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BLOG

IRS Guidance on SECURE Act and Miners Act Retirement Plan Issues

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On September 2, 2020, the Internal Revenue Service (IRS) issued Notice 2020-68 (the Guidance) in the form of questions and answers interpreting several provisions of the Setting Every Community Up for Retirement Enhancement Act (SECURE Act) and the Bipartisan Miners Act of 2019 (Miners Act) affecting qualified retirement plans, 403(b) plans, and Individual Retirement Accounts (IRAs). The Guidance provides clarification on a number of provisions of interest to employers, as detailed below:

Qualified Birth or Adoption Distributions

Beginning January 1, 2020, “qualified birth or adoption distributions” (QBADs) are permitted from a retirement plan or IRA. QBADs are:

- Any distribution of up to $5,000 from an eligible employer plan or IRA to an individual, if the distribution is made during the one-year period beginning on the date the individual’s child is born or the legal adoption of the child by the individual is finalized.
- Exempt from the 10% early-distribution tax penalty.
- Not treated as eligible rollover distributions, are not subject to mandatory 20% withholding, and do not require the issuance of rollover notices upon distribution.

The Guidance provides further clarity on a number of questions related to QBADs, including the definition of an “eligible adoptee,” the calculation of permitted amounts, and certain recontribution requirements.

Definition and Amount.

- “Eligible adoptee” means any individual, other than the child of the taxpayer’s spouse, who has:
  - not yet attained age 18, or
  - is physically or mentally incapable of self-support (i.e., unable to engage in any substantial gainful activity by reason of a medically determinable impairment that can be expected to result in death or long-continued and indefinite duration).

- Each parent of a child may receive a QBAD of up to $5,000 with respect to the same child or eligible adoptee, and multiple QBADs with respect to multiple births of children or adoptions of eligible adoptees (for example, a parent may take a $10,000 distribution for the birth of twins).
- The QBAD recipient's tax return must report the name, age, and Tax Identification Number of the child or eligible adoptee in the year the QBAD is taken.

Plan Requirements.

- Retirement plans are not required to permit in-service distribution of QBADs. Plans may *choose* whether to offer QBADs as an in-service distribution option.
- A plan sponsor or plan administrator may rely on a reasonable representation from an individual that the individual is eligible for a QBAD (self-certification), unless the sponsor or administrator has "actual knowledge to the contrary."
- An employer may expand the distribution options under its plan to allow an amount attributable to an elective, qualified nonelective, qualified matching, or safe-harbor contribution under a 401(k) plan to be distributed as a QBAD, even though it is distributed before an otherwise-permitted distributable event.
- If a retirement plan does not permit QBADs and an individual receives an otherwise-permissible in-service distribution that meets the requirements of a QBAD, the individual may treat the distribution as a QBAD on the individual's federal income tax return.

Recontribution.

- Retirement plans must accept the recontribution of a QBAD from an individual if: (i) the plan permits QBADs, (ii) the individual received a QBAD from that plan, and (iii) the individual is eligible to make a rollover contribution to that plan at the time the individual wishes to recontribute the QBAD.
- A recontribution made with respect to a QBAD from a retirement plan or an IRA is treated as the direct transfer of an eligible rollover distribution.

Long-Term Part-Time Employees in 401(k) Plans

For plan years beginning after December 31, 2020, part-time employees must be eligible to make elective deferrals after attaining age 21 if they have completed at least 500 hours of service during three consecutive 12-month periods, unless they are in a collective-bargaining unit. Each 12-month period for which the employee has at least 500 hours of service must be treated as a year of service for vesting purposes, and not as a one-year break in service.

The Guidance clarifies that 12-month periods beginning *before* 2021 can be disregarded for purpose of applying the deferral *eligibility* rule, but they cannot be disregarded for *vesting* purposes in any employer contributions provided to such employees. This is true unless another rule permits disregarding a part-time employee's years of service for vesting purposes, such as years of service prior to age 18.

Repeal of Maximum Age for Traditional IRA Contributions

For contributions made for taxable years beginning after December 31, 2019, individuals who have attained age 70½ by the last day of such year are no longer prohibited from making non-rollover contributions to traditional IRAs. The Guidance provides clarification on IRA contribution requirements of financial institutions and individuals.

- Financial institutions that serve as IRA trustees, custodians, and issuers are *permitted*, but not *required*, to accept post-age-70½ IRA contributions.
- Financial institutions that choose to accept post-age-70½ IRA contributions must amend their IRA contracts to provide to for such contributions, and must distribute a copy of the amendment and a new disclosure statement to each applicable individual. Both documents must be delivered to the last known address of the applicable individual within 30 days of the date on which the amendment is adopted or becomes effective, whichever is later.

- An individual may not offset (or net) the amount of required minimum distributions from the individual's IRA by the amount of post-age-70½ contributions for the same taxable year.

Winston Takeaway: IRS expects to issue revised model IRAs and prototype language addressing changes made to the relevant tax code provisions under the SECURE Act.

Difficulty-of-Care Payments

The amount that can be contributed to a defined contribution plan or an IRA for any individual for a taxable year generally cannot exceed the individual's compensation, which generally includes only an individual's *taxable* income.

However, the SECURE Act provides that certain tax-exempt "difficulty of care" payments made by an employer to an employee for qualified foster care will be treated as compensation for purposes of these limits. Accordingly, a participant may make contributions to, or receive allocations under, the plan that are based on these difficulty-of-care payments, even if the participant has no other compensation. The Guidance clarifies the treatment and plan requirements regarding difficulty-of-care payments.

- Difficulty-of-care payments received by an employee from a person other than his or her employer are not includible in the definition of compensation under that employer's plan. Only difficulty-of-care payments from an individual's employer are treated as compensation.
- If an employer does not make difficulty-of-care payments, they do not have to be mentioned in the employer's plan. If the employer does make such payments, the plan must be amended to include difficulty-of-care payments.

Small Employer Automatic Enrollment Credit

For taxable years beginning after December 31, 2019, employers with generally up to 100 employees are eligible for a credit of $500 per year for up to three years, beginning with the first taxable year for which the employer includes an eligible automatic contribution arrangement (EACA) under a qualified employer plan. The Guidance clarifies and confirms eligibility requirements for employers to obtain the credit.

- An eligible employer may only receive this credit for taxable years during a single three-year credit period that begins when the employer first includes an EACA in a qualified employer plan.
- To be eligible for the new credit for the second and third taxable years of an employer's three-year credit period, the employer must include the same EACA in the same plan in the second and third taxable years.
- Employers participating in a multiemployer plan (MEP) may each qualify for their own credit if they meet the applicable requirements. An employer under a MEP generally would be eligible for the credit for the three-year credit period beginning with the first taxable year in which the employer's participating employees are first covered by an EACA.

In-Service Distribution Age for Pension Plans

For plan years beginning after December 31, 2019, the Miners Act permits defined benefit pension plans to lower the age in which participants may take in-service distributions from age 62 to 59½.

The Guidance clarifies that pension plans are *permitted*, but not *required*, to make in-service distributions available at age 59½. The Guidance also explains that the in-service distribution rule is separate from the definitely determinable benefit requirement in the Treasury regulations, and therefore adopting the in-service distribution rule does not require the plan to change its definition of normal retirement age. Any change to a pension plan's normal retirement age must separately satisfy the requirements of Treasury regulations.

Plan Amendments

The Guidance reaffirms that the deadline for both required and discretionary plan amendments under the SECURE Act and the Miners Act, and the regulations thereunder, is the end of the first plan year beginning on or after

January 1, 2022 (2024 for governmental plans and collectively bargained plans). Any later amendments to reflect the SECURE Act or Miners Act must follow the usual remedial-amendment-deadline rules and are not entitled to relief from the anti-cutback rules under the Internal Revenue Code and the Employee Retirement Income Security Act of 1974.

Winston Takeaway: The Guidance indicates that the IRS intends to (i) issue regulations that further address the recontribution rules for QBADs, (ii) issue revised model IRAs and prototype language addressing changes made to relevant tax code provisions under the SECURE Act, and (iii) issue additional guidance under the SECURE Act "as appropriate." Employers who sponsor tax-qualified retirement plans should review their plans in light of this Guidance, and look out for future Benefits Blast Blogs that will address the forthcoming guidance and regulations.

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