Benefits & Compensation
INSIDER

January 2020
Winter Edition

Highlights:

- **Setting Every Community Up for Retirement Enhancement (SECURE):** Highlights of the new legislation
- **Hardship Distribution Rules**: Rules take full effect in 2020 – Explanation of operational changes and the need for plan amendments
- **Electronic Delivery of Retirement Plan Disclosures**: New proposed DOL regulations pave the way for expanded electronic delivery of required retirement plan disclosures
- **Proposed Code Section 162(m) Regulations**: Highlights of the proposed regulations which published in the Federal Register in December 2019
- **Missing Participants & Uncashed Checks:** Employers have legal obligations with respect to uncashed checks

Setting Every Community Up for Retirement Enhancement (SECURE) Act

Setting Every Community Up for Retirement Enhancement (SECURE) Act was signed into law on December 20, 2019. Here are the provisions we are thinking about the most:

1. Open MEPs. The SECURE Act "opened up" the rules regarding multiple employer plans (MEPs). Starting in plan years beginning after 12/31/20, more separate employers can join together in one plan. There no longer needs to be any commonality or nexus amongst the various employers, and the SECURE Act eliminated the "one bad apple" rule that had discouraged some employers from joining MEPs in the past. The new rules allow unrelated employers to join a "pooled employer plan" (PEP) that is administered by a "pooled plan provider" (PPP). It remains to be seen whether this is an incremental step that allows more small employers to offer 401(k) plans by banding together . . . or whether, a decade from now, there will be a handful of huge 401(k) plans for all U.S. employers.

2. Lifetime income. The SECURE Act included a few provisions to encourage 401(k) plans to offer lifetime income payment options (annuities). One provision provides a safe harbor for annuity provider selection. The new rule seems consistent with the DOL guidance in Field Assistance Bulletin 2015-02 that laid out a process for prudent selection of an annuity provider; in addition, the SECURE Act specifically permits plan fiduciaries to rely on representations from insurers about their status under state insurance laws and notes that a prudently selected annuity provider will not always be the lowest-cost option. Another provision requires that annuities must be portable, meaning that participants can receive plan distributions as annuities that they can roll over or hold as individuals. Finally, a third provision requires that, at least once a year, a participant's benefit statement will need to include a lifetime income disclosure, which means showing the participant's benefits as a joint & survivor annuity (for married participants) or a single life annuity (for unmarried participants). The DOL is required to issue safe harbor assumptions to be used in these lifetime income disclosures and also issue a model lifetime income disclosure notice.

3. 401(k) eligibility for part time employees. The SECURE Act mandates that employees who work more than 500 hours in three consecutive 12-month periods must be eligible for the employer's 401(k) plan. This new mandate is effective for plan years beginning after 12/31/2020, and 12-month periods beginning before 1/1/21 do not get counted. Thus,

the first newly-eligible employees under this rule will become eligible in 2024. Collectively-bargained plans are exempt, and plans can continue to require that employees be at least age 21 to be eligible for plan participation. The part-time employees who become eligible for a 401(k) plan due to this new rule do not have to be given any employer contributions (such as match or nonelective), and they can be excluded from plan testing. The point is simply to give long term part-time employees access to a 401(k) plan for their own retirement savings. We think employers should start thinking through the administrative aspects of this new requirement sooner rather than later. Employers may need to revise their HR systems so they can count hours for all part-time employees, starting 1/1/21. Employers should think about how this new rule will impact plan headcount and administration, how the additional plan fees will be paid, and what plan design decisions they want to make about employer contributions for these new plan participants. Note that employers can continue to exclude employees based on criteria other than age and service, such as job classification. Those rules have not changed.

4. Closed pension plan relief. The SECURE Act includes relief from nondiscrimination, coverage and minimum participation rules for closed defined benefit pension plans that meet certain criteria. The IRS provided short-term relief along these lines over the past few years and had extended such relief a few times. The SECURE Act confirms the testing relief. This is welcome news for employers who want to maintain defined benefit plans that are closed but not frozen. It means the plans can stay closed (assuming they meet the criteria) versus having to freeze.

5. Withdrawals for birth or adoption. The SECURE Act allows 401(k) plans to add provisions to allow participants to withdraw up to $5,000 within a year of a child's birth or adoption. Such withdrawals are subject to tax but are not subject to any penalty for early withdrawal. This provision is effective for plan years beginning after 12/31/19, which means that plans can allow these in-service withdrawals now. It seems that, if a participant takes an in-service withdrawal for this reason, plans will need to permit the amount to be repaid. Plan sponsors who want to allow withdrawals for birth or adoption should discuss the administrative aspects with their recordkeepers asap.

6. Required distributions. The SECURE Act increases the required minimum distribution (RMD) age from 70.5 to 72, starting in 2020. Thus, participants who reached age 70.5 in 2019 still have to commence their distributions by April 1, 2020. The SECURE Act also changed the rules about inherited benefits (both in defined contribution plans and IRAs), effective for deaths after 2019 (although there are later effective dates for collectively bargained and governmental plans). The maximum time for required payouts is now 10 years instead of the beneficiary's lifetime, with some notable exceptions. Surviving spouses, disabled or chronically ill beneficiaries, and other beneficiaries who are not more than 10 years younger than the participant can still take advantage of longer distribution timelines, so long as they begin taking distributions within a year of the participant's death. There is an exception for minor children too, but then they are subject to the 10-year rule when they are no longer minors.

Changes to Hardship Distribution Rules Take Full Effect in 2020

Changes to hardship distributions introduced by new regulations finalized in September 2019 took effect January 1, 2020. Additional guidance from the IRS under Revenue Procedures 2019-39 and 2020-9 has clarified that although the operational changes are live now, sponsors of 401(k) and non-governmental 403(b) plans have until December 31, 2021 to adopt plan amendments for these changes. This deadline applies to mandatory changes and optional changes and to individually designed and pre-approved plans. In the meantime, fiduciaries of 401(k) or 403(b) plans that permit hardship distributions should confirm that plan operations comply with the new regulations. Read full details here.

Expanded Electronic Delivery of Retirement Plan Disclosures on the Horizon

New regulations proposed by the Department of Labor in October 2019 have paved the way for expanded electronic delivery of certain retirement plan disclosures. Under the new "notice and access" safe harbor, after an initial paper notification of default electronic delivery, plan administrators will be permitted to make the required disclosures electronically. Although the existing rules already permit electronic disclosures to employees who affirmatively consent to it or have regular access to electronic documents at work, the new rules will not require affirmative consent or access at work. However, the proposed rules apply only to retirement plan disclosures required by Title I of ERISA and do not apply to notices required by the IRS or to welfare plans. The new rules will become effective 60 days following the publication of the final regulations.

Existing Opt-In Electronic Disclosure Will Remain Available. Under an existing DOL safe harbor established in 2002, electronic disclosure may be provided to employees who have affirmatively consented to electronic delivery or who have access to electronic documents as part of their employment duties. This method of electronic disclosure remains available and will continue to be available after the new regulations become effective.

New Safe Harbor for Electronic Disclosure Will Not Require Opting in but Will Require Additional Notices Before and Concurrently with Electronic Disclosure. The new safe harbor expands the existing rules to allow electronic disclosure to employees to whom the employer has assigned an email address and to individuals, including beneficiaries and alternate payees, who provide the employer with an email address or a smartphone number. The new safe harbor also covers former employees if the plan has taken reasonable steps to confirm accurate electronic addresses or numbers with (or has issued them to) employees at the time of severance. By incorporating into the employee offboarding process the confirmation of future contact information, employers may also alleviate missing participant issues in the future.

The proposed regulations assume that email and websites are the dominant means of electronic communication. However, the Department of Labor is considering other means such as text messages and mobile applications and may address them in the final regulations.

The new safe harbor covers any document that the plan administrator is required to furnish to participants and beneficiaries under Title I of ERISA (e.g., summary plan descriptions, summaries of material modifications, summary annual reports), but not documents that must be provided upon request. The new safe harbor does not cover IRS notices, such as 402(f) rollover notices, and does not apply at all to health and welfare plans.

Before covered documents may be electronically disclosed, recipients must be provided a paper notification of default electronic delivery, right to opt out, and the right to receive paper versions of covered documents free of charge. Employers may consider incorporating this notification into new employee intake process.

In addition to the initial notification, recipients must generally be provided an electronic notice of internet availability each time a new covered document is made available, unless a consolidated notice is used (no more than once within a 14-month period). The notice of internet availability must meet certain content requirements, including a statement of the right to opt out of electronic disclosure, and be written in a manner calculated to be understood by the plan participant. Documents disclosed electronically must remain on the website until superseded. Additional rules apply for how long and in what format electronically provided disclosures must be made available.

New Safe Harbor Will Not Apply Until After Final Regulations Are Published. The new safe harbor will become effective 60 days after the final regulations are published. Plans may not rely on the proposed regulations before they are finalized.

Proposed Code Section 162(m) Regulations
Some Things Old, Some Things New

The proposed Code Section 162(m) regulations were published in the Federal Register on December 20, 2019. The proposed regulations are extensive and cover a good amount of new ground, such as:

1. The covered employee "once-always" rule.
2. Grandfather rule for multi-year incentive arrangements.
3. Grandfather rule for nonqualified deferred compensation plans.
4. Compensation subject to the limit.
5. Disregarded entities.
6. Covered employee SEC disconnect.
7. 409A plans delaying payout.
8. Predecessor entities.

Read full details in our *Benefits & Compensation Insider Alert.*

Missing Participants & Uncashed Checks

Can't find your plan participants? ERISA imposes fiduciary obligations on the plan administrator to locate missing participants and beneficiaries. This is a hot audit issue for the Department of Labor, and the legal guidance in this area is unclear. We can help you develop a reasonable search process to find missing participants without becoming a cyber stalker.

A Diligent Search. As a starting point, the IRS has defined a "diligent search" as including all three of the following steps:

1. A search of alternate contact info (address, telephone, email, etc.) in the **employer's records** or **publicly-available records**. This would include, for example, records maintained by the medical plan or life insurance plan, and any public databases such as the white pages.
2. Use of a **commercial locator service**, a credit reporting agency, or a proprietary internet search tool for locating individuals.
3. Mailing a contact letter by **USPS certified mail** to the last known address and any other alternate address found.

See, e.g., IRS Manual section 4.71.1.4(15)(d). If you conduct a reasonable search and still can't find a participant, the IRS permits you to forfeit the participant's account. *See, e.g.*, Treas. Reg. section 1.411(a)-4(b)(6). The missing participant's benefit would be transferred to the plan's forfeiture account and applied as specified under the plan document. A forfeiture provision might allow you to offset plan expenses and employer contributions, or it might require an allocation to plan participants. If the participant returned at a future date to claim his or her benefits, you would reinstate the account from plan forfeitures or from the company's general assets.

Uncashed Checks. If a check has been delivered to the participant but remains uncashed, the employer still has legal obligations with respect to reporting and withholding. As a result, a Form 1099-R must be issued in January 2020 for any plan distributions

over $10 made in 2019, and income taxes must be withheld. IRS Rev. Rul. 2019-19 clarifies that this amount is includible in income for the participant and reportable for the employer, regardless of whether the check is cashed.

The IRS guidance focused on a participant who receives the check but fails to cash it. This scenario is not uncommon. Some participants misplace their checks or become incapacitated. Others deliberately avoid depositing the check because they fear losing eligibility for government benefits, or they falsely believe they can avoid taxation. These participants may be nonresponsive but they are not truly missing.

Rev. Rul. 2019-19 did not address a true missing participant, i.e., who did not receive the check at all. Instead, it provided that the IRS is continuing to analyze the issue of uncashed checks in this particular context. Until such guidance is issued, you should continue to report and withhold on such plan distributions unless you have actual reason to believe that the participant's address is incorrect. We can assist you with these reporting and withholding obligations.

2020 Compliance Calendars Available

Be sure to stay one step ahead of your filing dates this year with our printable compliance calendars.

2020 401(k) Plan Compliance Calendar

2020 Defined Benefits Plan Compliance Calendar

2020 Health & Welfare Plan Compliance Calendar

2020 Limitations for Retirement Plans, HSAs, and FSAs

2020 Limitations for Retirement and H&W Plans (by Code Section)

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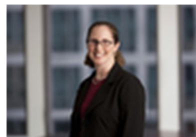
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