SECURE ACT EXPANDS RETIREMENT SAVINGS OPPORTUNITIES AND SIMPLIFIES PLAN ADMINISTRATION

Hodgson Russ Employee Benefits Alert
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The SECURE Act (Setting Every Community Up for Retirement Enhancement Act) has been signed into law by President Trump, making multiple changes to encourage increased retirement savings and simplify certain administrative requirements for retirement plan sponsors. This article addresses the Act's impact on employer-sponsored retirement plans. Please refer to our article on the Act's implications for estate plans incorporating individual retirement accounts.

The Act is broadly organized around two different titles: the first focuses on expanding opportunities for retirement savings and the second emphasizes administrative provisions.

Expanding and Preserving Retirement Savings

Increased Age for Commencing Required Minimum Distributions (RMDs) to 72 – Under prior law, participants (other than 5% owners) in employer-sponsored retirement plans were required to begin receiving RMDs by April 1st following the later of the year they retired, or attained age 70 ½. The Act changes the age-based threshold when retirement plan participants must begin receiving RMDs from employer-sponsored retirement plans from 70 ½ to 72. Because the age increase is effective only for individuals who have not attained the age of 70 ½ by December 31, 2019, anyone who turned 70 ½ in 2019 must still receive their first RMD by April 1, 2020.

Expanding the Ability of Long-Term Part-Time Employees to Make Elective Deferrals to 401(k) Plans – Currently, employers may exclude from participation in company-sponsored 401(k) plans those employees who have not completed a year of service (defined as 1,000 hours) or attained age 21. The Act requires 401(k) plans to allow employees to make elective deferrals if the employee has worked at least 500 hours per year for three consecutive years, and has attained age 21 by the end of the three year period (a "long-term part-time employee"). Long-term part-time employees must enter the plan on the earlier of the first day of the plan year or the date six months after they satisfy the age and service requirements. The Act provides that the first three year measurement period will not commence until January 1, 2021.

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While 401(k) plan sponsors will be required to allow participation by eligible long-term part-time employees for purposes of making elective deferrals, employers may still choose whether or not to provide non-elective or matching contributions to long-term part-time employees and may exclude such employees from participation in safe-harbor plan features, including automatic enrollment. However, if an employer chooses to make non-elective or matching contributions for long-term part-time employees, they must be credited with vesting service if they complete 500 hours of service during the year.

Expanding Availability of Multiple Employer Retirement Plans - Effective for plan years beginning after December 31, 2020, the Act allows unrelated employers to band together into "open" multiple employer plans (MEPs). The expansion of MEPs is intended to allow unrelated small employers to have the advantages of reduced costs and administrative burdens from participating in a qualified retirement plan. The Act allows open MEPs to be maintained and administered by a "pooled plan provider," who acts as a fiduciary to the plan, and provides plan document and administrative services respecting the MEP.

The Act also provides meaningful relief from the current "one bad apple" rule, under which the total MEP can be disqualified based on noncompliance by a single participating employer. Under the Act, relief from disqualification will be provided if the plan assets related to the noncompliant participating employer are spun off and the noncompliant employer takes on liabilities related to the compliance failure.

Penalty-free Distributions On Account of a Qualified Birth or Adoption – Effective for distributions after December 31, 2019, plan participants may take withdrawals up to $5,000 within a year of the birth or adoption of a child without incurring the 10% penalty for a distribution prior to age 59 1/2. The maximum limit is applied on an individual basis, so that it is possible for each parent to receive a $5,000 distribution on account of a qualified birth or adoption. Participants who elect to take a distribution related to a qualified birth or adoption may recontribute the amount distributed to a qualified plan that permits eligible rollover distributions.

Increasing the Maximum Automatic Increase Percentage – Prior to the Act, an automatic enrollment safe harbor plan (i.e., a qualified automatic contribution arrangement, or QACA) was required to provide that, absent an affirmative election, eligible employees were treated as having made an election to defer at least 3% of compensation, escalating thereafter by a minimum percentage for each plan year, up to a maximum of 10% of compensation. Effective for plan years beginning after December 31, 2019, the maximum automatic enrollment percentage limit is increased to 15% of compensation. In the first deemed election year for a participant, the maximum automatic enrollment percentage limit remains at 10%.

Increased Tax Credit for Small Employers Establishing New Retirement Plan – The Act substantially increases the small employer pension startup credit. Currently, the credit is available to small employers (with no more than 100 employees who receive at least $5,000 in yearly compensation) who establish a qualified retirement plan, SIMPLE IRA or SEP. The current credit is paid over three years and is equal to the lesser of $500 or 50% of the employer's qualified startup costs. Effective for tax years beginning after December 31, 2019, the Act increases the three-year credit to the greater of (1) $500, or (2) the lesser of (a) $250 times the number of non-highly compensated employees who are eligible to participate, or (b) $5,000.

New Tax Credit for Small Employers Adopting Automatic Enrollment Provisions – Effective for tax years beginning on or after December 31, 2019, small employers who adopt automatic enrollment features in their 401(k) or SIMPLE IRA plans will receive a $500 credit per year for three years. Where a new plan is established, this credit is in addition to the small employer pension startup credit.

Simplification of Safe Harbor Requirements for 401(k) Plans Providing Non-elective Employer Contributions – Effective for plan years beginning after December 31, 2019, the safe harbor notice requirement is eliminated with respect to safe harbor 401(k) plans using non-elective employer contributions to satisfy the safe harbor rules. In addition, 401(k) plans can be amended to add a non-elective safe harbor design up to 30 days before the end of the plan year. If the non-elective contribution to be provided is at least 4%, the plan can be amended to add the non-elective safe harbor feature on or before the last day for distributing excess contributions for the plan year (which would normally be the last day of the following plan year).

Plan Loans Not Permitted Through Credit Cards – Effective for plan loans made after December 20, 2019, plan loans may not be distributed through credit cards or similar arrangements, or the loan will be treated as a deemed (and therefore taxable) distribution.

Administrative Provisions

Extended Timeframe to Adopt New Plans – Under prior law, a qualified retirement plan was treated as adopted for a tax year, if it is adopted by the last day of the tax year. Effective for tax years beginning after December 31, 2019, employers may treat a qualified plan as adopted for a tax year, if it is adopted by the due date (including extensions) for the employer's tax return for the tax year.

Consolidated Form 5500 Returns – Effective for plan years beginning after December 31, 2021, defined contribution retirement plans with a common plan administrator, trustee, plan year and slate of investment options may file a combined annual report for the plans. The IRS and DOL have been directed to implement the filing of single consolidated returns no later than January 1, 2022.

Increased Penalties for Delinquent Form 5500 Returns – Under prior law, retirement plan administrators were subject to a civil penalty under the Internal Revenue Code (IRC) of $25 for each day during which a failure to file the Form 5500 annual report continued, up to a maximum of $15,000. Effective for Form 5500 returns required to be filed after December 31, 2019, the IRC penalty is increased ten-fold to $250 per day, not to exceed a maximum of $150,000.

Increased Penalties for Delinquent IRS Form 8955-SSA – Under prior law, retirement plan administrators were subject to a civil penalty of $1 for each participant for whom the plan administrator failed to file an annual registration statement identifying participants who have separated from service with a vested benefit under the plan, up to a maximum penalty of $5,000. Effective for annual registration statements required to be filed after December 31, 2019, the penalty is increased ten-fold to $10 per participant, up to a maximum penalty of $50,000.

New Lifetime Income Disclosure for Defined Contribution Retirement Plans – Currently, defined contributions plans that allow participants to direct their investments are required to provide benefit statements at least quarterly, but are not required to provide information about the lifetime income stream that the participant's account might produce. Effective for benefit statements issued one year after the Department of Labor has issued a model disclosure and other required guidance, the Act requires that benefit statements provided to such defined contribution retirement plan participants must include a lifetime income disclosure at least annually.

Fiduciary Safe Harbor for Retirement Plans Offering Annuity Investments – Effective December 20, 2019, the Act creates a new safe harbor for retirement plan fiduciaries to satisfy their ERISA duty of prudence in selecting annuity products as plan investments. The new safe harbor protects employers from liability for the selection of an annuity provider, if the provider has provided a written representation that it has been licensed by the applicable state insurance commissioner to offer guaranteed retirement income contracts, files audited financial statements as required by the state, and has satisfied the state reserve and other insurance requirements. Effective for plan years beginning after December 31, 2019, the Act also increases the portability of such annuity investments by allowing qualified distributions (i.e. rollovers) to an IRA or qualified retirement plan within 90 days after the investment ceases to be available under the plan, thereby avoiding surrender fees.

Employers interested in making revisions to their retirement plans based on the SECURE Act provisions or who have questions about the new compliance landscape created by the Act should contact their Hodgson Russ attorney regarding the preparation of the necessary plan documents and the establishment of administrative practices to ensure compliance with the new law.