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SECURE ACT SET TO BECOME LAW

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Dec. 19, 2019

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Broad retirement legislation — the Setting Every Community Up for Retirement Enhancement (SECURE) Act — is heading for the president's signature after clearing the Senate on Dec. 19 and the House days earlier. The legislation is included in a year-end government spending package and essentially mirrors the version passed by the House in May. Key provisions include broad nondiscrimination testing relief for closed defined benefit (DB) plans, approval of "open" defined contribution (DC) multiple-employer plans, relaxed auto-enrollment rules and incentives for lifetime income options in DC plans. Other reforms aim to help individuals save more for retirement.

Enactment of the SECURE Act caps off several years of advocacy efforts by a broad range of stakeholders — including Mercer, which helped educate lawmakers about the importance of the reforms and the value of the employer-based retirement system. After winning overwhelming House approval in May, the legislation had stalled in the Senate for reasons unrelated to the measure's core reforms.

Many of the bill's reforms are effective starting in 2020 (or even retroactively), so plan sponsors should quickly review which provisions might be affected and what, if any, plan amendments and systems changes must be implemented. Some clarifications from regulators will be needed in the months ahead.

KEY FEATURES AFFECTING EMPLOYER PLANS

Closed plan testing relief. The law includes permanent nondiscrimination testing relief for closed DB plans and significantly broadens the temporary IRS relief first granted in 2014, renewed every year since then (most recently in Notice 2019-49) and expanded on a temporary basis in Notice 2019-60. Among other changes, the law:

- Allows employers to test closed DB plans with a DC plan on a benefits basis (cross-testing), even though the plans don't satisfy the regular conditions for doing so

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- Allows closed DB plans to be aggregated and cross-tested with the portion of a DC plan that provides matching contributions (as long as elective deferrals are included in the test) or with an employee stock ownership plan

- Eliminates the requirement that plans must have the same plan year to be aggregated

- Allows sponsors to test certain DC plans on a benefits basis if a closed class of participants whose DB plan accruals have been reduced or eliminated receive make-whole contributions (formerly called DB replacement allocations, or DBRAs)

- Provides closed DB plans with relief from certain benefits, rights and features testing, as well as the minimum participation rule under Internal Revenue Code (IRC) Section 401(a)(26), which generally requires a plan to have at least 50 participants

The relief is available immediately, but plan sponsors can elect to apply it as early as plan years beginning after Dec. 31, 2013.

Open MEPs. Employers of all sizes will be able to join together to create more affordable DC plans through "open" multiple-employer plans (MEPs) using a "pooled plan provider." A pooled plan provider is a person designated as the plan administrator and named fiduciary in the plan document who is responsible for performing all administrative duties. Before serving as pooled plan providers, individuals will have to register with IRS and the Department of Labor (DOL) and acknowledge in writing their plan administrator and fiduciary status. They also will have to ensure that everyone handling plan assets or serving as a fiduciary is bonded as required under ERISA.

Other changes will provide relief from two current rules for MEPs:

- The DOL requirement that participating employers have an employment-based common nexus or other genuine organizational relationship unrelated to the provision of benefits

- The IRS "one bad apple" rule that says a violation of plan qualification rules by one participating employer can jeopardize the entire MEP's tax qualification

These provisions are effective for plan years beginning after Dec. 31, 2020.

More time to retroactively adopt retirement plans. Employers of all sizes will have more time to retroactively adopt a new stock bonus, pension, profit-sharing or annuity plan — but not a 401(k) plan. The deadline to adopt one of those plans will be the extended due date of the employer's federal income tax return for the tax year in which the plan becomes effective. Employers meeting that deadline can treat the plan as having been adopted as of the last day of that tax year.

This provision is effective for plans adopted for taxable years beginning after Dec. 31, 2019.

Updated safe harbor DC plan rules. The law makes major changes to existing safe harbor rules for DC plans:

- ***Eliminate advance notice for one type of safe harbor.*** An employer that makes safe harbor qualified nonelective contributions (QNECs) of at least 3% will no longer have to give a safe harbor notice before each plan year. However, employers that make safe harbor matching contributions will still need to give this advance notice.

- ***Allow employer to elect 401(k) QNEC safe harbor after start of plan year.*** Employers can amend their 401(k) plans during a plan year to retroactively implement a QNEC safe harbor, but only if the amendment is adopted at least 30 days before plan year-end. Alternatively, an employer can amend its 401(k) plan by the following plan year-end to convert the design into a QNEC safe harbor, but the employer will have to make a 4% — instead of a 3% — QNEC. Similar rules are available to qualified automatic contribution arrangements (QACAs).

- ***Increase 10% cap for QACAs after first plan year.*** The current 10% cap on contributions to QACAs increases to 15% after the end of the first plan year that begins after the date the first elective contribution is made.

These provisions are effective for plan years beginning after Dec. 31, 2019.

Reduced Pension Benefit Guaranty Corporation (PBGC) premiums for CSEC plans. PBGC premiums for cooperative and small-employer charity (CSEC) plans will be rolled back to $19 per participant for flat-rate premiums and $9 per $1,000 of unfunded vested benefits for variable-rate premiums. This provision is effective for plan years beginning after Dec. 31, 2018. Most CSEC plans have already paid their 2019 premiums, so those plans will be eligible for a refund.

Lifetime income encouraged in DC plans. Several reforms aim to encourage more lifetime income options in DC plans:

- ***Lifetime income illustrations.*** Each year, DC plans will have to provide individual benefit statements showing the annuity equivalent of a participant's account using DOL-prescribed assumptions. The act also requires DOL to issue model disclosures. Plan sponsors, fiduciaries and others that use DOL's model disclosures and assumptions will have no ERISA liability for providing those annuity amounts. This provision is effective for benefit statements furnished more than 12 months after DOL has finished issuing the assumptions, model language and interim final rules.

- ***Annuity-provider selection safe harbor.*** DC plan fiduciaries selecting annuity providers can rely on representations from insurers regarding their ability to fulfill the contract and their status under state insurance laws. This provision is effective on the date of enactment, which is expected to be Dec. 20, 2019.

- ***Increasing portability of lifetime income investments.*** DC plans can provide "qualified distributions" — essentially direct rollovers to an IRA — of "lifetime income investments" starting 90 days before the date those investments are scheduled to cease being available under the plan. This provision is effective for plan years beginning after Dec. 31, 2019.

Converting 403(b) custodial accounts into individual retirement accounts (IRAs). If an employer terminates a 403(b) plan with amounts held in a custodial account, those accounts can be distributed in kind to each participant or beneficiary of the plan. The distributed accounts will be held by the custodian and receive 403(b) treatment until the amounts are actually paid to the participant or beneficiary.

The law requires the Treasury Department to issue guidance within six months of date of enactment authorizing this treatment. That guidance will be retroactively effective for taxable years beginning after Dec. 31, 2008.

Plan loans via credit cards barred. The act prohibits plans from making participant loans via credit cards or similar arrangements. This provision is effective for loans made after the date of enactment, which is expected to be Dec. 20, 2019.

Expanded coverage of long-term part-time workers. Sponsors of noncollectively bargained 401(k) plans will have to let part-time workers voluntarily contribute to the plan if they have completed at least 500 hours of service per year for three consecutive 12-month periods. Employers won't need to make nonelective contributions for these workers or match their contributions. Employers can exclude these employees from nondiscrimination testing and won't have to provide them with top-heavy minimum benefits.

This provision is effective for plan years beginning after Dec. 31, 2020. However, service during 12-month periods beginning prior to 2021 is disregarded.

Penalty-free withdrawals for birth or adoption of a child. Individuals can take up to $5,000 as a penalty-free early withdrawal from their qualified retirement plan savings to help pay for childbirth or adoption expenses — with repayment permitted at a later date. This provision is effective for distributions made after Dec. 31, 2019.

Consolidated Form 5500 for similar DC plans. By Jan. 1, 2022, IRS and DOL will have to implement a consolidated Form 5500 for similar DC plans. Plans eligible for consolidated filing must have the same trustee, named fiduciary (or named fiduciaries), administrator, plan year and investments or investment options for participants and beneficiaries. The group can include a DC plan not subject to Title I of ERISA — such as a governmental or church plan — if the same person carries out each specified function for all plans in the consolidated filing. This provision is effective for plan years beginning after Dec. 31, 2021.

Pension funding relief for community newspaper plans. The act provides pension funding relief for community newspaper plan sponsors by increasing the interest rate to calculate those funding obligations to 8% and extending the period for amortizing any shortfall from seven to 30 years. The relief is available only to plans in which no participants received an accrued benefit increase after Dec. 31, 2017. This provision is effective for plan years ending after Dec. 31, 2017.

Clarification of church plan requirements. The law clarifies which individuals may be covered by plans maintained by church-controlled organizations. This provision is effective on the date of enactment, which is expected to be Dec. 20, 2019, and applies retroactively for all plan years.

KEY FEATURES AFFECTING INDIVIDUALS

Reforms designed to help individuals save more for retirement will:

- ***Increase age for required distributions.*** The starting age for required minimum distributions will increase from 70-1/2 to 72. This provision applies to distributions required to be made after Dec. 31, 2019, with respect to individuals who attain age 70-1/2 after that date.
- ***Eliminate age limit for IRA contributions.*** The current ban on individuals contributing to an IRA after age 70-1/2 is lifted. This provision is effective for contributions made for taxable years beginning after Dec. 31, 2019.
- ***Allow graduate students to make IRA contributions.*** Taxable graduate or post-doctoral fellowships and stipends can be treated as compensation for purposes of making IRA contributions. This provision is effective for taxable years beginning after Dec. 31, 2019.
- ***Expand Section 529 accounts.*** These accounts can be used to pay for trade apprenticeship fees. The accounts can also help pay off up to $10,000 in student loans for any 529 plan's designated beneficiaries (or their siblings). The student loan interest deduction will be adjusted for such repayments. The final version of the act does not include a controversial provision to permit the accounts to be used for home-schooling costs. This provision is effective for distributions made after Dec. 31, 2018.

REVENUE OFFSETS

Taken together, the act's array of changes will cost approximately $16.3 billion over 10 years, according to the Joint Committee on Taxation's projection for a substantially similar bill passed by the House Ways and Means Committee earlier this year. Several retirement-related provisions are intended to offset that cost.

Shorter "stretch" IRAs. Most nonspouse beneficiaries in DC plans and IRAs — but not DB plans — will have to complete payouts within 10 years after the IRA owner's death. This provision generally applies to distributions with respect to employees who die after Dec. 31, 2019. Collectively bargained plans and governmental plans have delayed effective dates. The 10-year rule does not apply to certain commercial annuity contracts in effect as of the date of enactment, which is expected to be Dec. 20, 2019.

Higher penalty for failure to file. The act raises the penalty for failing to file a tax return from $330 to $435 (or, if less, 100% of the tax due). This provision applies to returns for which the due date (including extensions) is after Dec. 31, 2019.

Stiffer penalties for failure to file retirement plan returns. The penalties for failing to file certain retirement plan returns will increase sharply:

- The penalty for a late Form 5500 will increase to $250 per day up to a total of $150,000, rather than the current $25 per day, up to a maximum of $15,000.
- Failure to file a registration statement will incur a daily penalty of $10 per participant up to a total of $50,000, rather than the current $1 per participant daily, to a maximum of $5,000.
- The penalty for failing to file a required notification of change will increase from $1 to $10 per day, and the maximum will rise from $1,000 to $10,000.
- Failure to provide a required withholding notice would trigger a penalty of $100 for each failure, with a limit of $50,000 for all failures during any calendar year — a steep increase from the current $10 for each failure, with a $5,000 limit for the calendar year.

These provisions apply to returns, statements, notifications and notices required to be filed or provided after Dec. 31, 2019.

RELATED RESOURCES

Non-Mercer Resources

- Rules Committee Print 116–44 Amending HR 1865, Further Consolidated Appropriations Act, 2020 — see p. 1532 for SECURE Act (House Rules Committee, Dec. 16, 2019)
- Estimated Budget Effects of HR 1994, the SECURE Act (Joint Committee on Taxation, May 22, 2019)
- House Report 116-79, Amending the SECURE Act (House, May 20, 2019)
- Present Law and Background Relating to Challenges in the Retirement System (Joint Committee on Taxation, May 10, 2019)

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- SECURE Act Stalls Amid Senate 'Holds' (June 24, 2019)
- House Passes SECURE Act To Bolster Retirement Plans (May 24, 2019)
- Mercer Applauds Congressional Action on Retirement Reforms (April 4, 2019)
- Bipartisan Retirement Reforms Pass Key House Panel (April 3, 2019)
- 2019 Legislative and Regulatory Outlook for Employer-Sponsored Retirement Plans (Feb. 5, 2019)

Other Mercer Resources

- Economic Outlook 2020 (Dec. 4, 2019)
- Steps To Address America's Retirement Security Challenge (Nov. 3, 2017)

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