

# Employee Relations

## LAW JOURNAL

### Employee Benefits

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## Setting Every Community Up for Retirement Enhancement Act of 2019

*Mark E. Bokert and Alan Hahn*

On December 20, 2019, President Trump signed into law the Setting Every Community Up for Retirement Enhancement Act of 2019 (the “SECURE Act”), a widely supported bipartisan piece of legislation which significantly amends portions of the Internal Revenue Code of 1986 (the “Code”). The SECURE Act was part of the Further Consolidated Appropriations Act of 2020 (the “Appropriations Act”). While the main focus of the SECURE Act is to reform how employees save for retirement, the SECURE Act also includes meaningful changes in other areas of employee benefits.

This article provides an overview of some of the changes enacted by the SECURE Act that impact the employer-employee relationship. Employers will want to work with their legal counsel to understand the nuances of the SECURE Act to determine whether any of their employee benefits plans need to be amended or other action taken in light of the SECURE Act.

Mark E. Bokert is a partner and co-chairs the Benefits & Compensation Practice Group of Davis & Gilbert LLP. His practice encompasses nearly all aspects of executive compensation and employee benefits, including matters related to equity plans, deferred compensation plans, phantom equity plans, qualified retirement plans, and welfare plans. Mr. Bokert may be contacted at [mbokert@dglaw.com](mailto:mbokert@dglaw.com). Alan Hahn is a partner and co-chairs the Benefits & Compensation Practice Group of Davis & Gilbert LLP. His practice is devoted to advising clients of all sizes, including in the design and implementation of a wide variety of creative, unique, and tax-effective employee benefit plans and programs. Mr. Hahn may be contacted at [ahahn@dglaw.com](mailto:ahahn@dglaw.com). The authors would like to thank William Szanzer, an associate in the Benefits & Compensation Practice Group of Davis & Gilbert LLP, for his assistance in the preparation of this column.

## ***401(k) Plans***

The first category of changes addressed in this article impact 401(k) plans. Many of these changes were enacted to promote retirement savings through employer-sponsored retirement plans.

### *Long-Term Part-Time Employees*

Following the enactment of the SECURE Act, effective for plan years starting after December 31, 2020, plan sponsors will have to amend their 401(k) plans to allow long-term part-time employees to make elective deferrals.<sup>1</sup> A long-term part-time employee is defined under the SECURE Act as an employee who completes three consecutive 12-month periods during each of which the employee is credited with at least 500 hours of service. The SECURE Act states that 12-month periods beginning before January 1, 2020 shall not be included for purposes for determining whether or not an employee is considered a long-term part-time employee. Therefore, the earliest that a plan sponsor would have to allow a long-term part-time employee to make elective deferrals into its 401(k) plan is January 1, 2024 (i.e., January 1, 2021 – December 31, 2023 is the first three consecutive 12-month period that plan sponsors must use to determine eligibility of part-time employees).

Even though long-term part-time employees have to be allowed into the 401(k) plan for elective deferral purposes, these employees may still be excluded under the SECURE Act for employer matching and profit sharing contributions without causing the 401(k) plan to fail nondiscrimination and top-heavy testing. If a plan sponsor makes employer contributions on behalf of long-term part-time employees, then those employees will accrue a year of vesting service for each 12-month period during which the employee has at least 500 hours of service.

### *Safe Harbor 401(k) Plans*

Some plan sponsors provide for safe harbor employer contributions in their 401(k) plans in order to obtain nondiscrimination testing relief for their plans. Prior to enactment of the SECURE Act, if a plan sponsor offers either a safe harbor employer matching contribution or a safe harbor nonelective contribution, the plan sponsor would have to provide its employees with an annual notice informing the employee of the safe harbor feature in the plan. The SECURE Act eliminates the notice requirement for plans that offer a safe harbor nonelective contribution effective for plan years beginning after December 31, 2019 (plans that offer a safe harbor employer matching contribution still must furnish an annual

notice to participants).<sup>2</sup> Additionally, a plan sponsor can generally amend its plan midyear to allow safe harbor nonelective contributions, provided that (1) such amendment is adopted by the 30th day before the close of the plan year, or (2) if within 30 days before the close of the plan year, (x) a nonelective contribution of at least four percent of compensation (instead of at least three percent) for all eligible employees is made for that plan year, and (y) the plan is amended no later than the last day for distributing excess contributions for the plan year.

### *Qualified Automatic Contribution Arrangement*

A Qualified Automatic Contribution Arrangement (“QACA”) is a 401(k) plan that has an automatic enrollment feature that provides nondiscrimination testing relief under Code Section 401(k) and 401(m). Effective for plan years beginning after December 31, 2019, the SECURE Act increases the maximum automatic deferral rate from 10 percent to 15 percent for plans that include a QACA plan feature.<sup>3</sup> This is a discretionary amendment for QACAs.

### *In-Service Withdrawals for Birth and Adoption Expenses*

Plan sponsors may allow employees to take a withdrawal from their 401(k) plan account while still employed for a limited number of reasons that constitute a hardship. The SECURE Act provides another basis for an in-service withdrawal – when an employee incurs expenses in connection with the birth or legal adoption of the employee’s child.<sup>4</sup> Effective December 31, 2019, a plan sponsor may allow employees to withdraw up to \$5,000 within one year following the birth or legal adoption of the employee’s child. Such a withdrawal would not be subject to a 10 percent early withdrawal tax. Providing for an in-service withdrawal for birth and adoption expenses is a discretionary plan feature (like allowing hardship withdrawals generally), so a plan sponsor may choose whether or not to provide for this withdrawal option.

### *Increase in Age for Require Mandatory Distributions*

Prior to the enactment of the SECURE Act, participants are generally required to begin taking minimum distributions (“RMDs”) from their retirement plans at age 70 1/2. The SECURE Act increases this age to 72, effective for participants who turn age 70 1/2 after December 31, 2019.<sup>5</sup> Participants who turned age 70 1/2 prior to December 31, 2019 will have to continue taking their RMDs for plan years after December 31, 2019 even if they have not turned age 72 at the time of the distribution.

### *Lifetime Income Disclosure*

In order to assist participants to better understand how their 401(k) plan account balances will impact their retirement savings, the SECURE Act requires plan sponsors to provide participants with a 401(k) plan statement that sets forth the “lifetime income stream equivalent” of the participant’s 401(k) plan account balance.<sup>6</sup> This statement will have to be provided at least once during a 12-month period. However, this disclosure requirement only becomes effective 12 months after the later of the Department of Labor’s (“DOL”) issuance of (i) interim final rules implementing the lifetime income provisions, (ii) model disclosures, and (iii) the assumptions that 401(k) plans should use in converting a participant’s account balance to a lifetime income stream. The SECURE Act directs the DOL to issue such guidance by the first anniversary of the enactment of the SECURE Act (i.e., by December 20, 2020).

### *Pooled Employer Plans*

The SECURE Act provides a new type of multiple employer plan (“MEP”) called a “pooled employer plan,” under which unrelated employers may participate in a single qualified deferred compensation plan.<sup>7</sup> The SECURE Act also includes “bad apple” relief provisions that allow a MEP to maintain its qualified status despite one of the participating employers not being fully compliant, provided certain conditions are met.<sup>8</sup>

### *Defined Benefit Plans*

There are a number of changes to defined benefit plans under the SECURE Act and the Appropriations Act. First, the SECURE Act modified the nondiscrimination rules with respect to benefit accruals and benefits, rights, and features for a closed class of participants under a defined benefit plan that has been closed for new hires, provided that the plan satisfies certain requirements.<sup>9</sup> Second, the Appropriations Act allows in-service distributions under a defined benefit plan, money purchase plan or governmental section 457(b) plan at age 59 1/2 (previously, age 62 for defined benefit plans and money purchase plan, and age 70 1/2 for 457(b) plans).<sup>10</sup> Lastly, the changes to RMDs described earlier apply to defined benefit plans as well, so participants will not have to commence their benefit prior to attaining age 72 (provided they did not attain age 70 1/2 before January 1, 2020).<sup>11</sup> Plans that are looking to de-risk and add a lump sum feature may have more reason to do so under these new rules.

### ***403(b) Plans***

Many of the abovementioned changes for 401(k) plans will also apply to 403(b) plans. Specifically, the SECURE Act eliminates the notice requirement for 403(b) plans that offer a safe harbor nonelective contribution,<sup>12</sup> increases the maximum automatic deferral rate from 10 percent to 15 percent for 403(b) plans that include a QACA plan feature,<sup>13</sup> allows 403(b) plan sponsors to amend their 403(b) plans to offer an in-service withdrawal for birth and adoption expenses,<sup>14</sup> and increases the age for RMDs to age 72 for participants in a 403(b) plan.<sup>15</sup> Additionally, the SECURE Act directs the Treasury Department to issue guidance by June 20, 2020 under which a 403(b) plan may make distributions of individual custodial accounts to facilitate a plan termination.<sup>16</sup>

### ***Additional Changes to Retirement Benefits***

The SECURE Act repeals the prohibition on contributions to a traditional IRA by an individual who has attained age 70 1/2.<sup>17</sup> Additionally, the SECURE Act requires non-spouse beneficiaries to withdraw all the money of an inherited IRA within 10 years from the death of the original account owner instead of over the beneficiary's lifetime (i.e., there is no more "stretch" IRA).<sup>18</sup>

The SECURE Act also increases the following fees in connection with a plan sponsor's filing and reporting obligations for a qualified retirement plan:

- The penalty for a late IRS Form 5500 increased to \$250 per day (previously \$25) per day up to a total of \$150,000 (previously \$15,000).
- Failure to file a registration statement will incur a daily penalty of \$10 (previously \$1) per participant up to a total of \$50,000 (previously \$5,000).
- The penalty for failing to file a required notification of change of certain plan information increased to \$10 (previously \$1) per day, and the maximum will rise to \$10,000 (previously \$1,000).
- Failure to provide a required withholding notice would trigger a penalty of \$100 (previously \$10) for each failure, with a limit of \$50,000 (previously \$5,000) for all failures during any calendar year.<sup>19</sup>

### ***Other Employee Benefits***

The SECURE Act and Appropriations Act also includes some provisions that impact health and welfare plan sponsored by employers including, repealing the excise tax on high-cost employer health plans (more commonly known as the Cadillac Tax),<sup>20</sup> extending the PCORI fees for 10 years through plan years ending September 30, 2029,<sup>21</sup> extending a tax credit for employers that provide employees with paid leave under the Family and Medical Leave Act through 2020,<sup>22</sup> and reducing tax-exempt organizations' unrelated business taxable income ("UBTI") by repealing the requirement for such organizations to include the value of its qualified transportation fringe benefits as UBTI.<sup>23</sup>

The SECURE Act also expands the definition of a "qualified education expense" under Code Section 529 to include repayment of qualified student loans and expenses for certain apprenticeship programs.<sup>24</sup> Unlike the previous definition of qualified education expense, there is a \$10,000 lifetime limit for repayment of qualified student loans.

### ***Notes***

1. Section 112 of the SECURE Act.
2. Section 103 of the SECURE Act.
3. Section 102 of the SECURE Act.
4. Section 113 of the SECURE Act.
5. Section 114 of the SECURE Act.
6. Section 203 of the SECURE Act.
7. Section 101 of the SECURE Act.
8. *See id.*
9. Section 205 of the SECURE Act.
10. Section 104 of Division M of the Appropriations Act.
11. Section 114 of the SECURE Act.
12. Section 103 of the SECURE Act.
13. Section 102 of the SECURE Act.
14. Section 114 of the SECURE Act.
15. Section 114 of the SECURE Act.
16. Section 110 of the SECURE Act.
17. Section 107 of the SECURE Act.
18. Section 401 of the SECURE Act.
19. Section 403 of the SECURE Act.

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20. Section 503 of Division N of the Appropriations Act.
21. Section 104 of Division N of the Appropriations Act.
22. Section 142 of Division Q of the Appropriations Act.
23. Section 302 of Division Q of the Appropriations Act.
24. Section 302 of the SECURE Act.

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