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Senate panel approves SECURE 2.0 bill, spurs talks on final package

By Geoff Manville, Matthew Calloway, Brian J. Kearney and Margaret Berger
June 27, 2022

The Senate Finance Committee unanimously approved its SECURE 2.0 bill, the Enhancing American Retirement Now (EARN) Act on June 22, kicking off an effort to meld the legislation and two other bipartisan bills into a final package that could become law by the end of the year. The EARN Act overlaps with a widely-supported SECURE 2.0 bill approved by the Senate Health, Education, Labor and Pensions (HELP) panel earlier this month (S 4353) and with a measure that passed the House in March (HR 2954). All of the bills build on the suite of retirement reforms enacted in the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 (Div. O of Pub. L No. 116-94). This GRIST highlights key provisions in the EARN Act of interest to employers.

Talks on final bill underway

Finance members approved a version of the EARN Act that was not drafted in legislative language, instead offering a summary and Joint Committee on Taxation (JCT) analysis of the provisions and edits, as is customary for tax measures in that committee. It draws on elements of legislation introduced last year by Senators Ben Cardin, D-MD, and Rob Portman, R-OH, (S 1770) and from other bipartisan bills from committee members.

The EARN Act also incorporates some provisions similar to those in the HELP committee bill, which makes changes to ERISA but not the tax code, and in the House bill, which includes both ERISA and tax code changes. All of the bills aim to expand retirement plan coverage, boost savings, increase lifetime income opportunities and ease plan administration.

Key differences in the EARN Act include proposals for a major expansion of the Saver's Credit that would make the credit payable only to workplace plans and IRAs, a new automatic enrollment safe harbor, and an array of incentives for small employers to offer savings plans. The EARN Act drops a House proposal to require most new 401(k) and 403(b) plans to adopt automatic enrollment. Instead, it offers a tax credit to small businesses that adopt auto enrollment in their plans.

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The EARN Act raises revenue to pay for its reforms the same way the House bill does, however, directing or encouraging more retirement savings in the form of post-tax Roth contributions. These provisions would raise more than $39 billion in federal revenue within the 10-year budget window because much of the Roth tax break for distributions would occur beyond the window, according to the JCT.

Congress is already working to reconcile the three bills into a package that the president could sign later this year. Lawmakers hope to attach a final measure to the tax vehicle during the lame-duck period following the November elections to wrap up a range of unfinished business and extend popular, expired pieces of the tax code.

Student loan matching payments

The EARN Act would let sponsors of 401(k), 403(b), governmental 457(b) and savings incentive match plans for employees (SIMPLE IRA) plans match employees' qualifying student loan payments as if the payments were salary-reduction contributions. The change would apply to plan years starting after 2023. Employers offering the benefit would have to make it available to all employees eligible to receive matching contributions on salary deferrals (and vice versa). The match rate and vesting schedules for both salary deferrals and student loan payments would have to be the same. The benefit would apply only to repayments of student loan debt incurred by a participant (or their spouse or dependent) for higher education, and employers could rely on an annual employee certification that the loan repayments were made.

The bill would modify the minimum coverage and nondiscrimination rules as follows:

- Student loan matching contributions would be considered available to all employees, even those with no student debt.
- The contributions could count as matching contributions for purposes of the basic and auto-enrollment safe harbors (including the new secure deferral arrangements discussed in the next section).
- Plans could apply the actual deferral percentage (ADP) test separately to employees who receive these matching contributions.

The bill directs the Treasury Secretary to issue implementing regulations, including permitting student loan matching contributions to be made at a different frequency than matching contributions on salary deferrals.

New automatic-enrollment safe harbor

The bill aims to increase the use of automatic-enrollment designs in defined contribution (DC) plans for plan years beginning in 2024 through a new secure deferral arrangement. This new auto-enrollment safe harbor design would have higher minimum deferral and matching contribution rates than the existing

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qualified automatic contribution arrangement (QACA) safe harbor. Eligible small employers who offer the secure deferral arrangement feature would be eligible for a tax credit.

Expanded coverage of part-time workers

The EARN Act would allow some part-time workers to participate in workplace retirement plans a year earlier than current eligibility rules require. Sponsors of noncollectively bargained 401(k) plans would have to let part-time workers voluntarily contribute to the plan if they have completed at least 500 hours of service in two consecutive years (reduced from three) and have attained age 21. Pre-2021 service would not be counted, but some part-time employees could still be eligible as early as the 2023 plan year. The bill would also clarify that pre-2021 service by these part-time employees could be excluded for vesting purposes in any employer contributions.

Increased catch-up contribution limits

Beginning in 2025, 401(k), 403(b) and governmental 457(b) plans could allow larger catch-up contributions of up to $10,000 for individuals who will be at least age 60 but less than age 63 by the end of the tax year. The maximum catch-up contribution for SIMPLE plans would increase to $5,000. These increased catch-up contribution limits (and the current $1,000 limit for IRAs) would undergo annual cost-of-living increases.

Minimum distribution requirements

The bill would make a number of changes to Internal Revenue Code (IRC) Section 401(a)(9) rules for required minimum distributions (RMDs):

- **Starting age.** A participant's RMD start date would increase from the current age of 72 (as set by the SECURE Act) to age 75 beginning in 2032. This change would also mean some participants who attained age 72 prior to 2032 could stop taking RMDs until the year they attain age 75.
- **No penalty on partial annuitization.** Participants who elect to receive a portion of their DC account balances or IRAs as an annuity could choose to determine their RMD on the total account balance, including the value of all purchased annuity contracts. The RMD payable from the remaining account balance for a given year would be the total RMD minus the annuity payments.
- **Excise tax.** The excise tax on a missed RMD would be reduced from 50% to 25%. Individuals who correct within a prescribed correction window would be eligible for a further reduction to 10%.
- **Surviving spouses.** The surviving spouse of an employee who died before commencing RMDs could elect to be treated as the employee, but only if the spouse is the sole designated beneficiary.
- **Elimination of pre-death RMDs for Roth.** The bill would eliminate pre-death RMD requirements for participants' designated Roth accounts under employer-sponsored plans starting in 2024. This change would align with current RMD rules for Roth IRAs.

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DC plan distribution changes

The bill would make the following changes to DC plan distribution rules:

- **Three-year limit for repaying qualified birth or adoption distributions (QBOADs)**. Current law does not limit the period during which a QBOAD may be repaid to the plan and qualify as a rollover contribution. The bill would restrict the repayment period to three years after a participant's receipt of a QBOAD.
- **Self-certification of hardship**. Employers could rely on an employee's certification that:
  - The employee has experienced one of the events identified in Treasury regulations as a deemed hardship under the rules for 401(k) or 403(b) plans or an unforeseeable emergency under the rules for governmental 457(b) plans, and
  - The distribution does not exceed the employee's financial need, and the employee has no other reasonably available alternative means of satisfying that need.
- **Penalty-free withdrawals in cases of domestic abuse**. Penalty-free early withdrawals up to $10,000 (or 50% of the value of the vested benefit, if less) would be available to victims of domestic abuse by a spouse or a domestic partner. Plan administrators may rely on a participant's certification that the distribution is an eligible distribution to a domestic abuse victim. Eligible distributions could be repaid to any eligible retirement plan within three years, subject to certain requirements.
- **Withdrawals for certain emergency expenses**. Starting in 2024, DC plan participants and IRA owners could take penalty-free distributions for emergency expenses, which are defined as "unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses." Plan administrators may rely on a participant's certification that the distribution is for eligible emergency expenses. A single distribution of up to $1,000 per year would be allowed, and participants could repay the distribution within three years. No further emergency distribution would be permissible during the three-year repayment period unless repayment occurs or the employee subsequently makes contributions in excess of the amount of the emergency distribution.
- **Penalty-free distributions for individuals with a terminal illness**. The 10% penalty tax for early distributions would not apply to a "terminally ill" individual, defined as an individual who has been certified by a physician as having an illness or physical condition that can reasonably be expected to result in death in 84 months or less after the date of the certification.
- **Distributions to pay for long-term care insurance.** Employers could permit distributions up to the lesser of $2,500 (indexed) or the amount of premiums paid by the participant during the taxable year for long-term care insurance contracts that meet certain coverage thresholds. Distributions would be exempt from the 10% tax on early distributions. Treasury would also maintain a website providing consumer education regarding eligible long-term care contracts.

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- **Automatic relief for federally declared disasters.** The bill would make disaster-related distribution and loan relief automatically available in the event of federally declared disasters. Affected individuals could withdraw up to $22,000, and such distributions would not be subject to the 10% early withdrawal penalty tax. Distributions would be treated as gross income over three years, and could be repaid to a tax-preferred retirement account within that time. The provision would be effective for disasters occurring on or after January 26, 2021.
- **Exemption for automatic portability transactions.** This provision would permit a retirement plan service provider to receive reasonable compensation in connection with automatic portability services — subject to detailed conditions and disclosure requirements — starting in 2024. Such services involve the automatic transfer of a participant's default IRA (established in connection with a mandatory distribution from a former employer's plan) into the participant's current employer retirement plan, unless the participant affirmatively elects otherwise.

Preservation of income

The bill includes several provisions to help retirees make their savings last throughout retirement.

Qualified longevity annuity contracts (QLACs)

QLACs let employees use a portion of their retirement savings to purchase an annuity starting as late as age 85 without violating RMD rules. The bill directs Treasury to amend its regulations on QLACs to provide more flexibility.

- **Premiums.** The bill would eliminate the requirement limiting QLAC premiums to 25% of the account balance and would increase the dollar limit on these premiums from $125,000 to $200,000 (indexed for inflation).
- **Joint and survivor benefits after divorce.** The bill would clarify the treatment of joint and survivor benefits for couples who get divorced after purchasing a QLAC but before commencing payment.
- **"Free look" periods.** The bill would permit rescission periods up to 90 days from the date of purchase.

Remove barriers for life annuities

To remove what some retirees consider barriers to purchasing commercial annuities, the bill would allow the following:

- **Small increases.** Annuity payments could increase by a set percentage, as long as the increases occur at least annually and are less than 5%.
- **Cashouts.** Annuitants could receive full or partial lump-sum cash outs of the remaining annuity payments or the payments scheduled to be made for the next 12 months.

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- **Dividends and premium death payments.** The bill would permit the payment of dividends, as well as a lump-sum return of premium death benefits.

Expanded Self-Correction Program

The bill would significantly expand the Self-Correction Program (SCP) under IRS's Employee Plans Compliance Resolution System (EPCRS) and add a new safe harbor correction for elective deferral failures:

- **Inadvertent errors.** Plans could use the SCP to correct eligible inadvertent failures at any time before Treasury identifies the error. Eligible inadvertent failures would include those that occur despite practices and procedures reasonably designed to promote and facilitate overall compliance with applicable IRC requirements. Plans could not use SCP to correct failures that are egregious, involve the diversion or misuse of plan assets, or directly or indirectly relate to an abusive tax avoidance transaction.
- **Loan failures and the Voluntary Fiduciary Correction Program (VFCP).** The bill would make the SCP available for more plan loan failures.
- **Safe harbor correction for elective deferral failures.** The bill would make permanent a temporary safe harbor correction for automatic contribution failures available under EPCRS that is currently scheduled to sunset at the end of 2023. The bill would also require Treasury to amend EPCRS to clarify that this correction method applies to former employees.
- **Correction by IRA custodians.** The bill directs Treasury to expand EPCRS to allow IRA custodians to correct inadvertent errors.

Recovery of retirement plan overpayments

The bill would give retirement plan fiduciaries the latitude to decide not to recoup certain inadvertent benefit overpayments. Plan sponsors would also have the ability to amend the plan to increase past or future benefits for affected participants to adjust for inadvertent benefit overpayments. Participants and beneficiaries who rollover overpayments to an IRA or another plan would not have to unwind their rollovers if the plan decides to forgo recoupment.

Reporting and disclosure

Several provisions would simplify reporting and disclosure requirements:

- **Joint agency report.** Treasury, DOL and the Pension Benefit Guaranty Corp. (PBGC) would have to review how to consolidate, simplify and standardize reporting and disclosure requirements and assess their effectiveness. The agencies would have to consult with a balanced group of participant and employer representatives and report recommendations to Congress within two years of the bill's enactment.

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- **Model rollover forms and notices.** The bill requires Treasury to release sample forms for direct rollovers and trustee-to-trustee transfers by January 1, 2025. The Government Accountability Office would be directed to issue a report to Congress within 18 months of the bill's enactment on the effectiveness of currently required Section 402(f) rollover notices, with recommendations to facilitate better understanding of the different distribution options and corresponding tax consequences, including spousal rights.
- **Simplified disclosure for nonparticipating employees.** DC plans would only have to provide an annual reminder notice to employees who received the plan's summary plan description (SPD) and other required disclosures on first becoming eligible, but chose not to participate and have no account balance. Nonparticipating eligible employees could continue to request any documents available to participants.

Provisions specific to 403(b) plans

Several of the bill's provisions relate specifically to 403(b) plans:

- **Investment in group trusts.** The bill would expand the IRC's list of permitted investments for 403(b) custodial accounts to include collective investment trusts (CITs). The IRC currently allows these accounts to invest only in mutual funds. CITs — which are managed by banks or trust companies — are generally less expensive than mutual funds.
- **Multiple-employer plan (MEP) reforms expanded.** Starting with plan years beginning after the bill's enactment, 403(b) plans (except church plans) could join MEPs, including pooled employer plans (PEPs).
- **403(b) hardship rules conformed to 401(k) rules.** A revenue-raising provision would conform 403(b) plan hardship rules to 401(k) hardship rules. While current law allows hardship distributions of employee contributions (without interest) from 403(b) plans, the bill would allow such distributions from qualified matching contributions, qualified nonelective contributions and account earnings.

Retirement savings lost and found

The bill would require the Treasury Department to establish an Office of the Lost and Found to administer an online searchable database of information about retirement benefits. Plan administrators would have to provide Treasury with information about current and former participants to enable the construction and operation of the database — called the Retirement Savings Lost and Found. Individuals who had been a retirement plan participant or beneficiary would be able to search the database to get contact information for the plan's administrator.

Treasury also would be required to hold mandatory distributions of non-responsive participants' account balances of $1,000 or less. Employer plans would have to transfer these balances to the Office of the Lost and Found when participants fail to make an election or cash the distribution check within six months. An account balance held by Treasury would be treated as being held in an IRA and would be

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credited with interest. The Office of Lost and Found would have to conduct periodic searches to attempt to locate these non-responsive participants.

Key provisions affecting defined benefit plans

The bill contains a few targeted provisions for defined benefit (DB) pension plan sponsors:

- **Mortality.** The mortality tables Treasury sets for sponsors to determine minimum funding requirements and minimum lump sums couldn't use future mortality improvements greater than 0.78% at any age, or another figure Treasury determines is consistent with the overall rate of mortality improvement projected by the Social Security Administration.
- **Section 420 transfers.** Employers' current ability to fund retiree health and life insurance benefits with surplus pension assets would be extended from the end of 2025 through 2032. The proposal would also relax the eligibility rules for certain de minimis transfers, though the maintenance period for those transfers would be seven years rather than the usual five.
- **Benefits limits eased for rural electric cooperative plans.** Non-highly paid participants in plans maintained by rural electric cooperatives would not be subject to the Section 415 Internal Revenue Code limits on annual benefits.

Provisions of interest to small employers

Some provisions will be of special interest to small employers:

- **Starter 401(k) and 403(b) deferral-only plans**. Employers not sponsoring a retirement plan could offer a new safe-harbor starter 401(k) or 403(b) plan, as applicable. These plans would generally have to automatically enroll employees between 3% and 15% of compensation, and employer contributions would not be allowed. The limit on annual deferrals would be the same as the IRA contribution limit, which for 2022 is $6,000, with an additional $1,000 (annually indexed) in catch-up contributions beginning at age 50. This provision would be effective for plan years beginning after 2023.
- **Auto-portability tax and re-enrollment credits.** Eligible small employers could receive a $500 tax credit in the year they add an auto-portability feature to their plan (auto-portability is explained above). Eligible small employers could also receive a $500 tax credit in the year they add a provision that would automatically re-enroll, on an annual basis, eligible employees who aren't contributing or are contributing an amount less than the initial contribution rate under the plan's automatic enrollment arrangement.
- **Increased start-up tax credits.** Starting in 2024, the current retirement plan start-up tax credit for 50% of administrative costs would increase to 75% for employers with 25 or fewer employees.

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- **Start-up credits extended to MEPs.** Small employers that join a MEP — including a PEP — could claim the start-up credit for their first three years in the MEP, regardless of how long the MEP has existed.
- **Military spouse eligibility credit.** Small employers could receive a three-year tax credit if they (i) make employees who are military spouses eligible for DC plan participation within two months of hire, (ii) let eligible military spouses receive any matching or nonelective contribution they would otherwise have been eligible to receive at two years of service, and (iii) immediately vest 100% of all employer contributions for military spouses. The credit would apply only to contributions for military spouses who are not highly compensated employees.
- **Higher contribution limits for SIMPLE plans.** Beginning in 2024, employers with up to 25 employees, the limit on employee contributions would be increased from $13,500 to $16,500 (indexed annually), and the catchup limit would be increased from $3,000 to $4,750 (indexed annually). Employers with more than 25 employees but not more than 100 could elect to apply the same increases if the employer also makes matching contributions up to 4% or nonelective contributions up to 3%. The bill would also allow employers to make nonelective contributions up to the lesser of 10% of an employee's compensation or $5,000.

Miscellaneous

Other miscellaneous provisions that might be of interest to employers include:

- **Mandatory cash-outs.** The bill would increase the permissible mandatory cash-out limit from $5,000 to $6,000.
- **457(b) deferrals.** Governmental 457(b) plans could allow employees to change their deferral rates at any time before the deferred compensation would otherwise have been available to the employees. Current rules require making the change before the month of deferral.
- **Retroactive benefit accrual amendments allowed.** Retroactive amendments to increase benefits (except matching contributions) for a plan year could be made by the due date of the employer's tax return (including extensions) for the tax year that includes the effective date of the amendment. This would give existing plans the same flexibility to retroactively enhance benefits that the SECURE Act provided by allowing employers to retroactively sponsor new plans.
- **Separate application of top-heavy rules to DC plans covering excludable employees.** Employers could exclude from their top-heavy testing employees who don't meet the tax code's minimum age and service requirements for participation.
- **Small financial incentives for contributing to plans.** Employers could offer small financial incentives — without violating ERISA's prohibited transaction rules — to encourage employees to participate in a 401(k) or 403(b) plan. The bill doesn't define a monetary threshold for these financial incentives or address their taxability to employees, and incentives couldn't be provided to employees who don't elect to participate.

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Expanded tax credit payable to employer plans

The EARN Act revives an earlier proposal from Finance Committee Chair Ron Wyden, D-OR, to replace the currently nonrefundable saver's credit with a government matching contribution deposited directly into eligible individuals' workplace savings plans or IRAs. Beginning in 2027, a pretax matching contribution of 50% would be available on eligible individuals' first $2,000 of retirement savings per year. The 50% rate would be phased out between $41,000 and $71,000 for taxpayers filing a joint return ($20,500 to $35,500 for single taxpayers and married filing separate; $30,750 to $53,250 for head of household filers). Government matching contributions would not count against any applicable limits on contributions and would not count for purposes of nondiscrimination testing.

Revenue-raising provisions

- **Mandated Roth treatment for catch-up contributions.** Beginning in 2024, 401(k), 403(b) and governmental 457(b) plan participants age 50 or older could only make catch-up contributions on a Roth (i.e., after-tax) basis. Excess pretax deferrals could no longer be treated as catch-up contributions.
- **Matching contributions permitted on Roth basis.** Beginning in 2023, employers could permit employees to elect to have some of all of their matching and nonelective contributions treated as Roth contributions under 401(k), 403(b) or governmental 457(b) plans, but only if employees are fully vested in the contributions. Employer contributions made on a Roth basis wouldn't be excludable from employees' income.
- **Roth contributions allowed for SIMPLE and SEP plans.** Beginning in 2024, employers could let employees elect Roth treatment of contributions to SIMPLE plans and simplified employee pension (SEP) plans. All contributions to these plans must be pretax under current law.

Related resources

Non-Mercer resources

- Section-by-section summary of the EARN Act (Senate Finance Committee, June 22, 2022)
- Description of the Chairman's Mark of the 'Enhancing American Retirement Now (EARN) Act' (Joint Committee on Taxation, June 17, 2022)
- Estimated revenue effects of the Chairman's Mark (Senate Finance Committee, June 17, 2022)
- Description of the Chairman's modification to the provisions of the 'Enhancing American Retirement Now (EARN) Act' (Joint Committee on Taxation, June 21, 2022)
- Estimated revenue effects of the Chairman's modification to the 'Enhancing American Retirement Now (EARN) Act' (Senate Finance Committee, June 21, 2022)

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Mercer Law & Policy resources

- Senate HELP Committee releases SECURE 2.0 retirement bill (June 8, 2022)
- Bill seeks new lump-sum buyout disclosures to participants, agencies (May 9, 2022)
- Broad ‘SECURE 2.0’ retirement bill gets overwhelming House approval (April 18, 2022)
- Host of retirement bills may hitch ride on final SECURE 2.0 package (March 25, 2022)
- 2022 legislative, regulatory and judicial outlook for retirement plans (March 15, 2022)
- House retirement bill advances, seeks scrutiny of pension risk transfers (Nov. 15, 2021)
- Senate bills seek spousal consent for DC plans, expanded saver’s credit (July 29, 2021)
- Senators revive major bipartisan retirement reform legislation (May 28, 2021)

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