

Summary of SECURE Act 2.0 Guidance Released in 2023

The SECURE 2.0 Act of 2022 (“SECURE Act 2.0”) was signed into law on December 29, 2022 as part of the Consolidated Appropriations Act of 2023.¹ SECURE Act 2.0 builds on the Setting Every Community Up for Retirement Act of 2019 (the “SECURE Act”) and aims to modernize the retirement system, encourage additional retirement savings, and ease administrative requirements. Summarized below are key pieces of agency guidance released this year related to various SECURE Act and SECURE Act 2.0 provisions.

Revisions to Forms 5500 and 5500-SF. Agencies have finalized revisions to Forms 5500 and 5500-SF for plan years beginning on or after January 1, 2023, and which include revisions for certain SECURE Act provisions. Notable changes include new IRS compliance questions, more detailed reporting of plan expenses, new schedules for multiple-employer plans and for plans that participate in a “defined contribution group,” and an update to how participants are counted for purposes of determining whether a plan is a “small plan” entitled to simplified Form 5500 reporting (this will now be based on the number of participants with account balances).²

Expansion of the Employee Plans Compliance Resolution System (“EPCRS”). SECURE Act 2.0 modified EPCRS to permit plan sponsors to self-correct at any time certain eligible inadvertent failures that are not egregious or identified by the IRS prior to any actions demonstrating specific commitment to implement self-correction, provided the correction satisfies all other applicable EPCRS rules pertaining to self-correction and is made within a reasonable time after the failure is identified. The IRS issued guidance in June clarifying application of the new rules pending the next formal update to EPCRS.³

Required Minimum Distributions (“RMDs”). The IRS issued transition relief and guidance for qualified plans, 403(b) plans, and 457(b) eligible deferred compensation plans addressing changes in RMD requirements made by the SECURE Act and SECURE Act 2.0, including:

- **Change in Required Beginning Date.** For distributions made between January 1 and July 31, 2023 to a participant who turned age 72 in 2023 that would have been an RMD but for the increase to age 73 of the applicable RMD age trigger made by SECURE Act 2.0, plan administrators and other payors will not be liable for treating such distributions as RMDs and not providing rollover rights. Additionally, the 60-day period for making an indirect rollover was extended for any such distribution until September 30, 2023.
- **Specified RMDs for 2023.** The relief relating to “specified RMDs” first announced in 2022 was extended to apply for 2023 as well.
- **Applicability Date for Final Regulations.** The IRS announced that the effective date of the yet-to-be-released final regulations on RMD requirements will be no earlier than 2024.⁴

Roth Catch-Up Requirements. The IRS delayed until 2026 the SECURE Act 2.0 rule requiring that catch-up contributions by higher-income participants be made on a Roth basis. The IRS also announced

¹ Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4,459 (2022). SECURE Act 2.0 refers specifically to Division T of this session law.

² 88 Fed. Reg. 11,984 (Feb. 24, 2023).

³ IRS Notice 2023-43.

⁴ IRS Notice 2023-54.

that (1) individuals without FICA wages (e.g., self-employed individuals) would not be subject to the Roth requirement; (2) the income requirement will be calculated without aggregating wages from multiple employers maintaining a single plan, and (3) for participants subject to the requirement, a plan may treat an election to make pre-tax catch-up contributions as an election to make Roth catch-up contributions.⁵

“Grab-bag” Guidance. The IRS released interpretive guidance in December on a number of different SECURE Act 2.0 provisions, including the following⁶:

- **Auto-enrollment Mandate.** SECURE Act 2.0 generally requires 401(k) plans established after December 29, 2022 to include automatic enrollment provisions by no later than 2025 and grandfathered (exempts) plans established before that date. Among other things, the guidance clarifies: (1) that when a grandfathered plan merges with a plan subject to the mandate, the ongoing plan is subject to the mandate, unless the grandfathered plan is the ongoing plan and the plan merger occurs by the end of the Code Section 410(b)(6)(C) transition period; (2) that a spin-off does not result in loss of grandfathered status; and (3) the applicable rules concerning multiple-employer plans.
- **Terminal Illness Distributions.** SECURE Act 2.0 created a new exception to the Code Section 72(t) early distribution penalty tax. Per the guidance, this is not an exception to the distribution restrictions on 401(k) and 403(b) plans, so terminally ill individuals must be otherwise eligible for a distribution—e.g., hardship distribution, have reached age 59½ or terminated employment. The guidance defines “terminal illness” as an illness expected to result in death within 84 months, and clarified: (1) a doctor’s certification is required to demonstrate eligibility; (2) recontribution is permitted under rules like those governing qualified birth or adoption distributions; and (3) a participant in a plan not permitting terminal illness distributions, who is otherwise eligible for a distribution and who satisfies the criteria for a terminal illness distribution, may treat an otherwise permissible distribution as a terminal illness distribution on their tax return.
- **Roth Employer Contributions.** Under SECURE Act 2.0, 401(k) plans may allow participants to designate employer matching and non-elective contributions as Roth contributions. (Previously, only employee contributions could be designated as Roth.) The guidance clarifies that plans may offer Roth employee contributions, Roth matching, and Roth non-elective contributions, or any of those without the others. It also clarifies that: (1) rules similar to those for designating Roth elective deferrals apply to Roth employer contributions; (2) a participant must be vested in an employer contribution before designating it as Roth; (3) Roth employer contributions are subject to income tax in the year allocated to the account, but are not subject to employment taxes; (4) Roth employer contributions are reported as in-plan Roth rollovers on Form 1099-R for the year allocated; and (5) Roth employer contributions are not compensation under the Code Section 415 safe harbor.
- **De Minimis Financial Incentives.** Under SECURE Act 2.0, plan sponsors may provide de minimis financial incentives to employees for electing to participate in a 401(k) plan, if they do not have a deferral election in effect. The guidance explains that financial incentives may not exceed \$250 in value; are subject to the same tax, withholding, and reporting requirements that apply to fringe benefits; are not subject to the Code rules governing plan contributions; and that a matching contribution may not be considered a de minimis financial incentive.
- **Cash Balance Plan Accrual Rule.** SECURE Act 2.0 modified how cash balance plans are tested for compliance with the accrual requirements under Code Section 411. Per the guidance, a cash

⁵ IRS Notice 2023-62.

⁶ IRS Notice 2024-2.

balance plan with age- or service-based pay credits and a variable interest crediting rate does not need a fixed annual minimum interest crediting rate to comply with Code Section 411(b)(1). The guidance also addresses how and when plans can be amended to take advantage of the new provision without violating the anti-cutback rule under Code Section 411(d)(6).

- *Amendment Deadline.* The guidance provides that, generally, the deadline for required or discretionary plan amendments to reflect various legislative changes (including CARES Act, SECURE Act, and SECURE Act 2.0) is extended until December 31, 2026 for qualified retirement plans (but December 31, 2028 for collectively bargained plans and December 31, 2029 for governmental plans).

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