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PLAN SPONSOR QUARTERLY UPDATE
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What's New in Washington

SECURE 2.0 is Back … Back Again!

by Kelsey Mayo
Partner, Poyner Spruill

Kelsey's practice is focused in the areas of Employee Benefits and Executive Compensation. She works with business owners and HR executives to understand and manage employee benefits and executive compensation arrangements. She routinely represents clients before the Internal Revenue Service, Department of Labor, and Pension Benefit Guarantee Corporation and has extensive experience in virtually all aspects of employee benefit plans and executive compensation arrangements.

December brought a lot of excitement. Among the fun: Hannukah for some, Christmas for some, and a ghost from months past for all — SECURE 2.0! The Act was included in Congress's year-end spending bill and contains more than 90 retirement-related provisions. The Act will have a number of wide-ranging impacts on the retirement industry, including those summarized below.

Required Provisions

- **Require auto enrollment and auto escalation for new defined contribution plans.** Nearly all 401(k) and 403(b) deferral plans established after the Act is enacted, will have to satisfy auto-enrollment and auto-escalation requirements no later than the plan year beginning in 2025. Small employers with 10 or fewer employees, businesses less than three years old, church plans, and governmental plans generally will be exempt from this requirement.
- **Reduce the service required for long-term part-time employees.** The SECURE Act requires that long-term, part-term employees — those who work at least 500 hours in 3 consecutive years — be permitted to defer to the 401(k) plan. This bill will reduce this to 2 years, effective with the 2025 plan year and will also require 403(b) plans to comply.
- **Roth Catch-Up Contributions.** Beginning in 2024, catch-up contributions must be made on a Roth-basis for employees with compensation of at least $145,000 in the prior year.
- **Birth or Adoption Distributions.** Individuals who take a qualified birth or adoption distribution can only repay the distribution within 3 years of the distribution. Transition rules apply to QBADs already made.
- **Retirement Lost and Found.** DOL must create a national database of employee benefit amounts to allow employees to track benefits across employers and aid employers in finding lost participants. Plan sponsors will have a new reporting obligation for the 2025 plan year (two years after enactment).

- **Lump Sum Window Disclosures.** For pension plans that are amended to offer a lump sum window in the future, new disclosure and reporting to DOL and PBGC would apply. This wil likely apply some time after January 1, 2025.
- **Update to related company rules.** For plan years beginning after December 31, 2023, SECURE 2.0 modifies the rules for determining whether companies are related for plan purposes. This is particularly applicable to business owners living in community property states and business owners with children under age 21.

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Optional Design Provisions

- **RMD Changes.** While changes to required minimum distributions typically are adopted almost universally, plan sponsors do have the option to retain current rules that force out benefits sooner. You may, however, adopt the following changes:
    - **Increase the RMD age.** SECURE 2.0 increases the RMD age to 73 in 2023 and age 75 in 2033.
    - **No RMD from Designated Roth.** Designated Roth accounts will not be required to pay minimum distributions during the participant's lifetime.
    - **Surviving Spouse.** Surviving spouse can elect to be treated as the participant for RMDs.
- **Increase the Cashout Limit.** The mandatory cashout limit will be increased from $5,000 to $7,000, effective for distributions made after December 31, 2023.
- **Additional Catch-ups.** Beginning in 2025, a plan may offer higher limit on catch-up contributions for years a participant attains age 60, 61, 62, and 63. The limit in those years may be the greater of: (1) $10,000 or (2) 50% of the 2024 regular catch-up limit. This new limit is indexed for years after 2025.

- **Revisions to in-service withdrawals.** The bill makes a number of optional changes to in-service withdrawals, including:
    - Withdrawals for personal emergency expenses, with limits on the amount and frequency.
    - Withdrawals in the case of domestic abuse (these also are excepted from the 10% early withdrawal penalty).
    - Distributions of up to $22,000 to individuals impacted by federal disasters, effective for disasters occurring on or after January 26, 2021. Also permits repayment of certain prior distributions.

    In addition, the bill ensures the plan administrator may rely on an employee's certification that the employee meets the hardship distribution requirements (essentially a codification of current IRS guidance).
- **Provide small incentives for participation.** Plan sponsors will be able to provide small financial incentives (not from plan assets) to induce employees to contribute to the 401(k) plan.
- **Extend time to adopt discretionary amendment.** Plan sponsors may adopt a discretionary amendment for the immediately preceding plan year no later than the plan sponsor's tax return due date if the amendment is increasing benefits other than matching contributions. Effective beginning with the 2024 plan year.
- **Permit treatment of student loan payments as deferrals for matching contributions.** Plans will be permitted to match an employee's student loan payment and treat it as an employer matching contribution, beginning with the 2024 plan year. Currently loan payments can be matched by a plan, but this changes the treatment for nondiscrimination testing.
- **Offer NHCEs pension-linked emergency savings accounts.** Plans may offer non-highly compensated employees after-tax emergency savings accounts with flexible in-service withdrawals.
- **Permit treatment of employer contributions as Roth.** Plans may offer employer contributions on a Roth basis. Currently, employer contributions must be pre-tax only, although the plan could then offer a Roth conversion.
- **Top Heavy Modification.** Beginning in 2024 taxable years, employees who do not meet the minimum age and service requirements under the Code may be excluded in determining whether a plan satisfies the top-heavy minimum contribution requirement.

Provisions Related to Plan Notices

- **Reduce notices to unenrolled participants.** Plan sponsors will be able to provide fewer notices to employees who elect not to participate.
- **Paper Statements Required.** The bill will require one paper benefit statement per year for participants who are not "wired at work."
- **Annual Funding Notice.** The bill changes the content requirements for pension plan annual funding notices.

Provisions Related to Plan Corrections

- Expands the self-correction program to inadvertent significant errors, without time limit.
- Restricts the ability to recover overpayments (preventing recovery in many instances) — particularly with respect to recovery from annuity recipients.
- Provide a new favorable correction of employee automatic enrollment errors.
- Reduced penalties for missed required minimum distributions (RMDs).

What's next? These changes will impact every plan. Work with your trusted TPA partner and ERISA counsel to determine how and when these provisions will impact your plan.

Hot Topic:

Highlight on SECURE 2.0's Small Employer Pension Plan Start-Up Credit

by Kelsey Mayo, Partner, Poyner Spruill

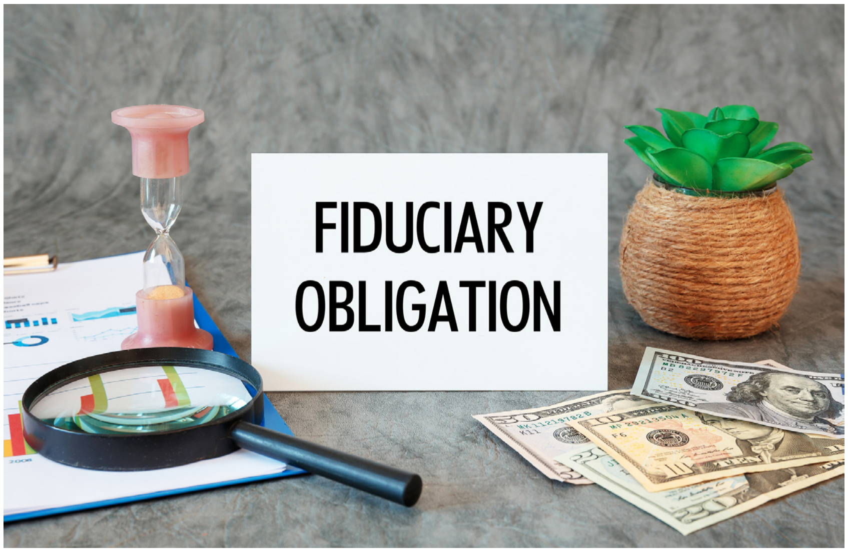
As you've heard by now, SECURE 2.0 is back, carefully inserted beginning on page 2,046 of Congress's 4,000+-page year-end spending bill. This article highlights one of the many retirement-related provisions contained therein: the small employer pension plan start-up credit.

First, SECURE 2.0 modifies the plan start-up credit (which was added in SECURE 1.0) that employers with 100 or fewer employees are entitled to by increasing the percentage of costs used in calculating the credit. Before SECURE 2.0, the credit equaled 50% of an eligible employer's eligible startup costs, generally up to an annual $5,000 cap (limited by the number of non-highly compensated employees). If you have more than 50 employees, this amount remains unchanged. However, if you have 50 or fewer employees, SECURE 2.0 increases the credit to cover 100% of eligible startup costs for the first three years of the plan. The $5,000 cap and limit based on non-highly compensated employees remains. "Eligible startup costs" includes ordinary and necessary costs to set up and administer the new plan and educate employees about the new plan — therefore this change makes it nearly free for employers with 50 or fewer employees to start a retirement plan.

Second, SECURE 2.0 adds a new credit for employers with 100 or fewer employees that provide employer contributions to a new defined contribution plan. For the first five years of the plan, small employers are entitled to a tax credit for the employer contributions made to each employee who earns less than $100,000 (indexed after 2023), up to $1,000 *per employee*. In the year the plan is established and the next year the tax credit is equal to 100% of this amount. It is then phased out over the next three years: 75% of contributions up to the cap in year three, 50% of contributions up to the cap in year four, and 25% of contributions up to the cap in year five. The full credit is available to employers with 50 or fewer employees. The credit is phased out for employers with between 51 and 100 employees. This provides an incredible incentive for small employers to provide employer contributions in the first 5 years of the plan! If you are eligible, your TPA partner can help you evaluate how to maximize the benefit of this new tax credit. Reach out sooner rather than later because certain plan changes may be advisable—and those options may be more limited later in the year.

Bottom line, if you are an eligible plan sponsor who has recently started a new plan and you qualify as a small employer for purposes of these credits, this is great news! Note that certain restrictions apply, such as you are not eligible if in the three years prior to the establishment of a new plan, you or a related company maintained a plan that would cover substantially the same employees as the new plan. Therefore, as with all tax matters, be sure to consult with competent tax advisors on your eligibility and how to take advantage of one or both of these credits.

Best Practices for Plan Sponsors: DOL Proposes New VFCP Rules



by Kelsey Mayo, Partner, Poyner Spruill

In November, the DOL released proposed updates to its Voluntary Fiduciary Correction Program ("VFCP") and related guidance. While plan sponsors may *not* yet rely on the proposal, it may provide a window into current DOL thinking regarding the program and what is soon to come in 2023.

Perhaps most significantly: if approved, the change would permit plan sponsors to self-correct late deferrals and loan repayments. Under the current VFCP, plan sponsors are only able to obtain certainty the DOL will not require a different rate of earnings or require other corrections if the plan sponsor completes a formal VFCP filing. The proposed change would provide plan sponsors will reliance on self- corrections, but the proposal comes with a number of caveats:

- Self-correction would be permitted only for deferrals and loan repayments that were remitted within 180 calendar days from the date of withholding or receipt.
- Self-correction would be permitted only in situations where lost earnings did not exceed $1,000. Further, lost earnings would be calculated from the date of withholding—not from the date of the amounts should have been remitted, as is commonly used in current self-corrections.
- Plan sponsors would be required to submit a self-correction notice to the DOL and complete and retain a self-correction record retention checklist.
- Plan sponsors under investigation would be ineligible for the new self-correction program.

In addition, if the proposal were adopted, self-corrections would be eligible for excise tax relief *without* the participant notices that are currently required for excise tax relief.

Of course, plan sponsors are likely to encounter errors that don't fit within the new self-correction program. In the past, it was common practice to self-correct many of those errors. It is of some concern that this proposal would, by negative implication, suggest that the DOL believes that only the described situations may be self-corrected. Of course, plan sponsors may still elect to self-correct without formal reliance under the new VFCP, but they might want to evaluate methodology and DOL enforcement trends after the VFCP changes are finalized when deciding how to correct errors that don't fall within the official self-correction program.

While the proposal cannot be used by plan sponsors just yet, this has significant promise for permitting faster and more efficient corrections in the future. In addition, plan sponsors may consider whether any changes to self-correction practices in the meantime is advisable.