SUMMARY OF KEY CHANGES UNDER SECURE ACT 2.0

The SECURE 2.0 Act of 2022 ("SECURE 2.0" or "the Act") was signed into law on December 29, 2022 as part of the Consolidated Appropriations Act of 2023.[1] SECURE 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 the Act's key provisions that apply to retirement plans (note that not all provisions of the Act are addressed). The first section of this bulletin covers changes that impact plan design, and the second covers changes that are more administrative in nature.

The amendment deadline for plan changes required or optional under SECURE 2.0 is the end of the first plan year beginning on or after January 1, 2025 (January 1, 2027 for governmental and collectively bargained plans). SECURE 2.0 also extends the plan amendment deadlines for the SECURE Act, the Coronavirus Aid, Relief, and Economic Security Act of 2020 (the "CARES Act") and the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (the "Relief Act of 2020") to these same dates.

SECURE 2.0 Changes Impacting Plan Design

RMD rule changes. The Act made several changes to the Code's required minimum distribution (RMD) rules, including: (1) increasing the applicable triggering age for RMDs from age 72 to age 73, effective for participants born on or after January 1, 1951 (and to age 75, effective for participants born on or after January 1, 1960);[2] (2) eliminating RMDs during a participant's lifetime for Roth accounts in employer plans;[3] and (3) allowing surviving spouses to elect to be treated as employees for purposes of determining life expectancy RMD payments.[4] The latter two changes are effective starting in 2024. The excise tax for missed RMD payments was also decreased by SECURE 2.0, effective beginning in 2023, to 25% of the missed RMDs (down from 50%), and further reduced to only 10% if the failure is corrected through receipt of the missed RMDs and payment of the 10% excise tax within a two-year correction window (and prior to a penalty assessment or notice of deficiency from the IRS).[5]

Automatic/nonelective distributions. Effective starting in 2024, the Act increases the maximum permissible threshold for plans to make involuntary distributions to terminated participants from $5,000 to $7,000.[6] As before, a mandatory distribution of more than $1,000 must be automatically rolled over into a default IRA unless the participant affirmatively elects otherwise. The Act also establishes a framework via a new prohibited transaction exemption that will allow amounts in certain default IRAs to be automatically rolled back into an individual's new retirement plan when he or she is rehired, subject to notice requirements and an opportunity to opt-out.[7] The specifics will be detailed in implementing regulations that the DOL is directed to issue prior to this provision's effective date, which is December 27, 2023.

Mondress | Monaco | Parr | Lockwood PLLC
2101 Fourth Avenue, Suite 2170, Seattle, WA 98121 Tel: 206.398.1500 Fax: 206.398.1501 www.mmpl-law.com

Matching contributions based on student loan payments. Starting in 2024, employers may contribute to 401(k), 403(b), or governmental 457(b) plans by making matching contributions on "qualified student loan payments" made by employees who annually certify to making such payments on their loans.[8] Special nondiscrimination testing rules apply with respect to such student loan payment matching contributions.

Required automatic enrollment in new retirement plans. Starting in 2025, the Act requires new 401(k) and 403(b) plans to have automatic enrollment provisions that include an initial automatic enrollment deferral percentage of between 3% and 10%, automatic escalations of 1% annually, up to at least 10%, but no more than 15%, and a 90-day period in which participants can request withdrawal.[9] All 401(k) and 403(b) plans in effect on December 29, 2022 are grandfathered (i.e., allowed to continue unchanged), except grandfathering does not apply to employers adopting an existing multiple employer plan ("MEP") after December 29, 2022. Additionally, there is an exception for governmental plans, church plans, small employers with 10 or fewer employees, SIMPLE plans, and new employers that have been in existence for less than 3 years.

Small financial incentives for contributing to a 401(k) or 403(b) plan. The contingent benefit rule prohibits plan participants from receiving any financial incentives (other than matching contributions) for making elective deferrals to a 401(k) or 403(b) plan. Effective for plan years beginning in 2023 or later, the Act allows participants to receive de minimis financial incentives for making deferrals, such as gift cards for small amounts, by providing an exemption from the contingent benefit and prohibited transaction rules.[10] These de minimis financial incentives must be provided by the employer, not paid for from plan assets.

Emergency savings accounts linked to ERISA-governed individual account plans. SECURE 2.0 permits sponsors of ERISA-governed individual account plans to offer pension-linked emergency savings accounts ("ESAs") to their non-highly compensated employees ("NHCEs"), effective for plan years beginning in 2024 or later.[11] Employers may require affirmative elections to participate or they may have provisions for the automatic enrollment of eligible employees at a rate of up to 3% of compensation. Contributions to ESAs are capped based on a $2,500 maximum account balance (as indexed for inflation) or some lesser limit selected by the employer, must be funded on a Roth basis, and a default spillover election rule may be applied with respect to any participants with an existing designed Roth account under the plan under which excess contributions are converted to Roth deferrals. No minimum contribution or balance requirements are allowed, withdrawals must be permitted at least monthly, and the first four withdrawals per year may not be subject to withdrawal fees. Contributions must be treated as elective deferrals for purposes of any matching contributions made to the linked individual account plan. At separation from service, ESAs may be distributed in cash or rolled into an IRA or designed Roth account. ESAs must be invested in cash, an interest-bearing deposit account, or an investment product designed to preserve capital, as selected by the plan sponsor. Distributions from ESAs are not subject to the Code § 72(t) early distribution tax.

Optional treatment of employer matching or nonelective contributions as Roth contributions. Effective immediately, the Act allows 401(a) qualified plans (including 401(k) plans), 403(b) plans, and governmental 457(b) plans to provide participants the option of having fully vested matching contributions and nonelective contributions made on a Roth basis.[12]

Catch-up Contributions. Individuals age 50 and over may make catch-up contributions (additional elective deferrals) on either a pre-tax or Roth basis to 401(k), 403(b), governmental 457(b) and SIMPLE plans, limited to $7,500 for non-SIMPLE plans and $3,500 for SIMPLE plans. Starting in 2025, SECURE 2.0 increases the catch-up maximums for individuals ages 60-63: For non-SIMPLE plans, to the greater of $10,000 or 150% of the regular catch-up amount for 2024, and for SIMPLE plans, to the greater of $5,000 or 150% of the regular catch-up amount for 2025, with these amounts indexed for inflation.[13] Additionally, starting in 2024, all catch-up contributions made by participants whose prior year compensation exceeded $145,000 (as indexed for inflation) must be Roth contributions.[14]

Modification to SECURE Act long-term part-time employee rule. Per a change in law made by the SECURE Act, 401(k) plans may not impose a minimum service requirement that excludes eligible employees from making elective deferrals once they've worked at least 500 hours in each of three consecutive 12-month periods (disregarding periods beginning prior to 2021). SECURE 2.0 modifies this rule to shorten the measurement period to *two* consecutive 12-month periods (disregarding periods beginning before 2023), and also expands the applicability of this rule to include 403(b) plans, effective for plan years beginning in 2025 and later.[15]

Elimination of the "first day of the month" rule for governmental 457(b) plans. Effective for plan years beginning after December 29, 2022, SECURE 2.0 eliminated the "first day of the month" requirement for elective deferral changes made under governmental 457(b) plans.[16] This optional change allows governmental 457(b) plans to implement participant deferral elections mid-month, if desired.

Hardship distribution rule changes for 403(b) plans. Effective for plan years beginning in 2024 and later, the Act modifies the hardship distribution rules that apply to 403(b) plans to bring them back into alignment with the current rules applicable to 401(k) plans – for example, to expand the eligible sources for hardship distributions to include earnings on elective deferrals and to eliminate the "loan first" requirement.[17]

New special distribution provisions for defined contribution plans. Subject to certain exceptions, distributions made prior to a participant's attainment of age 59½ are subject to a 10% early distribution penalty tax under Code § 72(t). Per the Act, the § 72(t) early distribution tax does not apply to the following new special distribution categories, and these distributions are also eligible for certain other special tax treatment (as described in the endnotes).

- Distributions made after December 29, 2022 to terminally ill individuals (defined for this purpose as a participant whose physician certifies that they have an illness or condition that is reasonably expected to result in death in 84 months or less);[18]
- Distributions made after 2023 to participants who are victims of domestic abuse (self-certification applies for this purpose) of up to the lesser of $10,000 (as indexed for inflation) or 50% of the participant's vested account balance;[19]
- Distributions made after 2023 for "emergency personal expenses" (defined for this purpose as unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses; self-certification is permitted), up to the lesser of the following amounts per year: $1,000, or the participant's vested account balance minus $1,000;[20]

- Distributions made after December 29, 2025 for the purchase of certified long-term care insurance, up to the lowest of the following amounts annually: (1) $2,500 (as indexed for inflation); (2) the amount paid by or assessed to the employee during the year for long-term care insurance; or (3) 10% of the employee's vested account balance;[21] and

- Qualifying distributions made in connection with federally declared disasters occurring on or after January 26, 2021 and not exceeding $22,000 (as indexed for inflation) with respect to any qualified disaster.[22] (See below for further details on the disaster relief provisions included in the Act.)

Additionally, the Act retroactively clarifies that the repayment period for qualified birth or adoption distributions as permitted by the original SECURE Act is three years (the SECURE Act did not specify a repayment deadline).[23]

Permanent adoption of disaster relief provisions. The Act makes disaster relief provisions that were previously adopted on temporary bases a permanent part of the Code, but with a smaller cap for eligible distributions ($22,000 as compared to the $100,000 limit generally included in prior disaster relief legislation). Under the Act, "qualified disaster recovery distributions" may be allowed by a plan even if the participant is not otherwise eligible for distribution; may be repaid to the plan on a tax-free basis within three years; are treated as ineligible for rollover; may be included in income ratably over a three-year period; and, as noted above, are exempt from the Section 72(t) early distribution penalty tax. The other disaster relief provisions made permanent by SECURE 2.0 include: (a) permitting recontribution of hardship distributions taken for the purchase or construction of a home that fell through due to a qualifying disaster; (b) a two times larger than normal loan limit for participants affected by a qualifying disaster; and (c) the permitted suspension of loan repayments for participants affected by a qualifying disaster.[24] These provisions apply with respect to federally-declared disasters occurring on or after January 26, 2021, are available only to participants who have been impacted in certain ways by a qualifying disaster, and are limited in time based on when the disaster occurred.

Benefit accrual method rules for cash balance plans with variable interest crediting rates. Effective for plan years beginning after December 29, 2022, cash balance plans with variable interest crediting rates may now use a reasonable projection of their crediting rate not to exceed 6% for purposes of applying the accrual method rules of Code § 411(b) and ERISA § 204(b).[25]

Application of top-heavy rules to defined contribution plans covering excludable employees. Effective for plan years beginning in 2024 and later, the Act modifies the top heavy rules of Code § 416 to permit the exclusion of employees not yet meeting the Code § 410(a) minimum age and service requirements (but who are otherwise allowed to participate) from the requirement to receive a minimum contribution from a "top heavy" defined contribution plan.[26]

Amendment deadline for retroactive benefit increases extended. Currently, a plan amendment to increase benefit accruals or contributions for a plan year must be adopted by the last day of that plan year. Effective for plan years beginning in 2024 and later, SECURE 2.0 extends the plan amendment deadline for such increases (other than with respect to matching contributions) to the plan sponsor's tax return filing deadline (including extensions) for the year that includes the effective date of the benefit increase.[27]

SECURE 2.0 Changes Impacting Plan Administration

Recovery of retirement plan overpayments. Effective immediately, SECURE 2.0 significantly changes the landscape regarding the recoupment of benefit overpayments by ERISA-governed retirement plans.[28] Previously, benefit overpayments were governed by the IRS's EPCRS correction program, and recoupment efforts by plans were generally required (with some narrow exceptions added in recent iterations of EPCRS). SECURE 2.0 amends ERISA to not only make recovery attempts optional for all "inadvertent benefit overpayments," but also place substantial limitations on a plan's ability to collect overpayments from the participant (e.g., no interest, cap on reductions to future payments, limitations period applies, etc.) It also amends the Code to specify that a plan's failure to recover inadvertent benefit overpayments generally does not adversely affect its qualified status and to no longer disqualify such overpayments from rollover eligibility. The Act grandfathers any installment repayment plans and plan-imposed reductions in future benefit payments already in effect on December 29, 2022 for overpayments that occurred and commenced prior to then.

Expansion of Employee Plans Compliance Resolution System ("EPCRS"). SECURE 2.0 makes several changes to the IRS's EPCRS correction program, effective immediately.[29] First, it expands self-correction under EPCRS to cover any "eligible inadvertent failure" regardless of when it occurred unless the error is identified by the IRS before actions have been taken demonstrating a specific commitment to self-correct, or the self-correction is not completed within a reasonable time after the failure is identified. Second, it removes limitations on the self-correction of participant-loan-related errors, and requires the DOL to treat loan failures self-corrected under EPCRS as meeting the requirements of the DOL's Voluntary Fiduciary Correction Program, although the DOL may impose reporting or other procedural requirements. Finally, the Act also codifies an existing safe harbor correction method for elective deferral failures under plans with automatic enrollment that was set to expire under the current version of EPCRS at the end of 2023.

Plan may rely on employee self-certification for hardships and unforeseen emergency distributions. Previously, the law was unclear on what documentation a plan must obtain when approving a participant's application for a hardship distribution (401(k) and 403(b) plans) or unforeseen emergency distribution (457(b) plans). Effective for plan years beginning after December 29, 2022, SECURE 2.0 allows these plans to accept a participant's self-certification that their need is of the type deemed approved in regulations, that the amount they are requesting doesn't exceed their need, and that they have no alternative means to satisfy it.[30] However, the Treasury may issue regulations excepting situations where the employer has actual knowledge to the contrary and to address employee misrepresentation.

Retirement savings lost and found. SECURE 2.0 directs the DOL, in consultation with the Treasury Department, to create an online searchable "lost and found" database to assist plan participants and beneficiaries in locating lost retirement benefits to which they may be entitled.[31] This applies to all retirement plans subject to ERISA's vesting provisions. The database is to be created no later than December 29, 2024.

Requirement to provide paper statements in certain cases. Effective for plan years beginning after 2025, the Act provides that defined contribution plans must provide participants with at least one paper benefit statement annually and defined benefit plans must provide participants with at least one paper benefit statement every three years.[32] An exception applies if the participant affirmatively requests electronic delivery or the plan otherwise complies with certain electronic delivery rules.

New disclosure requirements for lump sum windows. The Act creates new disclosure requirements (to participants and governmental agencies) for pension plans if/when they offer lump sum windows.[33] The Act directs the DOL, in consultation with the Treasury Department, to issue implementing regulations by December 29, 2023, and the new requirement will be effective as provided for in the final regulations.

Changes to annual funding notice contents. Effective with respect to plan years beginning after 2023, the Act makes certain changes to the required annual funding notices for defined benefit plans under ERISA § 101(f).[34] These changes impact both single employer and multiemployer plan funding notices.

Cessation of indexing for PBGC variable rate premiums. PBGC premiums for underfunded single-employer defined benefit plans include not only the normal flat rate premium ($35 per participant for the 2023 plan year) but also a variable rate premium based on the plan's level of underfunding, which for the 2023 plan year is $52 per $1,000 of unfunded vested benefits capped at $652 per participant. Under prior law, the variable rate premium was scheduled to increase based on an inflation index for plan years after 2023, but SECURE 2.0 eliminates these future inflation-based automatic increases.[35]

Performance benchmarks for asset allocation funds. The DOL's participant disclosure regulations require plan administrators to compare the historical performance of a plan's designated investment alternative to an appropriate broad-based securities market index. However, these rules do not adequately address increasingly popular investments like target date funds that include a mix of asset classes. The Act directs DOL to mitigate this problem by December 29, 2024, by issuing regulations that allow administrators to benchmark an investment that uses a mix of asset classes against a blend of broad-based securities market indices.[36]

Section 72(t) penalty tax exception for distributions to qualified public safety officers and firefighters. Code § 72(t) exempts from the normal early distribution penalty tax any distributions made to an employee after separation from service after attainment of age 55, but for "qualified public safety employees" in a governmental plan, a special rule applies. Effective immediately, SECURE 2.0 modifies this special rule as follows: (1) it now applies based on attainment of the earlier of age 50 or 25 years of service (not just attainment of age 50);[37] (2) the definition of "qualified public safety employees" is broadened to include corrections officers and forensic security employees;[38] and (3) the exemption now applies to any employee who provides firefighting services whether they participate in a governmental or non-governmental plan.[39]

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Not intended as legal advice.

[1] Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4,459 (2022). SECURE 2.0 refers specifically to Division T of this session law.
[2] SECURE 2.0 § 107. Depending on how a drafting error in the statute is resolved, the age 75 change may alternatively apply to participants born in 1959 or later.
[3] *Id.* § 325.
[4] *Id.* § 327.
[5] *Id.* § 302.
[6] *Id.* § 304.
[7] *Id.* § 120.
[8] *Id.* § 110.
[9] *Id.* § 101.
[10] *Id.* § 113.
[11] *Id.* § 127.
[12] *Id.* § 604.
[13] *Id.* § 109.
[14] *Id.* § 603. Under a technical drafting error in this provision of the Act, the law could now be read to disallow all catch-up contributions beginning in 2024. This is obviously contrary to Congressional intent, and we expect this issue to be addressed in either a technical correction passed by Congress or IRS guidance.
[15] *Id.* § 125.
[16] *Id.* § 306.
[17] *Id.* § 602.
[18] *Id.* § 326. Such terminally ill distributions may be repaid to the plan on a tax-free basis within three years. However, it does not appear under the Act that a plan can offer "terminally ill distributions" to a participant who is not otherwise eligible for distribution (e.g., under age 59 ½ and still working), nor does it appear that these distributions are automatically treated as ineligible for rollover.
[19] *Id.* § 314. These domestic abuse victim distributions may be allowed by a plan even if the participant is not otherwise eligible for distribution; may be repaid to the plan on a tax-free basis within three years, and are treated as ineligible for rollover.
[20] *Id.* § 115. Emergency personal expense distributions may be allowed by a plan even if the participant is not otherwise eligible for distribution; may be repaid to the plan on a tax-free basis within three years, and are treated as ineligible for rollover. Also, unless they are repaid or new elective deferrals or employee contributions are made that exceed the prior distribution amount, no amount may be treated as an emergency personal expense distribution for the next three years.
[21] *Id.* § 334. These qualified long-term care distributions may be allowed by a plan even if the participant is not otherwise eligible for distribution and they are treated as ineligible for rollover.
[22] *Id.* § 331.
[23] *Id.* § 311. For withdrawals that have already been taken, the repayment deadline is December 31, 2025.
[24] *Id.* § 331.
[25] *Id.* § 348.
[26] *Id.* § 310.
[27] *Id.* § 316.
[28] *Id.* § 301.
[29] *Id.* § 305.
[30] *Id.* § 312.
[31] *Id.* § 303.
[32] *Id.* § 338.
[33] *Id.* § 342.
[34] *Id.* § 347.
[35] *Id.* § 349.
[36] *Id.* § 318.
[37] *Id.* § 329.
[38] *Id.* § 330.
[39] *Id.* § 308.