The SECURE 2.0 Act

Pub. L. 117-328, Division T (Dec. 29, 2022)

Required Minimum Distributions – Sec. 107

Big Picture.

- The "triggering age" for required minimum distributions under Code § 401(a)(9) will incrementally increase from age 72 (pre-SECURE 2.0) to age 73 (for individuals who attain age 72 after December 31, 2022, and age 73 before January 1, 2033) and then age 75 (for individuals who attain age 74 after December 31, 2032).
- Did not modify rule that participants who retire after the year in which they attain age 70 ½ are entitled to an actuarial adjustment to their benefits. (Code § 401(a)(9)(C)(iii).)
- Effective Date: Beginning with individuals who attain age 72 after December 31, 2022.

Final Rule Implementing SECURE Act and SECURE 2.0 Act Changes to Required Beginning Date Rules.

- Treasury released a final rule on July 19, 2024 implementing changes made to the RBD rules. (89 Fed. Reg. 58,886 (July 19, 2024).)
- Maintains the "later of" RBD rule for non-5% owners.
- Keeps the see-through trust rule permitting a plan to disregard a trust that is designated as a participant's beneficiary and instead treating the trust's beneficiaries as the participant's beneficiaries.
    - Exception: A see-through trust beneficiary is treated as the participant's beneficiary if the trust's right to receive payment is not contingent upon or delayed until the death of another trust beneficiary who survives the participant.
- Implements "applicable multi-beneficiary trust" provisions of SECURE Act that added special rules regarding trust beneficiaries when one or more beneficiary is the participant's spouse, child under the age of majority, or chronically ill/ disabled beneficiary.
- Effective for required minimum distributions on and after January 1, 2025.

Recoupment of Overpayments – Sec. 301

The Basics.

- Provides plans with long-awaited guidance for recouping overpayments made to participants.
- New Section 206(h) of ERISA gives trustees discretion to not seek recovery of "inadvertent benefit overpayments" and provides fiduciaries some protection against claims for breach of fiduciary duty for not pursuing the overpayments.
- Effective: December 29, 2022.

Limitations to Recoupment

- Imposes limitations on plan fiduciaries recouping an overpayment.
  - No interest or other fees on the overpayment.
  - If recouping by offsetting a non-decreasing annuity by reducing future payments, amount of recoupment each year cannot exceed 10% of the overpayment amount, future benefit payments cannot be reduced below 90% of the correct monthly benefit.
  - Recoupment efforts cannot include threats of litigation unless a fiduciary determines there is a likelihood of success to recover more than the costs of such litigation.
  - Cannot use collections agency or other third party to attempt recovery (with limited exceptions).
  - Cannot seek recoupment of an overpayment to a participant from any beneficiary.

Additional Protections for Participants

- Cannot recover an overpayment if first overpayment occurred more than 3 years before notifying the participant of the overpayment.
- 3-year rule and other requirements do not apply if the participant or beneficiary is "culpable."
  - Unclear what rises to the level of being "culpable."
- A participant or beneficiary may challenge the recoupment under a plan's claims and appeals procedures.

Expansion of Employee Plans Compliance Resolution System ("EPCRS") – Sec. 305

- EPCRS provides guidance on how plan fiduciaries can correct and resolve qualification failures.
- IRS must issue guidance within 2 years of date of SECURE 2.0's enactment (*i.e.*, December 29, 2024)
- Expands plan fiduciaries' ability to self-correct "eligible inadvertent failures."
- Eligible inadvertent failures are ones that occur despite the plan having proper protections and procedures in place that comply with EPCRS.
- Egregious errors, failures due to the diversion or misuse of plan assets, and direct or indirect abusive tax avoidance transactions are not eligible for expanded corrections.
- The plan's correction of a qualification error must conform to the correction methods set forth in current or future EPCRS procedures (currently Rev. Proc. 2021-30).

Other SECURE 2.0 Act Changes

- ❖ Secretary of Treasury directed to promulgate regulations within 2 years from date of enactment for consolidating certain defined contribution plan notices. (Sec. 341.)
- ❖ Increased the involuntary cash-out limit from $5,000.00 to $7,000.00 for distributions made after December 1, 2023. (Sec. 304.)
- ❖ DOL, Treasury, and PBGC directed to review existing reporting and disclosure requirements and submit report to Congress addressing the effectiveness of existing reporting and disclosure requirements and whether certain notices can be consolidated or simplified. (Sec. 319.)
  - ❖ Departments started the process by soliciting feedback from interested parties on the effectiveness of existing disclosures and the consolidation/ elimination of others. (89 Fed. Reg. 4,215 (Jan. 23, 2024).)

Retirement Savings Lost and Found – Sec. 303.

The Basics.

- DOL must establish (in consultation with Treasury) an online searchable database where participants can find lost retirement plans and plans may be able to find missing participants.
- The program must safeguard all data and allow individuals to opt out of the database.
- Effective Date: No later than 2 years after enactment.

Big 8 Technical Discussion Draft (Dec. 2023).

- Clarifies that info allowing an individual to locate a plan may be provided to a beneficiary/ former beneficiary of participant.
- Allows program to provide information about a designated trustee or IRA issuer to which mandator distributions were made under IRC § 401(a)(31)(B) as well as information about an annuity issuer connected to a distribution made to a participant during the plan year.
- Alters the reporting requirements by expanding the collection of information to all annuities, not just deferred annuity contracts.

DOL's Notice of Proposed Information Collection.

- In April 2024, EBSA issued a notice asking plan administrators to <u>voluntarily</u> provide the following information to establish the Retirement Savings Lost and Found.
    - ERISA § 523(e) states "the administrator of a plan to which the vesting standards of section 203 apply ***<u>shall</u>*** submit to the Secretary. . ." certain information.
    - DOL explains voluntary information collection is necessary, because IRS determined it would not allow for Form 8955 – SSA to be shared with DOL due to privacy concerns related to IRC § 6103.
    - DOL made what some viewed as a veiled threat through its investigation and information collection authority under other sections of ERISA.
- In addition to the voluntary nature of the information collection, DOL has requested data "dating back to the date a covered plan became subject to ERISA."
- Information to be submitted electronically.

New Distribution Options: Eligible Distributions for Domestic Abuse Victims – Sec. 314.

The Basics.

Eligible distribution to a domestic violence victim NOT subject to the § 72(t) 10% penalty.

Must be made during 1-year period during which the individual is a victim of DV.

Self-certification permitted.

Effective Date: Distribution made after December 31, 2023.

Limits.

Such distribution may not exceed the lesser of:

- $10,000; or
- 50% of the present value of the nonforfeitable accrued benefit.

Repayment Rules.

The amount of the distribution may be repaid similar to the repayment for birth or adoption.

Outstanding questions:

- Is this permissive or mandatory?
- Need clarification whether repayment period is 3 years.

New Distribution Options: Emergency Expenses – Sec. 115

The Basics.

Amends IRC § 72(t) to allow 1 annual penalty-free withdrawal for "emergency personal expenses."

An "emergency personal expense" meets unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses.

Self written certification that distribution meets the definition of an emergency.

Limits.

Not to exceed the lesser of:

- $1,000 or
- an individual's total nonforfeitable benefit.

Repayment Rules.

No subsequent emergency personal expense distributions for 3 years unless previous distribution is fully repaid, or the aggregate elective deferrals and employee contributions equal the amount distributed.

Distribution may be repaid similar to distributions for birth or adoption distributions – 3 year repayment period.

New Distribution Options: Terminally Ill Individuals – Sec. 326

The Basics.

Terminally-ill individuals (certified by a physician) will not be subject to IRC § 72(t) 10% penalty. The employee must furnish the plan administrator sufficient evidence of the terminal illness.

Terminal means likely to die within 84 months.

No limits on amount to be distributed.

Repayments.

Distribution may be repaid similar to distributions for birth or adoption distributions.

Outstanding Qs.

- Permissive or mandatory?
- Need clarification that repayment period is 3 years.

SECURE Technicals Discussion Draft.

While SECURE 2.0 included an exception to the early withdrawal penalty on distributions for terminally-ill individuals, this provision simply provides that a distribution made to an employee on or after the date on which the employee has been certified by a doctor to be terminally ill is a permissible distribution.

Roth Catch-up Contributions – Sec. 603.

The Basics.

- For individuals who have compensation for the preceding year from the employer that exceeds $145,000 (adjusted), catch-up contributions must be made on a Roth basis.
- Does NOT apply to SEPs or SIMPLEs.
- Effective for taxable years beginning 12/ 31/ 23 (*but see* Treasury Guidance)

Treasury Guidance.

- In August 2023 in Notice 2023-62, Treasury announced a 2-year administrative delay and subsequently noted there would be no additional delays.
- Still waiting for guidance to cover some unanswered questions:
  - What should a plan do with respect to elections for individuals whose compensation is later determined to be above the threshold?
  - What is the compensation for individuals with part-year employment or new hires?
  - Special considerations for multiemployer pension plans.

Big 8 Technical Discussion Draft.

- The technicals legislative package would codify the clarification that Treasury had already noted: catch-up contributions are permitted for taxable years beginning after December 31, 2023.
- Also clarifies that for 457(b) plans, only wages from the employer sponsoring the plan will count in determining whether a participant's catch-up contributions must be made on a Roth basis.

Tribal QDROs – Sec. 339

The Basics.

- Added by Sen. Smith's (D-MN) amendment to RISE & SHINE, Senate HELP's bill that was added to the other 4 corners' bills to create the SECURE 2.0 Act.
- Amends ERISA and the Code to permit domestic relations orders issued by or under the laws of an Indian tribal government, a subdivision of such tribal government, or an agency or instrumentality of either, to qualify as QDROs.
- Applies to domestic relations orders received by plan administrators after December 31, 2022, including any order resubmitted after such date for reconsideration.

Thank you.

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