SECURE Act Will Ring in New Year with Major Pension Law Changes

On December 20, 2019, President Trump signed into law a $1.4 trillion spending package that, while primarily designed to fund federal agencies through September 2020, includes provisions which substantially modify many of the rules governing retirement plans. The Setting Every Community Up for Retirement Enhancement Act (SECURE Act) (incorporated into the Further Consolidated Appropriations Act, 2020 (P.L. 116-94)), promises to have a major impact on the structure and administration of retirement plans. The impact will be greater given that the sweeping rule changes generally apply to tax years beginning after 2019.

High Points of Secure Act

Multiple Employer Plans: Pooled Employer Plans. The Act, effective for plan years beginning after December 31, 2020, authorizes a new “open” Multiple Employer Plan (MEP), called a Pooled Employer Plan (PEP). The designated pooled plan provider would, as the named fiduciary, be responsible for plan administration. However, employers would be subject to fiduciary standards in the selection and monitoring of the pooled plan provider. The rules effectively eliminate the “one bad apple” restriction.

Increase in 10 percent cap for automatic enrollment safe harbor. The default maximum applicable to safe harbor qualified automatic contribution arrangements will increase, effective for plan years beginning after December 31, 2019, from 10 percent to 15 percent of an employee’s compensation.

Notice requirement for nonelective safe harbor plans eliminated. The Act, effective for plan years beginning after December 31, 2019, eliminates the annual notice requirement applicable to nonelective safe harbor plans.

Amendment deadline for nonelective safe harbor plans extended. The Act, effective for plan years beginning after December 31, 2019, authorizes plan sponsors to adopt an amendment implementing a nonelective safe harbor plan, including a Code Sec. 401(k)(13) automatic contribution arrangement, at any time before the 30th day before the close of the plan year. An amendment, however, may be adopted at any time before the last day allowed for the distribution of excess contributions for the plan year (i.e., by the close of the following year) if the amendment requires the employer to provide a nonelective contribution of at least 4 percent of compensation for all eligible employees for that plan year.

Increase in tax credit limit for small employer pension plan start-up costs. The tax credit afforded small employers for starting a new retirement plan will increase, effective for tax years beginning after December 31, 2019, from 50 percent of the qualified start-up costs paid or incurred during the taxable year to 50 percent of the qualified start-up costs paid or incurred during the taxable year.
year to the greater of: (1) $500, or (2) the lesser of (a) $250 for each nonhighly compensated employee eligible to participate in the plan, or (b) $5,000.

**Small employer automatic enrollment credits.** Small employers are provided, effective for tax years beginning after December 31, 2019, a $500 tax credit to pay the start up costs incurred in adopting a new 401(k) or SIMPLE plan that allows for automatic enrollment. The credit would be available for three years and would be provided in addition to the plan start up credit authorized under Code Sec. 45E.

**Repeal of maximum age for traditional IRA contributions.** The Act, effective for tax years beginning after December 31, 2019, repeals the prohibition on contributions to a traditional IRA by a taxpayer who has attained age 70½.

**Prohibition on plan loans through credit cards.** The Act, effective on the December 20, 2019 date of enactment, prohibits plan loans executed through credit cards or similar arrangements.

**Portability of lifetime income options.** Qualified defined contribution plans, 403(b) plans or governmental 457(b) plans are empowered, effective for plan years beginning after December 31, 2019, to make direct trustee-to-trustee transfers to another employer-sponsored retirement plan or IRA of lifetime income investments or distributions of a lifetime income investment in the form of a qualified plan distribution annuity, in the event the lifetime income investment is no longer authorized to be held as an investment option under the plan.

**Expansion of plan eligibility to long term, part-time employees.** The Act, effective for plan years beginning after December 31, 2020, requires employers maintaining a 401(k) plan to have a dual eligibility requirement under which an employee must complete either a one year of service requirement (not to exceed 1,000 hours) or three consecutive 12-month periods of service in which the employee completes at least 500 hours of service.

**Penalty-free plan withdrawals to cover birth or adoption expenses.** The Act, effective for distributions made after December 31, 2019, authorizes penalty free withdrawals by an individual from an eligible retirement plan (excluding defined benefit plans) for “qualified birth or adoption distributions” of up to $5,000. The distribution may also be recontributed to a retirement plan as an eligible rollover distribution.

**Increase in age for taking required minimum distributions.** The Act, effective for distributions required to be made after December 31, 2019, increases the age at which required minimum distributions must begin to be made from qualified plans and IRAs from 70½ to 72.

**Treatment of plans adopted by filing due date as in effect as of close of year.** The Act, effective for tax years beginning after December 31, 2019, will allow employers to treat qualified retirement plans adopted after the close of the tax year, but before the due date of their tax return for the year (including extensions) as having been adopted as of the last day of the tax year.

**Combined annual report for group of plans.** The IRS and DOL are directed to allow a group of similar defined contribution plans, effective for returns due for plan years after Dec. 31, 2021, to file a consolidated Form 5500 annual report. The plans must have the same named fiduciary, the same administrator, use the same plan year, and provide the same investments or investment options to participants and beneficiaries.

**Lifetime income disclosure.** Benefit statements provided to defined contribution plan participants would need to include a lifetime income disclosure at least once during any 12-month period. The disclosure would illustrate the monthly payments the participant would receive if the total account balance were used to provide lifetime income streams, including a qualified joint and survivor annuity for the participant and the participant’s surviving spouse and a single life annuity. The Secretary of Labor is directed to develop a model disclosure and applicable assumptions. Plan fiduciaries, plan sponsors, or other persons will not incur liability under ERISA to the extent that they provide lifetime income stream equivalents that are derived in accordance with the prescribed assumptions and include the explanations contained in the model disclosure. The amendments will apply to benefit statements furnished more than 12 months after the latest of the DOL issuances.

**Fiduciary safe harbor for selection of lifetime income provider.** Plan fiduciaries are afforded an optional safe harbor to satisfy the prudence requirements of ERISA with respect to the selection of insurers of guaranteed retirement income contracts. In the event the fiduciary receives certain assurances from the insurer regarding its compliance with state insurance requirements,
The new MEP rules effectively eliminate the “one bad apple” restriction.

Elimination of one bad apple rule. Multiple employer defined contribution plans would not be disqualified merely because one or more employers of employees covered by the plan (qualified plan or IRA) fails to comply with plan qualification requirements. (Code Sec. 413(e)(1)).

Transfer of assets and employer liabilities. In order for the protections to apply, the terms of the plan must provide that the assets of the plan attributable to the employees (or beneficiaries) of a noncompliant employer will be transferred to either: a plan maintained only by that employer (or its successor); to an eligible plan, including an IRA, qualified plan, 403(b) annuity, or 457(b) plan, or to any other arrangement that the Treasury Secretary determines is appropriate, unless the Secretary determines it is in the best interests of the employees (or their beneficiaries) of such employer to retain the assets in the plan (Code Sec. 413(e)(2)(A)(i)).

In addition, the terms of the plan must provide that a noncompliant employer shall, except to the extent provided by the Secretary, be

Detailed Analysis

The following provides a more detailed analysis of selected provisions of the SECURE Act.

I Multiple Employer Plans: Pooled Employer Plans

Under the new law, effective for plan years beginning after December 31, 2020, a new class of Multiple Employer Plan (MEP) service provider will be able to create and offer an open MEP called a Pooled Employer Plan (PEP) (Code Sec. 413(e), as added by Act Sec. 101). The plans may be structured as a 401(k) or another qualified plan or as an IRA-based plan. Significantly, the new rules effectively eliminate the “one bad apple” restriction.

a fiduciary would be shielded from liability for any loss that may be incurred by a participant or beneficiary due to the insurer’s failure to satisfy its financial obligations under the contract.

Modification of cross-testing nondiscrimination rules. The governing nondiscrimination rules would be amended, effective upon the December 20, 2019 date of enactment, to allow expanded cross-testing between an employer’s closed defined benefit plan and defined contribution plans. The modifications will help closed plans pass the applicable nondiscrimination tests and enable existing participants in such plans to continue to accrue benefits.

Modification of required distribution rules for designated beneficiaries. Under modified required minimum distribution rules, effective for distributions with respect to plan participants and IRA owners who die after December 31, 2019, distributions to individuals other than the surviving spouse of the employee (or IRA owner), disabled or chronically ill individuals, individuals who are not more than 10 years younger than the employee (or IRA owner), or a child of the employee (or IRA owner) who has not reached the age of majority, must generally be distributed by the end of the 10th calendar year following the year of the employee or IRA owner’s death. Limited exceptions are authorized, but the provision will effectively limit if not eliminate the “stretch IRA” as a tool for managing retirement assets.

Increase in failure to file return penalty. The penalty assessed for failure to file a federal income tax return has been increased, effective for returns due after December 31, 2019, from $330 to the lesser of $435 or 100% of the amount of the tax.

Increased plan reporting penalties. The Act, effective for returns and statements due after December 31, 2019, significantly increases the applicable reporting penalties. The Form 5500 penalty would be increased to $250 per day, not to exceed $150,000. The failure to file a registration statement would increase to $10 per participant, up to $50,000. The failure to file a required notification of change would result in a penalty of $10 per day, not to exceed $10,000 for any failure. Finally, the failure to provide a required withholding notice would result in a penalty $100 for each failure, up to $50,000 for all failures during the calendar year.
liable for any liabilities with respect to the plan attributable to employees of the noncompliant employer (or beneficiaries of such employees). These liabilities are not to be placed on the plan or any other employer in the plan (Code Sec. 413(e)(2)(a)(ii)).

**Pooled plans.** A pooled employer plan is an individual account plan providing benefits to the employees of two or more employers. The plans may be structured as a 401(k) or another qualified plan or as an IRA-based plan (ERISA Sec. 3(43)(A), as added by Act Sec. 101(c)).

Pooled plans, however, may not be maintained by employers which have a common interest other than having adopted the plan (ERISA Sec. 3(43)(A)). A pooled employer plan also may not include: a multi-employer plan under Code Sec. 413(b); or a plan established before the date of the enactment of the SECURE Act unless the plan administrator elects to treat the plan as a pooled employer plan and the plan meets the requirements applicable to a pooled employer plan established on or after such date (ERISA Sec. 3(43)(C)).

**Pooled plan providers.** A pooled plan provider would be a person who is designated by the terms of the plan as a named fiduciary, as the plan administrator, and as the person responsible to perform all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan) which are reasonably necessary to ensure compliance with ERISA and the Internal Revenue Code (Code Sec. 413(e)(3)). The pooled plan provider would need to register with the Department of Labor, acknowledge its status as a named fiduciary in writing, and be appropriately bonded in accord with ERISA Sec. 412.

**Required terms of pooled provider MEP.** The terms of a pooled multiple employer plan must: designate a pooled plan provider and provide that the pooled plan provider is a named fiduciary of the plan; designate one or more trustees meeting the requirements of Code Sec. 408(a)(2) to be responsible for the collection of contributions and the holding of plan assets; provide that each employer in the plan retains fiduciary responsibility for the selection and monitoring of the pooled plan provider, and unless delegated to another fiduciary, the investment and management of the portion of the plan’s assets attributable to the employees of the employer; provide that employers in the plan, and participants and beneficiaries, are not subject to unreasonable restrictions, fees, or penalties with regard to ceasing participation, receipt of distributions, or otherwise transferring assets; require the pooled plan provider furnish to employers in the plan any required disclosures or information required to take actions necessary to administer the plan or for the plan to meet any requirements of Code Sec. 401 or 408, whichever is applicable; and state that any disclosure or other information required to be provided may be furnished in electronic form and will be designed to ensure only reasonable costs are imposed on pooled plan providers and employers in the plan (ERISA Sec. 3(43)(B)).

II Notice Requirement for Nonelective Safe Harbor Plans Eliminated

The ADP nonelective safe harbor may not be adopted unless the employer provides written notice to each employee who is eligible to participate in the plan of their rights and obligations under the plan (Code Sec. 401(k)(12)(D)). The Act, effective for plan years beginning after December 31, 2019, eliminates the notice requirement, as long as the nonelective contribution requirements under Code Sec. 401(k)(12)(C) are met (Code Sec 401(k)(12)(A), as amended by Act Sec. 103(a)). However, eliminating the notice does not eliminate the right of employees to make or change an election at least once per year.

⚠️ **CAUTION.** In the event the employer elects to make the matching safe harbor contribution, notice would still be required.

III Amendment Deadline for Nonelective Safe Harbor Plans Extended

The Act, effective for plan years beginning after December 31, 2019, authorizes plan sponsors to adopt an amendment implementing a nonelective safe harbor plan, including a Code Sec. 401(k)(13) automatic contribution arrangement, at any time.
The start-up tax credit is limited to the adoption of new plans and is available only for 3 years.

IV Increase in Tax Credit Limit for Small Employer Pension Plan Start-up Costs

The Act, effective for tax years beginning after December 31, 2019, increases the tax credit for establishing a new retirement plan. Specifically, for the first credit year and each of the two tax years immediately following the first credit year, the tax credit would be the greater of: (1) $500, or (2) the lesser of (a) $250 for each nonhighly compensated employee eligible to participate in the plan, or (b) $5,000 (Code Sec. 45E(b)(1), as amended by Act Sec. 104).

COMMENT. The increase in the tax credit may aid in the adoption of retirement plans. However, the tax credit is inherently limited. The tax credit is limited to the adoption of new plans and is available for only 3 years. Thus, the law does not provide an ongoing credit that an employer may use to pay the administration costs of maintaining an established plan.

Moreover, qualified start-up costs are not deductible to the extent that they are effectively offset by the tax credit. Thus, taxpayers should remember to claim deductions for the remaining qualified costs that are ordinary and necessary business expenses under Code Sec. 162.

V Small Employer Automatic Enrollment Credits

The Act, effective for tax years beginning after December 31, 2019, amends Code Sec. 38 by recognizing, as a current year business credit, up to $500 in costs incurred by small employers in adopting a 401(k) plan or SIMPLE plan with an automatic enrollment feature (Code Sec. 38(b) (33), added by Act Sec. 105(b); Code Sec. 45T, as added by Act Sec. 105(a)).

$500 credit during credit period. The credit is limited to $500 for any tax year occurring during a specified “credit period.” The credit period would be the 3-taxable-year period beginning with the first tax year for which the employer included an eligible automatic contribution arrangement in a qualified plan sponsored by the employer (Code Sec. 45T(a) and (b), as added by Act Sec. 105(a)). However, in order for the credit to apply for a tax year, the eligible automatic contribution arrangement must have been included in the plan for the year (Code Sec. 45T(b)(2)).

Additional credit. The credit is provided in addition to the plan start up credit authorized under Code Sec. 45E.

Eligible employers. The credit is limited to employers that had no more than 100 employees who received at least $5,000 in compensation from the employer in the preceding year (Code Sec. 45T(c), citing Code Sec. 408(p)(2)(C)(i)).

VI Repeal of Maximum Age for Traditional IRA Contributions

The Act, effective for contributions made for tax years beginning after December 31, 2019, repeals the prohibition on contributions to a traditional IRA by a taxpayer who has attained age 70½
Coordination with qualified charitable distributions. The Act clarifies that the amount of qualified charitable distributions that may be excluded from income must be reduced (but not below zero) by an amount equal to the excess of: (1) the aggregate amount of deductions allowed the taxpayer under Code Sec. 219 for all tax years ending on or after the date the taxpayer attains age 70½, over (2) the aggregate amount of reductions allowed for charitable purposes for all tax years preceding the current tax year (Code Sec. 408A(c)(4), repealed by Act Sec. 107(c)).

The amendment will apply to distributions made for tax years beginning after December 31, 2019.

**Comment.** Taxpayers may continue to make IRA contributions after attaining age 70½. However, those contributions will reduce the amount eligible for the qualified charitable distribution.

VII Portability of Lifetime Income Options

The Act, effective for plan years beginning after December 31, 2019, will allow for the portability of lifetime income options, in the event the lifetime income investment is no longer authorized to be held as an investment option under the plan (Code Sec. 401(a)(38), as added by Act Sec. 109).

**Trustee-to-trustee transfer.** In the event the lifetime income investment is no longer authorized as an investment option, qualified defined contribution plans, 403(b) plans or governmental 457(b) plans will be able to make direct trustee-to-trustee transfers to another employer-sponsored retirement plan or IRA of lifetime income investments or distributions of a lifetime income investment in the form of a qualified plan distribution annuity (Code Sec. 401(a)(38)). The direct trustee-to-trustee transfer (i.e., qualified distribution) would need to occur within 90 days prior to the date on which the lifetime income investment is no longer authorized to be held as an investment option under the plan (Code Sec. 401(a)(38)(A) and (B)).

**Comment.** The provision of an alternative route to plan eligibility promises to greatly benefit working women who primarily bear the burden of child rearing in the United States.

VIII Expansion of Plan Eligibility to Long Term Part-Time Employees

The Act, effective for plan years beginning after December 31, 2020, requires employers maintaining a 401(k) plan to have a dual eligibility requirement under which an employee must complete either a one year of service requirement (not to exceed 1,000 hours) or three consecutive 12-month periods of service in which the employee completes at least 500 hours of service (Code Sec. 401(k)(2)(D), as amended by Act Sec. 112(a)).

Note, the expanded eligibility rule would affect only 401(k) plans and also would not apply to employers with collectively bargained plans (Code Sec. 401(k)(15)(C), as added by Act Sec. 112(a)).

Employee must attain age 21 by end of period. The expanded three consecutive years of service eligibility track would not be available to an employee unless the individual attains age 21 by the close of the last of the three consecutive 12-month periods (Code Sec. 401(k)(15)(A)).

Nondiscrimination and top heavy rules do not apply. Employees who qualify for plan participation under the 500-hour rule are likely to be low paid employees which can cause nondiscrimination headaches for the employer. Accordingly, employers may elect to exclude employees from nondiscrimination testing benefit requirements if they participate solely by reason of the 500-hour track (Code Sec. 401(k)(15)(B)(i)(II)). In addition, employers will not be required to make nonelective or matching contributions on behalf of such employees even if such contributions are made on behalf of other employees (Code Sec. 401(k)(15)(B)(ii)).

An employer may also elect to exclude all employees who are eligible to participate in a plan under the 500-hour track from the top-heavy rules of Code Sec. 416 (Code Sec. 401(k)(15)(B)(ii)).

**Comment.** The provision of an alternative route to plan eligibility promises to greatly benefit working women who primarily bear the burden of child rearing in the United States.
IX Increased Age for Taking Required Minimum Distributions

The Act, effective for distributions required to be made after December 31, 2019, increases the age at which required minimum distributions must begin to be made from qualified plans and IRAs from 70½ to 72 (Code Sec. 401(a)(9)(C)(i)(I), as amended by Act Sec. 114(a)).

The extension also applies for purposes of the date by which a surviving spouse must begin taking required minimum distributions as the designated beneficiary of the employee. (Code Sec. 401(a)(9)(B)(iv)(I)).

Note, the amended law does not alter the rule allowing participants (other than 5 percent owners and IRA holders) to defer required minimum distributions until retirement.

**COMMENT:** The provision approximates the goal of reflecting the increase in life expectancy. However, it may not appease those who have advocated a repeal of the age condition or provide solace to many taxpayers who either are not in a position to defer distributions or will be faced with larger required minimum distributions at age 72.

X Lifetime Income Disclosure

Benefit statements provided to defined contribution plan participants would need to include a lifetime income disclosure at least once during any 12-month period. The disclosure would illustrate the monthly payments the participant would receive if the total account balance were used to provide lifetime income streams, including a qualified joint and survivor annuity for the participant and the participant’s surviving spouse and a single life annuity (ERISA Sec. 105(a)(2) (D), as added by Act Sec. 203). The amendments would apply to benefit statement furnished more than 12 months after the last of the issuance of the required interim rules, model disclosure, or specified assumptions.

**Lifetime income stream equivalent of total benefits accrued.** The required disclosure will reflect the “lifetime income stream equivalent of the total benefits accrued” with respect to a participant or beneficiary (ERISA Sec. 105(a)(2)(D)(i)(I)).

A lifetime income stream equivalent of the total benefits accrued benefits would be the amount of monthly payments the participant or beneficiary would receive if the total accrued benefits of the participant or a beneficiary were used to provide “lifetime income streams,” based on assumptions to be specified by the Secretary of Labor (ERISA Sec. 105(a)(2)(D)(ii)).

**Plan fiduciaries would not have liability solely because they provide lifetime income stream equivalents that are derived in accordance with prescribed assumptions.**

**Model disclosure.** The Secretary of Labor is directed, within one year of the December 20, 2019 date of enactment, to issue a model lifetime income disclosure (ERISA Sec. 105(a)(2)(D)(ii)). The model disclosure must be written in a manner so as to be understood by the average plan participant and explain: (1) that the lifetime income stream equivalent is only provided as an illustration; (2) that the actual payments under the lifetime income stream which may be purchased with the total benefits accrued will depend on numerous factors and may vary substantially from the lifetime income stream equivalent in the disclosures; and (3) the assumptions upon which the lifetime income stream equivalent was determined.

**Assumptions and rules.** The Secretary of Labor is further instructed, within one year of the date of enactment, to prescribe assumptions which administrators of individual account plans may use in converting total accrued benefits into lifetime income stream equivalents (ERISA Sec. 105(a)(2)(D)(iii)). The DOL must also issue interim final rules implementing the assumptions.

**Limitation on liability or providing lifetime income stream equivalent.** Plan fiduciaries, plan sponsors, or other persons will not have liability under ERISA solely because they provide lifetime income stream equivalents that are derived in accordance with the prescribed assumptions and...
include the explanations contained in the model disclosure (ERISA Sec. 105(a)(2)(D)(v)).

XI Fiduciary Safe Harbor for Selection of Lifetime Income Provider

Plan fiduciaries are afforded an optional safe harbor to satisfy the prudence requirements of ERISA with respect to the selection of insurers for a guaranteed retirement income contract (ERISA Sec. 404(e), as added by Act Sec. 204). In the event the fiduciary receives certain assurances from the insurer regarding its compliance with state insurance requirements, a fiduciary would be shielded from liability for any loss that may be incurred by a participant or beneficiary due to the insurer’s failure to satisfy its financial obligations under the contract.

**Safe harbor for selection of guaranteed retirement income contract.** The safe harbor would deem a fiduciary to have satisfied the prudence requirements under ERISA Sec. 404(a)(1)(B) in the selection of a guaranteed retirement income contract, if the fiduciary:

1. engages in an “objective, thorough, and analytical search” for the purpose of identifying insurers from which to purchase such contracts;
2. with respect to each insurer of a guaranteed retirement income contract: (a) considers the financial capability of the insurer to satisfy its obligations under the contract, and (b) considers the cost (including fees and commissions) of the guaranteed retirement income contract offered by the insurer in relation to the benefits and product features of the contract and administrative services to be provided under such contract; and
3. on the basis of such considerations, concludes that: (a) at the time of the selection, the insurer is financially capable of satisfying its obligations under the guaranteed retirement income contract; and (b) the relative cost of the selected guaranteed retirement income contract is reasonable (ERISA Sec. 404(e)(1))

**Determination of financial capability of insurer.**

A fiduciary would be deemed to have satisfied its fiduciary duties under ERISA in determining the financial capabilities of an insurer to satisfy its obligations under the guaranteed retirement income contract under specified conditions.

**Written representation by insurer of financial capability.** The fiduciary must obtain written representations from the insurer that the insurer:

1. is licensed to offer guaranteed retirement income contracts;
2. at the time of selection and for each of the immediately preceding 7 plan years: (a) operates under a certificate of authority from the insurance commissioner of its domiciliary state which has not been revoked or suspended; (b) has filed audited financial statements in accordance with the laws of its domiciliary state under applicable statutory accounting principles;
3. maintains (and has maintained) reserves which satisfy all the statutory requirements of all states where the insurer does business; and
4. is not operating under an order of supervision, rehabilitation, or liquidation; (3) undergoes, at least every 5 years, a financial examination (within the meaning of the law of its domiciliary state) by the insurance commissioner of the domiciliary state (or representative, designee, or other party approved by such commissioner); and
5. will notify the fiduciary of any change in circumstances occurring after the required representations have been provided which would preclude the insurer from making such representations at the time of the issuance of the guaranteed retirement (ERISA Sec. 404(e)(2)).

**Fiduciary not required to select lowest cost contract.** The safe harbor does not require a fiduciary to select the lowest cost contract (ERISA Sec. 404(e)(3)). Thus, a fiduciary may consider the value of a contract, including features and benefits of the contract and attributes of the insurer (including, without limitation, the insurer’s financial strength) in conjunction with the cost of the contract.

**Liability limitation.** Fiduciaries who comply with the conditions of the safe harbor would be shielded from liability following the distribution of any benefit, or the investment by or on behalf of a participant or beneficiary pursuant to the selected guaranteed retirement income contract, for any losses that may result to the participant or beneficiary due to the insurer’s inability to satisfy its financial obligations under the terms of the contract (ERISA Sec. 404(e)(5)).

XII Modification of Nondiscrimination Cross-Testing Rules

The Act, effective upon the December 20, 2019 date of enactment, would allow expanded
A defined contribution plan may be tested on a benefits basis if the plan provides “make-whole” contributions to a closed class of participants whose accruals under a defined benefit plan have been reduced or eliminated.

Matching contributions. In the event a defined benefit plan is aggregated with a portion of a defined contribution plan providing matching contributions, the defined benefit plan must also be aggregated with any portion of such defined contribution plan which provides elective deferrals (Code Sec. 401(o)(1)(B)(ii)(I)). In addition, the matching contributions must be treated in the same manner as nonelective contributions (Code Sec. 401(o)(1)(B)(ii)(II)).

Testing of defined contribution plans on a benefits basis. A defined contribution plan may be tested on a benefits basis if: (1) the plan provides “make-whole contributions” to a closed class of participants whose accruals under a defined benefit plan have been reduced or eliminated; (2) for the plan year of the defined contribution plan as of which the class eligible to receive such make-whole contributions closes and the two succeeding plan years, the closed class of participants satisfies the coverage requirements of Code Sec. 410(b)(2)(A)(i)
(determined by applying the special rules of Code Sec. 401(o)(1)(I); (3) after the date as of which the class was closed, any amendment to the defined contribution plan which modifies the closed class or the allocations, benefits, rights, and features provided to such closed class does not discriminate significantly in favor of highly compensated employees, and (4) the class was closed before April 5, 2017, or meets the rule for defined benefit plans that were closed at a different date under 401(o)(1)(C) (Code Sec. 401(o)(2)(A)).

Make-whole contributions. Make-whole contributions are nonelective allocations made for each employee in the class which are reasonably calculated, in a consistent manner, to replace some or all of the retirement benefits which the employee would have received under the defined benefit plan and any other plan or qualified cash or deferred arrangement under 401(k)(2) if no change had been made to such defined benefit plan and such other plan or arrangement (Code Sec. 401(o)(3)(A)). Note, consistency is not required with respect to employees who were subject to different benefit formulas under the defined benefit plan.

Participation requirements for protected participants. Closed defined benefit plans are provided a measure of relief from the participation requirements of Code Sec. 401(a)(26). A plan will be deemed to satisfy the minimum participation rules if: (1) the plan is amended to cease all benefit accruals, or to provide future benefit accruals only to a closed class of participants; (2) the plan satisfies Code Sec. 401(a)(26)(A) as of the effective date of the amendment; and (3) the amendment was adopted before April 5, 2017, or the plan would be described in Code Sec. 401(o)(3)(A). Note, consistency is not required with respect to employees who were subject to different benefit formulas under the defined benefit plan.

XIII Modification of Required Distribution Rules for Designated Beneficiaries

The Act, effective for distributions with respect to plan participants and IRA owners who die after December 31, 2019, will require distributions to individuals other than the surviving spouse of the employee (or IRA owner), disabled or chronically ill individuals, individuals who are not more than 10 years younger than the employee (or IRA owner), or a child of the employee (or IRA owner) who has not reached the age of majority, to generally be distributed by the end of the 10th calendar year following the year of the employee or IRA owner’s death (Code Sec. 401(a)(9)(H), as added by Act Sec. 401(a)(1)). Note, unlike prior law, the 10-year period will apply regardless of whether the plan participant or IRA owner dies before or after reaching the required beginning date (Code Sec. 401(a)(9)(H)(i)(II)).

Eligible designated beneficiaries. The modified rules will not apply to “eligible designated beneficiaries” (Code Sec. 401(a)(9)(H)(ii)). A new term, eligible designated beneficiaries will be limited to: the surviving spouse of the employee; a minor child of the employee; a disabled person under Code Sec. 72(m)(7) (i.e., a person unable to engage in any substantial gainful activity due to a medically determinable physical or mental impairment; a chronically ill individual (as defined by Code Sec. 7702B(c)(2)), whose period of inability to perform at least two activities of daily living, such as bathing, dressing, or toileting, has been certified as indefinite and is expected to be lengthy); and an individual who is not more than 10 years younger than the deceased participant or IRA owner (Code Sec. 401(a)(9)(E), as amended by Act Sec. 401(a)(2)).

Determination of eligible designated beneficiary status. The determination of whether a designated beneficiary (i.e., a beneficiary designated by an employee) is an “eligible designated beneficiary” will made as of the date of the employee’s death (Code Sec. 401(a)(9)(E)(ii)).

COMMENT. Under prior law, an improper beneficiary designation could be “cured” by September 30 of the year following the year the plan participant or IRA owner died. The amended rules foreclose this option. However, it may still be possible to substitute a beneficiary by means of a qualified disclaimer under Code Sec. 2518, if the time limitation and other applicable requirements are met.
Children reaching age of majority. The exception applicable to minor children of the employee will no longer apply once the child reaches the age of majority. Thus, once a minor child reaches the age of majority, any remainder of the child’s interest in the plan or IRA distributions must be completed within 10 years after the date on which the age of majority is attained (Code Sec. 401(a)(9)(E)(iii)).

**COMMENT.** The new 10-year default rule will severely limit, if not eliminate, the use of the “stretch IRA” as an effective estate planning tool. The amended rules will subject non-spousal beneficiaries to potentially large tax liability on an accelerated time frame. However, taxpayers may consider other strategies, such as charitable remainder trusts, that can achieve similar, if not exactly the same, financially beneficial results.

**Conclusion**

The stated goals of the SECURE Act are to expand retirement savings, improve plan administration, simplify existing rules, and preserve retirement income. Whether the Act will attain its stated goals remains to be seen, but it will afford plenty of opportunity for new planning strategies.

However, plan sponsors and administrators are cautioned that, while Congress sat on the bill for months, they are not afforded the luxury of delay, given the accelerated effective date of most of the Act’s provisions. Accordingly, most qualified plans will need to adopt amendments implementing the Act, under the prescribed remedial amendment period, by the 2022 plan year. In the interim, all concerned parties may expect an abundance of regulatory guidance from the IRS and DOL.
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