SECURE 2.0: WHAT'S HAPPENING AND WHAT'S ON THE HORIZON FOR RETIREMENT PLANS

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I. Introduction

A. SECURE 2.0

The SECURE 2.0 Act of 2022 ("SECURE 2.0") was enacted on December 23, 2022, and signed into law by President Biden on December 29, 2022. This follow-up to the comprehensive Setting Up Every Community for Retirement Enhancement Act of 2019 ("SECURE") continued the path of modifying retirement plan law, which had been significantly unchanged since 2006, with a focus on ways in which to expand coverage of employees nationwide. SECURE 2.0 had seven titles, which are very reflective of the intended effect of the 92 sections of the law:

1. Title I: Expanding Coverage and Increasing Retirement Savings
2. Title II: Preservation of Income
3. Title III: Simplification and Clarification of Retirement Plan Rules
4. Title IV: Technical Amendments
5. Title V: Administrative Provisions
6. Title VI: Revenue Provisions
7. Title VII: Tax Court Retirement Provisions

B. Provisions That Became Effective on Enactment or in 2023

Several of the provisions of SECURE 2.0 have already become effective, including:

1. Increase in start-up credit for small employer pension plans from 50% to 100% for employers with 50 or fewer employees. [Sec. 102]
2. Pooled Employer Plans – permitted under SECURE, there were some minor modifications to the rules in SECURE 2.0, most notably of which are the removal of the requirement that the trustee be institutional and that the trustee be responsible for assuring contributions are made. The latter responsibility now must be borne by a "named fiduciary." [Sec. 105]
3. 403(b) plans are permitted to be multiple employer plans. [Sec. 106]

4. The required beginning date for required minimum distributions has been changed yet again. Current rules after SECURE 2.0 are:

   (a) Born on or before June 30, 1949: age 70½.

   (b) Born from July 1, 1949, to December 31, 1950: age 72.

   (c) Born from January 1, 1951, through December 31, 1959: age 73.

   (d) Born on or after January 1, 1960: age 75. [Sec. 107]

NOTE: There is a glitch in the law that makes it unclear whether those born in 1959 are subject to the age 73 or age 75 required beginning date. A proposed regulation includes a provision resolving this glitch in favor of such individuals having an age 73 required beginning date. [Prop. Treas. Reg. §1.401(a)(9)-2(b)(2)(v)]

5. Section 45E(d)(3)(A) of the Code was amended to clarify the definition of "first credit year." [Sec. 108]

6. A credit was added for plan sponsors who provide reduced eligibility requirements and faster vesting for spouses of military members. [Sec. 112]

7. Employers are able to provide de minimis incentives to encourage employees to contribute to a 401(k) or 403(b) plan. [Sec. 113]

8. Defined contribution plans may purchase increasing annuities to their retirees after their annuity starting dates. [Sec. 201]

9. The 25% premium limit on purchases of Qualifying Longevity Annuity Contracts is to be removed, and the dollar limitation is increased from $125,000 to $200,000, to be adjusted for inflation. [Sec. 202]

10. The required minimum distribution rules for a defined contribution plan are modified so that partial annuitization is permitted. [Sec. 204]

11. The rules regarding a plan's ability to recover overpayments from participants or beneficiaries were clarified, both in terms of fiduciary obligations vis-à-vis determining to attempt recoupment and the limitations on what can be recouped and how. [Sec. 301]

12. Reduction of the excise tax on failure to take mandatory required minimum distributions from 50% to 25%, with the potential of a participant reducing the penalty further to 10% through prompt correction. [Sec. 302]

13. Expansion of the self-correction rules under the Employee Plans Compliance Resolution System ("EPCRS") by modifying timing limitations for significant errors and permitting self-correction of demographic and employer eligibility failures. [Sec. 305]

14. Removal of the "first day of the month" deadline for governmental employees to elect deferrals or modifications to Section 457(b) plans. [Sec. 306]

15. Governmentally employed firefighters are eligible to take distributions from a plan at age 50 without being subject to the 10% premature distribution tax under Code section 72(t). [Sec. 308] So are certain state and local corrections employees. [Sec. 330]

16. Qualified Birth or Adoption Distributions ("QBADs") must be repaid within 3 years (SECURE permitted unlimited repayment). [Sec. 311]

17. 401(k), 403(b), and governmental 457(b) plans may rely on employee certifications of hardship (unforeseeable emergency, in the case of a 457 plan) for distribution purposes. [Sec. 313]

18. For the first plan year only, sole proprietors who own the entire interest of an unincorporated business and who are the only employees of such business may elect to defer compensation through the tax return due date (with extensions) of the year for which such deferrals are effective. [Sec. 317]

19. Reduction of annual notice requirements for individual account plans to eligible employees who have previously received SPDs and other notices and have historically chosen not to defer. Notice requirements were replaced by an "annual reminder notice." [Sec. 320]

20. Distributions from plans to participants who are terminally ill are not subject to the 10% premature distribution tax of Code section 72(t). Note, however, that this is not a distributable event, so the participant must be eligible for distribution for another reason. [Sec. 326]

21. Retired public safety officers may take a distribution of up to $3,000 to purchase qualified health and long-term care insurance and such payment does not need to be directly paid to the insurer. [Sec. 328]

22. The Code was modified to provide for a permanent withdrawal ability for qualified federally declared disasters; previously the law needed to be amended by Congress for disasters to qualify. Reduces available distributions from a maximum of $100,000 to $22,000. [Sec. 328]

23. Special needs trusts may qualify as "designated beneficiaries" for purposes of the required minimum distribution rules. [Sec. 337]

24. QDROs include orders issued under the laws of an Indian tribal government or its subdivision, agency, or instrumentality. [Sec. 339]

25. Annual audit requirements for plans that participate in Groups of Plans ("GOPs") are determined on a plan-by-plan basis. [Sec. 345]

26. Cash balance plans may use variable and projected interest crediting rates so long as they do not exceed 6%. [Sec. 348]

27. PBGC variable rates are no longer indexed. [Sec. 349]

28. The safe harbor correction of elective deferral failures in a plan that provides for automatic enrollment or automatic increases was originally due to sunset in 2023 and was not available for terminated employees. Under this provision, the safe harbor method is continued indefinitely, and may be used in relation to terminated employees if the correction period under such rules extends past December 31, 2023.

29. Amendments required for SECURE 2.0, as well as SECURE, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), the Bipartisan American Miners Act of 2019 ("Miners Act"), and the Taxpayer Certainty and Disaster Relief Act of 2020 are all extended to the end of the plan year beginning in 2025 (and to the plan year beginning in 2027 for governmental plans). [Sec. 501]

Note: This deadline was further extended by IRS Notice 2024-02 for the above Acts to December 31, 2026, for IRAs and qualified plans other than collectively-bargained plans (December 31, 2028) and governmental plans (December 31, 2029). Note that the deadline no longer relates to the plan year.

30. SEPs and SIMPLEs are permitted to have Roth provisions.

C. What This Outline (and the Related Presentation) Will Do

1. Discuss the deadlines that are effective in 2024 and 2025.

2. Discuss guidance that has been issued by the government in relation to the provisions enacted under SECURE and SECURE 2.0 during late 2023 and 2024 and its impact on the relevant sections of the law.

3. Discuss challenges experienced or expected by practitioners in relation to provisions already effective or to be effective in 2025 and proposed solutions in the event that no guidance is issued.

4. While this outline will discuss these provisions in section and effective date order, such order will not be followed in the presentation.

II. Mandatory Automatic Enrollment [SECURE 2.0, Sec. 101]

Congress is committed to the idea that automatic enrollment increases coverage, which is a significant societal concern in relation to retirement security. This provision is intended to ensure that all 401(k) and 403(b) plans (other than those that are already in existence) automatically enroll their participants and increase the automatic enrollment percentage on an annual basis until each participant is deferring, at a minimum, 10% of compensation.

Effective: Plan Years beginning on or after January 1, 2025.

A. All 401(k) and 403(b) plans are required to institute automatic enrollment as of the first plan year beginning on or after January 1. 2025.

1. Exceptions:

   (a) Plans (or 401(k) provision added to an existing profit-sharing plan) adopted "pre-enactment" – i.e., *signed* before December 29, 2023 (as clarified by Notice 2024-02, Section A, Q&A-A-1).

   (b) SIMPLE plans.

   (c) Government and Church Plans.

   (d) Businesses that have been in existence for fewer than 3 years.

   (e) Businesses that normally employ not more than 10 employees (automatic enrollment becomes effective as of the date one year after the close of the company's first taxable year during which the employer "normally employs" more than 10 employees).

   Note: There is no current guidance to determine when a plan "normally" employs more than 10 employees; safest practice is to start automatic enrollment once the employer has more than 10 employees.

2. Application of "pre-enactment" rule (or "grandfathering") to mergers/spin-offs (Notice 2024-02):

   (a) If two single employer grandfathered plans merge, surviving plan is considered to be grandfathered.

   (b) If a single employer grandfathered pre-enactment plan merges into a grandfathered multiple employer plan (MEP), the plans continue to be considered grandfathered.

   (c) If two single employer plans merge and only one is grandfathered:

      (i) General Rule: surviving plan is not grandfathered.

      (ii) Exception: in connection with a Code section 410(b)(6)(C) event and survivor plan is the previously grandfathered plan, the survivor plan continues to be grandfathered.

   (d) If a single employer plan that is not a grandfathered plan is merged into a MEP that is grandfathered, the portion of the MEP related to that employer is not considered to be a grandfathered plan.

   (e) Spin-offs:

      (i) General rule: a plan that spins off from a grandfathered single employer plan is considered to be grandfathered.

      (ii) If the spin-off plan was not grandfathered and is spun-off from a multiple employer plan, the spun-off plan is not grandfathered

(i.e., the grandfathering follows the status of that employer within the MEP).

(f) **Critical Gap in Guidance**: no guidance about what the status is of a grandfathered single employer plan that merges into a non-grandfathered MEP or pooled employer plan (PEP).

B. Automatic Enrollment Requirements

1. Plan must be an Eligible Automatic Contribution Arrangement per Code section 414(w).

(a) <u>Must</u> provide for permissible withdrawal up to 90 days after enrollment.

(b) Can apply only to new participants, but will not qualify for the extension of the ADP/ACP correction period to 6 months after plan year if all employees are not auto-enrolled after provision is effective.

(c) Once an employee makes an affirmative election, automatic enrollment ceases to apply to that person unless the plan provides otherwise.

(i) Must comply with notice requirements.

2. Initial rate of automatic enrollment: cannot be less than 3% or more than 10%.

3. Automatic increase of 1% per year up to at least 10%, but could go as high as 15%.

(a) Effective date of increase is the first day of each plan year starting after the participant completes a year of participation.

4. Plan can avoid automatic increase by having level automatic enrollment at 10%.

5. Must provide for investment in a qualified default investment alternative (QDIA) per Labor Reg. § 2550.404c-5.

III. Increased Catch-up Limit for Ages 60-63 [Sec. 109]

This provision permits higher catch-up contributions for individuals who are age 60-63.

Effective: Tax years beginning after December 31, 2024.

A. Amount of Catch-up Increase: applicable catch-up limit is the greater of $10,000 ($5,000 for SIMPLE Plans) or the 150% of the normal limit.

B. Applies to Anyone Who is Age 60-64 by End of the Affected Year.

C. Will Be Adjusted for COLA as the Normal Catch-up Limit Increases.

IV. Student Loan Payments Treated as Deferrals for Matching Purposes [Sec. 110]

This provision is intended to permit individuals burdened by student loan payments to receive matching contributions that are calculated as if the loan payments were salary deferrals to the Plan.

Effective: Contributions for plan years beginning after December 31, 2023.

A. Plans Affected:

1. 401(k);
2. 403(b);
3. Governmental 457(b).

B. How it Works:

1. Optional provision: employers do not have to provide for this.
2. Matching of student loan payments must be at the same rate as matches on regular elective deferrals.
3. The affected employee must be eligible to receive matching contributions if he/she defers.
4. Plan permits matching of student loan payments.
5. If the plan permits this provision, all participants eligible for matching contributions must be eligible to match student loan payments.
6. The fact that some employees do not have student loans does not cause this provision to be a discriminatory right or feature.
7. The student loan payment is treated as a deferral for purposes of calculating the match, but not for any other purposes (such as meeting the ADP test).
    (a) If the employee also makes salary deferrals, the match on the student loan repayment is reduced by the match on the deferrals (e.g., if the plan matches deferrals up to 6% of pay and the employee makes deferrals of 4% of pay, the student loan payments taken into account for matching purposes cannot exceed 2% of pay).
8. People who receive the student loan match may be tested separately for ADP testing purposes.
9. Plan administrator may rely on the employee’s certification as to the existence of the loan and the amount of the payment.

10. The Treasury is to issue regulations to:

(a) Permit the employer to make matching contributions for the student loan payments at a different frequency than regular matching contributions, but not less often than annually;

(b) Permit the employer to establish reasonable procedures, but they may not require that the employee make a claim for the matching contribution earlier than 3 months after the plan year; and

(c) Provide model amendment language.

C. Concerns

1. Employee self-certification creates a potential for abuse.

2. If the employee need not claim the match within 3 months after the plan year, it will be impossible to know the amount of the match for ACP testing purposes (and refunds) until after the 2½ month period for corrections without incurring the 10% excise tax.

V. Emergency Personal Expense Withdrawal [Sec. 115]

This provision permits participants to take a distribution of up to $1,000 if they experience a personal emergency. Personal emergency is more broadly defined than “hardship,” thus making the retirement plan funds available for more reasons than pre-SECURE 2.0.

Effective: Distributions made after December 31, 2023.

A. One of several new exceptions to the pre-age 59½ distribution penalty, and also a new potential distributable event from a defined contribution plan (including 401(k), 403(b), and 457 plans).

B. Permissible Distribution Amount:

1. Not more than 1 per year.

2. Maximum amount: Lesser of:

(a) $1,000; or

(b) Participant’s total nonforfeitable account as of the date of distribution minus $1,000.

3. Limits are applied on an aggregate basis for all plans within the affiliated employers (controlled group, affiliated service group, management services group).

4. Cannot take another emergency personal expense distribution within 3 years unless:

   (a) the prior distribution was repaid; or

   (b) sufficient deferrals are made after the distribution to equal the distributed amount.

C. Other Rules:

1. Definition of Emergency Personal Expense: an expense used for purposes of meeting an unforeseeable or immediate financial need relating to necessary personal or family expenses.

2. Plan Administrator may rely on written certification by employee that the distribution purpose meets the above definition.

3. Distribution may be repaid within 3 years to retirement plan that accepts rollovers.

4. Distribution is not an eligible rollover distribution (waivable 10% withholding applies).

VI. Nonelective Contributions Permitted to SIMPLE Plans [Sec. 116] and Increased Contributions for Larger Plans [Sec. 117]

These provisions increase the amount that can be saved in a SIMPLE Plan by permitting sponsors of SIMPLE plans to make additional nonelective (i.e., profit-sharing-like) contributions and increasing the salary deferral limit for some participants.

Effective: Taxable years beginning after December 31, 2023.

A. Prior to SECURE 2.0, the Only Employer Contributions that Were Permitted in a SIMPLE Plan Were the Required Contributions.

1. 2% nonelective contribution; or

2. Matching contribution of 100% of deferrals up to 3% of pay (4% if more than 25 participants).

B. New Provision Permits Employer to Contribute up to 10% as a Nonelective Contribution.

1. Must be uniform for all eligible participants.

2. Cannot exceed $5,000 per participant (indexed for inflation).

C. New Rules Permit Higher Contribution Levels.

1. Revised contribution limits (both base and catch-up): 110% of normal limits.

2. Application:

   (a) Automatic if plan has 25 or fewer eligible participants.

   (b) Plans with more than 25 eligible participants:

      (i) Employer must elect;

      (ii) Increased mandatory employer contributions if higher limits elected:

         (A) Match: 100% of deferrals up to 4% (increased from 3%).

         (B) Nonelective: 3% of compensation (increased from 2%).

3. Increased limit permitted only if the employer (including affiliated employers) had no other plan (qualified, 403(b), governmental, SIMPLE, or SEP) within the prior 3 years.

VII. Starter 401(k) Plans [Sec. 121]

This provision allows employers to get their "feet wet" with retirement plans, creating a deferral only, limited administration option. This appears to be intended to give employers an option to the state-mandated plans.

A. Simplified Deferral-Only Plan for Employers Who Do Not Sponsor Other Plans.

   1. Does not permit employer contributions.

   2. Safe harbor plan – i.e., no nondiscrimination testing.

   3. Available also for 403(b) plans.

B. Required Features:

   1. Employer must not have another qualified plan to which contributions are made or benefits accrued for the year.

      (a) Can provide for just union employees, in which case, plan for nonunion employees does not cause the company to fail this requirement.

      (b) If company is involved in an acquisition, disposition, merger, etc., there is a transition rule that permits the plan to operate for a period of time.

   2. Can exclude employees with less than 1 year of service, age 21, union employees, nonresident aliens.

   3. Provides for automatic enrollment from 3% to 15% of compensation, applied uniformly to all participants who do not make affirmative elections (automatic increase not required).

4. Maximum annual deferrals:

   (a) General rule: $6,000.

   (b) Catch-up contribution: $1,000.

   (c) Will increase after 2024 for cost-of-living.

5. Exempt from top-heavy rules.

VIII. Modification of Long-Term Part-Time Employee Rules [Sec. 125]

This provision modifies the SECURE 1.0 Act LTPT rules to reduce the service requirement to 2 years from 3 years.

Effective: plan years beginning after December 31, 2024.

A. Modifies SECURE 1.0 Act Rules for LTPT Employees (which apply for 2024 plan years).

   1. Reduces service requirement from 3 consecutive years with more than 500 hours to 2 consecutive years.

   2. Applies for both 401(k) and 403(b) plans.

IX. Distributions from Long-Term Qualified Tuition Programs (529 Accounts) to Roth IRAs [Sec. 126]

This provision permits unused amounts from 529 plans to be transferred into a Roth IRA for the beneficiary.

Effective: Distributions after December 31, 2023.

A. Requirements:

   1. Must be accomplished through a trustee-to-trustee transfer;

   2. Amount may not exceed the Roth IRA annual contribution limit; and

   3. The 529 account must have been in place for more than 15 years.

X. Emergency Savings Accounts Linked to Individual Account Plans (PLESAs) [Sec. 127]

This provision permits an employer to offer a special savings account to participants within the 401(k) or 403(b) plan for Roth contributions designated to be an emergency savings account. Funds contributed to this account are subject to special contribution limitations and distribution rules.

Effective Date: plan years beginning after December 31, 2023.

A. Pension-Linked Emergency Savings Account ("PLESA").

1. Special Roth account in an individual account plan.

(a) Enrolled separately from normal deferral accounts.

(b) Not available for highly compensated employees (HCEs).

(i) Contributions must stop once an employee becomes an HCE.

(ii) Employee can continue to access the PLESA after becoming an HCE.

(c) Accounted for separately from other accounts in the plan.

2. Plan provisions must permit.

3. Must be either:

(a) Held as cash in an interest-bearing deposit account; or

(b) Invested in a product offered by a State- or federally-regulated financial institution and designed to:

(i) Maintain principal; and

(ii) Provide a reasonable rate of return consistent with the need for liquidity (does not need to be a guaranteed rate).

4. Contributions.

(a) No minimum contribution or balance amount.

(b) Maximum contributions: $2,500 (as adjusted for cost-of-living after 2024) or employer-designated amount, if less.

(i) Note: $2,500 is lifetime, not per year.

(A) Per Notice 2004-02, employer can track $2,500 maximum on the basis of contributions or on the basis of account balance.

(ii) If distribution taken, it is subtracted from the amount contributed, and new contributions may be made up to the maximum.

(A) If $2,500 is tracked based on contributions, the $2,500 is reduced by amount of "principal" distributed.

(B) If $2,500 is tracked based on total account balance, entire distribution reduces the $2,500.

(iii) Excess contributions:

(A) If Plan contains Roth accounts, move excess to Roth.

(B) If no Roth accounts, plan cannot accept excess.

(c) Plan may, but is not required to, have automatic enrollment of PLESA contributions of *not more than* 3% of compensation.

(d) If plan provides for matching contributions:

(i) PLESA contributions must be matched at same rate as normal deferrals, but not to exceed the maximum amount that can be contributed to the PLESA (i.e., $2,500) or a lower amount designated by the employer.

(ii) Matching contributions are made to normal matching account (not PLESA account).

(iii) If there is a limit on matching contributions, matches are considered to be made first in relation to normal deferrals and then to PLESA.

B. Distributions

1. Plan must permit withdrawal in whole or in part at the discretion of the participant (no reason needs to be given).

2. Participant must be able to take distribution at least once per calendar month, payable as soon as practicable after request is submitted.

3. Participant cannot be charged anything for up to 4 withdrawals per year, with additional withdrawals subject to "reasonable fees or charges."

(a) Charge may include reimbursement fees imposed for the incidental cost of handling paper checks.

C. Employee Notices

1. Must be provided between 30 days and 90 days before the first contribution to the PLESA and at least annually thereafter.

2. Must be written in a manner sufficiently accurate and comprehensive to describe the rights and obligations under the PLESA, and in a manner calculated to be understood by the average participant.

3. Can be consolidated with other notices, such as the QDIA notice, the safe harbor notice, and the automatic enrollment notice.

4. Must describe:

   (a) The purpose of the PLESA is short-term emergency savings;

   (b) The limits on contributions and how they are treated for tax purposes;

   (c) Any fees, expenses, restrictions, or charges associated with the PLESA;

   (d) Procedures for electing or opting out of PLESA contributions, changing contributions, and obtaining withdrawals (including limits on frequency);

   (e) If automatic enrollment applies, amount of intended contribution;

   (f) The designated investment option;

   (g) Options for the account after termination of employment or termination of the provision; and

   (h) The fact that, if the employee becomes an HCE, s/he can still take withdrawals, but cannot make additional contributions.

D. PLESA May Be Discontinued At Any Time.

1. Not a Protected Benefit under Code section 411(d)(6).

2. Participant may elect to transfer the account to another Roth account or to take a distribution within a reasonable time.

E. Special Considerations:

1. Abuse Concern: As all participant contributions to the PLESA are matched, there are concerns that a participant will contribute and immediately remove the contribution, then recontribute it immediately, getting multiple credit for matching purposes.

2. IRS Notice 2024-22 permits an employer to initiate reasonable procedures to limit abuse (did not give suggestions of permissible procedures).

3. These are <u>impermissible</u> procedures:

   (a) Forfeiting a match associated with a distributed contribution;

   (b) Suspending contributions to the PLESA on account of withdrawal(s); and

   (c) Suspending matching contributions to the PLESA in relation to regular elective deferrals in relation to distributions from the PLESA.

NOTE: PLESAs require handling that is very different from the balance of the plan, and most of the cost associated with that is at the expense of the employer, and not the participant. A plan sponsor should think carefully about whether to initiate this provision.

XI. Increase of Cash-Out/Mandatory Distribution Limit [Sec. 304]

Effective: Distributions made after December 31, 2024.

A. Applicability of "Cash-Out Limit."

1. A qualified plan may provide that balance is automatically distributed to participant (or a rollover IRA) without his/her consent on termination of employment.

2. QJSA rules do not apply to amounts equal to or less than the Cash-Out Limit.

3. Was $5,000 under pre-SECURE 2.0 law.

B. New Limit: $7,000.

C. Plan may continue to use a lower limit or have no cash-out provision at all.

XII. Top-Heavy Application to Otherwise Excludable Employees [Sec. 310]

This provision recognizes that a plan may allow employees to participate prior to their completion of the maximum permissible eligibility requirements (i.e., 1 year, age 21). This provision permits the plan to exclude these individuals from receiving top-heavy minimum contributions in defined contribution plans.

Effective: Plan years beginning after December 31, 2023.

XIII. Distributions to Domestic Abuse Victims Not Subject to Pre-Age 59½ Additional Tax

This provision permits certain victims of domestic abuse to take a distribution from a 401(k) or 403(b) plan or other defined contribution plan not subject to the QJSA rules, if the plan so permits. Such a distribution will not be subject to the 10% premature distribution tax under Code Section 72(t).

A. Amount of Permitted Distribution: Lesser of:

1. $10,000 (adjusted for cost-of-living after 2023); or

2. 50% of the participant's vested account.

B. Domestic Abuse Victim Defined:

1. Victimized by spouse or domestic partner.

2. Includes physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim, or to undermine the victim's ability to reason independently, including by means of abuse of the victim's child or another family member living in the household.

C. Distribution Characteristics:

1. Not subject to 10% tax on distributions prior to age 59½ under Code section 72(t).

2. Must be made within 1 year of abuse.

3. Plan may treat as distributable event.

4. Participant may repay the distribution within 3 years.

5. Not an eligible rollover distribution (waivable 10% withholding applies).

XIV. Reform of Family Attribution Rule for Controlled Group Determinations [Sec. 315]

This provision is designed to eliminate controlled groups that result from spousal attribution in community property states regardless of "noninvolvement exception" and attribution to minor children.

A. Historic Attribution:

1. Spousal attribution:

(a) The controlled group rules under Code section 414 generally attribute ownership of a business from one spouse to the other.

(b) The regulations contain an exception to this attribution when a spouse (the "nonowner spouse") is not involved in the other spouse's business. In particular, the exception applies if:

(i) The nonowner spouse does not, at any time during the taxable year, directly own any stock in the company;

(ii) The nonowner spouse is not a director or employee and does not participate in the management of the company;

(iii) Not more than 50% of the company's gross income is from royalties, rents, dividends, interest, and annuities; and

(iv) The stock is not, at any time during the taxable year, subject to conditions that substantially restrict or limit the owner spouse's right to dispose of the stock and that run in favor of the nonowner spouse and minor children.

(c) The noninvolvement exception does not apply to spouses in community property states because the community property rights constitute direct, and not attributed, ownership. As a result, married couples in a community property state must generally treat independent businesses as a controlled group.

2. Minor child attribution:

(a) Stock in a company owned by the parent of a minor child is attributed to such child.

(b) If each parent owns his or her own business, ownership in both businesses is attributed to the child, creating a controlled group.

(c) These rules applied regardless of the relationship between the two parents and regardless of any noninvolvement exception that might apply to the attribution between the parents.

B. Modified Rule under SECURE 2.0:

1. Community property rules are disregarded for ownership purposes (i.e., the spouse is not considered to have direct ownership of his/her spouse's business through community property).

2. Stock in different companies attributed to a minor child from each parent and not attributed between the parents as spouses is not considered to cause a controlled group.

3. Stock not attributed directly to a spouse due to the noninvolvement exception will not attribute to the spouse through combined application of the attribution of options and the attribution to a minor child.

NOTE: This is effective as of the beginning of 2024, so two companies that might have been treated a controlled group in prior years might cease to be one in this year. Be sure to plan ahead for changes in nondiscrimination testing and coverage.

XV. Timing for Amendments to Increase Benefit Accruals [Sec. 316]

This provision permits an employer to adopt an amendment in relation to a plan year to increase benefits at any time up until the tax return due date for the amendment year (assuming that the amendment does not create a disqualifying provision).

Effective: Amendments adopted for plan years beginning after December 31, 2023.

XVI. Clarification of Substantially Equal Periodic Payment Rules for Purposes of Code Section 72(t) [Sec. 323]

This provision clarifies that an individual taking substantially equal periodic payments from one program may roll over the benefit in such program to another plan and continue the payment scheme. In such a circumstance, the exemption from the pre-age 59½ 10% tax will continue.

Effective: For distributions after December 31, 2023.

A. Explanation of the Rules:

1. A participant who is under age 59½ can avoid the 10% premature distribution tax if s/he takes distributions in the form of substantially equal payments over a period of not less than 10 years.

2. Under prior rules, if the stream of payments was interrupted during the 10-year period and payments were modified, the participant would retroactively owe the 10% penalty for all prior periods.

B. New Provision

1. Permits the participant to roll over from the plan making distributions to a recipient plan and continue the payment stream without incurring the 10% penalty.

2. Is particularly useful and important if the distributing plan terminates or if a better investment opportunity is available in a different program.

XVII. Roth Accounts in Qualified Plans No Longer Subject to Lifetime Required Minimum Distributions [Sec. 325]

Historically, Roth accounts in qualified plans have been subject to the required minimum distribution (RMD) rules, even though such rules did not apply to Roth IRAs. This provision removes the RMD rules that would normally apply during the participant's lifetime for Roth accounts in qualified plans.

Effective: Taxable years after December 31, 2023.

XVIII. Surviving Spouse May Elect to be Treated as the Employee for Required Minimum Distribution Purposes [Sec. 327]

Effective: Calendar years beginning after December 31, 2023.

A. Prior Provision: **Historically, when the surviving spouse was the sole beneficiary, and the participant died prior to his/her required beginning date:**

1. The spouse had to begin taking distributions over his/her lifetime beginning not later than when the participant would have attained his/her required minimum distribution age. For example, if a participant died at age 60, and his required beginning date for RMDs was age 73, the spouse could wait until the end of the year in which the participant would have attained age 73 to begin taking lifetime distributions.

2. In years subsequent to the first year of RMDs, the life expectancy factor was recalculated based on the spouse's age in that year. This produces a lower RMD than the rules that apply for other beneficiaries, in which the life expectancy factor is equal to the factor for the prior year, minus 1.

3. If the spouse preferred, he/she could roll over the death benefit to his or her own account. In that circumstance, the RMDs from that account would be based on the

uniform life table (which assumes a same-age joint beneficiary), which would result in even smaller RMDs.

B. Post SECURE 2.0 Provision

1. The new provision permits a surviving spouse to elect to be treated as if he/she were the employee for RMD purposes.

2. This treatment permits the spouse to get the positive attributes discussed above if he/she rolled over the account to his/her own name (i.e., the same as paragraph A.3 above).

XIX. Replacement of SIMPLE Plan with 401(k) Safe Harbor During the Year [Sec. 332]

This provision permits an employer sponsoring a SIMPLE plan to convert to a 401(k) safe harbor plan mid-year, a welcome change from the prior situation, in which a SIMPLE had to be maintained as the only plan of the employer throughout the year.

Effective: Plan years beginning after December 31, 2023

A. SIMPLE Plans Have Historically Been Full-Year Commitments

1. Once a SIMPLE was adopted, it was required to be the only plan sponsored by the company until it was terminated.

2. The law required that the SIMPLE be in place for the full year.

3. Problems arose when a company realized after the start of the year that it would be better served sponsoring a 401(k) plan.

B. New Provision is an Exception to the Full-Year Rule

1. An employer may terminate a SIMPLE mid-year and adopt a safe harbor 401(k) plan the day after the termination and not disqualify the SIMPLE.

2. In addition, participants are able to move their money from the SIMPLE to the 401(k) plan if they so desire without violating the normal 2-year withdrawal limitation on SIMPLE contributions and without incurring the 25% additional tax under Code section 72(t).

   (a) Rollover must go to 401(k) or 403(b) plan to qualify for the waiver of the additional tax.

3. The exception applies to 401(k) safe harbor plans only – other plans (such as a cash balance plan) cannot be adopted until the following year.

C. Specific Rules

1. The 401(k) plan must *replace* the SIMPLE – no time lag between the termination of the SIMPLE and the adoption of the 401(k) plan the following day.

   (a) IRS guidance in Notice 2024-02 requires that an employer take "formal written action" to terminate the SIMPLE, e.g., Board resolution, resolution of members or partners or by sole proprietor.

   (b) Employer must provide 30 days advance notice of the SIMPLE termination to employees, as well as notice to the financial institution to which SIMPLE contributions are made, and arrange with payroll provider to stop SIMPLE deferrals and transmissions to the SIMPLE (to be replaced, based on deferral elections, with deferral to the 401(k) plan).

   (c) Employer must also provide safe harbor notice that "accurately describes the type and amount of compensation that may deferred under the plan."

      (i) Question: does the notice need to advise each participant of how much was deferred to SIMPLE so that he/she can calculate what is left that can be deferred to the 401(k)? Unclear.

   (d) SIMPLE match or nonelective contribution must be made up until date of termination.

      (i) Match based on deferrals through date of termination.

      (ii) Nonelective based on compensation through the date of termination.

2. The 401(k) plan may be any kind of safe harbor plan:

   (a) Can be matching or nonelective contribution.

   (b) Can be normal safe harbor or QACA.

   (c) Can be Starter 401(k) plan, which has no required employer contribution.

3. Section 402(g) limit on participant deferrals for the year equals a pro-ration of the SIMPLE limit and the 401(k) limit, weighted by the number of days in the plan divided by 365. (The 365 does not appear to change to 366 in leap years.)

   (a) Example: Employer terminates the SIMPLE plan on April 30, 2024, and initiates a new safe harbor 401(k) on May 1, 2024.

   (b) Number of days with SIMPLE: 121 days

   (c) Number of days with 401(k): 245 days

   (d) Limit on deferrals: ($16,000 x 121/365) + ($23,000 x 245/365) = $20,742

(e) Participant's maximum deferrals to the 401(k) plan: limit on deferrals minus whatever was deferred to the SIMPLE.

(f) What about catch-up contributions?

(i) No guidance.

(ii) Best guess: pro-rate like with the normal deferrals.

XX. Consolidation of DC Plan Notices [Sec. 341]

A. DOL and Department of the Treasury Directed to Adopt Regulations by December 29, 2024

B. Purpose of New Regulations

1. Consolidation of 2 or more of the notices required under the QDIA rules and automatic enrollment rules.

2. Can consolidate additional notices, if the Secretaries desire.

3. Combined notice must:

(a) Include the content that is required.

(b) Clearly identify what issues are being addressed by the notice.

(c) Be furnished by the due date of the individual notices.

(d) Presented in a manner calculated to be understood by the average participant and that does not obscure or fail to highlight the primary information required by the notices.

C. Nothing Issued Yet …

XXI. Modifications to Defined Benefit Annual Funding Notices [Sec. 343]

This provision modified the information that needs to be included in the Annual Funding Notices (AFN) for defined benefit plans, including cash balance plans.

Effective: AFNs for Plan Years beginning after December 31, 2023

A. Changes Required:

1. Percentage of plan liabilities that are funded is calculated at the end of the year and the two preceding years (previously, the notice required that the FTAP be shown, which is normally a beginning of year calculation).

2. The participant count as of the end of the current year and the two prior years must be shown (previously, the information was provided as of the beginning of the plan year and for the current year only).

3. Plan assets at year end for the current plan year and the two prior years are still required to be provided, but are unreduced for certain credit balances, which are no longer required to be disclosed.

4. The notice must show the average rate of return on the plan assets for the year.

5. Liabilities at year end are calculated based on the same interest rates as are used to calculate the standard premium funding target for PBGC variable rate premiums.

6. If the figures are shown in a table (as is the case in the model notice), there must be a statement that it is possible that the liabilities may be greater at the time of plan termination than is shown.

7. The notice must state whether the plan's funded status is at least 100% for the current and two prior years and, if not, provide actual funding percentages.

8. The notice must state, for plans covered by the PBGC and for which plan assets are sufficient to pay vested benefits that are not PBGC-guaranteed, a statement that participants may receive benefits in excess of the guaranteed amount, as well as information about the assumptions used for that purpose.

XXII. 403(b) Hardship Withdrawal Rules [Sec. 602]

This provision broadens the types of accounts available for hardship to match the rules for 401(k) plans.

Effective: Tax years beginning after December 31, 2023

XXIII. Catch-Up Contributions Must Be Roth Amounts for Certain Participants [Sec. 603]

Under this provision, catch-up contributions made for individuals whose FICA wages were more than $145,000 in the prior year must be Roth contributions.

Effective: Tax years beginning after December 31, 2023

NOTE: This effective date was extended through the use of an "Administrative Transition Period" for the first two taxable years beginning after December 31, 2023 (i.e., 2024 and 2025)

A. Catch-ups By People Earning More than $145,000 Must be Roth

1. The compensation is measured as of the prior calendar year and for participating employers only (i.e., an employee with compensation from two different companies will be able to make pre-tax catch-up contributions if the compensation from either company is $145,000 or less).

2. Compensation at issue is defined in Code section 3121(a), which is wages for employees.

3. Individuals who are self-employed or partners do not receive this type of income (see Code section 3121(b)(7)), so they are not subject to this limitation, i.e., can make pre-tax catch-up contributions. This was confirmed in IRS Notice 2023-62.

B. Some Administrative Issues

1. If the plan does not offer Roth contributions, affected participants will not be able to make catch-up contributions.

2. IRS guidance clarifies that the plan must offer all participants the opportunity to make catch-up contributions as Roth contributions.

3. Plan document can provide that a participant whose pre-tax deferrals are converted to catch-up contributions will be deemed to have elected those amounts to be Roth.

XXIV. Election to Treat Employer Contributions as Roth [Sec. 604]

Under this provision, a plan may permit an employee to elect for a plan to treat employer nonelective and matching contributions as Roth amounts.

Effective Date: Contributions made after December 29, 2022.

NOTE: Despite this early effective date, the IRS did not provide guidance for how to accomplish this process until Notice 2024-02 was issued in late December 2023.

A. General Concept (Modifies Code section 402A(a))

1. Participant may make election in relation only to amounts that are fully vested when received by the participant's account.

(a) Avoids the administrative difficulties of having the vested portion treated one way for tax purposes and the nonvested portion treated differently.

(b) Not treated as a benefits, rights, and features issue just because a partially vested participant cannot elect to Rothify (but is a BRF in general – i.e., cannot exclude groups of people from being able to convert to Roth without passing BRF nondiscrimination testing).

2. Applies to any "applicable retirement plan":

(a) A qualified plan under Code section 401(a) that is exempt from tax under code section 501(a);

(i) Note: this provision appears to permit profit-sharing plans without a (k) feature to allow participants to elect Roth treatment of the nonelective contribution.

(b) Any 403(b) plan; and

(c) Any governmental 457(b) plan.

3. Rules for designations (per Notice 2024-02, similar to rules in Treas. Reg. §1.401(k)-1(f)):

   (a) Designation as Roth is irrevocable;

   (b) Amounts so designated are not excluded from income;

   (c) Amounts must be maintained in a separate account;

   (d) Participant must designate the contribution as a Roth amount by no later than the time that the amount is allocated to the participant's account;

   (e) Participants must be allowed to make or revoke designations as to future contributions at least once per year;

   (f) Can designate only deferrals as Roth or only employer contributions as Roth; i.e., one designation is not dependent on the other; and

   (g) Not treated as deferral for ADP test (but if the converted amount is a matching contribution, it is still includible in the ACP test).

4. Amounts included in participant's taxable income:

   (a) "for the taxable year in which the contribution is allocated to the individual's account" – even if deemed to have been made on the last day of the plan year or taxable year of the employee.

   (b) Example: nonelective contribution is made to the plan and allocated to participant accounts on April 30, 2025, in relation to the 2024 calendar plan year. Participant previously elected for that allocation to be treated as a Roth amount. Amount is included in participant's income in 2025.

   (c) Not includible for:

      (i) FICA or FUTA (Code sections 3121(a) or 3306(b)) (although government 457(b) plan amounts are subject to FICA if the employer is subject to FICA); or

      (ii) W-2 income or plan Compensation (Code sections 3401(a), 3402).

5. Tax reporting of these amounts:

   (a) Treated in same manner as if the amount had been an in-plan conversion to Roth.

   (b) Reported using Form 1099-R, in boxes 1 and 2a, with Code "G" in box 7.