Legislative and regulatory bulletin

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IRS and DOL issue much anticipated guidance on key SECURE Act provisions

As 2019 was drawing to a close, Congress passed the Setting Every Community Up for Retirement Enhancement (SECURE) Act[1]—the most significant retirement legislation since the Pension Protection Act of 2006. As with most retirement plan legislation, in many of the provisions of the SECURE Act Congress set forth the overall policy and outlined some specific requirements but directed the Internal Revenue Service (IRS) and the Department of Labor (DOL) to fill in a number of the details and provide interpretive guidance.

Many of the SECURE Act's provisions became effective in 2020, so plan sponsors, financial professionals and other retirement service providers were looking forward to hearing from the IRS and DOL. Understandably, however, those agencies needed to give priority to providing timely guidance on the retirement provisions of the CARES Act and other matters related to the COVID-19 pandemic. But recently, they have been able to finalize some of the needed guidance on a number of the SECURE Act's provisions.

From the IRS: Notice 2020-68

On September 2, the IRS published Notice 2020-68, which, in the form of questions and answers, addresses some SECURE Act provisions. Here is a summary of those that affect employer-sponsored retirement plans:

> **Automatic enrollment credit.** The SECURE Act created a new credit for small employers (those with 100 or fewer employees) that add an automatic enrollment feature to their 401(k) or SIMPLE IRA plans. The credit—$500 per year for three years—is available for taxable years beginning after 2019. In Notice 2020-68, the IRS clarified that because the credit is available for a three-year period, a small employer that added automatic enrollment to its plan in 2018 can claim the credit for 2020, the last year of the three-year eligibility period. Similarly, if the employer first included automatic enrollment in its plan in 2019, the employer could claim the credit for 2020 and 2021.

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[1] For a summary of the SECURE Act, please see our 1Q 2020 Legislative and Regulatory Bulletin.

Participation by long-term part-time employees. The Act will require 401(k) plans to permit employees who work at least 500 hours in three consecutive 12-month periods to contribute to their company's plan. For purposes of determining eligibility to participate, the years part-time employees worked prior to 2021 are not counted. Thus, 2024 will be the first year this cohort must be permitted to contribute to their company's 401(k).

Though service before 2021 is ignored for *eligibility*, Notice 2020-68 states that all of an employee's years in which he or she worked at least 500 hours must be counted for *vesting* purposes. Matching or other employer contributions need not be made for these long-term part-time employees. But if the employer does make contributions for this cohort and those contributions are subject to a vesting schedule, the employer must be sure to track all of the years these employees worked. The IRS specifically asked for comments on how to reduce the administrative burdens related to counting these pre-2021 years for vesting.

Qualified birth or adoption distributions. The SECURE Act created an exception to the 10% pre-59½ withdrawal penalty for distributions from plans or IRAs of up to $5,000 in connection with the birth or adoption of a child. These qualified birth or adoption distributions (QBADs) must be made within one year of the child's birth or adoption. In Notice 2020-68, the IRS answered several questions about this new provision.

First, each parent may receive a QBAD of up to $5,000 with respect to the same child. Second, for multiple births the limit is $5,000 per child. Thus, for example, parents of twins could each receive a QBAD of up to $10,000. Third, the IRS confirmed that although plans are not required to permit QBADs, if a plan does permit them, it must allow participants who received them to recontribute the distributions to the plan if they are eligible at that time to make rollover contributions. Fourth, plans can rely on reasonable representations from participants that they are eligible for a QBAD "unless the plan sponsor or plan administrator has actual knowledge to the contrary." Finally, a QBAD is not an eligible rollover distribution, so it is not subject to 20% withholding, but it is subject to voluntary withholding.

In-service distributions from defined benefit and 457(b) plans. Notice 2020-68 also provides guidance on a provision of the Bipartisan American Miners Act, which was part of the same legislative package that included the SECURE Act. The Miners Act lowered the minimum age for in-service distributions from defined benefit plans from 62 to 59½ and from 457(b) plans from the calendar year in which the participant attains 70½ to the calendar year in which the participant turns 59½. Notice 2020-68 confirmed that plans are not required to permit in-service distributions. If plans do permit such distributions, they are not required to lower the minimum age to 59½.

Plan amendment deadlines. The deadline for amending plans for the provisions of the SECURE Act or the Bipartisan American Miners Act is the last day of the 2022 plan year. The deadline for government plans and certain union plans is the last day of the 2024 plan year. Notice 2020-68 noted that these deadlines apply to both required and discretionary amendments.

From the DOL: Proposed and interim rules

Among other things, Congress directed the DOL to provide guidance on pooled employer plans and the lifetime income disclosure provisions of the SECURE Act.

Registration of pooled plan providers. The SECURE Act allows for the creation of a new type of multiple employer plan called a pooled employer plan (PEP) to be administered by a "pooled plan provider." This provision becomes effective in 2021, but pooled plan providers must register with the DOL and the Treasury Department before beginning operations. On August 20, the DOL issued proposed regulations setting forth an online registration process that would require a pooled plan provider to describe the services it intends to offer and provide other information, including the existence of civil, criminal or administrative actions relevant to the provider's operation of benefit plans.

Lifetime income disclosures on participant statements. The SECURE Act required defined contribution plans to include on participant statements at least annually an illustration of the monthly amount a participant could receive as a single life and joint and survivor annuity, based on the participant's current balance. The Act required the DOL to list the assumptions plans must use when making these illustrations, and to provide a model explanation for participants.

In an interim final rule issued on August 18, the DOL stated that the illustrations must be based on the participant's balance at the end of the statement period, assuming that the monthly payments start on that day. Plans must assume that the participant is 67 years old with a spouse of the same age. The calculations must use the 10-year Treasury interest rate and the same mortality table as the one generally used to calculate lump-sum distributions from defined benefit plans. The rule includes a model explanation for participants to accompany the statement. Plan sponsors will have safe harbor protection from liability if they use the prescribed assumptions and provide the model explanation. The rule is effective on September 18, 2021, but DOL is taking comments until November 17, 2020.

More guidance expected

We expect that the IRS and DOL will be issuing additional SECURE Act guidance in the coming weeks and months.

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