WINSTON & STRAWN LLP

BLOG

SECURE Act Brings Gifts, and a Few Lumps of Coal, for Plan Sponsors in 2020

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The Setting Every Community Up for Retirement Enhancement Act (the "SECURE Act") is one of the most significant pieces of retirement plan legislation to be enacted in many years. The SECURE Act brings some long-awaited gifts for 2020, but includes a few lumps of coal for plan sponsors as well. We highlight in this blog post some of the provisions of the SECURE Act that are most likely to affect large, single-employer retirement plans. In the coming weeks, we will blog in more depth on various facets of this law, which bring both new opportunities and new challenges for plan sponsors.

On December 20, 2019, President Donald J. Trump signed the Further Consolidated Appropriations Act, 2020 (H.R. 1865) (the "Act"), one of two measures to fund federal government operations through the 2020 fiscal year. This legislation included many provisions of the SECURE Act, which passed the House of Representatives with overwhelming support earlier this year.

All Retirement Plans

Required Beginning Date Increased from Age 70½ to Age 72. Recognizing that the American workforce is living and working longer than in the past, the Act raises—from age 70½ to age 72–the age at which plan participants and spousal beneficiaries are required to begin taking minimum distributions from tax-qualified retirement plans. This change applies to distributions required to be made after December 31, 2019, but only with respect to individuals who attain age 70½ after that date. Individuals who have attained age 70-1/2 in 2019 or earlier must continue receiving their required minimum distributions under the schedule that applied prior to the effective date of the Act.

Winston Comment: Under this new rule, an individual who attains age 70½ in 2019 must begin taking required minimum distributions under a tax-qualified plan for the 2019 calendar year no later than April 1, 2020. However, an individual who attains age 70½ in 2020 will *not* be required to take a minimum distribution from a tax-qualified plan for the 2020 calendar year. Any distribution that such an individual does receive in 2020 will be subject to the normal taxation and withholding rules, including direct rollover rules, generally applicable to distributions from tax-qualified retirement plans.

Increased Penalties for Failure to File Certain Forms and Notices. By a factor of 10 (for example, from $25 to $250/day), the Act increases the penalties for failure to file a Form 5500, an annual registration statement regarding deferred vested participants, or a required withholding notice. These penalties apply to filings and notices due after December 31, 2019.

401(k) Savings Plans

Penalty-free Withdrawals Following Birth or Adoption. Within the one-year period following the birth or adoption of a child, the parent may receive a qualified birth or adoption distribution of up to $5,000 from his or her defined contribution plan. The qualified birth or adoption distribution may also be repaid, and any such repayment will be treated as a rollover into the plan. This rule applies to both in-service withdrawals as well as post-termination distributions made after December 31, 2019.

Winston Comment: A plan may, but does not appear to be required, to add a new qualified birth or adoption in-service withdrawal option. However, even if a plan does not add a new in-service withdrawal option, if a post-termination or other distribution qualifies as a birth or adoption distribution under the new rules, the plan must treat it as such. A qualified birth or adoption distribution is a non-periodic payment that is *not* an eligible rollover distribution, and thus, is subject to 10% withholding, unless the participant elects otherwise.

Participation by Long-Term Part-Time Employees. Currently, as a matter of plan design, employers may exclude from eligibility to participate in the plan employees who do not complete at least 1,000 hours of service in a 12-month period. Except for collectively bargained plans, the Act adds a new requirement, mandating that "long-term part-time employees" be treated as eligible to participate in a 401(k) plan upon completing at least 500 hours of service per year for three consecutive 12-month periods. Notably, however, the employer does not have to make nonelective or matching contributions on behalf of such long-term part-time employees, and the top heavy rules do not apply to them. This provision of the Act is effective for plan years beginning after December 31, 2020, and 12-month periods beginning before January 1, 2021 will not count.

Changes to the Safe Harbor 401(k) Rules. The Act makes some significant changes to the rules for certain 401(k) safe harbor plans. Effective for plan years beginning after December 31, 2019:

- With respect to a qualified automatic contribution arrangement ("***QACA***"), the Act raises the percentage limit on default automatic enrollment contributions from 10% to 15% of eligible compensation for any plan year *after* the first plan year in which a participant is automatically enrolled.
- With respect to a nonelective contribution 401(k) safe harbor plan, the Act eliminates the annual notice requirement and permits a plan to convert from a plan subject to the ADP/ACP test to a nonelective contribution 401(k) safe harbor plan at any time prior to the 30th day before the close of the plan year. This election could be made by the end of the *following* plan year if the nonelective contribution is at least 4% of eligible compensation for all eligible employees in that plan year.

Lifetime Income Disclosure. Under the Act, employers must provide savings plan participants with an annual disclosure showing the monthly income each participant could receive from their current plan account balances if their benefit was paid as an annuity over the participant's lifetime. This requirement applies broadly to all defined contribution plans regardless of whether the plan actually offers annuities as a distribution option. The Act directs the Department of Labor ("***DOL***") to specify actuarial assumptions to convert account balances into lifetime income streams, and provide model notice language. Employers are relieved of fiduciary liability for the information included in the notice if they provide the notice in accordance with these DOL rules. This provision becomes effective 12 months after the DOL issues guidance.

Other Lifetime Income Developments.

- The Act encourages defined contribution plan sponsors to offer lifetime income options by creating a fiduciary safe harbor for the selection of an annuity provider. Under the safe harbor, a plan sponsor will satisfy its fiduciary duties if it: (1) engages in an objective, thorough and analytical search for insurers; (2) considers an insurer's financial capability to satisfy its obligations under the annuity contract and the contract cost in relation to the benefits and services to be provided; and (3) concludes that, at the time of the selection, the provider is financially capable and the relative contract cost is reasonable. A fiduciary can satisfy the second requirement by obtaining certain written representations that demonstrate the insurer's financial capability.

- For plan years beginning after December 31, 2019, the Act also increases the portability of lifetime income options by permitting defined contribution plans to make a direct trust-to-trust transfer to an IRA or another employer-sponsored 401(k) plan if the option is removed from the initial plan's investment line-up.

Consolidated Form 5500 Reporting. The Act permits defined contribution plans with the same trustee, named fiduciary, administrator, plan year, and investment fund line-up to file a single Form 5500. This change applies to the Form 5500 for the plan year beginning after December 31, 2021.

Plan Loans via Credit Card. Effective for loans made after the date of enactment, the Act prohibits savings plans from making plans loans through the use of credit cards "or any other similar arrangement."

Defined Benefit Pension Plans

Relief from Non-Discrimination Testing for Certain Closed Pension Plans. Under existing law, pension plans that are closed to new entrants must satisfy nondiscrimination testing that prohibits tax-qualified plans from favoring highly compensated employees. Passing these nondiscrimination tests is often difficult for closed plans, as the participant population dwindles, ages, and becomes more highly paid. Some plan sponsors avoid these issues by freezing benefit accruals under the plan.

The Act makes it easier for closed pension plans (and savings plans that provide make-whole contributions to former pension plan participants) to satisfy non-discrimination testing—and thus continue benefit accruals—through cross-testing. In cross-testing, defined benefit and defined contribution plans are tested as a single plan. To qualify for this nondiscrimination testing relief, which also extends to the minimum participation rules, a plan must satisfy certain requirements, including the requirement that, after the plan is closed, any plan amendment must not discriminate significantly in favor of highly compensated employees.

These provisions are effective immediately, although employers may elect to apply these provisions retroactively to plan years beginning after December 31, 2013.

Next Steps

Employers who sponsor tax-qualified retirement plans should review their plans in light of this legislation, as changes will be required beginning in 2020. Plan amendments will be required by the end of the plan year beginning on or after January 1, 2022 (or such later date provided by the Secretary of the Treasury).

If you have any questions, please contact one of the authors or another member of the Employee Benefits & Executive Compensation Group for more information.

In addition, please look out for future Benefits Blast Blogs that will address specific aspects of this new legislation in greater detail.

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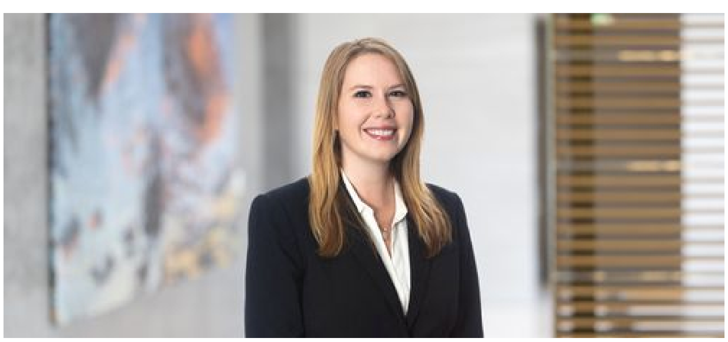

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