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**The SECURE 2.0 Act:
Things We Now Know
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Speaker

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The SECURE 2.0 Act of 2022

- 529 pages long
- More than 90 substantive provisions
- Easily the most significant law affecting retirement plans since the Pension Protection Act of 2006

SECURE 2.0 – Mandatory vs Permissive Provisions

- Some provisions are mandatory
 - But decisions may need to be made as to how a plan complies
- Other provisions are permissive
 - Decisions will need to be made as to whether these provisions should be implemented in a plan

SECURE 2.0 – Detail Lacking

- Unfortunately, Congress did not tell us everything we need to know in order to implement the 90+ provisions in the statute
- That task has been left mostly to the Treasury / IRS
 - With a few things falling to the DOL

SECURE 2.0 – Agency Guidance

- In the first eight months after enactment, almost no guidance was provided
- However, starting in September 2023, guidance on multiple aspects of SECURE 2.0 has been issued
 - A partial listing can be found at the end of this presentation

Guidance Addresses:

- Participation by long-term part-time employees
- Requirement that new plans offer automatic enrollment
- Incentives for employees to contribute to a plan
- Matching contributions on student loan repayments
- “Roth-ifying” employer contributions
- Roth-only catch-up contributions

Guidance Addresses:

- Special rules for participants affected by federally-declared disasters
- Distributions to participants who are
 - Terminally ill, and/or
 - Victims of domestic violence
- Pension-linked emergency savings accounts

Long-Term Part-Time Employees

SECURE Act (2019)

– LTPT Employees

- Non-precise “plain English” summary:
 - Beginning in 2024
 - Employees must be allowed to participate in a 401(k) plan
 - If they have worked at least 500 hours
 - In each of three consecutive 12-month periods
 - (Soon to be two consecutive 12-month periods)
 - SECURE Act (2019), § 112

Concept of “Limited Participation”

- But they do not have to be “full participants”
- SECURE 1.0 recognizes a concept of “limited participation”
 - Disclaimer: Our term
 - Not an official US Government term!

“Limited Participation”

- Under SECURE 1.0
 - Long-time part-time employees must be allowed to make 401(k) elective deferrals
 - But employers do not have to provide
 - Employer matching contributions, and/or
 - Employer nonelective contributions
 - Disregarded for purposes of
 - Nondiscrimination testing, and
 - Applying the top heavy rule

SECURE 2.0 Act Changes

- The SECURE 2.0 Act made minor changes to the LTPT provisions in the SECURE Act
- Beginning in 2025
 - Instead of three consecutive years with more than 500 hours
 - Only two consecutive years with more than 500 hours can be required
 - SECURE 2.0 Act, § 125
- Additionally, LTPT provisions apply to 403(b) plans beginning in 2025

Important Clarification: Other Eligibility Conditions

- Eligibility conditions that are not based on age or service are still permitted
 - For example, excluding employees in “a job classification that is not based on age or service” is permitted
 - But a job classification cannot be “a proxy for imposing an age or service requirement”
 - Prop. Reg. § 1.401(k)-5(c)(3)

Automatic Enrollment Requirement for New Plans

Automatic Enrollment for New Plans

- Existing law encourages (but does not require) the use of “automatic enrollment”
- The SECURE 2.0 Act requires new 401(k) / 403(b) plans to use “auto enrollment”
 - “New” means adopted on or after December 29, 2022

Exceptions to Requirement

- Small employers
 - No more than 10 employees
- New employers
 - Business is less than three years old
- Church and governmental plans

Deferral Percentages

- First year deferral percentage must be at least 3%
 - Can be set at a higher percentage
 - But not more than 10%
- Participants can opt out by making a deferral election of their own

Annual Increases

- If, after the “first year of participation,” the participant still has not made an election of his/her own, then
 - The participant’s deferral percentage must be “auto increased”
 - Effective on the first day of each plan year
- Amount of the increase must be 1% per year
 - Up to a minimum of at least 10%
 - Minimum can be set as high as 15%

When Is a Plan Adopted?

- A plan is “adopted” on the date the plan terms are “adopted initially”
 - Even if the effective date is not until later
- For example:
 - Plan is adopted on October 3, 2022
 - But effective date is January 1, 2023
 - Plan was adopted before December 29, 2022
 - IRS Notice 2024-2, § II(A), Q&A A-1

Incentives for Contributions

The Contingent Benefit Rule

- “Benefits (other than matching contributions) must not be contingent on [a participant’s] election to defer”
 - Code § 401(k)(4)

New Exception

- Employers are permitted to provide a “*de minimis* financial incentive” to employees who elect to defer compensation
 - But plan assets cannot be used to provide the incentive
 - Code § 401(k)(4)(A), as amended
 - Code § 403(b)(12)(A), as amended
- “*De minimis*” is not defined in the statute

Small Incentives for Contributions

- A “*de minimis*” financial incentive cannot exceed \$250 in value
- May be offered only “to employees for whom no election to defer ... is already in effect”
 - This would appear to mean that an incentive cannot be offered to employees who have already been “automatically enrolled”
 - IRS Notice 2024-2, § II(D)

Takeaways from Notice 2024-2

- The *de minimis* financial incentive can be
 - Paid in installments, and
 - Payment can be conditioned on an employee “continuing to defer”
- But the total incentive cannot exceed \$250 in value
 - IRS Notice 2024-2, § II(D) Q&A D-2

Example in Notice 2024-2

- Employer announces the following:
 - Employees will receive a \$100 gift card if
 - They are not currently making any deferrals, and
 - They make an election to defer within the next 90 days
 - Employees who do this will receive a second \$100 gift card if one year later, they are continuing to make deferrals
 - IRS Notice 2024-2, § II(D) Q&A D-2

Tax Implications

- *A de minimis* financial incentive
 - “is includible in the employee’s gross income and wages,” and
 - “is subject to applicable withholding and reporting requirements for employment tax purposes
 - unless the incentive “satisfies an exception under the Code”
 - IRS Notice 2024-2, § II(D) Q&A D-5

Gift Cards

- A gift card is not excludible from an employee's gross income as a *de minimis* fringe benefit
- Per the IRS
 - “[A]s a cash equivalent, it is not eligible for that exclusion”
 - “therefore the gift card is includible in the employee's gross income and wages and is a taxable fringe benefit for employment tax and reporting purposes”
 - Unless another exception applies
 - IRS Notice 2024-2, § II(D) Q&A D-2

Matching Contributions On Student Loan Repayments

Student Loan Matching Contribution

- Employers may choose (but are not required) to
 - Provide an employer matching contribution
 - Based on the “qualified student loan payments” (or “QLSPs”) made by their employees
 - On their “qualified education loans”

Matching Contributions for Student Loans

- If this is done, for matching purposes
 - Student loan repayments
 - Will be treated
 - As if they were participant “elective deferrals” to the plan
- But the match can be provided at the end of the year
 - Rather than on an ongoing basis during the year

Matching Contributions for Student Loans – Example #1

- ABC 401(k) Plan provides a matching contribution equal to
 - 100% of participant elective deferrals
 - Up to 4% of the participant's compensation

Matching Contributions for Student Loans – Example #1

- Sallie Mae's compensation is exactly \$50,000
- She defers nothing into the plan
 - But she does make \$2,500 in student loan repayments

Matching Contributions for Student Loans – Example #1

- If the plan is providing a match on student loan repayments, Sallie Mae's matching contribution will be \$2,000
 - Loan repayments are treated as if they were deferrals
 - 100% match on deferrals, but only up to 4% of compensation
 - 4% of \$50,000 is \$2,000
 - So no match on loan repayments above \$2,000

Matching Contributions for Student Loans – Example #2

- Sallie Mae's compensation is still exactly \$50,000
- But, in addition to making \$2,500 in student loan repayments, she also defers \$3,000 into the plan

Matching Contributions for Student Loans – Example #2

- Loan repayments are treated as if they were deferrals
 - \$3,000 in actual deferrals
 - Plus \$2,500 in loan repayments
 - Equals \$5,500

Matching Contributions for Student Loans – Example #2

- The employer match is 100% of deferrals
- But the match is capped at 4% of compensation
 - 4% of \$50,000 is \$2,000
- So, by the end of the year, Sallie Mae
 - Has already received the maximum possible match, and
 - Will not receive any additional match based on her student loan repayments

Starting Point: Requirements for a QSLP

- A payment
- Made by an employee
- In repayment of a “qualified education loan”
- That was incurred by the employee
- To pay for “qualified higher education expenses” of
 - The employee
 - The employee’s spouse, or
 - The employee’s dependent
 - IRS Notice 2024-63, § III, Q&A- A-1

Requirements for a QSLP

– “Incurred by the Employee”

- The employee “must have a legal obligation to make the payment under the terms of the loan”
 - Generally will include a cosigner
 - But not a guarantor
 - Notice 2024-63, § III, Q&A- A-1

Limits on Providing QSLP Matching Contributions

- If a QSLP match is offered, “all employees eligible to receive elective deferral matches ... must be eligible to receive QSLP matches”
- Cannot limit QSLP matches to payments on loans for
 - The employee’s own education
 - Attendance at a particular school, and/or
 - Particular degree programs
 - Notice 2024-63, § III, Q&A- B-4 & B-5

Employee Certification of QSLPs

- Employee must certify that “the payment satisfies the requirements to be a QSLP”
 - Annual certification for all payments is permissible
- Certification must include the amount and date of each payment
 - Notice 2024-63, § III, Q&A-B-1 & B-2

Providing the Match

- Plans “may establish any reasonable administrative procedures to implement a QSLP match feature”
 - Including the “QSLP match claim deadline” or deadlines
 - Notice 2024-63, § III, Q&A- C-1 & C-2
- Match may be provided “at a different frequency than elective deferral matches”
 - But “not less frequently than annually”
 - Notice 2024-63, § III, Q&A- E-3

“Roth-ifying” Employer Contributions

Normal Rule

- Participants are not taxed on
 - Matching contributions, and/or
 - Employer nonelective contributions
 - Until the contribution is actually distributed to the participant

SECURE 2.0 Roth Option

- Plans are permitted (but not required) to give participants
- The option of choosing to receive employer contributions
 - Such as matching contributions and nonelective contributions
- On a Roth basis
- When those contributions are made
 - SECURE 2.0 Act, § 604

Things We Now Know

- Must be designated by the employee before the contribution is allocated to the employee's account
- Designation must be irrevocable
- Employee must have an effective opportunity to make (or change) that designation at least once each plan year
 - IRS Notice 2024-2, § II(L)

Tax Treatment

- Includible in income as of the date it is allocated to the individual's account
 - Even if the contribution is deemed to have been made as of the last day of the prior taxable year of the employer
 - IRS Notice 2024-2, § II(L), Q&A L-2
- Reported using Form 1099-R
 - IRS Notice 2024-2, § II(L), Q&A L-9

Tax Reporting

- Per 2024 Instructions for Form 1099-R:

Report designated Roth nonelective contributions and designated Roth matching contributions for the year in which the contributions are allocated. Enter the total amount of designated Roth nonelective contributions and designated Roth matching contributions that are allocated to an individual's account in the year in boxes 1 and 2a. Use Code G in box 7. See Q&A L-9 of Notice 2024-2, available at [IRS.gov/irb/2024-02_IRB#NOT-2024-2](https://www.irs.gov/irb/2024-02_IRB#NOT-2024-2).

Catch-Up Contributions “Roth Only” for Some Participants

“Roth Only” Requirement for Catch-Up Contributions

- Catch-up contributions
 - Cannot be made on a pre-tax basis
 - But must instead be made on a Roth basis
 - Beginning in 2024*
 - *Wait two more slides – real date is 2026!
 - If the participant’s wages in the previous year exceeded \$145,000
 - SECURE 2.0 Act, § 603(c)

Participants Subject to “Roth Only” Requirement

- Requirement applies if
 - The participant’s wages
 - As defined in Code § 3121(a)
 - In the previous calendar year
 - From the employer sponsoring the plan
 - Exceed \$145,000
 - As indexed for inflation in years after 2024

What We Now Know: 2024 Really Means 2026

- SECURE 2.0 says that this requirement applies beginning in 2024
- However
 - As a result of a two-year “administrative transition period,”
 - “2024” really means 2026

“Administrative Transition Period”

- During the two-year “administrative transition period”
 - All catch-up contributions
 - Will be treated “as satisfying the requirements” of Code § 414(v)(7)(A)
 - As added by § 603 of the SECURE 2.0 Act
 - Even if the contributions
 - Were not made on a Roth basis, and/or
 - The plan does not provide for Roth contributions
 - IRS Notice 2023-62

Other Takeaways from IRS Notice 2023-62

- Subject to comments received, the Treasury and IRS expect to issue guidance saying the following:

Participants Who Do Not Have § 3121(a) Wages

- The “Roth only” requirement will not apply to participants who do not have 3121(a) wages
 - Partners or other self-employed individuals
 - State and local government employees “whose services were excluded from the definition of employment under section 3121(b)(7)”
 - Notice 2023-62, § V(1)

Pre-Tax Elections Can Automatically Be Switched to Roth

- For participants who are subject to the “Roth only” catch-up contribution requirement
 - An election to make pre-tax catch-up contributions
 - Can be treated as an election to make Roth contributions
- In other words, it appears that the plan can automatically switch pre-tax deferrals to Roth deferrals
 - Notice 2023-62, § V(2)

Wages From More Than One Employer

- An individual's wages will not be aggregated for this purpose if
 - The individual is a participant in a plan that is “maintained by more than one employer,” and
 - The individual received wages from more than one of the participating employers
 - Notice 2023-62, § V(3)

Be Careful!

- If you have a “single employer plan,”
 - Then you don’t have “more than one employer”
 - Even if the participant has received “wages” from more than one “participating employer” in the plan

Federally-Declared Disasters

SECURE 2.0 – Participants Affected by Federally Declared Disasters

- Plans can choose to provide special “relief” to participants
 - Who live in a “qualified disaster area” and
 - Who have “sustained an economic loss by reason of” a federally-declared disaster

SECURE 2.0 – Participants Affected by Federally Declared Disasters

- These participants may be allowed to
 - Request and receive a “qualified disaster distribution,” and/or
 - Borrow more than normal limit for plan loans, and/or
 - Stop making payments on plan loans for a period of up to one year
 - Without experiencing a default

Qualified Disaster Distributions – Key Points

- Qualified disaster distributions
 - Are available for up to 180 days after the date of the disaster
 - But are limited to no more than \$22,000 per disaster
 - From all plans

Qualified Disaster Distributions – Key Points

- Distribution will (normally) be includible in a participant's taxable income
 - But participants can spread their tax liability over three years, and
 - The 10% penalty tax for early distributions will not apply
- Distributions can be repaid within three years
 - To the Plan or to an IRA

IRS Guidance – “Economic Loss”

- IRS guidance suggests (without actually saying) that an “economic loss” needs to be more than a small loss
- IRS Fact Sheet 2024-19 provides three examples of an “economic loss”:
 - Loss to real or personal property from fire, flooding, looting, vandalism, theft, wind, or other cause
 - Loss related to displacement from the individual’s home
 - Loss of livelihood due to temporary or permanent layoffs

Relief Related to Plan Loans: Loan Limits

- SECURE 2.0 allows the normal plan limits to be doubled
- Participants who have “sustained an economic loss” can borrow up to the lower of
 - 100% of their vested account balance
 - Rather than 50%
 - \$100,000
 - Rather than \$50,000

Relief Related to Plan Loans: Suspension of Payments

- SECURE 2.0 also allows
 - Loan repayments to be suspended
 - For up to one year
 - For participants who have “sustained an economic loss”

IRS Guidance

– Suspension of Loans Repayments

- For payments to be suspended, the loan must be outstanding on or after
 - The first day of the “incident period” for the qualified disaster, or
 - The first day of the disaster declaration for the qualified disaster
- This is in addition to suggesting that an “economic loss” needs to be more than a small loss
 - IRS Fact Sheet 2024-19 (May 2024)

Distributions to Terminally Ill Individuals

Early Distribution Penalty Tax Exemption: Individuals with a Terminal Illness

- 10% penalty tax on “early distributions” does not apply to distribution to terminally ill employee
- “Terminally ill”
 - Certified by physician
 - Death reasonably expected within 7 years from certification
- May be repaid within three-year window
 - SECURE 2.0 Act, § 326

Individuals with Terminal Illnesses

- Does not create a new distributable event
 - Meaning that a participant who is still employed must be able to receive an in-service distribution on some other basis
- However, an individual may
 - Treat an otherwise permissible in-service distribution
 - As a “terminally ill individual distribution” on his/her federal income tax return
 - If the conditions for receiving a “terminally ill individual distribution” have been met
 - Notice 2024-2, § II(F) – Q&A F-15.

IRS Guidance

– Individuals with Terminal Illnesses

- Distribution must be made on or after the date the individual has been certified by a physician as having a terminal illness
- The physician certification must include the following:
 - A narrative description of the evidence supporting the physician's determination
 - The date the physician examined the individual
 - An attestation by the physician
 - been met
 - Notice 2024-2, § II(F) – Q&A F-6 & F-7

Domestic Abuse Victim Distributions

Domestic Abuse Victim Withdrawals – Optional (Not Required)

- Plans can choose to allow victims of domestic violence to request and receive a distribution
 - IRS Notice 2024-55, Q&A B-7

Domestic Abuse Victim Withdrawals

- An “eligible distribution” to a domestic abuse victim cannot exceed the lesser of
 - \$10,000 (indexed) or
 - 50% of individual’s total accrued benefits
- Must be made within one year “of any date on which the individual is a victim of domestic abuse by a spouse or domestic partner”

Domestic Abuse Victim Withdrawals

- “Domestic abuse” means
 - Physical, psychological, sexual, emotional or economic abuse
 - Including efforts
 - To control, isolate, humiliate, or intimidate the victim, or
 - To undermine the victim’s ability to reason independently
 - Including by means of abuse of the victim’s child or another family member living in the household
 - » Code § 72(t)(2)(K)(iii)(II)

Domestic Abuse Victim Withdrawals – Self Certification

- Distribution requirements are met if a participant certifies that
 - The participant is “eligible for a domestic abuse victim distribution” and
 - The distribution is being made within the one-year period
- To meet the certification requirements, the individual “could check [a] box on the distribution request form”
 - IRS Notice 2024-55, Q&A B-9

Early Distribution Penalty Tax Exemption: Domestic Abuse Victim Withdrawals

- 10% early distribution penalty will not apply to
 - An eligible distribution to domestic abuse victim
 - Made from eligible retirement plan
 - Within one year from any date of domestic abuse
- Even if the plan does not permit domestic abuse victim withdrawals
 - But the participant was able to receive a distribution on some other basis
 - IRS Notice 2024-55, Q&A B-14

Repayment of Domestic Abuse Victim Withdrawals

- Distribution can be repaid within three years after the date an “eligible distribution” was received
- The repayment is generally treated as if it were a rollover contribution to the plan or IRA
 - IRS Notice 2024-55, Q&A B-11 & B-12

Pension-Linked Emergency Savings Accounts (PLESAs)

Pension-Linked Emergency Savings Accounts

- An employer may (but is not required to) add a “pension-linked emergency savings account” to its defined contribution plan
 - Or “PLESA”
- A PLESA is part of a retirement plan, but is subject to a different set of rules

Rules for PLESA

- Limited to participants who are “non-highly compensated employees”
- Participants are limited to a \$2,500 cumulative contribution
 - But withdrawn contributions can be replaced with new contributions
- Beginning in 2025, \$2,500 limit will be subject to an annual adjustment

Rules for PLESAs

- Employers are prohibited from
 - Establishing a minimum contribution amount, and/or
 - Requiring participants to maintain a minimum balance
- Limited to participants who are “non-highly compensated employees”
- Any contributions must be made on a Roth basis

Rules for PLESAs

- Investments are limited to cash or cash-equivalents
- Withdrawals must be permitted at least once each month
- Participants cannot be charged for the first four withdrawals each year

Rules for PLESA

- Contributions must be matched if the plan provides a matching contribution
- However
 - Elective deferrals to the plan itself can be matched first, and
 - The matching contribution must be given to the participant in the defined contribution plan itself
- No other employer contributions are permitted
- Annual notice requirement applies

Guidance re PLESAAs

- IRS Notice 2024-2, § II
- DOL FAQs
 - www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/pension-linked-emergency-savings-accounts

Plan Amendments

Plan Amendments

- Deadline for adopting both required and discretionary plan amendments has been extended
 - Applies to both SECURE 1.0 and SECURE 2.0
- General deadline for qualified plans is December 31, 2026
 - For governmental plans, the deadline is December 31, 2028
 - Notice 2024-2, § II(J)

IRS and DOL Guidance

SECURE 2.0 – IRS Guidance

- Notice 2023-43
 - Expansion of EPCRS
 - May 2023
- Notice 2023-62
 - Roth-Only Catch-Up Contributions for Certain Participants
 - September 2023
- Proposed Regulations re Long-Term, Part-Time Employees
 - November 2023
- Notice 2024-02
 - “Grab Bag” Guidance re 12 different sections of SECURE 2.0
 - December 2023

SECURE 2.0

– IRS Guidance (Cont'd)

- Notice 2024-22
 - Pension Linked Emergency Savings Accounts
 - January 2024
- Fact Sheet 2024-19
 - Special disaster relief rules
 - May 2024
- Notice 2024-55
 - Emergency Personal Expense Distributions
 - Domestic Abuse Victim Distributions
 - June 2024

SECURE 2.0

– IRS Guidance (Cont'd)

- Final and Proposed Regulations
 - SECURE and SECURE 2.0 changes to required minimum distribution rules
 - July 2024
- Notice 2024-63
 - Matching contributions on Qualified Student Loan Payments
 - August 2024
- Notice 2024-73
 - Long-Term Part Time Employees and 403(b) Plans
 - October 2024
- Notice 2024-77
 - Inadvertent overpayments from plans
 - October 2024

SECURE 2.0 – DOL Guidance

- FAQs re Pension-Linked Emergency Savings Accounts
 - January 2024
- Proposed Regulations re Automatic Portability
 - January 2024

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