terminate a 403(b) plan that has custodial accounts. Under the provision, the Secretary of the Treasury will issue guidance that leaves the annuity contract with the §403(b) custodian until amounts are actually paid to the participant or beneficiary.

The guidance is to be retroactive to taxable years beginning after December 31, 2008.[12] [Section 110]

Difficulty-of-care payments

The Act requires that a qualified foster care payment that is a "difficulty-of-care" payment under the Social Security Act and excluded from gross income be treated as income for purposes of the contribution limits of IRC §415(c). Any contribution to a plan by a participant because of this income is to be treated as an after-tax contribution.

[8] The regulatory safe harbor is at DOL Reg. §2550.404a-4.

[9] Although this provision is not applicable to governmental plans, it may be of interest as a best practice.

[10] This provision applies to governmental plans.

[11] Although this provision is not applicable to governmental plans, it may be of interest as a best practice.

[12] This provision applies to governmental plans.

The amendment applies for plan years beginning after December 31, 2015.[13] [Section 116]

Action items

The requirement that long-term part-time employees be allowed to participate in 401(k) plans for purposes of employee elective contributions is mandatory for plan years beginning after December 31, 2020. Although no such participants will be eligible for almost four years (January 1, 2024), recordkeeping changes likely will be needed beginning with the 2021 plan year. Plan sponsors might wish to begin preliminary conversations with their service providers about implementation sooner rather than later, given that this change is mandatory for all 401(k) plans.

The increase in the auto-enrollment cap from 10 to 15 percent is a discretionary change, and interested plan sponsors should consider whether increasing the cap might support their benefit objectives.

The inclusion of otherwise excludable “difficulty-of-care” payments as plan compensation is intended to increase contributions for affected plan participants and is retroactively effective to the 2016 plan year. As a practical matter, this change is unlikely to affect many plans. It is possible, however, that the IRS will nonetheless require all DC plans to incorporate the change into the plan definition of IRC §415(c) compensation, as it occasionally has done in the past.

Plan sponsors may wish to consider adding lifetime income options to their 401(k) plan platforms in light of the expanded fiduciary protection and additional clarification on portability. No action is required on lifetime income disclosures until DOL issues related guidance.

Form 5500s and increased penalties

Beginning with the 2022 plan year, DC plans will be permitted to file a single, consolidated Form 5500 if they are part of a related “group.” To be considered related, the plans must share the same trustee, plan administrator, plan year and investment options. The Act requires additional guidance to come from the regulatory agencies to update the Form 5500 and instructions to permit this single filing. This change will be useful for plan sponsors seeking to reduce the administrative burden of filing Form 5500s and will be convenient for unrelated employers that adopt similar DC plans that fulfill the related group rules. We await guidance to confirm that each plan will still be required to receive its own Form 5500 audit. [Section 202]

Several penalties imposed on plan sponsors with respect to notices and forms due after December 31, 2019 are significantly increased:

- To $250 per day, up to a maximum of $150,000 per report, for failing to timely file Form 5500
- To $100 per failure, up to a maximum of $50,000 for all failures, for failing to provide income tax withholding notices
- To $10 per participant per day, up to a maximum of $50,000, for failing to file Form 8955-SSA [Section 403]

[13] This provision has limited application to governmental plans.

Action items

These significant increases mean that plan sponsors should work with their vendors to file or provide all required notices and forms at the proper time. Sponsors should also review their vendor contracts to confirm that they include appropriate processes, performance guarantees, and indemnification clauses with respect to these new penalties.

Relief provisions for single-employer DB plans

Permanent relief from nondiscrimination rules for closed plans

The Act provides permanent relief for closed DB plans from the nondiscrimination rules governing plan coverage and benefit amounts. It also provides relief from nondiscrimination in benefits, rights and features and from the minimum participation rules (the 50-employee rule of IRC §401(a)(26)).

The provision is effective as of December 20, 2019, but certain plan sponsors may elect to apply it retroactively to plan years beginning after December 31, 2013. [Section 205]

Reduced PBGC premiums for CSEC plans

For pension plans of cooperatives and small employer charities (CSEC plans), prior law provided special funding rules, but did not make similar changes to PBGC premiums. The Act reduces the amount CSEC plans must pay to PBGC for variable rate and flat-rate premiums retroactive to plan years beginning after December 31, 2018. [Section 206]

Funding for community service newspapers

The Act provides elective funding relief for plans of community service newspapers that were frozen no later than December 31, 2017. For purpose of this provision, “community newspaper plan” is narrowly defined and its ownership structure limited in general to control by related persons who primarily reside in the state.

The amendments made by this section apply to plan years ending after December 31, 2017. [Section 115]

Action item

Plans affected by any of the above relief provisions should consider what further actions, if any, are necessary on their part in order to implement their relief. Plans that are not yet closed to new participants or have not yet frozen accruals, might wish to reconsider the closed plan option in the event that the new relief makes closing participation a more viable option for addressing risk.

DB and money purchase plan change

In-service distributions at age 59½

In addition to the SECURE Act, the 2020 Appropriations Act also includes the Bipartisan American Miners Act of 2019 (Miners Act),[14] which allows in-service distributions at age 59½. Prior law did not allow in-service distributions from DB plans and money purchase plans until the participant reached age 62, and from 457(b) plans until age 70½. The

[14] See FN. 1. The Miners Act is Division M of the 2020 Appropriations Act.

Miners Act amends changes age 62 to age 59½. For 457(b) plans, prior law allowed in-service distributions in the calendar year in which a participant attained age 70½. Under the Miners Act, *governmental* 457(b) plans, but not tax-exempt entity 457(b) plans, may also allow in-service distributions at age 59½.

The changes are effective for plan years beginning after December 31, 2019. [Miners Act Section 104]

Action item

Plans that are now able to offer in-service distributions at an earlier age might wish to consider whether implementation of this discretionary change might support their benefit objectives, including whether offering in-service lump sums at 59½ would help to reduce plan risk.

Relief provision for mine workers' pension plan

The Miners Act transfers funds to the United Mine Workers of America pension plan from amounts held by the government under Section 402 of the Surface Mining Control and Reclamation Act of 1977.

The provision is effective for fiscal years beginning after September 30, 2016. [Miners Act Section 102]

Implications

Years of service provider summaries describing the earlier versions of the SECURE Act might have lulled many plan sponsors into thinking that it would be easy to address the changes it contemplated. Now that the Act has become law, however, its uncertainties and complexities are emerging.

There is a lot to digest. Plan sponsors will want to begin by identifying all the provisions that apply to their particular plans and then determining which provisions they must, or might wish to, adopt. For each provision in the "must" or "might wish" category, they need to begin to identify what more they will need to know before making actual changes.

Questions?

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