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BENEFITS ALERT: SECURE Act 2.0

The SECURE 2.0 Act of 2022 ("SECURE Act 2.0"), enacted on December 29, 2022, made significant changes to the retirement plan landscape. Below is a summary of those provisions of the SECURE Act 2.0, which we think our clients may find of interest, or that impact pension and annuity plans.

Overpayment

For years, the Internal Revenue Service ("IRS") and the Department of Labor ("DOL") have been at odds with respect to a plan's duty to seek recoupment of an overpayment. The DOL's position has been that a plan need only seek recoupment if, generally, it made fiscal sense to do so (on the plan's part and on the participant's part). The IRS, however, allowed for no such consideration, and requires plans (in order to retain their tax-qualified status) to seek recoupment (and, to the extent not recovered, repaid to the plan by the sponsor). The SECURE Act 2.0 reconciles these positions, essentially following the DOL position, by providing that, after considering the matter in accordance with their fiduciary duties, the trustees do not breach their duty if, in exercising their discretion, they decide not to seek recoupment of an overpayment, and a plan will not lose its tax qualification if the amount is not repaid.

The new rules do not prohibit the trustees, again, after consideration and exercising their discretion, from seeking recoupment of the overpayment (either as a direct payment from the participant, or by reducing future payments), provided the following conditions are satisfied:

- The plan may not collect interest on the overpayment.
- Where overpayments were made as part of an annuity, and a plan reduces future installment payments to recoup the overpayment:
    - For each year, the total reduction may not exceed 10% of the total amount of overpayment; and
    - Each installment may not be decreased by more than 10% (of the amount otherwise required to be paid).

    <u>Note:</u> These limits also apply to any repayment agreement entered into with a participant requiring repayment in installments of annuity overpayments.

- Recoupment efforts may not be accompanied by threats of litigation, unless the plan determines that is has a reasonable likelihood of success to recover more than the cost of recovery.
- Recoupment may not be sought from a beneficiary or spouse.
- Except in the case of fraud or misrepresentation, recoupment is not permissible if the first overpayment occurred more than 3 years prior.
- Participants may use the plan's claim procedures to contest the attempted collection.

<u>**Note:**</u> **No plan amendment is required.**

Effective date: December 29, 2022.

Required Beginning Date

The original SECURE Act increased the required beginning date (the date by which participants must begin to collect their retirement benefits) from the later of retirement or age 70 ½, to the later of retirement or age 72. The SECURE Act 2.0 increases the age yet again, this time to the later of retirement or:

- Age 73 (with respect to participants who turn 72 after December 31, 2022, and turn age 73 before January 1, 2033); and
- Age 75 (with respect to participants who turn age 74 after December 31, 2032).

<u>**Note:**</u> **This is an optional provision.** Plans may retain the age 72 (or 70 ½) required beginning date. Plans that increase the required beginning date are required to adopt a plan amendment by the deadline discussed at the end of this Alert.

Effective Date: Required minimum distributions after December 31, 2022.

Cash Out Limit

The cash out limit (when a plan is permitted to distribute a lump sum to a participant without the participant's, or spouse's, consent) is increased from $5,000 to $7,000.

<u>**Note:**</u> **This is an optional provision.** Plans may retain a lower cash out threshold. Plans that increase the threshold are required to adopt a plan amendment by the deadline discussed at the end of this Alert.

Effective Date: Distributions made after December 31, 2023.

IRS Correction Program

The SECURE Act 2.0 makes it easier for plans to self-correct operational errors, by providing that any inadvertent administrative error may be self-corrected (without the need for seeking IRS approval pursuant to its Voluntary Correction Program). Before, certain errors that were considered "significant" and not corrected in a timely manner, had to be corrected with IRS approval. To self-correct under the new rules, plans must correct the error within a reasonable time after discovering it. The SECURE Act 2.0 directs the IRS (within 2 years) to update its correction program guidelines to reflect these changes.

Note: **No plan amendment is required.**

Effective Date: December 29, 2022.

Catch-Up Contributions

The SECURE Act 2.0 made two changes to catch-up contributions (additional contributions that participants aged 50 or older may make under a 401(k) plan).

First, for any participant whose compensation for the prior year was greater than $145,000, catch-up contributions must be made as Roth contributions.

Note: Because many plans do not contain Roth provisions, this will require some adjustments to the plan's recordkeeping system.

This is a mandatory provision, and plans are required to adopt a plan amendment by the deadline discussed at the end of this Alert.

Effective Date: Plan Years beginning after December 31, 2023.

Second, the catch-up limit for participants ages 60, 61, 62 and 63 has been increased to the greater of $10,000 or 150% of the regular catch-up limit for the year.

Note: **This is a mandatory provision**, and plans are required to adopt a plan amendment by the deadline discussed at the end of this Alert.

Effective Date: Plan Years beginning after December 31, 2024.

Emergency Savings Accounts

Individual account plans may, but are not required to, allow participants to set-up a sub-account which would:

- Allow participants to make contributions (on a Roth basis).
- Allow participants to withdraw from this account once a month.
- Be limited to $2,500 (or a lesser amount, if the plan sponsor wishes) at any time.
- Be invested in cash/cash equivalents.
- For the first four withdrawals, not be subject to any distribution fees.

Emergency savings accounts are not permitted for "highly compensated employees."

Note: This may be a useful addition for plans that have significant participant hardship distributions.

This is an optional provision. Plans that add an emergency savings account are required to adopt a plan amendment by the deadline discussed at the end of this Alert.

Effective Date: Plan Years beginning after December 31, 2023.

Excise Taxes

A new exception to the 10% excise tax on early distributions from a retirement plan has been added for certain emergency distributions. Only one such distribution per year is eligible for the excise tax exception and is limited to $1,000. An emergency distribution is one that a participant certifies in writing is necessary to meet an unforeseeable or immediate financial need relating to a participant or family emergency.

> **Note:** Because this provision of the SECURE 2.0 Act relates to the imposition of an excise tax, the determination of whether a distribution is permitted under a plan for a circumstance that may qualify as an emergency will be based on the terms of the plan.

A participant who takes an emergency distribution is prohibited from treating another distribution as such for three years following, unless the participant repays the distribution to the plan.

> **Note: No plan amendment is required.**

Effective Date: Distributions made after December 31, 2023.

The excise tax on participants who fail to take a required minimum distribution is reduced from 50% to 25%. The tax is further reduced to 10% if a corrective distribution is made within two years.

> **Note: No plan amendment is required.**

Effective Date: Plan years beginning after December 29, 2022.

Hardship Distributions

In addition to relying on a participant's written certification that he/she does not have sufficient assets to satisfy a hardship distribution, plans may also rely on a written certification as to the existence of a hardship event and the amount necessary to satisfy to satisfy it. So, rather than having to collect documentation, *e.g.,* medical bills, foreclosure notices, etc…, from a participant as part of the hardship review procedure, plans can simply update their hardship distribution forms to include these certifications.

> **Note:** Plans have implemented self-certification of hardship distributions in one form or another over the years (although this is the first time that it has been explicitly permitted by law). IRS guidance from 2017 provided that when relying on self-certification, plans should have participants agree to retain and provide, upon request, the documents that substantiate the hardship event and amount. This is important should the IRS ever audit the plan. It is not clear whether such retention will continue to be required now that self-certification is explicitly permitted pursuant to the SECURE Act 2.0.
>
> **This is an optional provision.**

Effective Date: Plan years beginning after December 29, 2022.

401(k) Plans

Newly established 401(k) plans must provide for automatic enrollment (starting with at least a 3% contribution, with annual increases).

Note: **This is a mandatory provision** for newly established 401(k) plans.

Effective Date: December 29, 2022.

401(k) plans that include service eligibility criteria may not require, as a condition of participation, a period of service longer than two years (of at least 500 hours each year).

Note: While this provision does not apply to union member participants, it does apply to any non-union staff that may otherwise be eligible to participate in the plan.

This is a mandatory provision. 401(k) plans will need to adopt a plan amendment by the deadline discussed at the end of this Alert if current plan terms contain a service eligibility requirement that more stringent than this new rule.

Effective Date: Plan years beginning after December 31, 2024

Plan Amendments

Amendments reflecting the provisions of the SECURE Act 2.0 (as well as the original SECURE Act) are due by the last day of the plan year beginning on or after January 1, 2025.

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