



## **IRS Grants Three-Year SECURE/CARES Extension!**

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The Internal Revenue Service ("IRS") just released Notice 2022-33 giving a very welcome extension to adopt Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE") and certain Coronavirus Aid, Relief, and Economic Security Act ("CARES") and amendments for most plans until December 31, 2025. Procrastinators rejoice! This FlashPoint outlines the specifics of the extension.

### **What amendments are covered by the extension?**

This extension covers amendments related to SECURE, the required minimum distribution 2020 holiday in CARES, and Section 104 of the Bipartisan American Miners Act of 2019 (which allowed pension plans and governmental 457(b) plans to permit in-service distributions at age 59 ½).

### **What plans are covered by the extension?**

The extension covers qualified plans, 403(b) plans, governmental 457(b) plans, and IRAs. Interestingly, it does not apply to tax-exempt organization 457(b) plans, who are required to amend their plans to comply with the changes to the required minimum distribution rules of Internal Revenue Code (the "Code") §401(a)(9).

### **What is the new amendment deadline?**

For most plans, the new amendment deadline is December 31, 2025. Notice that this is a fixed date which does not depend on the plan year or the employer's tax year. It applies to union and nonunion plans. There are several important exceptions:

- The deadline for a qualified governmental plan, or a 403(b) plan maintained by a public school, is 90 days after the close of the third regular legislative session of the legislature with the authority to amend the plan that begins after December 31, 2023. For example, suppose the State of Harmony has a regular legislative session each year from February 1, to April 30. The amendment deadline for a Harmony qualified plan would be July 29, 2026.

- The deadline to amend a governmental 457(b) plan is the later of the date that would apply to a governmental qualified plan or, if applicable, the first day of the first plan year beginning more than 180 days after the IRS informs the employer that the plan isn't complying with the law.

One small catch in the deadline – Notice 2022-33 didn't mention an extension for CARES related distributions and loans. Absent that language, and any further guidance from the IRS, those discretionary amendments remain due by the end of the first plan year beginning on or after January 1, 2022 (which would be December 31, 2022 for calendar year plans). The CARES extension is limited to the required minimum distribution relief.

### **What was the deadline before this extension?**

For nongovernmental calendar year plans, the deadline was December 31, 2022. For non-calendar year plans, the deadline was the last day of the first plan year beginning after December 31, 2021. Conceivably, for a plan that changed to a short plan year, the deadline might already have expired (and was revived by this extension). Somewhat longer deadlines applied to governmental and union plans.

### **How does this extension apply to the anti-cutback rule?**

Amendments to reflect SECURE or its regulations made prior to the extended deadline will not cause the plan to violate the anti-cutback requirements of the Code or the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).

*Example 1:* A plan provided that automatic deferrals under a Qualified Automatic Contribution Arrangement would increase 1% per year up to the maximum allowed in Code §401(k)(13)(C)(iii). Before SECURE, that maximum was 10%. After SECURE, the maximum can be 15% after the first two years. Thus, the plan document automatically triggers an increase in maximum automatic enrollment percentages after SECURE. Suppose the employer continues to administer the plan as though the 10% limit applied and amends the plan in 2025 to incorporate the 10% limit. The plan does not have an operational failure for not complying with plan terms, and the amendment does not violate the anti-cutback rule.

*Example 2:* A plan before SECURE provides that if a participant dies before the required beginning date, 100% of the participant's account will be distributed to the participant's beneficiary within five years after death. Pursuant to SECURE, and the proposed 401(a)(9) regulations, the employer operates the plan by requiring distribution to all designated beneficiaries 10 years after such a participant's death. The employer amends the plan in 2025 to reflect plan operations. The plan does not have an operational failure and the amendment does not violate the anti-cutback rule.

### **How does this impact a terminating plan?**

Terminating plans should still adopt their CARES and SECURE amendments prior to termination.

### **What does an employer need to do to make use of the extension?**

Using the extension is a simple, three-step process: (A) Adopt the amendment by the new deadline. (B) Make the effective date retroactive to the effective date of the legislation (or, in the case of an amendment that is not mandated, the effective date specified by the plan). (C) Operate the plan as if the amendment were in effect.

## How does the extension apply to individually designed plans (“IDPs”)?

The extension applies to IDPs as well as to preapproved plans. The IRS mentions in a footnote that “certain guidance issued under the SECURE Act” will appear on the 2023 Required Amendments List. Since the deadline for a calendar year plan to adopt the amendments on that list consistent with the remedial amendment period would be December 31, 2025, the extension will tie in nicely with that deadline.

## I already adopted my SECURE/CARES amendment. Do I need to do anything?

For CARES, probably not. For SECURE, we are still waiting for guidance on some very key issues, including long-term part-time employees, the final required minimum distribution regulations, and qualified birth and adoption distributions. It is entirely possible after that guidance is issued, you may wish to modify your SECURE amendment. Fortunately, you will be able to do so by the extended deadline, even if the anti-cutback rule would otherwise prohibit the revised amendment.

## Why is the IRS being so nice?

They didn’t say. But we can guess.

- The extension gives them more time to issue important guidance which can impact amendments.
- Congress is considering extending the deadlines in connection with the “SECURE 2.0” and related bills. Granting the extension now provides certainty and may allow the amendment to cover both SECURE and its sequel.

## Conclusion

This extension gives the pension community, and plan sponsors, a change to catch its collective breath after just wrapping up the defined contribution Third Cycle restatement project. Likely, there are some stragglers that missed the July 31, 2022, deadline and will need to be addressed. See our earlier FlashPoint, “Can We Self-Correct a Missed Restatement? You Bet! Well, Maybe...” for further help. If it all gets too much, give us a call, and remember that we are your ERISA solution.



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