

## NEWS ALERT

# EMPLOYEE BENEFITS



## The SECURE Act Significantly Changes Many Retirement and Other Employee Benefit Rules

By Melanie N. Aska and Erik M. Sharp | February 4, 2020

The Further Consolidated Appropriations Act, 2020 (the “Act”), enacted on December 20, 2019, significantly changed many retirement and other employee benefit plan rules. The Setting Every Community Up for Retirement Enhancement Act of 2019 (the “SECURE Act”), contained in Division O of the Act, affects not only retirement plans, but also Internal Revenue Code Section 529 qualified tuition programs. Division N of the Act includes provisions that repeal, modify or extend certain taxes that were created by the Affordable Care Act (the “ACA”). Division Q of the Act includes provisions that extend certain expiring tax provisions. Many changes became effective on the Act’s enactment date, others apply in 2020, and still others apply after 2020. The most significant changes are summarized below.

### SECURE Act Provisions (Division O of the Act)

#### • Changes in Plan Distribution Rules

- *Increase in Age, From 70½ to 72, for Required Beginning Date for Required Minimum Distributions (SECURE Act Section 114).* The age used to determine the required beginning date (“RBD”) for required minimum distributions (“RMDs”) has been increased from 70½ to 72, effective for RMDs required to be made after December 31, 2019, with respect to individuals who reach age 70½ after December 31, 2019.
- *Changes in Post-Death RMD Rules for IRAs and Defined Contribution Plans (SECURE Act Section 401).* This revenue-raising provision of the SECURE Act changed the RMD rules to eliminate many beneficiaries’ ability to stretch out their distributions over their single-life expectancy. The new rules generally require that all distributions after a participant’s (or IRA owner’s) death be made to beneficiary(ies) by the end of the tenth (10th) calendar year following the year of death. The new 10-year rule does not apply, however, to “eligible designated beneficiaries”, i.e., surviving spouses, children who have not reached majority age, and designated beneficiaries who are disabled, chronically ill, or not more than 10 years younger than the deceased participant (or IRA owner). If the eligible designated beneficiary dies before receiving the deceased participant’s (or IRA owner’s) entire benefit, however, the remainder must be distributed within 10 years after the eligible designated beneficiary’s death. The new rules generally apply to distributions made by reason of a participant’s (or IRA owner’s) death after December 31, 2019 (there are delayed effective dates for governmental and collectively-bargained plans), but they do not apply to a binding qualified annuity in effect on December 20, 2019 (the Act’s enactment date).
- *Prohibition Against Making Plan Loans Through Credit Cards (SECURE Act Section 108).* Plan loans may no longer be made through the use of credit cards or any other similar arrangements, effective for loans made after December 20, 2019 (the Act’s enactment date).

- *Penalty-Free Retirement Plan Withdrawals for Birth or Adoption of a Child (SECURE Act Section 113)*. Effective for distributions made after December 31, 2019, Section 401(a) qualified defined contribution plans, 403(b) plans, 457(b) governmental deferred compensation plans, and IRAs may distribute up to \$5,000 (calculated on a controlled group basis) to an individual to pay birth or adoption expenses for up to one year after the birth or legal adoption, and those distributions will not be subject to the Code Section 72(t) 10% additional income tax on early distributions. In certain cases, the distributed amounts may be re-contributed to eligible retirement plans that permit rollover contributions.
- *Reduction of Minimum Age for In-Service Distributions (Division M of the Act, Section 104)*. Effective for plan years beginning after December 31, 2019, Code Section 401(a) qualified pension plans (e.g., defined benefit and money purchase pension plans) may make in-service distributions to participants when they reach age 59½ (instead of age 62), and Section 457(b) governmental deferred compensation plans may make in-service distributions to participants when they reach age 59½ (instead of age 70½).

#### • **Changes Affecting 401(k) Plans**

- *Participation by Certain Part-Time Employees in 401(k) Plans (SECURE Act Section 112)*. Effective for plan years beginning after December 31, 2020, 401(k) plans must permit participation by long-term part-time employees who are at least age 21 and who work at least 500 hours in 3 consecutive 12-month periods, unless they are in a collective bargaining unit. No employer matching or nonelective contributions are required to be made for these participants, and they can be disregarded in certain nondiscrimination and top-heavy testing. These participants will earn one year of vesting service for each 12-month period during which they complete at least 500 hours of service.
- *Increase on Maximum Default Rate under a Qualified Automatic Contribution Arrangement (“QACA”) Safe Harbor 401(k) Plan (SECURE Act Section 102)*. Effective for plan years beginning after December 31, 2019, the 10% cap on default automatic contribution rates under a Code Section 401(a)(13) QACA safe harbor 401(k) plan is increased to 15%, after the employee’s first plan year of participation.
- *Changes for Nonelective Employer Contribution Traditional and QACA Safe Harbor 401(k) Plans (SECURE Act Section 103)*. Effective for plan years beginning after December 31, 2019, nonelective employer contribution 401(k) safe harbor plans—
  - o Are no longer subject to safe harbor notice requirements; and
  - o May be amended to provide for safe harbor nonelective employer contributions after the beginning of the plan year. The employer must adopt the plan amendment more than 30 days before the end of the plan year, unless the rate of nonelective employer contributions is at least 4% of employee compensation, in which case, the employer must adopt the amendment by the end of the following plan year.

#### • **Changes in Plan Administration**

- *Consolidated Form 5500 Filings (SECURE Act Section 202)*. The SECURE Act directs the IRS and DOL to modify the annual reporting (Form 5500 Series) rules to allow a group of defined contribution plans to file a single, consolidated Form 5500, provided the plans have the same trustee, named fiduciary(ies), plan administrator, plan years, and the same investments or investment options for participants and beneficiaries. The new rules would apply to plan years beginning after December 31, 2021.
- *Increased Penalties for Failure to Timely File Retirement Plan Returns (SECURE Act Section 403)*. Effective for returns, statements and notifications required to be filed or provided after December 31, 2019, the SECURE Act increases the penalties for failure to timely file or provide the following retirement plan-related returns and notices:
  - o The Code Section 6652(e) penalty on qualified plans, funded deferred compensation plans, and fringe benefit plans that file late or materially incomplete Form 5500 annual returns is increased from \$25 per day to \$250 per day, and the maximum penalty per plan year is increased from \$15,000 to \$150,000;
  - o The Code Section 6652(d) penalty for failure to file Form 8955-SSA (Annual Registration Statement Identifying Separated Participants with Deferred Vested Participants) is increased from \$1 per participant multiplied by the number of days the failure occurred (up to a maximum penalty of \$5,000) to \$10 per participant multiplied by the number of days the failure occurred (up to a maximum penalty of \$50,000); and

o The Code Section 6652(h) penalty for failure to provide recipients with withholding notices required by Code Section 3405(e)(10)(B) is increased from \$10 per failure (up to a maximum of \$5,000 per calendar year) to \$100 per failure (up to a maximum of \$50,000 per calendar year).

- *Increased Penalty for Failure to Timely File Tax Returns (SECURE Act Section 402)*. The SECURE Act increases the Code Section 6651(a) minimum penalty for filing a late tax return to the lesser of \$435 (adjusted for inflation) or 100% of the tax reported on the return, effective for returns with due dates (including extensions) after December 31, 2019.
- *Remedial Plan Amendment Period (SECURE Act Section 601)*. For most plans, the deadline for making plan amendments reflecting applicable provisions of the SECURE Act (or any IRS or DOL guidance issued thereafter) will be the last day of the first plan year beginning on or after January 1, 2022 (2024 for governmental and collectively bargained plans). If, in the interim, a plan operates as though the retroactive amendment is already in effect, then the retroactive amendment will not be treated as violating anti-cutback rules (unless otherwise provided in IRS guidance).

#### • **Changes Affecting Lifetime Income Provisions in Retirement Plans**

- *Lifetime Income Disclosure (SECURE Act Section 203)*. After the DOL issues regulations, the pension benefit statements that employers provide to defined contribution plan participants will be required to include, at least once every 12 months, lifetime income disclosures showing the estimated monthly payments a participant or beneficiary would receive if his or her total plan benefit were used to provide a lifetime income stream. To aid in this process, the DOL has been directed to issue model lifetime income disclosures and prescribe assumptions that may be used to convert an individual's account balance to an equivalent lifetime income stream.
- *Fiduciary Safe Harbor for Selection of Lifetime Income Provider (SECURE Act Section 204)*. Effective December 20, 2019 (the Act's enactment date), the SECURE Act provides a new safe harbor under which a fiduciary's duty of prudence under ERISA would be deemed satisfied in connection with selecting an insurer for a guaranteed retirement income contract in a defined contribution plan if the fiduciary, after conducting a search and analysis meeting certain requirements, concludes that the insurer can meet its obligations under the contract and the relative cost of the selected contract is reasonable.
- *Portability of Investments in Lifetime Income Options (SECURE Act Section 109)*. Effective for plan years beginning after December 31, 2019, participants may make direct trustee-to-trustee transfers or transfers of annuity contracts to eligible employer plans or IRAs of lifetime income investments that can no longer be held under Code Section 401(a) qualified defined contribution plans, Section 403(b) annuity plans, or Section 457(b) governmental deferred compensation plans, without regard to restrictions on in-service distributions.

#### • **Expanding and Preserving Employer-Provided Retirement Plans**

- *Pooled Employer Plans (PEPs) (SECURE Act Section 101)*. Effective for plan years beginning after December 31, 2020, the SECURE Act permits unrelated employers (i.e., those that lack "commonality") to participate in a new type of multiple employer plan ("MEP")—called a pooled employer plan ("PEP")—which will be treated as a single plan for ERISA purposes provided certain conditions are met. The SECURE Act also amended the Internal Revenue Code to provide procedures aimed to ensure that qualification failures affecting one or more participating employers ("bad apples") would not disqualify the entire PEP or MEP.
- *Increases in Small Employer Plan Startup Cost Credits (SECURE Act Sections 104 and 105)*. Effective for taxable years beginning after December 31, 2019, the nonrefundable income tax credit available to eligible small employers (i.e., those with 100 or fewer employees) has been increased to as much as \$5,000, and an additional nonrefundable credit (of up to \$500 for 3 years) has been created for small employers that establish new plans with automatic enrollment features or that add such features to an existing plan.
- *Extension of Plan Adoption Deadline (SECURE Act Section 201)*. Effective for plans adopted for taxable years beginning after December 31, 2019, the SECURE Act permits an employer to adopt a Section 401(a) qualified retirement plan after the close of the employer's taxable year, as long as the employer adopts the plan by the due date (with extensions) for filing the employer's tax return for the taxable year.

## • **Changes Affecting Defined Benefit Plans**

- *Minimum Funding Standards for Community Newspaper Plans (SECURE ACT Section 115)*. Effective for plan years ending after December 31, 2017, certain frozen community newspaper defined benefit plans may elect to apply alternative minimum funding rules to the plan and other plans sponsored by employers in the same controlled group.
- *Modified PBGC Premiums for Cooperative and Small Employer Charity (“CSEC”) Defined Benefit Plans (SECURE Act Section 206)*. Effective for plan years beginning after December 31, 2018, the SECURE Act sets PBGC insurance premiums for CSEC defined benefit plans at \$19 per participant and \$9 for every \$1,000 of unfunded vested benefits.
- *Modified Nondiscrimination Testing Rules for Frozen Plans (SECURE Act Section 205)*. Generally effective on the Act’s December 20, 2019 enactment date (although plan sponsors may elect to have the new rules apply earlier), the SECURE Act provides nondiscrimination, minimum coverage, and minimum participation testing relief for defined benefit plans with closed classes of participants and also for defined contribution plans that provide make-whole contributions to a closed class of participants whose accruals under a defined benefit plan have been reduced or eliminated. These changes are intended to protect older, longer-service participants.

## • **Changes Affecting Individual Retirement Accounts and Annuities (IRAs)**

- *Repeal of Maximum Age for Traditional IRA Contributions (SECURE Act Section 107)*. Effective for contributions made for taxable years beginning after December 31, 2019, the SECURE Act repeals the prohibitions on contributions and deductions to traditional (i.e., non-Roth) IRAs for individuals who have reached age 70½.
- *Certain Non-Tuition Fellowship and Stipends and “Difficulty of Care” Payments Treated as Compensation for Contribution Purposes (SECURE Act Sections 106 and 116)*. Effective for taxable years beginning after December 31, 2019, amounts which are included in an individual’s gross income and paid to the individual in the pursuit of graduate or postdoctoral study count as compensation for IRA contribution purposes. In addition, qualified foster care payments excludable under Code Section 131’s “difficulty of care” exemption count as “compensation” for purposes of making contributions to defined contribution plans (effective for plan years beginning after December 31, 2015) and to IRAs (effective with respect to contributions made after December 20, 2019, the SECURE Act’s enactment date).

## • **Changes Affecting Other Plans**

- *Expansion of Section 529 Qualified Tuition Programs (SECURE Act Section 302)*. Effective for distributions made after December 31, 2018, the SECURE Act allows Section 529 plans to make tax-free distributions (in amounts up to \$10,000 per individual) to pay qualified higher education expenses that are either certain registered apprenticeship program expenses or qualified education loan repayments.
- *Treatment of Custodial Accounts on Termination of Section 403(b) Plans (SECURE Act Section 110)*. The SECURE Act requires the IRS to issue guidance, within 6 months after December 20, 2019, which shall be retroactively effective for taxable years beginning after December 31, 2008, permitting a terminating Section 403(b) plan to make in-kind distributions of individual 403(b)(7) custodial accounts to a participant or beneficiary.
- *Clarification of Certain Church Plan Rules (SECURE Act Section 111)*. Effective for years beginning before, on, or after December 20, 2019, the SECURE Act clarifies that certain church-controlled organizations’ employees may be covered under Section 403(b) plans whose assets are held in a Section 403(b)(9) retirement income account.
- *Benefits for Volunteer Firefighters and Emergency Medical Responders (SECURE Act Section 301)*. Effective for taxable years beginning after December 31, 2019, the SECURE Act reinstates, for one year, the exclusions for local and state tax benefits and qualified reimbursement payments made to certain volunteer firefighters and emergency medical responders.
- *Modification of Rules Relating to the Taxation of Unearned Income for Certain Children (SECURE Act Section 501)*. Effective generally for taxable years beginning after December 31, 2019, the SECURE Act removes a previous provision that had triggered high taxes for parents with unearned income of minor children, including children of members of the military and first responders killed in the line of duty.

## Provisions Repealing or Extending Certain Affordable Care Act Taxes (Division N of the Act)

- PCOR Fees Reinstated (Division N, Section 104). The ACA created the Patient-Centered Outcomes Research (PCOR) Institute, funded in part by fees paid by certain health insurers and self-insured health plan sponsors, to support clinical effectiveness research. PCOR fees were collected for plan years ending before October 1, 2019. The Act reinstates the ACA's PCOR provisions and extends the fee requirements through plan years ending before October 1, 2029.
- Medical Device Tax Repealed (Division N, Section 501). The Act repeals the 2.3% excise tax on the value of medical devices sold domestically, effective for sales after December 31, 2019.
- Repeal of Annual Fee on Health Insurance Providers (Division N, Section 502). The Act also repeals the annual fee on health insurance providers, effective for calendar years beginning after December 31, 2020. The annual fee, which took effect in 2014, has been apportioned among covered health insurance providers based on their relative U.S. health insurance market share.
- Repeal of Excise Tax (the "Cadillac Tax") on High Cost Employer-Sponsored Health Coverage (Division N, Section 503). The Act also repeals the 40% excise tax (the "Cadillac tax") which the ACA would have imposed starting in 2022 on the cost of employer-sponsored health benefits exceeding certain statutory thresholds.

## Other Tax Provisions Modified or Extended (Division Q of the Act)

- Medical Expense Deduction Floor Reduced (Division Q, Section 103). The Act extends until December 31, 2020, the threshold of 7.5% of adjusted gross income ("AGI") for medical expense deductions. The ACA had increased the threshold to 10% of AGI, but the Tax Cuts and Jobs Act of 2017 ("TCJA") reinstated the 7.5% threshold for 2017 and 2018. The Act retains the 7.5% threshold for 2019 and 2020.
- Employer Credit for Paid Family and Medical Leave Extended (Division Q, Section 142). The TCJA created a business tax credit for certain employer-paid family and medical leave. The Act extends that credit through 2020.
- Credit for Health Insurance Costs of Eligible Individuals Extended (Division Q, Section 146). The refundable health coverage tax credit ("HCTC") subsidizes the cost of health insurance for eligible individuals and their families. HCTC-eligible individuals are individuals eligible for Trade Adjustment Assistance (TAA) allowances because they experienced qualifying job losses or individuals whose defined benefit pension plans were taken over by the Pension Benefit Guaranty Corporation ("PBGC") due to financial difficulties. The HCTC was scheduled to expire at the end of 2019, but the Act extended it for one year.
- Disaster Relief (Division Q, Sections 202 to 205). Among the Act's disaster relief measures are provisions that modify certain retirement plan loan and in-service withdrawal rules to make it easier for affected individuals to access retirement plan funds. This relief applies generally to major disasters declared during the period beginning January 1, 2018 through the 60th day following enactment.
- UBTI Tax on Certain Fringe Benefit Expenses Repealed (Division Q, Section 302). The TCJA included a provision that required tax-exempt organizations to treat amounts paid or incurred for qualified transportation fringe benefits and qualified parking as unrelated business taxable income. The Act repeals the TCJA's provision retroactively to the TCJA's enactment date.

*If you have questions about this bulletin, please contact:  
Melanie N. Aska at [maska@murthalaw.com](mailto:maska@murthalaw.com) or 617.457.4131 or  
Erek M. Sharp at [esharp@murthalaw.com](mailto:esharp@murthalaw.com) or 203.772.7772*

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