

How the SECURE Act Affects Employer-Sponsored Plans



On December 20, 2019, President Trump signed into law the “Setting Every Community Up for Retirement Enhancement” Act (SECURE Act) as part of the Further Consolidated Appropriations Act, 2020 (H.R. 1865). While there were many changes impacting retirement savings accounts for individuals, as a business owner, you should also be aware that the SECURE Act makes several changes to employer-sponsored retirement plans. Most have the effect of administrative simplification, but not all.

The following is an overview of some of the major changes impacting businesses and retirement plans. Note that the effective dates for the various provisions may be different from others.

- **Plans Adopted by Filing Due Date Treated as in Effect as of Close of Year.**

Prior to the SECURE Act, qualified retirement plans must have been adopted (i.e., documents filed and executed) by December 31 in order to count for that tax year. In most situations, funding of the plans could be delayed until the due date (including extensions) of the business’s tax return. Starting for tax years beginning after December 31, 2019, the SECURE Act allows businesses to treat qualified retirement plans adopted before the due date (including extensions) of the tax return for the tax year as having been adopted as of the last day of the tax year. Note that in any event, adoption of the plan must occur no later than the due date for filing of Form 5500 and Schedules, which is generally September 15 following the plan year.

- **Relief for Multiple Employer-Defined Contribution Plans.** Multiple Employer Plans (“MEPs”) have existed for some time to allow more than one business to combine with others to create a retirement plan for all of the employees of those businesses. The theory was to allow for economies of scale to save on plan

costs. In reality, MEPs have not been widely adopted because of two issues. One issue was the rule that businesses had to be related somehow—for example, part of the same trade association. That rule was liberalized by the Department of Labor in 2019. The second issue was the so-called “one bad apple” rule where the disqualifying actions of one employer could disqualify the entire plan, ruining the MEP for all participating employers. For plan years beginning after December 31, 2020 (including reporting for purposes of Forms 5500 for plan years beginning after December 31, 2020), the SECURE Act provides relief by carving out the portion of the plan covering the disqualified employer but leaving the rest of the MEP in place as a qualified plan.

- **Increased Auto Enrollment Safe Harbor Cap.** The SECURE Act includes provisions to help employers encourage employees to increase contributions to employer-sponsored retirement plans. Prior to the SECURE Act, employers could set the default contribution rate for automatic enrollment to 10 percent. For plan years beginning after December 31,

2019, that default percentage is increased to 15 percent after the first full plan year that an employee’s deemed election applies.

- **401(k) Safe Harbor Simplified.** For plan years beginning after December 31, 2019, the SECURE Act eliminates the notices that were required to be given to employees by employers who make safe harbor qualified nonelective contributions, as set forth in Treasury Regulations §1.401(k)-3(d) and §1.401(m)-3(e). However, employers who make safe harbor matching contributions still need to provide notice. Also, the general rule that requires a 401(k) plan to provide each eligible employee with an opportunity to make or change an election to make elective deferrals at least once each plan year still applies.

Employers can elect to retroactively amend an existing plan to be a safe harbor plan, provided that the election is made at least 30 days prior to the end of the plan year. Alternatively, the employer can amend the 401(k) plan to a safe harbor plan by the following plan year-end, but in that situation, the safe harbor contribution is 4 percent, not 3 percent.

- **Annuities in 401(k) Plans.** While annuities have been available to 401(k) plans for some time, few actually have them as investment choices, despite the fact that lifetime income sources are highly desirable in retirement. Plan fiduciaries have been fearful of potential liability if a plan offers an annuity, but the annuity carrier runs into financial issues that could jeopardize its ability to meet its obligations. The SECURE Act now provides a safe harbor to fiduciaries for selecting a lifetime income (annuity) provider with a new Section 404(e) of ERISA, provided the fiduciary engaged “in an objective, thorough, and analytical search” of carriers. The fiduciary must review the “the financial capability of [an] insurer to satisfy its obligations” and obtain certain written representations from the carrier that the carrier meets certain regulatory and financial requirements. The fiduciary must also ensure that “the cost (including fees and commissions) of the guaranteed retirement income contract offered by the insurer in relation to the benefits and product features” is “reasonable.” The law explicitly states that the term “reasonable” does not mean lowest cost.

The SECURE Act also provides for a new distribution event applicable only to annuities in the plan. If the plan no longer allows for an annuity to be an investment option, then the plan may distribute the annuity in kind beginning 90 days after the annuity is no longer a plan investment option. Thus, the annuity is portable. This new feature is

available for plan years beginning on or after January 1, 2020.

- **Increased Tax Credit for Small-Employer Retirement Plan Start-Up Costs.** Prior to the SECURE Act, the law provided small businesses a tax credit of up to \$500 for up to three years for start-up costs incurred in establishing an employer-sponsored retirement plan. Small employers were defined as having 100 or fewer employees making over \$5,000 per year. Now, for tax years beginning after December 31, 2019, the SECURE Act increases the potential tax credit. For tax years beginning January 1, 2020, the credit for up to three years is the greater of: (1) \$500 or (2) the lesser of (a) \$250 multiplied by the number of non-highly compensated employees who are eligible to participate in the plan, or (b) \$5,000. The tax credit is meant to provide an incentive to small businesses to start an employer-sponsored retirement plan for its employees.
- **Small-Employer Automatic Enrollment Credit.** For tax years beginning after December 31, 2019, the SECURE Act creates a new tax credit of up to \$500 per year to employers who adopt an “eligible automatic enrollment arrangement” as defined by IRC Section 414(w)(3). The credit is in addition to the plan start-up credit described above. The credit is available for the year in which the automatic enrollment is adopted and for the next two years, assuming the auto enrollment feature is still in place. Note that this credit is not just for new plans, but also existing plans that are amended to

include the automatic enrollment provision. Automatic enrollment has been proven to increase employee participation in the retirement plan, and is a policy that the government is trying to encourage.

- **Part-Time Employees.** Prior to the SECURE Act, it was common for employers to exclude employees who worked less than 1,000 hours in the plan year from participation in the employer-sponsored 401(k) Plan. In an effort to increase retirement savings for longtime part-time employees, the SECURE ACT now requires employers who have a 401(k) plan to include employees who have three (3) consecutive years of service in which the employee completes more than 500 hours of service each year. This excludes collectively bargained plans. The employer has the option to exclude these part-time employees from testing under the non-discrimination, coverage and “top-heavy” rules. Note, however, that this new eligibility provision does not require employers to start counting 500-hour employees until 2021, which in effect means that they will not be covered until at least 2024.
- **Penalties: Not all of the news is beneficial.** Employers and plan fiduciaries must be extra cautious to ensure that all required notices and filings are done in a proper and timely manner. Penalties for failure to comply with these requirements have been significantly increased.

As you can see, this is just a summary of some of the changes made to employer-sponsored retirement plans by the SECURE Act. There are many more provisions that may impact your business's situation. Please contact your Security Mutual life insurance advisor to discuss how these changes apply to your business and employer-sponsored retirement plan, and the overall impact on your employee benefits goals and objectives.

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