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Benefits Alert

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A holiday gift for retirement plans — the SECURE 2.0 Act of 2022

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Learn about the SECURE 2.0 Act and its impact on qualified retirement plans, Section 403(b) plans, and Section 457(b) plans.

What's the Impact?

- The Act features numerous provisions increasing access to, and participation in, retirement plans
- Plan sponsors can benefit from simplified administration and expanded flexibility
- Take your time with plan amendments—retirement plans do not have to be amended immediately to comply with the SECURE 2.0 Act of 2022

As part of the massive Consolidated Appropriations Act, 2023, Congress adopted the SECURE 2.0 Act of 2022 (Act), which is a hodge-podge of various retirement plan fixes, improvements, expansions, and clarifications. There are more than 90 discrete provisions in the SECURE 2.0 Act, so there is a little bit of something for everyone. Below is a summary of the provisions we believe

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are most pertinent to sponsors of qualified retirement plans, Section 403(b) plans, and Section 457(b) plans.

Provisions increasing access to and expanding retirement plans

Allowing matching contributions for student loan payments

Beginning in 2024, an employer can match employees' contributions to a defined contribution plan (401(k), 403(b), or SIMPLE IRA) with respect to student loan repayments. Effectively, the student loan repayment is treated as an employee elective deferral for purposes of calculating employer matching contributions. This optional plan feature could help employees who cannot save for retirement because they are overwhelmed with student debt and are missing out on employer matching contributions. For nondiscrimination testing purposes, the employees who receive matching contributions on student loan repayments can be tested separately—which might help avoid testing problems.

Saver's Match

For tax years beginning after December 31, 2026, the SECURE 2.0 Act replaces the existing Saver's Credit under Internal Revenue Code Section 25B with the Saver's Match for individuals who make "qualified retirement savings contributions." The new tax benefit will no longer result in a credit against the saver's taxes but will, instead, produce a genuine, fully vested matching allocation paid directly to the individual's applicable retirement savings vehicle.

Under the current Saver's Credit, eligible individuals can receive a credit against taxes based on the "qualified retirement savings contributions" they made during the calendar year up to a maximum allowable credit of $2,000. The credit phases out for taxpayers with income above certain thresholds. Notably, the Saver's Credit does not interfere with the daily administrative duties of sponsors and plan administrators. Instead, individual tax filers are the responsible parties for reporting the contributions.

Under the Saver's Match, eligible taxpayers may receive a 50% matching contribution from the IRS to their retirement plan on their "qualified retirement plan savings contributions" that do not exceed $2,000. The Saver's Match contribution phases out at higher income levels.

While the new Saver's Match is an exciting new opportunity for lower-income individuals to save for retirement, many administrative and other issues need to be addressed. Plan administrators should expect further guidance before the Saver's Match becomes effective.

New plans must provide auto-enrollment

Effective for plan years beginning after December 31, 2024, all new 401(k) and 403(b) plans must include an eligible automatic contribution arrangement. Under the terms of the arrangement, new participants are automatically enrolled in the plan at a uniform elective contribution rate, ranging from 3% to 10%, unless the participant elects otherwise. Additionally, the automatic contribution rate must be increased annually by 1% until the elective deferral rate reaches at least

10% but no more than 15% (for plan years ending before January 1, 2025, the contribution cap for non-safe harbor plans is 10%). Contributed amounts must be invested in the plan's qualified default investment alternative until the participant elects otherwise. Plans adopted before December 29, 2022 (the date the SECURE 2.0 Act was enacted), plans of new businesses (i.e., businesses in existence for less than three years), plans of small businesses (i.e., businesses that in the second preceding year normally employed less than ten employees), church plans and governmental plans are not subject to these rules.

Employees can be given small financial incentives to make elective deferrals

Generally, other than matching contributions, employers are not supposed to provide employees with financial incentives for, or condition other benefits on, making elective deferrals into a 401(k) or 403(b) plan. For plans years beginning after the date the SECURE 2.0 Act was enacted, employers may provide employees with *de minimis* financial incentives (not paid with plan assets) to make elective contributions to their plans. Regulators will have to explain what constitutes a "*de minimis* financial incentive," but we would expect low-value gift cards and the like will meet this standard.

Roth catch-up contributions

The catch-up contribution limit for 2023 is $7,500 and is available for employees aged 50 and older. Beginning in 2025, employees aged 60 through 63 can take advantage of an increased catch-up contribution limit. The new limit will be the greater of $10,000 (this amount is indexed for inflation) or 150% of the regular catch-up amount.

Effective January 1, 2024, all catch-up contributions made by participants whose wages from the plan sponsor for the preceding calendar exceeded $145,000 (as adjusted for inflation) must be made as Roth contributions. Participants whose compensation does not exceed such amounts must be given the opportunity to make their catch-up contributions in the form of Roth contributions.

Participation of part-time employees

Effective for plan years beginning after December 31, 2024, the SECURE 2.0 Act amends ERISA to allow part-time employees to make elective deferral contributions to 401(k) and 403(b) plans as soon as they attain age 21 and either complete the one-year-of-service requirement (which requires at least 1,000 hours of service) or have two consecutive twelve-month periods during which they complete at least 500 hours of service. This rule shortens the three-year period previously introduced by the SECURE Act and extends the requirement to 403(b) plans. For these purposes, periods of service before 2023 may be disregarded. Employers do not have to make these part-time employees eligible for employer contributions. However, if they do, part-time employees, who became participants based solely on satisfying the two-year requirement, will vest in employer contributions based on years the employees complete at least 500 hours of service (also disregarding periods before 2023). All rules regarding the identification of computation periods and entry dates that otherwise apply to 401(k) and 403(b) plans equally apply to the two-year and 500-service-hours requirement for part-time employees.

In-service withdrawal right for domestic abuse victims

The SECURE 2.0 Act permits in-service distributions (the lower of $10,000, as periodically adjusted for inflation, or 50% of vested account balance) to a victim of domestic abuse as self-certified by the individual (effective for distributions made after December 31, 2023).

Purchasing long-term care contracts with retirement plan distributions

Beginning after December 29, 2025, defined contribution plans can permit participants to withdraw up to $2,500 per year (this amount is indexed for inflation) or 10% of the account balance (if less) to purchase long-term care insurance. The withdrawals will not be subject to the 10% early withdrawal penalty that might otherwise apply. Employers that adopt this optional feature will need to substantiate that the distribution was used to pay the premium costs for qualifying coverage.

In-service withdrawals for emergency expenses

The SECURE 2.0 Act contains two measures for participants struggling with covering their day-to-day expenses. To encourage participants to contribute to their employer-sponsored retirement plans, the Act gives them the ability to withdraw without a penalty certain amounts from the plan while they are working.

- **Withdrawals for emergency personal expenses:** The first measure allows withdrawals for emergency personal expenses. A 10% early distribution penalty will not apply to emergency personal expense distributions from defined contribution plans (including qualified plans, 403(b) plans, and governmental 457(b) plans). Those are distributions that participants may take when they have an unforeseeable or immediate financial need for necessary personal or family expenses. A participant may only have one emergency personal expense distribution in a calendar year, and the total amount must not exceed $1,000 or the difference between the participant's total interest in the plan and $1,000, whichever is less. Moreover, a participant cannot have any more of these distributions in the next three calendar years unless the participant has repaid the withdrawn amount to the plan, or contributed to the plan after the emergency distribution an amount that is at least as much as the emergency distribution. Employees may repay emergency distributions to an eligible retirement plan within three years after the distribution. Plans and participants can start treating distributions as emergency personal expense distributions after 2023.
- **Pension-linked emergency savings accounts:** The second measure would permit employers to establish a separate designated Roth contributions account for non-highly compensated employees in their defined contributions plans. The Act amended both ERISA and the Internal Revenue Code, effective for plan years beginning after 2023, to lay out the rules for "pension-linked emergency savings accounts." The funds in these accounts would be available for emergency withdrawals at least once a month. The contributions to these accounts must not exceed $2,500 (as increased for inflation in future years). Once an employee becomes highly compensated, the employee would be precluded from

contributing to the account but may continue making withdrawals.

Employers must separately account for emergency savings accounts and invest them in cash, interest-bearing bank accounts, or an investment product that maintains the amount equal to the amount of contributions made, preserve principal and provide a reasonable rate of return. Employers would need to notify participants (at least thirty but no more than ninety days before the first contribution is made to the account) of their rights under the account. After the initial notice, employers must provide participants with an annual notice of their right to make contributions to an emergency savings account.

Qualified disaster recovery distributions

The Act extended tax-favorable rules to distributions made to individuals who sustain economic loss due to federally declared disasters occurring after January 26, 2021. The distribution would generally be made within 180 days after the first day of the disaster or the date of its declaration. A qualified disaster recovery distribution for any qualified disaster may not exceed $22,000. Qualified disaster recovery distributions are not subject to the 10% early distribution penalty, mandatory 20% tax withholding on eligible rollover distributions, or restrictions on in-service distributions from 401(k), 403(b), governmental 457(b), and money purchase plans. Unless a participant elects, the individual will include this type of distribution in income ratably over a three-year period. Further, the individual may re-contribute the amount to an eligible retirement plan within three years of distribution.

In addition, favorable repayment rules apply to hardship distributions that first-time home buyers received to purchase or build a home in a disaster area up to 180 days before or within 30 days after the disaster but could not use due to the disaster. The Act also permanently increases limits on plan loans made during the first 180 days of a qualified disaster to $100,000 or the participant's entire interest in the plan. It also permits plans to extend by one year the due date for loan prepayments that would otherwise be due during the disaster period and 180 days thereafter. Plans may also disregard the disaster period plus 180 days in determining the five-year limit on loan repayments. Just like the qualified disaster recovery distributions, the loan provisions apply to loans made with respect to qualified disasters occurring after January 26, 2021.

Administration simplification, expanded flexibility, and other provisions

Increased age for required minimum distributions

The original SECURE Act increased the age by which distributions from retirement plans must commence from age 70 1/2 to age 72 (or termination of employment, if later, and the participant is not a 5% or greater owner of the employer). The SECURE Act 2.0 further increases the mandatory age for commencing distributions from qualified retirement plans, Section 403(b) plans, and Section 457(b) plans. A participant who attains age 72 after December 31, 2022, and age 73 before January 1, 2033, is required to start benefit payments by April 1 following the end of the calendar year in which the participant attains age 73. For a participant who reaches age 74 after December 31, 2032, the mandatory age is 75.

Recovering overpayments from retirement plans

New rules soften the methods employers can use to recover retirement plan overpayments. In even well-run plans, retirees sometimes inadvertently receive more money than owed. Under current rules, plan fiduciaries generally had to try to correct mistakes by demanding repayment from the retiree or reducing future benefit payments. If an overpayment was sizable, those actions could create hardships for retirees. The new rules give employers the flexibility to decide not to recoup inadvertent overpayments. If an employer decides to recover an overpayment, the new rules limit, among other things, how much can be recovered in a given year. For pension plans, the recoverable amount generally cannot exceed 10% of the retiree's annual benefit amount. For defined contribution plans, the Department of Labor (DOL) will develop regulations that limit the recoverable amount.

Lost and found for retirement accounts

In a mobile workforce, it is sometimes difficult for individuals to keep track of the different retirement benefits earned during their careers. Many leave with small account benefits that are easily forgotten or later have trouble tracking down their former employers due to mergers or acquisitions. In fact, locating lost participants has been a recent focus of the DOL and the IRS.

The SECURE 2.0 Act provides a new tool to allow individuals to engage in self-help to find their lost benefits. The Act requires the DOL to establish a national, searchable database called the "Retirement Savings Lost and Found." It will allow individuals to search for ERISA-covered retirement plans they formerly participated in and to contact the plan administrators of those plans. This database is to be created within two years of the enactment of the SECURE 2.0 Act and will require the DOL to collect pertinent information from all ERISA-covered retirement plans and assist individuals in locating lost benefits.

Expansion of employee plans compliance resolution system and safe harbor for corrections of employee elective deferral failures

The SECURE 2.0 Act directs the IRS to expand its Employee Plans Compliance Resolution System (EPCRS) and allow inadvertent failures to comply with IRS rules to be self-corrected. The only bars to self-correcting inadvertent errors involve (i) errors caught by the IRS prior to the plan sponsor's taking any actions that demonstrate a specific commitment to correct the errors, and (ii) errors that are not corrected within a reasonable time after they have been identified. The Act also takes the automatic contribution correction procedures outlined in Revenue Procedure 2021-30 Appendix A.05(8) and makes the correction permanent. Further, for plan loan failures, the Act requires the DOL to accept correction of the failure under EPCRS as satisfying the DOL's voluntary fiduciary correction program requirements.

Miscellaneous provisions

Other provisions to simplify plan administration and make retirement benefits more accessible include the following:

- Allowing participants to self-certify a need for a financial hardship distribution from 401(k) or

403(b) plans or an unforeseeable emergency distribution from 457(b) plans (effective for plan years commencing after December 29, 2022)

- Allowing plan participants to elect to have their matching or nonelective employer contributions made as Roth contributions (effective for contributions made after the effective date of the Act)
- Allowing plans to ignore certain disclosure and notice requirements that would otherwise apply to unenrolled participants, as long as the plan provides them with the summary plan description, initial eligibility information, and an annual reminder of the participant's right to enroll in the plan, as well as all required notices and disclosures upon request (effective for plan years beginning after December 31, 2022)
- Increasing the $5,000 threshold for small benefit cashouts to $7,000 beginning with 2024 distributions)
- Reducing the excise tax for failing to take required minimum distributions from 50% of the missed payment amount to 25% (effective immediately)
- Allowing qualified birth or adoption distributions from defined contribution plans to be repaid no later than three years after the distribution (except that distributions made on or before the enactment of the SECURE 2.0 Act must be repaid no later than December 31, 2025)
- Eliminating the 10% early distribution penalty for early distributions to a terminally ill individual; provided the individual's physician certifies that the illness or physical condition is expected to result in death within 84 months (effectively immediately)
- Removing pre-death minimum distribution requirements and incidental death benefits requirements for Roth contributions within an employer plan—before only a Roth IRA could avoid the pre-death minimum distribution rules and the incidental death benefit rules (effective for taxable years beginning after December 31, 2023)

Special 403(b) plan changes

403(b) plans can offer investments in collective investment trusts

Historically, 403(b) plans only allowed participants to invest in annuities and mutual funds. Effective on December 29, 2022, 403(b) plans can allow participants to invest in collective investment trusts established for qualified retirement plans. This should give 403(b) plan sponsors the opportunity to offer investment alternatives with lower fees. However, conforming changes to applicable securities laws may need to be enacted before this provision can be implemented.

Hardship withdrawals for 403(b) plans

Beginning in 2024, 403(b) plans can permit hardship withdrawals from all contribution types. Currently, 403(b) plans permit hardship withdrawals from employee contributions only (excluding any earnings). This rule change aligns hardship withdrawals from 403(b) plans with 401(k) plans, which already allow hardship withdrawals from all contribution types.

Looking ahead

There is a lot to digest in this new legislation. Moreover, forthcoming guidance will shed light on its nuances and clarify ambiguities. The good news is that, generally, plans do not have to be amended to comply with the Secure 2.0 Act until on or before the last day of the first plan year beginning on or after January 1, 2025, or such later date the Secretary of Treasury may prescribe.

The above summary just covers some of the provisions of the SECURE 2.0 Act. Numerous other provisions are not summarized. We encourage you to discuss the Act with your attorneys to fully understand the impact of this significant legislation on your particular plan and circumstances.

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