Enactment of the SECURE Act: Effects and Implementation

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Overview

• Landmark legislation with many new opportunities for broadening coverage and increasing savings.

• Certain almost immediate effective dates will pose administrative challenges.

• Key provisions highlighted below.
Open Multiple Employer Plans ("MEPs")

- Elimination of nexus requirement for MEPs. Effective for plan years beginning after 2020.
  - Gig worker issue.

- Issue: how can financial institutions sponsor an open MEP?
  - Independent third party overseeing financial institution. Model exists today.
  - Employers oversee financial institution.
Open MEPs

• No start-up credit for joining a MEP in effect for three years.
  ▪ Under current law, small employers (100 or fewer employees) receive credit equal to 50% of administrative costs, up to annual maximum of $500 for three years. SECURE generally increases $500 to $5,000.
  ▪ Disadvantage to MEP.

• Alternative: cookie cutter single employer plans with single 5500 (under separate SECURE provision effective for 2022 plan year).
  ▪ Eligible for start-up credit.
  ▪ Called a MEP by some.
  ▪ No gig worker issue.
MEPs

• Repeal of one bad apple rule. Effective for plan years beginning after 2020.
  ▪ Current proposed regulations can be modified to implement this repeal.

• Alternative cookie cutter single employer plans: no one bad apple rule.

• Exclusion of 403(b) plans from open MEPs and repeal of one bad apple rule: to be addressed later?
Closed Plan Nondiscrimination Reform

• Issues Addressed:
  • Closed plan
  • Closed benefit right or feature
  • DC plan make-whole contributions
  • Minimum participation
Closed Plan

- If special rule is satisfied, permitted to aggregate DB plan with DC plan and test on a benefits basis

- Not deemed compliance
Closed Plan

- Special rule requirements:
  - Closed class before 4/5/17 or meet “plan size” rule
  - Satisfy 401(a)(4) and 410(b) for year of closing and next two years
  - No amendment that significantly discriminates
Closed Plan

• Plan size rule:
  - Plan in effect for five years
  - Neither coverage nor benefits increased by more than 50% during those five years.
    - Disregard participants merged into plan
    - MEPs treated as single plan for this purpose
Closed Plan

- Demonstrating compliance with 401(a)(4) and 410(b) for purposes of qualifying for 3 years special rule
  - Closing plan is not a significant change in coverage for purposes of business transaction transition rule.
  - Demographic changes attributable to transactions disregarded.
  - Plans with different plan years may be aggregated. This also applies for actual testing.
Closed Plan

• If DB plan spun off, same rules continue to apply.
Closed Plan

• Actual testing: Aggregation permitted with matches (with electives), 403(b) matches (with electives) and nonelectives, and ESOPs, for purposes of testing DB benefits.
Closed BRF, Make-Whole, Minimum Participation

• Closed benefit right or feature: deemed compliance if plan satisfies special rules very similar to closed plan rules

• Make-whole contributions to DC plan: very similar to closed plan rules

• Minimum participation: deemed compliance for frozen or closed plans under very similar rules
Lifetime Income Portability

• Today, if employer discontinues an annuity investment available under a plan, employees lose the guarantees they have paid for.

• SECURE: allow employees to roll over amounts invested in annuity in this situation (or receive a distribution of annuity). Effective for plan years beginning after 2019.
Annuity Provider Selection
Safe Harbor

- Present law: in order to offer an annuity under a plan, the plan fiduciary must analyze the financial strength of the insurer.

- SECURE: allow the plan fiduciary to rely on the insurer’s representation that it is in compliance with state insurance laws. Effective on the date of enactment.
Lifetime income disclosure

• Require benefit statements to include annuity equivalents of account balance based on DOL assumptions.
  ▪ Fiduciary protection.

• Questions regarding use of other tools or disclosures.
Increase in 70 ½ age for required minimum distributions

  
  ▪ Age 70½ for qualified charitable distributions not affected.
  
  ▪ Implementation challenges: as of 1/1/20 plan, distributions to individuals who attain 70½ in 2020 may be fully subject to the direct rollover rules, 20% withholding, and the 402(f) notice rules. Also, notices that RMDs are due for 2020 should not be sent to such individuals.
Post-death acceleration of required minimum distributions

• Referred to as “stretch”.
• Present law: beneficiaries can take distributions over life expectancy.
• SECURE: designated beneficiaries must receive distributions within 10 years of death.
  - Exception: life expectancy payout option preserved for spouses, beneficiaries not more than 10 years younger, disabled, chronically ill, and minors (until age of majority when 10-year rule applies).

• Generally, for deaths after 2019, subject to delays for collectively bargained plans and governmental plans, and an exemption for qualified annuities that are a binding contract as of the date of enactment.
Part-time employees

• Present law: employers can require, as a condition of eligibility for a plan, 1,000 hours of service during a year.

• SECURE: in a 401(k) plan, plans must provide an alternative means of satisfying the service eligibility requirement: 500 hours for three consecutive years. For employees who become eligible by reason of this rule:
  ▪ No employer contributions required.
  ▪ Can be excluded from testing and testing safe harbors

• Effective for plan years beginning after 2020, but service during years beginning before 2021 is disregarded.
Withdrawal or birth or adoption of a child

- Upon birth or adoption of a child, a participant may withdraw up to $5,000 penalty-free from a DC plan or IRA. Optional plan provision, but see below. Effective for distributions after 2019.

- Distribution may be repaid (treated like a rollover).
Withdrawal or birth or adoption of a child

• Implementation challenges: It appears, though not clearly, that a regular distribution, like a post-termination of employment distribution, may qualify as a birth or adoption distribution if it is made upon a birth or adoption. Birth or adoption distributions are not subject to the direct rollover rules, the 402(f) notices rules, or the 20% withholding rules. This new exception to the pre-59½ penalty tax also requires a change to 402(f) notices generally.
Cap on Safe Harbor Deferrals

- Increase in safe harbor 10% cap on automatic deferrals to 15% after first year. Effective for plan years beginning after 2019.
  - Implementation challenge if a plan incorporates the cap by reference to the law.
Phased Retirement

- Pension plans and governmental 457(b) plans may make in-service distributions at 59½. (Separate from SECURE.) Effective for plan years beginning after 2019.
Other SECURE Act Provisions to Note

• Permitting post-70½ contributions to deductible IRAs. Corresponding change to reduce excludable IRA charitable distributions by post-70½ contributions. Effective for taxable years beginning after 2019.

• Small employers (100 or fewer employees) get $500 per year credit for three years for adding automatic enrollment. Effective for tax years beginning after 2019.
Other SECURE Act Provisions to Note

• Remedial amendment period. Generally, plan amendments not required until 2022.

• Church plan clarification.

• CSEC premium reform.

• Elimination of safe harbor notice for nonelective plans.