Flashpoint: New Pension Legislation Passes! Feeling More Secure?

Against what seemed to be all odds, Congress got together on December 19, 2019, to pass the Setting Each Community Up for Retirement Enhancement (SECURE) Act. It was signed into law by the President on Friday, December 20.

The most extensive retirement plan legislation since the Pension Protection Act of 2006, SECURE contains several of the pension industry's wish list items. In addition, it finally legislates the ability of service providers to sponsor Open MEPs, and establishes a structure for those plans clearly intended to allocate responsibility between the provider-sponsor and the adopting employer.

Most of the most highly anticipated provisions of SECURE are not effective until 2021, although some of its provisions will come into effect with the New Year … just several days away!

Amendments for SECURE will not be due until the last day of the plan year beginning on or after January 1, 2022, and the law provides certain anti-cutback language in relation to such amendments. Treasury can extend the amendment date further if required.

Here's our first pass at the new provisions that we think are most important for you. We are sure there will be more to say as the information about the law develops and regulations are drafted and released. But, if you have questions in the meantime, give us a call!

Making Safe Harbor 401(k) Plans Easier to Administer

Several SECURE provisions ease the administrative burdens for safe harbor 401(k) plans, including:

- No notices are required for safe harbor plans that have only nonelective contributions. One easy to miss pitfall: nonelective contribution safe harbor plans that have matching contributions intended to fall within the ACP safe harbor must still give notice.
- Safe harbor nonelective provisions (both regular and QACAs) may be adopted anytime up to 30 days before the end of the plan year. This late adoption is not available for plans that have an ADP or QACA matching contribution at any time during the plan year. Safe harbor nonelective provisions may be adopted after the 30-day deadline and up until the deadline for ADP refunds (generally the end of the plan year following the year for which

the refunds are made), if the nonelective safe harbor contribution increases from the normal 3% of compensation to 4%.

- This is not a simplification, but SECURE removes the 10% cap on the automatic escalation feature of QACAs after the first-year period, and replaces it with a 15% cap. This recognizes that 10% may not be a high enough rate of deferral, particularly for those who start the process later in the life.

These changes are effective for plan years beginning after 12/31/2019.

Extended Adoption Deadline for New Plans

In a provision that will likely gain more enthusiasm from accountants and plan sponsors than from TPAs, SECURE permits the adoption of new plans up to the tax return due date of the employer, including extensions. While this may ease TPA pressure at year end, it likely will move that "end-of-year busy season" to April and September, right in the middle of the already maniacal testing and Form 5500 periods. This rule is effective for plan years beginning after 12/31/2019. However, this applies only to employer contributions. Deferral provisions must be in place before the plan accepts elective deferrals.

Long-Term, Part-Time Employees Can Defer … But Not Much Else

As a means of increasing the access of more employees to retirement savings opportunities, SECURE requires that plans permit employees who are at least age 21, have worked for at least three consecutive 12-month periods, and have completed at least 500 hours of service in those periods to make salary deferrals to the plan. So long as these individuals stay below 1,000 hours, they may be excluded from employer contributions (including top-heavy and gateways), ADP testing, coverage testing, and other nondiscrimination testing. As the law permits plans to ignore years of service prior to 1/1/2021 for the three-year period purposes, no employees will need to be permitted to defer under this provision before 2024.

Pooled Employer Plans – Open MEPs Fully Realized!

Everyone in the pension industry has looked to the ability to sponsor Open MEPs (now to be called "Pooled Employer Plans" or "PEPs") with a combination of excitement and trepidation. No one is really sure if this structure is a positive or negative development for those of us who provide retirement plan services, but it is now a reality.

These provisions, which are effective for plan years beginning in 2021, permit a "pooled plan provider" or "PPP" to sponsor a multiple employer plan for its clients. The PPP is required to take responsibility as a named fiduciary, plan administrator, and the person who ensures that ERISA and Code requirements are met for the plan. The PPP is also required to make sure that all plan fiduciaries are properly bonded (and the new law makes it clear that bonding applies regardless of whether the fiduciary handles plan assets).

SECURE codifies that the PEP will not be disqualified because of a failure of an adopting employer to comply with the legal requirements. The adopting employer at issue, however, will be liable for qualification issues that affect its employees. We expect that the IRS will finalize its proposed rules—perhaps with modifications—that permit the plan sponsor (the PPP under the new rules) to eject the noncompliant part of the plan.

The law also reinforces that the adopting employer acts as a fiduciary in deciding to join a given PEP and for monitoring the PPP and other plan fiduciaries. In addition, unless the PEP has delegated investment management to someone else, the adopting employer is the investment fiduciary for its portion of the PEP.

The law provides that the PEP cannot apply "unreasonable" restrictions, fees, or penalties to employers or employees for ceasing participation, taking distributions, or otherwise transferring assets.

SECURE leaves it to the Departments of the Treasury and Labor to issue regulations to flesh out the details of the new structure, and permits a good faith, reasonable interpretation of these rules until such guidance is issued.

Three more interesting parts of these rules to note:

1. The legislation requires the PEP to name a fiduciary that is responsible for collecting contributions. The fiduciary must adopt a *written contribution collection procedure* that is reasonable, diligent, and systematic. Historically, the Department of Labor (DOL) has taken the position that the plan fiduciary has an obligation to ensure that contributions are collected, a position that has been fought strenuously, particularly by institutional trustees who advocate only the obligation to receive and safeguard contributions that are made. How this will affect the relationship between financial institutions and the named fiduciaries of the PEP will be interesting and remains to develop.
2. SECURE does not require that PEPs be audited until they either cover 1,000 participants or any adopting employer has more than 100 participants. It is interesting that Congress apparently weighed the risk of loss for these plans against the cost of audits, and decided that the cost outweighs the risk for smaller PEPs.
3. SECURE continues the relatively new MEP requirement that the Form 5500 include a listing of the adopting employers and the percentage of current year contributions and plan accounts for such employer's participants.

The PEP rules do *not* apply to association and PEO MEPs that have been authorized separately by DOL rulings and procedures. In other words, those can continue to function outside of the new PEP rules.

One Form 5500 for Groups of Plans

Defined contribution and individual account plans that have common trustees, named fiduciaries, Plan Administrators, plan year beginnings, and investment options are permitted to file one consolidated Form 5500 for plan years beginning in 2022 and later. This filing is considered to be one return for each affected employer. So, you don't need a PEP to file one return for a group of plans.

Participant Statements Must Include Annuitization Information

SECURE mandates that defined contribution participant statements contain, at least once a year, information about the lifetime income stream that would be provided by the plan balance. The law requires that the DOL outline the assumptions for these conversions, and provide model disclosures for plan sponsor use within a year. The law also provides that neither the plan sponsor nor other fiduciary is liable to participants solely by reason of providing the information, even if they provide more than is required. Presumably, this will eliminate the "You promised me a retirement income of $X and I didn't get it" lawsuits from participants whose actual investment experience is worse that the assumptions. These disclosures aren't required until 12 months after the DOL does everything it is required to do: i.e., issue guidance, issue the model disclosure, and outline the required assumptions.

Required Minimum Distribution (RMD) Rules

SECURE changes the RMD rules to extend the required beginning date for living participants from the April 1 following the year in which the participant attains 70½ to such date following attainment of age 72. It also extends the 5-year post-death distribution rule to 10 years, and eliminates the lifetime distribution option for beneficiaries who are not "eligible designated beneficiaries." Eligible designated beneficiaries include spouses, minor children (although kids who reach majority after death have an additional 10 years to distribute), chronically ill or disabled individuals, and other beneficiaries who are no more than 10 years younger than the participant. The effect of this change is to require most beneficiaries to get the money out of the plan faster, terminating the so-called "stretch IRAs." These changes are generally effective for employees who reach age 70½ or die after 12/31/2019.

Form 5500 Late Filing Penalties Multiplied by 10!

The DOL's Delinquent Filers Voluntary Correction Program (DFVC) (and, for that matter, the IRS procedure for Forms 5500-EZ under Rev. Proc. 2015-32) just got vastly more valuable, as IRS penalties for late Forms 5500 (which DFVC also abates) will be increasing from $25 per day to $250 per day, with a maximum per form (per plan year) that increases from $15,000 to $150,000.

The Form 8955-SSA penalties are also increasing ten-fold: from $1 per day per unreported participant to $10; and from a $5,000 maximum to $50,000. As there is no program outside DFVC that formally permits the waiver of these penalties, it would behoove everyone to be much more careful about the rules for these forms.

Last but not least, a little-known provision of the Code requires plan administrators to file Form 8822-B to register a change in plan name or plan administrator name/address. The penalty for nonfiling of that form will increase from $1 per day to $10, up to a maximum that is going up from $1,000 to $10,000.

These changes are effective for returns due after 12/31/2019.

403(b) Plan Guidance

SECURE clarifies that terminated custodial account plans are treated in the same manner as terminated annuity products— i.e., the plan may distribute individual custodial accounts to the participants that continue to be tax-deferred.

Other Bits and Pieces

- The Plan Start-up Credit for small employers increases to the greater of (a) $500; or (b) the lesser of (i) $250 per nonhighly compensated employee who is eligible to participate; or (ii) $5,000. The credit applies for three years.
- The law provides a credit of $500 per year for three years in which a small employer's plan includes an eligibility automatic contribution arrangement (EACA). This credit is not limited to administrative costs.
- Individuals over age 70½ can make deductible IRA contributions starting in 2020.

- Participants who have or adopt a child after 2019 can take a distribution of up to $5,000 from a plan or IRA without having to pay the 10% premature distribution tax if made within one year of the birth or adoption. Further, the distributed funds may be repaid and treated like a rollover to a plan or IRA. There appears to be no deadline on repayment.
- If you know anyone who has this feature, you should let them know that plan loans taken after 2019 that are effected through credit cards are considered to be taxable distributions. This is the death of something that was a really bad idea to begin with.
- SECURE outlines fiduciary standards for selecting annuity providers, and limits liability for problems that arise after the annuity is purchased if these standards are followed.
- The inapplicability of nondiscrimination rules relating to defined benefit plans with closed classes of employees (which have been extended on a piecemeal annual basis by the IRS) were codified. Furthermore, closed class plans may be aggregated for cross-testing on a benefits basis with defined contribution plans that provide matching contributions, 403(b) plans, and ESOPs.

Call us if you have any questions about any of these rules and how they impact your or your client's plans.

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