SECURE 2.0

Learn About the Impacts of This New Law

Prepared by Davis & Harman LLP.

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Tracking 1-05355746

Material created 01/23

SECURE 2.0

SECURE 2.0 is bipartisan retirement legislation signed into law on December 29, 2022. It incentivizes individuals to save for retirement, while increasing access to workplace plans.

The new law includes a number of provisions intended to benefit individuals as well as small business owners.

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RMD AGE

Increase in required beginning date to age 73 in 2023 and to age 75 in 2033 for mandatory distributions. Under current law, under the required minimum distribution (“RMD”) rules, participants are generally required to begin taking distributions from their retirement plan at age 72, increased from age 70½ for 2020. SECURE 2.0 would increase the RMD age from 72 to 73 in 2023 and to 75 in 2033***. However, there is a drafting glitch under which it is unclear whether age 75 goes into effect in 2033 or 2034; it appears that the intent was 2033***.

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RMD ISSUES

Allow spousal beneficiaries to treat accounts as their own. Effective for 2024. Spousal beneficiaries may elect to treat a deceased IRA owner's IRA as their own for purposes of the RMD rules. Under SECURE 2.0, this treatment is extended to spousal beneficiaries in plans.

RMD treatment of plan Roth amounts. Generally effective for 2024.

Roth IRAs are exempt from the pre-death RMD rules. Under SECURE 2.0, the exemption is extended to Roth amounts in plans.

Reducing 50% penalty tax. Effective for taxable years beginning after the date of enactment. Failures to take minimum distributions are subject to a 50% excise tax. SECURE 2.0 reduces that tax to 25%. If a failure to take an RMD is corrected in a timely manner (as defined in the provision), the excise tax on the failure is further reduced from 25% to 10%.

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REQUIRING AUTO ENROLLMENT IN NEW PLANS

- **Requirement.** Effective for 2025, new 401(k) and 403(b) plans would be required to include (1) automatic enrollment at a minimum of 3% and a maximum of 10% and (2) automatic escalation at one percentage point per year up to at least 10%. New plans are plans not established before the date of enactment (December 29, 2022).
- **Employers excepted from requirement.** Exceptions for government plans, church plans, employers with 10 or fewer employees, and new businesses that have not been in existence for three years.
- **MEPs and PEPs.** For purposes of the grandfather and exemptions, each employer in a Pooled Employer Plan (PEP) or Multiple Employer Plan (MEP) would be treated as maintaining a separate plan, so that, for example, a new employer joining a pre-enactment PEP or MEP would not be grandfathered.
- **SIMPLEs exempted.** SIMPLE plans would not be subject to this requirement.

START-UP CREDIT

Enhancement of the current start-up credit. Effective for 2023. Current law offers a tax credit to a small business (up to 100 employees) that adopts a new plan, which can apply for up to three years, equal to the lesser of (1) 50% of the employer's start-up costs, or (2) as much as $5,000. SECURE 2.0 increases 50% to 100% for employers with 50 or fewer employees.

New credit. Effective for 2023. Except in the case of defined benefit plans, an additional credit is provided equal to the applicable percentage of the amount contributed by the employer on behalf of certain employees, up to a per-employee cap of $1,000.

- This full additional credit would be limited to employers with 50 or fewer employees, and phased out for employers with between 51 and 100 employees.
- The applicable percentage would be 100% in the first and second years, 75% in the third year, 50% in the fourth year, 25% in the fifth year, and zero thereafter.
- No credit would be permitted with respect to contributions on behalf of an employee whose FICA wages for the taxable year exceed $100,000 (indexed). ***It is unclear whether partners and sole proprietors would be treated as employees for purposes of the credit; if so, they have no FICA wages, so the employer would receive a credit with respect to contributions on their behalf, regardless of their earned income.***

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START-UP CREDIT REGARDING MEPS AND PEPS

Extending the start-up credit to small employers that join a MEP (which includes PEPs). SECURE 2.0 provides that small employers that join a MEP are entitled to the start-up credit for their first three years in the MEP, regardless of how long the MEP has been in existence, retroactively effective as if included in the original SECURE Act.

EMERGENCY SAVINGS – ROTH VERSION

- **Effective for 2024.**
- **Cap of $2,500 on the emergency savings account.** The account can exceed $2,500 (indexed) by reason of account earnings, but no contribution can be made that would cause the account to exceed or further exceed $2,500.
- **Account must be part of a defined contribution plan.**
- **Employee contributions are treated as Roth contributions for almost all purposes and are deemed to be qualified distributions so distributions of earnings are always nontaxable.**
- **Contributions must be invested in a principal preservation investment.**
- **Very generally amounts may be withdrawn at least once per calendar month, penalty-free.**
- **Auto enrollment permitted up to 3% of pay**

A Roth offers tax deferral on any earnings in the account. Qualified withdrawals of earnings from the account are tax-free. Withdrawals of earnings prior to age 59 ½ or prior to the account being opened for 5 years, whichever is later, may result in a 10% IRS penalty tax. Limitations and restrictions may apply.

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EMERGENCY SAVINGS – ROTH VERSION

- **No employer contributions permitted.**
- **Highly compensated employees not permitted to contribute.**
- **Matches required at the same rate that the plan matches elective deferrals, subject to an annual $2,500 cap.** The matches would go into the retirement part of the plan, not the emergency savings part of the plan.
- **Withdrawal of matched contributions.** Employers shall not be required to suspend matching contributions for employees who make withdrawals of matched contributions. But under guidance to be prescribed, employers shall have unclear powers to prevent manipulation of this provision, presumably by employees who make contributions to get the match and then withdraw the contribution.

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EMERGENCY SAVINGS – ROTH VERSION

- **Termination of employment.** On termination of employment, the plan must allow for the emergency savings account to be (1) converted to Roth in the plan if the plan allows Roth accounts and such account is not being distributed, (2) distributed to the participant, or (3) rolled over to a Roth account.
- **DOL and Treasury both have authority to issue guidance on the same provisions, but they are not required to issue joint guidance.** This could raise questions about the ability to rely on guidance issued by only one agency.

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EMERGENCY SAVINGS – PRE-TAX VERSION

This provision is structured very much like the qualified birth or adoption distribution (“QBAD”) provision enacted in the SECURE Act and like the special coronavirus-related distributions (“CRDs”) permitted under the CARES Act. Effective for 2024.

- **Tax treatment.** A distribution from a retirement plan (other than a defined benefit plan) or from an IRA that is treated as an emergency distribution is not subject to the 10% early distribution tax.
- **Limits.** One emergency distribution is permitted per calendar year, and that distribution cannot exceed the lesser of (a) $1,000 (not indexed) or (b) the excess of the individual’s vested benefit over $1,000 (not indexed).
- **Plan treatment.** A 401(k), 403(b), or governmental 457(b) plan may allow – but is not required to allow – emergency distributions to individuals who otherwise would not qualify for a distribution.

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EMERGENCY SAVINGS – PRE-TAX VERSION

- **Self-certification.** A plan may rely on a participant’s certification that the distribution requested is an emergency distribution.
- **Ability to recontribute.** An individual who takes an emergency distribution has the right to roll the distribution back into the same plan or to an IRA within three years and thus render the original distribution non-taxable (which may require an amended return).
- **New rule (compared to QBADs): requirement to replenish retirement savings before taking an additional emergency distribution from the same plan or IRA.** If an individual takes an emergency distribution from a plan or IRA, such individual is not permitted to take another emergency distribution within the next three calendar years ***from the same plan or IRA*** unless the individual (1) has rolled the distribution back to the same plan or IRA or (2) has subsequently made contributions to the same plan or IRA in an amount at least equal to the amount of the prior emergency distribution.

EMPLOYER CONTRIBUTIONS MAY BE ROTH

Employers may permit employees to elect for some or all of their vested matching and nonelective contributions to be treated as Roth contributions under a 401(k), 403(b), or governmental 457(b) plan. Effective for contributions after the date of enactment.

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CATCH-UP CONTRIBUTIONS -- ROTH

Requirement that catch-up contributions other than under SIMPLE plans must be made on a Roth basis. Effective for 2024.

- **$145,000 rule.** The requirement that catch-up contributions be made on a Roth basis only applies to employees whose wages (as defined for Social Security FICA tax purposes) were over $145,000 (indexed) in the prior year. ***Technically, this means that self-employed individuals (partners and sole proprietors) are not subject to the Roth catch-up requirement. That seems like a glitch that will be addressed at some point.***
- **Plans generally required to offer Roth catch-up contributions.** If any participant in a plan to which the Roth catch-up rule applies has wages over $145,000 in the prior year, then no participant may make catch-up contributions unless the plan allows Roth catch-up contributions.
- **Allowing participants to change elections.** Assume that a participant is determined to be ineligible to make pre-tax Roth contributions by reason of having wages in excess of $145,000. Treasury is permitted to issue regulations permitting such a participant to change her election to make catch-up contributions if the election was made before the wage determination was made.
- **New rule not applicable to special 457(b) and 403(b) catch-up contributions.**

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HIGHER CATCH-UP CONTRIBUTIONS

Higher catch-up contribution for individuals who are ages 60-63. Effective for 2025. The limit on catch-up contributions for 2023 is $7,500, except in the case of SIMPLE plans for which the limit is $3,500. SECURE 2.0 increases these limits for employees who are 60-63.

- The $7,500 limit is increased to the greater of (1) $10,000 (indexed) or (2) 150% of the regular catch-up (which would be $11,250 in 2023).
- The $3,500 limit is increased to the greater of (1) $5,000 or (2) 150% of the regular SIMPLE catch-up (which would be $5,250 in 2023).

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SEP AND SIMPLE ROTH CONTRIBUTIONS

Allowing SIMPLE and SEP contributions to be made on a Roth basis. Effective for taxable years beginning after 2022. Unlike 401(k), 403(b), and governmental 457(b) plans, SIMPLEs and SEPs are not permitted to offer a Roth option; instead, all contributions must be pre-tax. SECURE 2.0 allows employers to permit employees to elect Roth treatment of both employer and employee contributions.

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STUDENT LOAN MATCHING CONTRIBUTIONS

Treatment of student loan payments as elective deferrals for purposes of matching contributions. Effective for 2024, for purposes of the nondiscrimination testing and safe harbor rules, an employer is permitted to make matching contributions under a 401(k) plan, 403(b) plan, or SIMPLE IRA with respect to "qualified student loan payments." Governmental employers would also be permitted to make matching contributions in a section 457(b) plan or another plan with respect to such repayments.

- **Separate testing for nondiscrimination test.** For purposes of the nondiscrimination test applicable to elective contributions, SECURE 2.0 permits a plan to test separately the employees who receive matching contributions on student loan repayments. Some nonhighly compensated employees who have been making elective contributions in order to get the match may cease making those elective contributions if they can get the match by simply continuing to make student loan repayments. If enough nonhighly compensated employees do that, it could cause a plan's elective contributions to fail to satisfy the nondiscrimination test. That problem can be solved in many cases by the type of separate testing permitted by the provision.

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529 ROLLOVERS TO ROTH IRAS

Rollover of excess 529 assets to a Roth IRA. Effective for 2024, SECURE 2.0 allows certain assets in a 529 qualified tuition program to be directly rolled over tax-free to a Roth IRA maintained for the benefit of the beneficiary of the 529 account.

- **15 years in existence.** Such rollovers are only permitted from 529 accounts of the beneficiary that have been maintained for at least 15 years.
- **Limits.** The rollovers count as contributions for purposes of the limits on Roth IRA contributions, and the rollover is subject to the requirement that the Roth IRA owner have includible compensation at least equal to the amount of the rollover. However, the income limits on Roth IRA contributions do not apply. In addition, the rollover would be limited to the aggregate amount contributed to the 529 account (plus earnings) before the 5-year period ending on the date the rollover occurs. Also, the rollovers from 529 accounts would be subject to a per-beneficiary lifetime limit of $35,000.

Prior to investing in a 529 Plan investors should consider whether the investor's or designated beneficiary's home state offers any state tax or other state benefits such as financial aid, scholarship funds, and protection from creditors that are only available for investments in such state's qualified tuition program. Withdrawals used for qualified expenses are federally tax free. Tax treatment at the state level may vary. Please consult with your tax advisor before investing.

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SELF-CORRECTION OF INADVERTENT ERRORS

Self-correction of inadvertent plan and IRA violations. Effective as of the date of enactment. Except as otherwise provided in guidance, generally all inadvertent plan violations may be self-corrected under the IRS' Employee Plans Compliance Resolution System ("EPCRS") without a submission to the IRS, provided that this rule does not apply if (1) the IRS discovers the violation on audit and the employer has not at that point taken actions that demonstrate a commitment to correct the violation, or (2) the self-correction is not completed within a reasonable period after such failure is identified. In addition, SECURE 2.0 applies EPCRS to inadvertent IRA errors.

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SAVER’S MATCH

- **Contributions eligible for the match.** Current law except that the treatment of ABLE contributions remains as it is under current law.
- **Where does the Saver’s Credit go?** Individuals would be eligible for the match, which generally can only be received as a ***pre-tax contribution*** to a 401(k), 403(b), or governmental 457(b) plan or traditional IRA, without regard to whether the individual has a tax liability. ***The treatment of the match as a pre-tax amount that will be eventually be taxed is a material change from current law.*** The individual can only receive the match by directing that it be sent to a plan or IRA unless the match is less than $100. The Saver’s Match contributions are not eligible for an additional Saver’s Match.
- **Treatment of the Saver’s Match contribution.** The contribution is treated as an elective contribution and (1) is not taxable income to the individual, (2) does not count against any applicable limits on contributions, (3) is disregarded for other purposes, such as nondiscrimination testing, and (4) is not treated as an amount available for hardship or unforeseeable emergency distribution, as applicable.
- **Additional withdrawal rules.** Additional rules have been added to discourage certain early withdrawals of Saver’s Matches.
- **Reporting.** The Form 5500 shall be amended to require separate reporting of all Saver’s Matches received by a plan, and Form 5498 shall be amended to apply the same requirement to IRAs.

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SAVER’S MATCH

Saver’s Credit: changed into a government matching contribution. Effective for taxable years beginning after 2026. Instead of a tax credit, SECURE 2.0 provides a government matching contribution without regard to whether an individual has a tax liability.

- **Maximum contribution amount eligible for the matching contribution remains unchanged at $2,000.**
- **Match percentage.** Under current law, the credit percentage – which is multiplied by the contribution up to the maximum contribution of $2,000 – is 50%, 20%, 10%, or 0%, based on the taxpayer’s modified adjusted gross income (“MAGI”) (indexed). For example, for 2023, married taxpayers filing jointly are eligible for a 50% credit if their MAGI does not exceed $43,500, 20% if their MAGI is between $43,501 and $47,500, 10% if their MAGI is between $47,501 and $73,000, and 0% if their MAGI is over $73,000 (all indexed). Under SECURE 2.0, the match percentage is a straight 50% until the taxpayer hits the maximum MAGI under the provision ($41,000 for joint filers, for example) (indexed) at which point the 50% figure phases out over $30,000 (for joint filers). So at $71,000 or higher for a joint filer, the match percentage is zero.

403(B) PLAN INVESTMENTS

Background. 403(b) plan investments are generally limited to annuity contracts and mutual funds, which appears to be an historical anomaly dating back to the days when 403(b) plans were generally sold on a retail basis. This limitation cuts off 403(b) plan participants – generally employees of charities and public educational organizations – from access to collective investment trusts and unregistered insurance company separate accounts, which are often used by 401(a) plans and governmental 457(b) plans due to their lower fees.

SECURE 2.0. Under SECURE 2.0, 403(b) custodial accounts are permitted to invest in collective investment trusts under the Code. However, the securities laws exemptions needed to make this provision work – and to include unregistered separate accounts – were not included in SECURE 2.0 due to disagreements on the securities changes. The hope now is to take up the securities issues this year.

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CASH-OUT LIMIT

Cash-out limit. SECURE 2.0 increases the cash-out limit from $5,000 to $7,000. Effective for distributions after 2023.

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LONG-TERM PART-TIME EMPLOYEES

Long-term part-time workers: three years to two years. Effective for 2025, except as noted.

- **Background.** Prior to the SECURE Act, employers generally could exclude certain part-time employees (i.e., employees who have not satisfied a requirement that they have 1,000 hours of service in a year) when providing a plan to their employees. SECURE generally required 401(k) plans (other than collectively bargained plans) to have a dual eligibility requirement under which an employee must complete either a one year of service requirement (with the 1,000-hour rule) or ***three*** consecutive years of service where the employee completes at least 500 hours of service.
- **Three years to two years.** SECURE 2.0 reduces the three-consecutive-years requirement to two years.

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LONG-TERM PART-TIME EMPLOYEES

- **Expansion of rule to ERISA and ERISA 403(b) plans.** SECURE 2.0 includes the two-consecutive-years rule not only in the Code, but also in ERISA, and broadens it to apply to ERISA-covered 403(b) plans in addition to 401(k) plans. The inclusion in ERISA would make the eligibility rule for part-time employees an enforceable right, as opposed to only a tax qualification requirement (as under current law).
- **Service.** For purposes of ERISA, service prior to 2023 would be disregarded for vesting and eligibility purposes. SECURE 2.0 also provides that pre-2021 service is disregarded for vesting purposes under the Code, just as such service is disregarded for eligibility purposes under current law; this change is retroactive as if included in the original SECURE Act.

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SIMPLE PLAN LIMITS

SIMPLE contribution limit. SECURE 2.0 includes the following provisions, effective for 2024:

- **Higher limit for employers with up to 25 employees.** For employers with up to 25 employees, the SIMPLE plan limit on employee contributions is increased from $15,500 (2023) to 110% of whatever that figure is for 2024 (and then indexed), and the catch-up limit is increased from $3,500 (2023) to 110% of whatever that figure is for 2024 (and then indexed). There is a two-year grace period during which an employer that fit within this rule but then grows beyond 25 employees would continue to be treated as having 25 employees.
- **Other small employers: higher limit conditioned on additional employer-provided benefits.** Employers with more than 25 employees but not more than 100 could elect to apply the same increases described above, but only if the employer also agrees to make matching contributions up to 4% (instead of 3%) or nonelective contributions up to 3% (instead of 2%). (For non-electing employers, the current-law SIMPLE IRA rules would continue to apply, so no existing SIMPLE IRA would need to be changed and new ones could be sold the same way.)
- **Increases only applicable if no plan within three years.** The above limit increases only applies to employers that have not maintained a 401(k) plan or 403(b) plan for three years; the objective is to prevent employers from dropping their 401(k) or 403(b) plan and moving to a SIMPLE plan.

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STARTER 401(K)

Starter 401(k). Effective for 2024, SECURE 2.0 allows an employer to adopt a starter 401(k) plan that:

- Is exempt from nondiscrimination and top-heavy testing since the contribution limit ($6,000) (indexed) is actually lower than the IRA contribution limit ($6,500 in 2023). ***It is unclear if it was intended to set the limit below the IRA limit.***
- Must have auto enrollment, which can be set anywhere between 3% and 15%.
- Does not permit employer contributions.
- Is adopted by an employer that does not have any other plan (other than for union employees) in each year in which the starter 401(k) is in effect.
- Limits catch-up contributions to the IRA catch-up limit ($1,000) (indexed under SECURE 2.0).

Starter 403(b). SECURE 2.0 also includes a parallel provision for 403(b) plans.

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CHARITABLE DISTRIBUTIONS FROM IRAS

Expansion of IRA charitable distribution rule. Effective for distributions made in taxable years beginning after the date of enactment. Under current law, certain IRA distributions to a charity can be excluded from income up to $100,000 annually. SECURE 2.0 indexes the $100,000 figure and expands the IRA charitable distribution provision to allow for one-time distributions to charities through charitable gift annuities, charitable remainder unitrusts, and charitable remainder annuity trusts, subject to a limit of $50,000 (indexed).

403(B) PEPS AND MEPS

403(b) PEPs and MEPs. Effective for 2023, SECURE 2.0:

- Clarifies that 403(b) plans may be maintained on a multiple employer plan ("MEP") basis, provided that governmental and non-governmental employers may not participate in the same 403(b) MEP.
- Permits open 403(b) MEPs (i.e., pooled employer plans ("PEPs")) under generally the same rules that apply to qualified plans.
- Clarifies that, under certain circumstances, the failure by one employer participating in a 403(b) MEP to satisfy the 403(b) plan rules does not affect the tax treatment of the rest of the MEP.

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RMD ANNUITY REFORM

SECURE 2.0 eliminates barriers to the availability of life annuities in plans and IRAs that arise under current law due to an outdated actuarial test in the RMD regulations that can prohibit, for example, modest cost-of-living adjustments, such as 1% or 2%. SECURE 2.0 updates the actuarial test and exempts certain types of benefits from the test, such as (1) annuity payments that increase by less than 5% per year, and (2) lump sum return of premium death benefits. Effective for calendar years ending after the date of enactment.

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PARTIAL ANNUITIZATION

- **Current law.** The individual account rules under the RMD regulations do not account for the fact that, in the vast majority of cases, annuity payments are in excess of the amounts that would have been required under the individual account rules.
- **Reform.** Effective as of the date of enactment. Under SECURE 2.0, the annuity rules in the RMD regulations continue to apply to an interest in a plan that is distributed in the form of an annuity. However, where a portion of an interest in a plan is distributed in the form of annuity payments, and the annuity payments exceed the amount that would be required to be distributed under the individual account rules based on the value of the annuity, the excess annuity payment amount for a year can be applied towards the RMD for the year with respect to any remaining interest in the same plan.

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DISASTER RELIEF

Automatic disaster relief. Effective for distributions and loans made with respect to disasters the incident period for which begins on or after January 26, 2021. In recent years, Congress has, on a case-by-case basis, made available various forms of distribution and loan relief to retirement plan participants and IRA owners who have been affected by federally declared disasters. SECURE 2.0 automatically makes this disaster-related distribution and loan relief available upon the issuance of a federal disaster declaration. SECURE 2.0's distribution relief, including the waiver of the 10% early distribution penalty, is only available for distributions of up to $22,000.

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PLAN AMENDMENTS

Plan amendments and anti-cutback relief.

- **SECURE 2.0.** The amendment deadline for SECURE 2.0's changes is generally the last day of the first plan year that begins on or after January 1, 2025. In the case of governmental plans and applicable collectively bargained plans, the deadline is extended until the last day of the first plan year that begins on or after January 1, 2027. ***SECURE 2.0 also includes anti-cutback relief for plans that are amended by the applicable deadline, "except as provided by the Secretary of the Treasury."***
- **SECURE 1.0 and other recent legislation.** SECURE 2.0 extends the deadlines for amending plans and IRAs to reflect the following changes: (1) SECURE 1.0; (2) The CARES Act; and (3) The Taxpayer Certainty and Disaster Tax Relief Act of 2020. The amendment deadlines for this series of changes will generally be coordinated with SECURE 2.0's amendment deadlines – i.e., the last day of the first plan year that begins on or after January 1, 2025. For governmental plans, and applicable collectively bargained plans in the case of SECURE 1.0, the deadline will be the last day of the first plan year that begins on or after January 1, 2027. SECURE 2.0's amendment deadlines for these prior changes are at least as favorable or more favorable than the extended deadlines announced by IRS in Notice 2022-33 and Notice 2022-45.

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BENEFIT STATEMENTS – CURRENT LAW

Pension benefit statements

- Defined Contribution (DC) plans generally must furnish benefit statements every quarter
- Defined Benefit (DB) plans generally must furnish benefit statements once every three years

2002 e-delivery safe harbors

- **Affirmative consent:** Participants can affirmatively consent to receive documents electronically
- **Wired at work:** Current employees can receive documents electronically if they use a computer "as an integral part of their employment duties"

2020 e-delivery safe harbors

- **Notice and access:** Permits electronic delivery if, among other conditions: (1) participants provide email addresses; (2) documents are timely posted to a website; (3) notices are sent to participants when documents are posted; and (4) participants are offered and notified of the right to request paper free of charge
- **Direct email:** Permits documents to be delivered via email, subject to conditions that are similar to the conditions that apply under the notice and access safe harbor
- **One-time paper notice:** Both 2020 safe harbors require a one-time initial notice to be sent to participants on paper before documents are delivered electronically

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BENEFIT STATEMENTS – SECURE 2.0

Paper statement requirement beginning in 2026

- DC plans must furnish one paper statement per year
- DB plans must furnish one paper statement once every three years
- Exceptions for: (1) 2002 safe harbor delivery; and (2) participants requesting electronic delivery

One-time paper notice added to 2002 safe harbors

- Adds a one-time paper notice requirement in order to use the 2002 safe harbors to deliver a statement that must otherwise be delivered in paper
- Grandfather for participants and beneficiaries who were eligible to participate or receive benefits before 2026

Direction to update other e-delivery guidance

- Directs DOL to update its e-delivery guidance – other than the 2002 safe harbors – to the extent necessary to ensure that:
  - Participants can request that any disclosures required to be delivered on paper under DOL guidance shall be delivered electronically
  - Paper statements explain how to request documents electronically
  - Plans may not charge a fee to deliver paper statements
  - Electronically delivered documents include an explanation of how to request paper
  - Plans can furnish electronic duplicates of any paper statements

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UNENROLLED PARTICIPANTS

Unenrolled participants. Effective for plan years beginning after 2022. Under current law, employees eligible to participate in a retirement plan are required to receive a broad array of notices of their various rights under the plan. In the case of eligible employees who have not elected to participate in the plan (“unenrolled participants”), these notices are generally unnecessary, just adding costs. Accordingly, under SECURE 2.0, defined contribution plans cease to be required to provide notices to unenrolled participants, other than upon initial eligibility and an annual reminder notice of the participant’s eligibility to participate in the plan.

AUDITS OF GROUPS OF PLANS

Groups of Plans. Under section 202 of the SECURE Act of 2019, if a group of, for example, 1,000 small employers each adopt virtually identical retirement plans, they can file a single Form 5500 with DOL and the IRS, instead of having to file 1,000 separate Form 5500s. The DOL has issued proposed rules that effectively make the provision unworkable by requiring a trust-level audit of the Group of Plans. For employers with under 100 participants in their plan, that audit would not only be a substantial expense, but also an expense that they could avoid by not joining a Group of Plans. SECURE 2.0 eliminates that trust-level audit, effective as of the date of enactment.

SELF-CERTIFICATION OF HARDSHIP

Self-certification of hardship. Effective for plan years beginning after the date of enactment. Under SECURE 2.0, employees may be permitted to self-certify that they have had an event that constitutes a deemed hardship for purposes of taking a hardship withdrawal from a 401(k) plan or a 403(b) plan. A similar rule applies for purposes of unforeseeable emergency distributions from governmental section 457(b) plans. (SECURE 2.0 also codifies the current law rule permitting self-certification that the amount of the distribution is not in excess of the need.) Treasury is authorized to issue regulations overriding this rule where the plan administrator has actual knowledge to the contrary.

CONFORMING HARDSHIP RULES

Conforming 403(b) hardship rules to 401(k) hardship rules. Effective for plan years beginning after 2023. Prior to the Bipartisan Budget Act of 2018 (“BBA”), the hardship rules for 401(k) plans and 403(b) plans were generally the same. The BBA created some differences, primarily allowing 401(k) plans to make hardship distributions from more contribution sources, such as qualified matching contributions, instead of just from employee contributions. SECURE 2.0 conforms the 403(b) plan hardship rules to the 401(k) hardship rules.

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Appendix

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QLACS

Current law. Qualifying longevity annuity contracts ("QLACs") are generally deferred annuities that begin payment at or near the end of an individual's life expectancy. The QLAC regulations limit the premiums an individual can pay for a QLAC to the lesser of (1) $155,000 (2023) and (2) 25% of the individual's account balance under the plan or IRA.

- **SECURE 2.0 repeals the 25% limit.** Effective for contracts purchased or received in an exchange on or after the date of enactment.
- **SECURE 2.0 raises the $155,000 limit (2023) to $200,000.** Same effective date as above.
- **SECURE 2.0 facilitates the sales of QLACs with spousal survivor rights.** SECURE 2.0 clarifies that a divorce occurring after a QLAC is purchased but before payments commence will not affect the permissibility of the joint and survivor benefits previously purchased under the contract. Retroactive to July 2, 2014.
- **Free-look period.** Generally, QLACs are prohibited from having any cash surrender value or similar right. SECURE 2.0 clarifies that this prohibition does not apply to free-look periods, up to 90 days. Retroactive to July 2, 2014.

MILITARY SPOUSES

Military spouses. Effective for taxable years beginning after the date of enactment. SECURE 2.0 allows an eligible small employer to take a new nonrefundable income tax credit with respect to each individual who (1) is married to an active duty member of the uniformed services and self-certifies as such (referred to as a military spouse), (2) is an employee of the employer, (3) participates in an eligible defined contribution plan of the employer during the taxable year, and (4) is a non-highly compensated employee.

- **Credit amount.** The credit is the sum of $200 for each such employee plus the amount of the contributions made to all eligible defined contribution plans by the employer (other than an elective deferral) with respect to the employee up to a maximum of $300 for the taxable year for each such employee.
- **Period of credit.** The credit applies for up to three consecutive years beginning with the first taxable year in which the individual begins participating in the plan.
- **Eligible plan.** An eligible defined contribution plan is a plan in which military spouses are eligible to participate within two months of beginning employment, and in which military spouses who are eligible to participate (1) are immediately eligible upon plan eligibility to receive employer contributions in amounts not less than that received by similarly situated nonmilitary spouses with two years of service, and (2) have an immediate, nonforfeitable right to the accrued benefits derived from employer contributions under the plan.

MISSING PARTICIPANTS

Retirement savings lost and found. Many people are unable to find and receive the benefits that they earned—often because the company they worked for moved, changed its name, or merged with a different company. Accordingly, SECURE 2.0 establishes a Retirement Savings Lost and Found registry to help participants find their benefits.

- **Registry.** The Lost and Found office is housed at DOL and must be established within two years of the date of enactment.
- **Information required to be reported to DOL.** Plans must report to DOL (1) certain information (not currently reported) about former employees whose benefits have been paid out, and (2) information already provided to the IRS about the plan and about former employees who have not been paid out. These new reporting requirements will apply with respect to plan years starting after 2023.
- **Limitation on DOL use of Lost and Found information.** The information that DOL obtains to administer the Lost and Found office can only be used to administer that office and may only be accessed by DOL employees working on the Lost and Found registry. Thus, the information cannot be used for DOL audits of employers regarding missing participants.

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PEP TRUSTEE DUTIES

Clarification of PEP trustee duties. Effective for 2023. There has been some uncertainty regarding whether a trustee of a PEP must be responsible for the collection of contributions from participating employers. SECURE 2.0 clarifies that any named fiduciary may have that responsibility, thus enabling directed trustees to serve as trustees of PEPs.

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PENSION RISK TRANSFERS

Safest available annuity standard for choosing an annuity provider from which a DB plan purchases annuities. SECURE 2.0 directs DOL to study the appropriateness of this current standard and report to Congress within one year of the date of enactment. SECURE 2.0 also directs DOL to consult with the ERISA Advisory Council regarding the issue.

- This study is based on concerns from Members of Congress and state regulators regarding:
  - Private equity acquisition of insurers.
  - Loss of ERISA and PBGC protections.

CESSATION OF VRP RATE INDEXING

Cease indexing variable rate premium rate. SECURE 2.0 ceases the indexing of the variable rate premium rate and freezes the rate at 5.2%, effective after 2023.

CASH BALANCE PLAN PROJECTIONS

Cash balance plan projections. Effective for plan years beginning after the date of enactment. SECURE 2.0 provides that, solely for purposes of the backloading rules, the interest crediting rate that is treated as in effect and as the projected interest crediting rate must be a reasonable projection of such variable interest rate, subject to a maximum of 6%.

MORTALITY ASSUMPTIONS

Mortality proposal. Effective as of the date of enactment without regard to the timing of the regulatory changes, but only applicable to valuation dates after 2023. SECURE 2.0 requires the Treasury Secretary to amend the regulation relating to "Mortality Tables for Determining Present Value Under Defined Benefit Pension Plans" (82 Fed. Reg. 46388 (October 5, 2017)). Under the amended regulations, mortality improvement rates shall not assume for years beyond the valuation date future mortality improvements at any age which are greater than 0.78%. Further regulatory amendments are to be made to modify the 0.78% figure as necessary to reflect material changes in the overall rate of improvement projected by the Social Security Administration.

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OVERPAYMENTS

Recovery of retirement plan overpayments. Effective as of date of enactment. Sometimes, retirees mistakenly receive more money than they are owed under their retirement plans. SECURE 2.0 allows retirement plan fiduciaries the latitude to decide not to recoup overpayments that were mistakenly made to retirees. If plan fiduciaries do choose to recoup overpayments, limitations and protections on the amount of the recoupment apply to protect retirees. In addition, rollovers of inadvertent overpayments remain valid, which is another important protection for participants.

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CORRECTION OF AUTO CONTRIBUTION ERRORS

Correction of automatic contribution failures. Effective for errors for which the required correction date is after 2023. Automatic contribution and automatic escalation errors may be corrected through a prospective correction, provided that the correction occurs by the earlier of (1) 9 ½ months after the plan year, or (2) the first compensation payment date on or after the last day of the month following the month in which the employee notified the employer of the error. The employer must make up for missed matching contributions but not for missed elective contributions.

ANNUAL FUNDING NOTICES

Annual funding notice. Effective for 2024 plan years. Under SECURE 2.0, the annual funding notice for single-employer plans is generally based on end-of-the-year spot interest rates and spot asset values. ***However, SECURE 2.0 does not eliminate the requirement to also show, for the year and the prior two years, the beginning-of-the-year funded status, funding shortfall, and minimum required contribution using (1) smoothed and unsmoothed interest rates (but not spot rates), and (2) the actuarial value of assets if applicable. So plans will continue to be required to show their funded status on multiple bases.*** The notice must also include the average return on plan assets for the year. In addition, the notice must be revised to alert participants to the fact that their plan may be treated as less well funded in a distress termination, because PBGC's valuation system results in higher valuations of liabilities.

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LUMP SUM WINDOWS

Enhanced disclosure regarding lump sum windows. SECURE 2.0 enhances the disclosure and reporting requirements required in connection with lump sum windows, such as with respect to the relative value regulations and the section 402(f) notice. The new rules will be issued by DOL and the enhancements will not be effective until those rules are issued. Since most of the requirements in this provision are already addressed by Treasury guidance, giving rule-writing authority to DOL raises significant concerns regarding the potential for inconsistent guidance. There is a requirement for DOL to consult with Treasury, but consultation does not ensure consistency.

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420 TRANSFERS

Section 420 permits “qualified future transfers,” allowing for up to 10 years of retiree health and life insurance costs to be transferred from a company’s defined benefit (DB) pension plan to a retiree health benefits account and/or a retiree life insurance account

Section 420 transfer extension. Effective for transfers made after the date of enactment (both the extension and de minimis transfers). Under the provision, the expiration date for section 420 transfers is extended from December 31, 2025 to December 31, 2032.

De minimis transfers. Also, under SECURE 2.0, in the case of a transfer of an amount that is not more than 1.75% of the amount of pension assets of an applicable plan, the determination of excess plan assets is made by substituting “110%” for “125%.” For purposes of this provision, a plan is an “applicable plan” if, as of any valuation date in each of the two plan years immediately preceding the plan year in which the transfer occurs, the amount of the excess plan assets exceeds 110% of the sum of the funding target and target normal cost for such plan year. In addition, with respect to a de minimis transfer, the cost maintenance period is seven years, rather than five years. This de minimis rule does not apply to collectively bargained plans.

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VARIABLE ETFS

Variable ETFs. Effective seven years after the date of enactment. Exchange-traded funds (ETFs) are similar to mutual funds, except the shares can be traded throughout the day on the stock market. In addition, expense ratios for ETFs are generally very low. However, outdated Treasury regulations have prevented ETFs from being widely available through individual variable annuities; simply because the regulations were written before the evolution of ETFs, ETFs cannot satisfy the regulatory requirements to be "insurance-dedicated." SECURE 2.0 solves this problem by directing Treasury to update the regulations to reflect the ETF structure.

ETFs trade like stocks, are subject to investment risk, fluctuate in market value, and may trade at prices above or below the ETF's net asset value (NAV). Upon redemption, the value of fund shares may be worth more or less than their original cost. ETFs carry additional risks such as not being diversified, possible trading halts, and index tracking errors.

TARGET DATE FUND BENCHMARKS

Performance benchmarks for target date funds. Under SECURE 2.0, DOL is directed, within two years after the date of enactment, to modify its regulations so that an investment that uses a mix of asset classes, such as target date funds, can be benchmarked against a blend of broad-based securities market indices.

SIMPLE NONELECTIVE CONTRIBUTIONS

Additional nonelective contributions permitted to SIMPLE plans. Effective for 2024. Under current law, an employer sponsoring a SIMPLE plan can make matching contributions up to 3% of pay or nonelective contributions of 2% of pay, but no other employer contributions are permitted. Under SECURE 2.0, an employer would be permitted to make up to an additional 10% nonelective contribution on behalf of all eligible employees, not to exceed $5,000 (indexed).

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