Executive Compensation, Employee Benefits and ERISA Alert

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President Trump Signs Secure Act into Law

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The Setting Every Community Up for Retirement Enhancement Act of 2019 (Secure Act) was passed by the House and Senate on December 17 and 19, respectively, as part of a budget bill known as the Further Consolidated Appropriations Act, 2020 (H.R. 1865). The bill was signed into law by President Trump on December 20. The Secure Act is the most significant retirement legislation in more than a decade. Below is a summary of the key provisions of the Secure Act, many of which became effective on January 1, 2020.

Open Multiple Employer Plans

In general, a "multiple employer plan" is a retirement (e.g., 401(k)) plan that (i) is not a multiemployer plan (i.e., maintained pursuant to a collective bargaining agreement) and (ii) permits two or more unrelated employers to participate in a single retirement plan. Prior to the Secure Act, an employer was not permitted to participate in a multiple employer plan unless the employer had a "commonality of interest" with (e.g., was in the same industry as) the other employers. The Secure Act allows employers, regardless of their industry, to join together to form a multiple employer plan, referred to by the Secure Act as a "Pooled Employer Plan." The Secure Act also amends the Internal Revenue Code (IRC) to provide that one employer's disqualifying defect will not cause the disqualification of an entire Pooled Employer Plan (subject to certain conditions). These provisions apply to plan years beginning after December 31, 2020.

Lifetime Income Disclosure

Under the Secure Act, plan sponsors are required to provide defined contribution plan participants with an estimate of the amount of monthly income they would receive in retirement if their plan balance were paid in a single life annuity or a joint and survivor annuity. The lifetime income disclosure must be included on participants' benefit statements and be provided at least once every 12 months. The Secure Act directs the Department of Labor (DOL) to develop a model disclosure and prescribe assumptions that plan sponsors may use to convert participant account balances to single and joint and survivor annuities. Plan sponsors will not have fiduciary liability if they provide estimates in accordance with DOL assumptions and guidance. This provision applies to benefit statements provided more than 12 months after the DOL issues (i) interim final rules, (ii) the model disclosure and (iii) applicable assumptions (whichever is latest).

Contact Information

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Fiduciary Safe Harbor for Selection of Lifetime Income Provider

Prior to the Secure Act, if a retirement plan sponsor wanted to include an annuity investment option in its defined contribution plan, the plan sponsor had to evaluate the financial capability of an insurer to satisfy its obligations under the annuity and did not have protection from any potential fiduciary liability in making that decision. The Secure Act creates a new safe harbor that provides that a plan sponsor will be deemed to satisfy its fiduciary obligations when selecting an insurer if the plan sponsor obtains certain written representations from the insurer as to the insurer's status under and satisfaction of state insurance laws. Notwithstanding this safe harbor, given the higher fees generally associated with annuities, it remains to be seen whether those sponsors who offer these options will nonetheless be subject to claims of fiduciary breach.

Portability of Lifetime Income Options

If a lifetime income investment (e.g., an annuity) is no longer offered under a defined contribution plan, Section 403(b) plan or a governmental Section 457(b) plan, the Secure Act permits (i) a direct trustee-to-trustee transfer of such investment to another employer-sponsored retirement plan or individual retirement account (IRA), or (ii) a distribution of such investment to a participant in the form of a qualified plan distribution annuity contract. This provision is effective for plan years beginning after December 31, 2019.

401(k) Plan Coverage of Long-Term, Part-Time Employees

Prior to the Secure Act, a part-time employee could be excluded from participating in a 401(k) plan if the employee did not complete at least 1,000 hours of service in a year. The Secure Act generally modifies this eligibility requirement to cover employees (other than collectively bargained employees) who complete either one year of service (i.e., at least 1,000 hours in a year) or three consecutive years of service where the employee completes at least 500 hours of service per year (and attains age 21 by the end of the three-year period). Long-term, part-time employees generally would not be counted for purposes of the nondiscrimination and top-heavy rules. This provision is generally effective for plan years beginning after December 31, 2020.

Increase in Age for Required Beginning Date for Mandatory Distributions

Prior to the Secure Act, Section 401(a)(9) of the IRC generally required that distributions under a qualified retirement plan must begin on April 1 following the calendar year a participant turns 70½ years old (or retires, if later). The Secure Act increases the age from 70½ to 72, effective for individuals turning 70½ after December 31, 2019.

Modifications to Required Minimum Distribution Rules

The Secure Act modifies the required minimum distribution rules for defined contribution plans and IRAs upon the death of an employee or IRA owner. Under the Secure Act, upon the death of an employee or IRA owner, account balances are generally required to be distributed to a beneficiary by the end of the 10th calendar year following the year of the employee's or IRA owner's death. However, the 10-year distribution requirement generally does not apply if the beneficiary is a surviving spouse of the employee or IRA owner, a disabled or chronically ill individual, an

individual who is not more than 10 years younger than the employee or IRA owner, or a minor child of the employee or IRA owner (although the rule kicks in when the child reaches the age of majority). This provision is generally effective for distributions attributable to employees or IRA owners who die after December 31, 2019.

Repeal of Maximum Age for Traditional IRA Contributions

The Secure Act repeals the prohibition on contributions to a traditional IRA by individuals who turn 70½. This provision is effective for contributions made for taxable years beginning after December 31, 2019.

Penalty-Free Withdrawals from Retirement Plans in Case of Childbirth or Adoption

The Secure Act permits penalty-free withdrawals of up to $5,000 from defined contribution, 403(b) and governmental 457(b) plans and IRAs for expenses incurred in connection with the birth or adoption of a child. Such withdrawals may only be made during the one-year period following the birth or adoption of a child. This provision applies to distributions made after December 31, 2019.

Increase in Auto Enrollment Safe Harbor Cap

Currently, an automatic enrollment safe harbor 401(k) plan may not automatically escalate employee contributions above 10 percent of an employee's eligible compensation. The Secure Act increases this 10 percent cap to 15 percent after the employee's first plan year of participating in the plan. This provision is effective for plan years beginning after December 31, 2019.

Simplification of 401(k) Safe Harbor Rules

In general, a company that sponsors a 401(k) plan that is a safe harbor plan is not subject to nondiscrimination testing if the company makes certain mandatory employer contributions (which must be vested) to the plan, and provides a safe harbor notice to employees at least 30 days (but not more than 90 days) before the beginning of each plan year. Generally speaking, there are two types of 401(k) safe harbor plans: (i) nonelective contribution plans, under which contributions are made to all eligible participants, and (ii) matching contribution plans, under which contributions are made only to participants who make deferrals under the plan.

With respect to nonelective contribution 401(k) safe harbor plans (but not matching contribution 401(k) safe harbor plans), the Secure Act makes the following changes: (1) eliminates the safe harbor notice requirement; (2) permits amendments to nonelective status at any time before the 30th day before the close of the plan year; and (3) amendments after that time (i.e., within 30 days before the plan year close) will be allowed if (a) they provide for a nonelective contribution of at least 4 percent of compensation for all eligible employees and (b) the plan is amended no later than the close of the following plan year. This provision is effective for plan years beginning after December 31, 2019.

Increased Penalties for Failure to File Certain Returns, Statements and Notices

The Secure Act increases the penalties under the IRC for failing to file and/or provide certain returns, statements and notices relating to retirement plans. For example, the penalty for failing to file Form 5500 is increased from $25 per day to $250 per day, not

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to exceed $150,000 (increased from $15,000), and the penalty for failing to file a registration statement on an Internal Revenue Service Form 8955-SSA (Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits) is increased from $1 per participant per day to $10 per participant per day, not to exceed $50,000 (increased from $5,000). These provisions are effective for returns, statements and notices due after December 31, 2019.

Increase to Small Employer Tax Credits

The Secure Act increases up to a maximum of $5,000 per year the amount of the income tax credit available to small employers (i.e., employers with 100 or fewer employees) for qualified start-up costs of adopting a new qualified retirement plan. In addition, the Secure Act creates a new tax credit of up to $500 per year for small employers that establish a qualified retirement plan that includes automatic enrollment or add automatic enrollment to an existing retirement plan. Both credits are available for up to three years. These provisions are effective for taxable years beginning after December 31, 2019.

Retroactive Adoption of Retirement Plans

Under the Secure Act, if an employer adopts a stock bonus, pension, profit-sharing or annuity plan after the close of a taxable year but before the due date (including extensions) of the employer's federal tax return for such year, the employer may elect to treat the plan as having been adopted as of the last day of such year. The effect of this provision is to allow the employer to take a tax deduction for the prior year for employer contributions made to the plan, generally through the extended due date of the employer's federal tax return. This provision also gives employees the opportunity to receive employer contributions for the prior year and begin to accumulate retirement savings. This provision is effective for plans adopted for taxable years beginning after December 31, 2019.

Consolidated Filing of Form 5500

Under the Secure Act, all members of a group of plans are permitted to file a consolidated Form 5500 if all the plans in the group: (1) are defined contribution plans or individual account plans; (2) have the same trustee, the same named fiduciary(ies), the same administrator and the same plan year; and (3) provide the same investments or investment options to participants and beneficiaries. This provision applies to Forms 5500 for plan years beginning after December 31, 2021.

Plan Loans through Credit Cards and Other Similar Arrangements

The Secure Act prohibits the distribution of plan loans through credit cards or similar arrangements. This provision is effective for loans made after enactment of the Secure Act.

Section 529 Plans

The Secure Act expands the tax-free distributions that are permitted from Section 529 plans to include certain apprenticeship program expenses and qualified education loan repayments of up to $10,000 per person. This provision is effective for distributions made after December 31, 2018.

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