Chimento & Webb, P.C.

MEMORANDUM

To: Clients and colleagues

From: George Chimento, Rob Webb, Jessica Stanford, and Geoff Fay

Date: January 30, 2020

Re: Retirement Plan Changes in the Budget Deal

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1. *Introduction to the new law*

The SECURE Act[1] is a combination of reforms and mandates for Tax Favored Retirement Vehicles - qualified employer plans, IRAs, 403(b)s, and 457(b)s of charities and governmental units. It started as a House bill in May and waited to be added as a tagalong to something more critical, which was the recent bipartisan 2020 Budget Deal[2] signed by the president on December 20, 2019. This article emphasizes what will be most important to our client base of large employers with installed plans.

The full text of the SECURE Act (Subdivision O of the 2020 Budget Deal) is at this link. A Committee Report which explains most of the changes is at this link. There are also changes relevant to benefit plans and personal planning in the 2020 Budget Deal that were not part of the SECURE Act, so we describe those as well, again emphasizing what is most important to our clients.

2. *Deadline for amendments*

Some of the changes in the SECURE Act are required, and some are optional. Retroactive amendments will be allowed provided they are executed no later than the end of the first plan year beginning on or after January 1, 2022 (January 1, 2024 for a collectively bargained plan in effect before December 20, 2019).

A condition for the retroactive treatment (and qualified status) is that the plan must have been operated during this period as if the change were in effect since the required effective date.

Observation: Notwithstanding the delayed amendment date, an employer should be planning now for operational compliance and employee communication, especially if it decides to implement optional features such as in-service withdrawals from defined contribution plans for qualified births and adoptions, or in-service withdrawals after age 59 & ½ from defined benefit and money purchase pension plans.

3. *In-service distributions from pension plans*

Background:

Defined benefit and money purchase pension plans were not allowed to permit in-service distributions to active employees prior to age 62, whereas 401(k) and 403(b) plans, could permit

[1] The "Setting Every Community Up for Retirement Enhancement Act of 2019"
[2] The "Further Consolidated Appropriations Act, 2020''

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such distributions after age 59 & ½ and even more lenient rules applied to basic profit sharing plans.

Changes:

Defined benefit and money purchase plans (including target plans) may be amended to allow in-service distributions as early as age 59 & ½.

Effective: Plan years beginning after December 31, 2019.

4. Qualified birth and adoption withdrawals

Background:

Qualified plans generally must have in-service withdrawal restrictions prior to age 59 & ½. Withdrawals prior to that age, if permitted, are usually subject to a 10% penalty tax as well as income tax, with differing exceptions for the 10% penalty if from a plan or an IRA.

Changes:

(1) Regardless of age, withdrawals up to $5,000 are now allowed within one year following birth of a child or adoption of a child who is less than 18 or disabled. The $5,000 is a per person limit, meaning that each parent can withdraw $5,000 in the aggregate from that person's eligible plans and IRAs on account of a birth or adoption.

(2) Withdrawals are taxable, but no 10% penalty tax applies. Withholding is not required but may be elected.

(3) The parent must identify the name, age, and TIN of the child or eligible adoptee on the tax return for the year of withdrawal.

(4) Eligible withdrawal vehicles are IRAs, 403(b) contracts and employer defined contribution plans which permit such withdrawals. Defined benefit plans and 457(b) plans sponsored by tax exempt employers may not permit these withdrawals.

(5) An employer which permits withdrawals must enforce the limit ($5,000 per event for all of its plans in the aggregate, including controlled group plans). The employer does not need to check if the employee has exceeded the limit due to withdrawals from other vehicles, such as personal IRAs.

(6) Individuals have the right to return a withdrawal to the plan which permitted it, provided that they are still eligible for the plan, but not additional amounts. (There is no such cap on returning withdrawals to IRAs.) When amounts are returned, the withdrawal is then considered to have been non-taxable.

Observation: It's unclear whether there is a time limit for repayment. Subject to IRS guidance, we think that a repayment would be timely if made within the time for amending the initial return which reported the taxable distribution, and that the initial return

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could then be amended to show reduced income equal to the amount of the repayment. A better approach would be for the IRS to allow a credit on a current return for overpaid tax in a prior year, making it unnecessary to amend a prior return. Let's see what IRS says.

Effective: Distributions after December 31, 2019. Tax-Favored Retirement Vehicles except defined benefit plans and 457(b) plans sponsored by tax exempt employers.

5. Automatic enrollment safe harbor limits increase to 15%

Background:

A safe harbor feature is a good way to bypass ADP/ACP testing of 401(k) deferrals, matching contributions, and after-tax (non-Roth) employee contributions. Under current law, a qualified automatic contribution arrangement ("QACA") allows an employer to make a smaller safe harbor matching contribution than required for plans with more traditional enrollment.

Instead of making a 100% match on the first 3% and a 50% match on the next 2% (4% in total), a plan with a QACA requires 100% of the first 1% and 50% of the next 5% (3 & ½ % in total).

QACAs must apply uniformly and must permit employees to opt out entirely or to select a different percentage. The QACA does not need to be offered to employees who have opted out or who made positive elections for the plan year.

Changes:

The SECURE Act allows employers to set a QACA default limit as high as 15% (rather than 10%) after the first full year of participation. As revised, a Plan can be designed with QACA limits as follows:

- From 3% to 10% (unchanged) for a full plan year after initial QACA eligibility.
- From 4% to 15% (changed from 10%) during the next (second) full plan year.
- From 5% to 15% (changed from 10%) during the next (third) full plan year.
- From 6% to 15% (changed from 10% during any (fourth and later) plan year.

Effective: Plan years after December 31, 2019. All 401(k)s, and all 403(b)s with matches.

6. Safe harbor rules made easier

Background:

Some employers prefer to make contributions on a non-matching basis to satisfy the safe harbor option for ADP/ACP testing. The amount required for these "non-elective" employer

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contributions is 3%. As is the case with matching safe harbor contributions, they must be fully vested. Plans may not permit their in-service withdrawal except for hardship, total disability, death or attainment of age 59 & ½. A descriptive notice must be provided to employees at least 30 days before the start of each plan year. The feature must be in the plan, or the notice must advise it may be added by amendment and supplemental notice at least 30 days before the year ends.

Changes:

— Annual notices not required for plans with non-elective safe harbor contributions

The requirement to distribute a safe harbor notice prior to the start of a plan year is removed for plans with this safe harbor feature (but not for plans which satisfy the safe harbor with matches).

— Retroactive amendments allowed to add a non-elective safe harbor feature

(1) A Plan which does not have the 3% non-elective safe harbor in the document can add it retroactively except during the last 30 days of the plan year. This means that employers which did not provide a beginning of the year notice can add a non-elective safe harbor feature after the year started. This mid-year amendment flexibility does not apply to plans which already have a safe harbor matching feature in effect for the plan year.

(2) A retroactive amendment adding a non-elective feature can even be added at any time in the following plan year, but the non-elective contribution must be 4%, not 3%, in that circumstance.

Observation: The normal correction for a failed ADP or ACP test is to make refunds or to contribute focused Q-NECs. The ability to adopt retroactive amendments at a 3% or 4% cost that can be limited to non-highly compensated employees adds extra flexibility.

Effective: Plan years after December 31, 2019.

7. Age-related changes

— Older persons can contribute to IRAs.

Background:

Previous law did not allow contributions to traditional non-Roth IRAs for the year of reaching age 70 & ½ or later. After reaching age 70 & ½, an IRA owner may reduce taxable adjusted gross income ("AGI") up to $100,000 with IRA direct contributions to qualifying charities.

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Change:

Individuals may now contribute to IRAs at any age. Contributions reduce the $100,000 amount that can be claimed in a year as a reduction of AGI for charitable IRA contributions.

Effective: For IRA contributions for tax years after 2019.

— Age for required minimum distributions raised to 72

Background:

The Required Minimum Distribution ("RMD") Age for all retirement vehicles has been age 70 & ½ for many years. The RMD for that first year may be paid as late as April 1 of the following year. Employer plans are allowed to use a late retirement year as the first RMD year for employees who keep working after age 70 & ½, unless they own more than 5% of the employer.

Changes:

Substitute age 72 for age 70 & ½ for all RMD rules. To prevent cut-backs for late retirees in defined benefit plans, the late starting benefit must still be equivalent to the benefit that would have started at age 70 & ½.

Effective: Only for persons who reach age 70 & ½ after December 31, 2019. Persons already 70½ by that date must continue to receive under the old rules. Applies to all Tax-Favored Retirement Vehicles.

Observation: Independent of this change to the law, IRS has proposed a revision to its RMD regulations to reflect longer life expectancies for all individuals, including those already over age 70 & 1/2. These proposed regulations are expected to go into effect for RMDs in 2021.

Observation: Withdrawals for charitable donations after age 70 & ½ are still excludible from taxable adjusted gross income, even for those with the new age 72 RMD age. IRA direct gifts to charities save taxes for those who take the large standard deduction and who no longer itemize charitable deductions.

— Death benefits must be distributed on a faster schedule for some beneficiaries

Background:

Before the change, distributions could be spread over the entire lifetime of a beneficiary in installments, provided that the first installment was made within the year following the death. There was also a rule that if the account owner died before age 70 & ½ that payments could start

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later than the year following death, but would have to be paid in full by the end of the 5th year following death.

A popular planning technique, especially for last surviving grandparents, was to leave IRAs to grandchildren so that they could enjoy retirement income over their long life expectancies, sometimes for decades.

Changes:

This new rule actually simplifies matters, but it compresses the time period over which benefits can be received by some persons ("Less-favored Beneficiaries") from life expectancy to 10 years. That increases tax revenue, but there is a welcome trade-off. The age of the account owner at death no longer matters, even if over age 70 & ½ and if lifetime benefits were started. Nothing has to be paid until the 10th year following the year of death, and everything comes due then. Less-favored Beneficiaries can wait until then or take out amounts, as desired, within the ten year period.

The new rule still allows distribution over life expectancies for some beneficiaries ("Favored Beneficiaries") if they prefer that rather than taking under the 10 year option that is required for Less-Favored Beneficiaries. Favored Beneficiaries include spouses, beneficiaries who are not younger by more than 10 years, disabled persons, and special trusts for the chronically ill and disabled. Children who have not reached the "age of majority" are also Favored Beneficiaries, with a special twist: although the age of majority in most states is 18, the age can be as high as 26 for those enrolled in "specified" education (which has not been specified by IRS). Remaining amounts after that age must then be distributed within 10 years of that date. Grandchildren will be Less-Favored Beneficiaries unless disabled or chronically ill.

If a Favored Beneficiary dies, his or her beneficiary will be subject to the rules for Less-favored Beneficiaries.

If a Trust is the beneficiary and if all of its beneficiaries are Favored Beneficiaries and if no one but Favored Beneficiaries can enjoy the trust until all of the Beneficiaries die, it gets Favored Beneficiary treatment. If only some of the trust beneficiaries are Favored Beneficiaries, and if the trust subdivides at the account owner's death into separate trusts for such persons, those separate portions of the trust will have Favored Beneficiary treatment.

Observation: Trusts need to be examined. The easiest way to stretch payments for minor children will be to provide that they are divisible into separate portions for each.

Spouses continue to have the right to defer the RMD starting date. For their own accounts, such as rollover spousal IRAs, that is the year of attaining RMD age – now 72. For payments from a deceased spouse's accounts, the surviving spouse can elect the 10 year rule for Less-Favored beneficiaries. Alternatively, the surviving spouse can elect under current law rules to defer the starting date for distributions until the date that would have been the spouse's RMD,

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and start annual distributions then up to the spouse's expectancy (as if the spouse were still alive).

Finally, for beneficiaries which did not qualify as "designated beneficiaries" under the former RMD rules, such as corporations or ineligible trusts, nothing seems to have changed. All must be distributed within five years of the year of death.

Observation: There is a lot of planning flexibility for those who realize this law change is not a simple elimination of stretch IRAs.

Observation: Large employers may not want this much flexibility in their plan documents. Considering that the same flexibility is available in rollover IRAs, we suspect many employers will continue to pay death benefits only in taxable lump sums, direct rollovers, or a combination.

Effective: For distributions with respect to decedents who die after December 31, 2019, including beneficiaries of persons who died before 2020. Applies to all Tax-Favored Plans subject to RMD requirements.

Not effective for binding annuities with survivor features purchased before December 20, 2019.

For collectively bargained plans, deaths after December 31, 2021 or earlier expiration of the agreement.

Observation: Many qualified plans include collectively bargained employees. This deferred effective date does not appear to be limited to members of the bargaining unit.

8. Annuities: a mixed message

The SECURE Act eases ERISA fiduciary concerns for defined contribution plans which distribute guaranteed retirement income contracts ("Distribution Annuities"). These are annuities which provide income either for a fixed term or over single or joint life expectancies. On the flip side, the Act makes it easier for plans to get rid of annuity options and to distribute annuities they no longer want to participants, even to those who are less than a required distribution age such as 59 & ½. Finally, annual benefit statements for defined contribution plans will need to disclose hypothetical annuity income which can be purchased with an account, based on assumptions and a model disclosure form to be provided by the Labor Department. Here's more detail on these three changes.

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— Fiduciary relief for purchasing Distribution Annuities

Background:

Fiduciaries have sometimes been reluctant to offer annuity features in defined contribution plans. The concern is obvious. What if the insurance company fails? In addition, when expenses are taken into account, even annuities from reputable carriers are very costly. Still, for unsophisticated participants who just hope for a regular income from their defined contribution account, annuities are helpful.

Changes:

The SECURE Act sets out a bright line safe harbor. Fiduciaries of defined contribution plans, such as the typical 401(k), who follow its guidelines will not have ERISA liability if they purchase Distribution Annuities from an insurer that later is unable to honor them. They will not be required to monitor the Distribution Annuities after they have been purchased and distributed. They may now shop with carriers who verify "financial capability" under the guidelines, even if the carriers do not have the very highest third-party rating.

Observation: This safe harbor only applies to defined contribution plans which purchase Distribution Annuities. Although reasonable, they do not provide a safe harbor for selection of a GIC contract or for purchase of Distribution Annuities by a defined benefit plan.

The safe harbor rules are:

(1) The fiduciary is not required to purchase the least expensive option.

(2) The fiduciary must perform an examination that the costs, including fees and commissions, are "reasonable" in relationship to the benefit provided. For plans which provide annuities through a single vendor, such as TIAA for many 403(b) plans, it is unclear whether the safe harbor process requires evaluation of other carriers.

(3) The examination must be conducted prior to distribution of the contract to an individual participant or beneficiary. For ongoing distributions to various participants, the review (including obtaining the insurer's representations) may be conducted annually.

(4) Most importantly, the fiduciary process must consider the insurer's "financial capability." Here's the good part. The safe harbor blesses "financial capability" of an insurer which provides the following written representations:

- it is licensed to offer guaranteed retirement contracts;
- for the last seven years it has had an unrevoked certificate of authority from its domiciliary state, has had adequate reserves required by that state, and is not under an order of supervision or rehabilitation or in liquidation;

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- at least every 5 years it undergoes a financial examination as required by the Commissioners of its domiciliary state; and
- it will notify the employer prior to issuance of a Distribution Annuity if any of the above representations are no longer valid.

Effective: For purchases after December 20, 2019.

— Getting rid of the annuity investment option

Background:

Defined contribution plans are not required to offer annuity investment options. However, some do, especially 403(b) plans for tax exempt employers. With the realization that internal annuity costs are very high and sometimes do a disservice to employees, some employers would like to remove annuities from their investment menu. However, many annuities have steep surrender costs, making it too expensive to liquidate them without causing financial pain and unhappiness for participants who own them.

Because of legal restrictions on the ability to make in-service distributions from many plans – such as having to wait until age 59 & ½ for 401(k) distributions – employers have been stymied if they wanted to distribute annuities as part of a divestiture program to get rid of the annuity option.

Changes:

Within 90 days of an employer amendment to remove annuity choices from a plan's investment menu, a plan can distribute the annuity product or a replacement annuity regardless of otherwise applicable restrictions on in-service distributions.

The distribution of an annuity held within a plan must be a direct transfer, either to another employer's retirement plan or to an IRA. A replacement annuity must have typical retirement-type features, providing for distributions over lifetime or a joint lifetime.

Finally, a qualified plan distribution annuity contract is an annuity contract purchased for a participant and distributed to the participant by an employer-sponsored retirement plan or an employer-sponsored retirement plan contract.

Effective: Plan years starting after December 31, 2019. Qualified defined contribution plans, 403(b) plans, and 457(b) plans.

— Annual disclosure regarding potential lifetime income from a plan account

Background

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Qualified defined contribution plans are required to provide an annual statement showing the account balance and vested percentage. It's not possible for the average participant to estimate lifetime income that the account could provide.

Changes:

The annual benefit statement for qualified defined contribution plans will now need to disclose what lifetime income an annuity would provide if a plan account were converted to a lifetime annuity. The DOL is charged with developing a model disclosure form and assumptions (to be updated periodically) for costs of a hypothetical annuity. Assumptions will, at a minimum, assume that the participant is married to a spouse of the same age. It's reasonable to believe that there will also be single life and period certain assumptions in the final DOL guidance.

Plans are not required to purchase annuities and there is no liability in the event the projected lifetime income cannot in fact be obtained.

Effective: Plan years starting more than 12 months after the DOL issues guidance, which guidance must be provide no later than December 20, 2020.

9. Part-timers must be included for deferral eligibility

"Long term part-time employees" must be allowed to defer, even if they do not meet the initial year of service requirement (1,000 hours in a 12 month eligibility period) which qualified plans are allowed to use. If a Plan allows for automatic enrollment, they should be included with rights to opt out.

(1) An employee is a long term part-time employee after completion of at least 500 hours in a three consecutive year period, and continues to have that status even if hours later drop below 500.

(2) Although deferrals must be permitted, long term part-time employees may be disregarded for all qualification tests, including ADP and ACP testing.

(3) Safe harbor employer contributions are not required for this group, even though application of an hours test is generally not allowed for safe harbors after an employee qualifies.

(4) A Plan can continue to apply a 1,000 hour test to share in other employer contributions.

(5) If these persons ever qualify for employer contributions, either due to reaching the 1,000 hour threshold or due to the employer liberalizing the rules, the 500 hour years will be credited for vesting.

Effective: Plan years beginning after December 31, 2020. Importantly, 12-month periods beginning before January 1, 2021 will not be taken into account, so this is really not effective until plan years starting after December 31, 2023. If an employer

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wants to start this early than the plan year starting in 2024, will it be allowed to disregard part-timers for qualification tests in the earlier years? Unclear. Hopefully, IRS would agree.

10. Closed and frozen defined benefit plans get relief

The Act formalizes relief for partially and fully frozen defined benefit plans ("Closed Plans") that meet certain conditions. This enables the plans to stay tax-qualified, even though they violate discrimination and coverage rules because the included class of employees tends to be older and more highly compensated over the years than the excluded class of newer members of the workforce, who often only get defined contribution participation.

This brief article just scratches the surface of an extremely complex, but welcome, strategy for employers who either want a full freeze because they can't afford to terminate their defined benefit plan, or who feel honor-bound to continue defined benefit accruals for longer service employees who had been counting on them.

Background:

IRS has been allowing Closed Plans to continue with qualified status under certain conditions, but the temporary nature of the relief has been unsettling for employers and participants. Now there are permanent rules that can be applied to Closed Plans, with special relief for closings that occurred prior to April 5, 2017.

> Especially important is that the SECURE Act embraces the idea of total benefit freezes, with replacement make-whole contributions to defined contribution plans for persons who have lost their defined benefits.

Changes:

Rules for defined benefit plans closed or frozen before April 5, 2017

(1) For the plan year of the close and the following 2 years, the plan satisfies discrimination tests and, is not amended after the close date to add benefits, rights, and features for the closed class that does not discriminate significantly in favor of highly compensated employees.

(2) There are easier rules for discrimination testing in those following 2 years, allowing the tests to disregard new employees added by mergers and acquisitions, aggregation with other plans with different plan years. Most importantly, matching contributions to defined contribution plans and ESOPs can be taken into account, which is generally not allowed when plans are aggregated for discrimination testing.

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Rules for plans closed or frozen at any past or future date

(1) The plan has been in effect for at least 5 years before the Close.

(2) During the 5 plan years prior to the Close, the employer has not stacked the deck for the Closed Plan, either by increasing the benefits "substantially" for the covered employees compared to what the non-covered employees get from other plans or by increasing the number of covered people in the plan by more than 50% before it is Closed.

(3) There are specific rules to determine whether the deck was stacked. Fortunately, employees added due to business mergers and acquisitions in the previous 7 years can be disregarded, and participants and benefits added due to plan mergers in the 5 years can be disregarded, with a few technical exceptions.

(4) Easier discrimination rules apply for ongoing years, similar to those for plans closed or frozen before April 5, 2017.

Special rules for enhanced benefits under defined contribution plans

Employers who freeze defined benefit plans have sometimes given those participants enhanced benefits under defined contribution plans. New employees do not get those make-whole contributions. The concept was to compensate only the persons who would lose future defined benefit accruals. Technically, these enhanced defined contribution plans could run afoul of traditional discrimination testing, especially when the "make whole" contribution is in the form of a match. The SECURE Act provides relief, with rules that are too much to describe in this brief article.

Observation: This is a planning opportunity for employers with unwanted defined benefit plans. Rather than terminating them with employee disappointment, existing participants can continue to benefit, either in the Closed Plan or with "make-whole contributions to a defined contribution plan.

Effective: December 20, 2019, with the option to elect retroactively to plan years beginning after December 31, 2013.

11. New plans can be adopted after the close of an employer's tax year

Background:

Since the beginning of time, or at least since the 1950s, the IRS has been clear. An employer cannot deduct a contribution to a new Qualified Plan unless the plan is signed and communicated by the last day of the employer's fiscal year. SIMPLE plans, allowing for salary deferrals to IRAs, need to be set up prior to October 1 of the calendar year in which effective. SEP plans, allowing for employer contributions to IRAs, can e set up after the tax year closes but not later than the following April 15.

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Changes:

The SEP and SIMPLE deadlines are not changed. The good news is for qualified plans. Contributions to new plans will now be deductible, provided the plan document is executed within the time for filing the employer's tax return (with extensions).

Observation: The requirement for employee notification is not mentioned. Conservative employers will notify employees within this extended timeframe to execute a new plan document. Obviously, 401(k) deferral elections will be prospective and only for compensation paid after the document is signed.

Effective: Employer taxable years starting after December 31, 2019.

12. Subsidies to encourage new plans

Background:

Current law offers a modest three year tax credit to small employers for third-party costs related to establishment, administration, and education for a new qualified retirement plan, or a SIMPLE or SEP IRA plan. The new plan must cover at least one non-highly compensated employee. The first of the three credit years can be the taxable year of the plan's establishment or the previous year, if elected.

The credit is for new plans only and is not allowed if there was another plan for the employees in the three years preceding the first credit year. The credit is for small employers, meaning less than 100 employees earning $5,000 or more in the previous year (aggregating all companies in a controlled or affiliated service group).

The current law credit is 50% of the start-up and administration costs, but not more than $500 per year. An employer cannot double-dip by claiming credit expenses as deductions.

Changes:

The credit is still limited to 50% of the eligible expenses, but the flat dollar amount is increased significantly for each of the three taxable years. It is now $250 multiplied by the number of non-highly compensated employees who are eligible to participate up to $5,000. For the very small, the yearly credit will be at least $500.

Effective: Employer taxable years beginning after December 31, 2019 for expenses related to qualified plans and SIMPLE and/or SEP IRA plans.

13. Subsidies to add automatic enrollment

Background:

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Current law does not offer a tax credit for adding an automatic enrolment feature to a 401(k) plan or SIMPLE IRA.

Changes:

Small employers, meaning less than 100 employees earning $5,000 or more in the previous year (aggregating all companies in a controlled or affiliated service group), get a $500 per year credit for adopting a new plan with automatic enrollment features, or for adding the feature to an existing plan. The credit is allowable regardless of actual expenses incurred to add the feature and is in addition to any allowable credit for establishing a new plan. (See Section 12.)

Effective: Employer taxable years beginning after December 31, 2019 for expenses related to 401(k) plans and SIMPLE IRA plans.

14. No credit card loans

Background:

Some qualified plans were adding a loan feature to allow participants to borrow from their accounts with credit cards.

Changes:

The SECURE Act prohibits plans from allowing participants to borrow through credit cards or similar arrangements.

Effective: Applies to loans made after December 20, 2019 from any Eligible Retirement Vehicle which allows loans.)

15. Penalties galore, so be sure to file those 5500 forms

(1) The tax penalty for not filing a Form 5500 is increased from $25 to $250 per day, not to exceed $150,000. The title of this provision states that it applies to retirement plan filings, but this this new penalty also seems to include late 5500s for "fringe benefits," meaning the typical health and welfare plan.

(2) The tax penalty for not filing a Form 5955-SSA for deferred vested participants has been increased from $1 to $10 per participant per day, not to exceed $50,000.

(3) The penalty for not providing the required rollover/tax withholding notice for retirement plan distributions is increased from $10 to $100 for each failure, not to exceed $50,000 for all failures during any calendar year.

Effective: For returns, statements and notifications required to be provided/filed after December 31, 2019.

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Observation: The DOL has its own set of discretionary penalties for late filing of 5500s. The SECURE Act didn't change these, because they are high enough already: $2,233 per day.

16. Section 529 expansion

Background:

Section 529 plans initially were limited to qualifying expenses for higher education, meaning tuition, fees, books, supplies, and equipment required for enrollment or attendance, and room and board for students who are enrolled at least halftime. Computer technology or equipment, internet access and related services and expenses for special needs of a student also qualify. Starting in 2018, up to $10,000 per year could be used for qualifying elementary and secondary school tuition, but not other expenses

Changes:

Section 529 plans may now pay a named beneficiary up to $10,000 tax-free (a lifetime limit) for principal and interest on a higher education loan. Loan expenses for a sibling of the 529 plan beneficiary, even if not a named beneficiary of the account, can also be paid. Sibling expenses will be applied to the $10,000 lifetime loan reimbursement limit of the sibling, not to the $10,000 lifetime limit of the 529 beneficiary.

Section 529 Plans may now pay for fees, books, supplies and equipment required to participate in apprenticeship programs registered with the US Labor Department.

A proposal to permit Section 529 plan to pay up to $10,000 per year for qualifying homeschooling expenses did not make it into the final law.

A proposal to expand reimbursement for non-tuition expenses for elementary and secondary education did not pass, but $10,000 per year tuition reimbursement is still allowed.

Effective: Distributions after December 31, 2018 (not 2019).

17. Special interest items for tax-exempt employers

In addition to the new rules applicable to sponsors of qualified plans and 403(b) plan that operate under similar rules, there are unique items of interest for some tax-exempt employers.

— Tax repealed for exempt employers who offer mass transit plans

Background:

The Tax Cuts and Jobs Act of 2017 ("TCJA") charge a 21% tax to exempt employers on the value of parking / mass transit benefits provided to employees. (The benefits remained tax-free.)

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The theory was that TCJA eliminated the deductibility of these benefits for taxable employers, so tax –exempt employers should pay a fair share. This resulted in tax exempt organizations having to file 990-Ts for years after 2017.

Changes:

The tax is repealed retroactively. Exempt organizations can file amended 990-Ts to recover any tax that was paid.

— Non-tuition fellowship and stipend payments are compensation for IRA purposes

Background

Graduate and postdoctoral students receive taxable stipends and similar amounts that are not treated as compensation for employment tax purposes. That means they cannot be the basis for IRA contributions.

Changes:

Taxable stipends and similar amounts may now be considered as compensation for purposes of contributing to IRAs.

Effective: Contributions for taxable years after December 31, 2019.

— Lower PBGC premiums for CSEC pension plans

Background:

CSECs are Cooperatives and Small Employer Charities that are sponsored by at least two unrelated employers. Special and more lenient defined benefit funding rules were adopted for them in 2014.

Changes:

The Secure Act provides that CSEC plans will pay significantly less in premiums to the PBGC than plans sponsored by single and controlled group employers.

Effective: Plan years starting after December 31, 2018

— Custodial accounts in terminated 403(b) plans

Background:

After termination of a 403(b) plan, employers were not allowed to shed responsibilities for tax-deferred custodial accounts (mutual funds) that were left with the custodian until claimed by the participant, although they were allowed to do this with 403(b) annuities.

Changes:

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The SECURE clarifies that) custodial accounts in terminated 403(b) plans can be treated in the same manner as 403(b) annuities. New regulations are required to be issued by June 20, 2020.

Effective: Retroactive: taxable years beginning after December 31, 2008.

18. Multiple and pooled employer plans

Background:

Multiple employer plans are often sponsored by trade groups for unrelated companies with a common connection, such as cooperative banks or manufacturers of a similar product. They are an efficient way for small employer to adopt a retirement plan, but there have been two traditional problems: (1) one rotten egg can spoil the qualification of the plan for all employers, and (2) many small employers don't belong to a group with a common nexus.

Observation: Don't confuse multiple employer plans with multiemployer plans. The latter are for union-negotiated benefits and are jointly trusteed under the Taft Hartley Act. Multiple employer plans are for employers who are not members of the same controlled group. Single employer plans are for controlled groups, even when there is more than one controlled company in the plan.

Changes:

(1) The rotten egg rule is eliminated for multiple employer plans, with rules to segregate the plan of the employer which has violated qualification rules, such as discrimination tests for 401(k) deferrals.

(2) Defined contribution multiple employer plans can now be created for employers without a common nexus, provided they are sponsored and administered by qualified Pool Plan Providers, who will need to satisfy registration requirements that will be established by IRS.

Observation: Government rules and guidance will be required. Pooled plan structures do provide some attraction for small employers who want to shed some of the administrative and fiduciary responsibilities required for sponsors of single employer plans.

Effective: Plan years beginning after December 31, 2020, with good faith compliance permitted after that date and before formal government guidance is issued.

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19. Other

There's a bit more, but not really relevant for most readers – an increase from $30 to $50 in the tax-free amount that can be provided to volunteer firefighters for each month of service in a year; a special funding rule for 17 community newspapers that allows them to stretch out pension funding; and a special rule for persons who receive non-taxable difficulty of care payments for foster care.

20. Summary

We have had three important pieces of employee benefits legislation since 2016: the Tax Cuts and Jobs Act of 2017, the Bipartisan Budget Act of 2018, and now the Secure Act, as part of the Further Consolidated Appropriations Act, 2020. There is something in each of these three laws for employers to consider and take seriously. We hope this memo is helpful to you.

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