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Client Alert

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SECURE Legislation: Impact on Benefit Plans, Retirement Planning

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What You Need To Know:

- **The SECURE Act is expected to impact individual's retirement planning and broaden retirement plan access for small employers.**
- **Employers should consider the impact of the SECURE Act on their 401(k) plans and begin to revise administrative procedures accordingly.**
- **The SECURE Act will have a major impact on estate planning for IRAs and other retirement plans.**

On December 20, 2019, President Trump signed new tax legislation called the Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act). The SECURE Act is expected to impact individuals' retirement planning and broaden retirement plan access for small employers. Sponsors of tax-qualified plans will also need to amend their plans (though not immediately).

The chart below briefly summarizes many elements of the SECURE Act and provides some observations about the changes for those affected by the new law to consider:

Category	Existing Law	SECURE Act	Observations/Comments
Required Minimum Distributions	Generally, tax-qualified plans and individual retirement accounts (IRAs) require participants to begin taking distributions at age 70½ (or the April 1 thereafter).	The new law defers the required minimum distribution age from 70½ to 72. Effective for individuals turning 70½ after December 31, 2019.	This change will benefit individuals who continue working beyond age 70½ and potentially result in additional retirement savings. Plan sponsors will need to amend their plans and adjust administrative procedures to reflect the change.
Stretch Distributions	Existing law allows an IRA owner or qualified plan participant to have retirement plan/IRA benefits distributed following death over a child's or grandchild's life, thereby allowing retirement assets to continue to grow tax-deferred over an extended period of time (this technique is commonly known as a "stretch distribution").	The new law limits stretch distributions by requiring non-spouse beneficiaries to take complete distributions by the 10th calendar year following the participant's or IRA owner's death. Exceptions to the 10-year rule apply if the designated beneficiary is (i) the spouse, (ii) a minor child (however, the 10-year limit will apply once the minor child reaches the age of majority), (iii) a disabled or chronically ill person, or (iv) a person not more than 10 years younger than the account owner. Effective for participants/owners who die after December 31, 2019.	IRA owners and participants in account balance plans should review their estate planning in light of the SECURE Act. In particular, IRA owners and participants should reconsider whether to name trusts as IRA beneficiaries, and consider the following alternatives: (i) naming a charitable remainder trust as beneficiary of a retirement plan (such charitable remainder trusts can receive IRA lump sum payouts from an IRA [and tax-qualified plans] without incurring income tax, and payouts then can go to children over their lifetimes, with the remaining balance to charity); (ii) using life insurance that beneficiaries can use to pay taxes on IRA/plan distributions (IRA owners can consider using funds distributed from an IRA to purchase insurance); (iii) opting for Roth conversions (distributions to beneficiaries from Roth IRAs are income tax free, the SECURE Act generally requires the payouts to occur over 10 years, and although Roth conversion triggers immediate income tax, this may still be beneficial given current relatively low income tax rates); (iv) SECURE Act apparently does not require payments each year—only that the entire fund be distributed within 10 years. The ability to take distributions during particular years within the 10 year payout period may create planning opportunities.

Withdrawals	Generally, distributions from qualified plans and IRAs prior to age 59½ result in a 10 percent penalty.	Under the new law, the 10 percent early distribution penalty will not apply to withdrawals of up to $5,000 for expenses for a qualified birth or adoption, which also constitutes a new early distribution event. The withdrawal must occur within the first year of birth/adoption. The withdrawal will still be taxable as ordinary income but will not be subject to penalty tax. Effective for distributions after December 31, 2019.	This change may aid participants who wish to take an early distribution in order to cover expenses incurred in connection with the birth/adoption of a child.
Multiple-Employer Plans	Many employers avoid participation in multiple-employer plans (i.e., plans that cover unrelated employers) since if one employer does not meet the plan requirements, the plan's qualification can impact other participating employers.	Under the new law, if a single employer fails qualification, the IRS can disqualify only that employer's portion of the plan while the remainder of the plan remains qualified. Also, under the new law, employers need not have "common characteristics" in order to join together in a multiple-employer plan. Effective for plan years beginning after December 31, 2020.	By eliminating some of the concerns that employers have in joining multiple-employer plans, small employers in particular may be more inclined to join such plans, which through economies of scale can allow employers to provide retirement savings opportunities for employees more effectively and with lower costs than they can achieve on their own.
Tax Credit for Establishing an Automatic Enrollment Plan	Under existing law, an income tax credit is available for eligible small employers that establish a new qualified retirement plan, SIMPLE IRA, or SEP IRA that covers at least one non-highly compensated employee.	Under the new law, effective for tax years beginning after December 31, 2019, a $500 business tax credit is available for eligible small employers that can be used toward (i) startup costs for a tax-qualified plan that includes an automatic enrollment feature or (ii) costs for converting an existing plan to an automatic enrollment plan. To qualify, the employer must have no more than 100 employees who received at least $5,000 in compensation for the preceding year.	Employers considering establishing an automatic enrollment plan should consider whether they qualify for the new tax credit.
Qualified Plan Loans	Many tax-qualified plans, particularly 401(k) plans, permit participants to borrow against their accounts, subject to certain limitations. Under current law, there is no prohibition against a plan permitting participants to effect loans by use of a credit card.	Under the new law, effective for plan loans made after December 20, 2019, a plan loan made via use of a credit card is treated as a taxable distribution.	By treating a loan via a credit card as a taxable distribution, the new law effectively prohibits the use of credit cards for plan loans. Plan sponsors and administrators that currently allow for loans via credit cards will need to revise their loan procedures.
Safe Harbor 401(k) Plans	Under current law, 401(k) plans that utilize the automatic enrollment safe harbor (which enables them to avoid certain nondiscrimination tests) can cap annual automatic increases in participants' contributions to 10 percent of compensation.	The safe harbor automatic contribution escalation cap will increase to 15 percent (effective for plan years beginning after December 31, 2019).	The change is intended to promote additional retirement savings.

401(k) Plans–Annuity Distributions	No provision.	The new law attempts to make annuity distribution choices under 401(k) plans more attractive and prevalent by (i) eliminating certain fiduciary liability concerns that employers have held about providing annuities and (ii) allowing an annuity to be rolled into another 401(k) plan or IRA following separation from service without triggering a surrender penalty. The changes are effective for plan years beginning after December 31, 2019.	The authors of this Alert are skeptical that these provisions will incentivize employers to provide annuity distribution options to their 401(k) plans.
401(k) Plans–Eligibility	Under current law, employers may exclude employees who work fewer than 1,000 hours in a year from participating in tax-qualified plans.	Under the new law, employers will be required to allow employees with 500 hours of service in three consecutive years to participate in their 401(k) plans. However, these employees can still be excluded for purposes of determining compliance with nondiscrimination and coverage testing requirements. The change is effective for plan years beginning after December 31, 2020.	Employers who currently exclude part-time employees from their 401(k) plans will need to establish administrative procedures to enable employees to participate once they meet the requisite eligibility requirements. Some employers may choose to allow part-time employees to participate rather than track their service and manage their entry dates.
IRA	Under prior law, an individual was not permitted to make a contribution to an IRA after age 70½. Also, an individual was generally required to have compensation in order to contribute to an IRA.	Effective December 31, 2019, the new law eliminates the maximum age limitation for making IRA contributions. Effective for taxable years beginning after December 31, 2019, compensation for IRA contribution purposes is expanded to include stipends and non-tuition fellowship payments.	The age-related change should help promote retirement savings for individuals who continue to work beyond age 70½.
Failure to File Retirement Plan Returns	The IRS may impose a penalty of $25/day up to a maximum penalty of $15,000 for failure to file an annual report (Form 5500), unless the failure is due to reasonable cause. Plan administrators are subject to a $1/day penalty for each day a form 8955-SSA is delinquent, up to a maximum of $5,000, unless the failure is due to reasonable cause.	The new law increases these penalties tenfold to: • $250/day up to a maximum of $150,000 for failure to file an annual report, unless the failure is due to reasonable cause; and • $10/day up to a maximum penalty of $50,000 for failure to file form 8955-SSA, unless the failure is due to reasonable cause. Effective for returns, notices, and statements required to be filed or provided after December 31, 2019.	Plan sponsors and administrators need to be mindful of these filing obligations in order to avoid the higher, potentially disastrous, penalties.

Some of the changes summarized above that affect tax-qualified plans will require that employers amend their plans. Under the SECURE Act, amendments are generally not required until the last day of the first plan year beginning on or after January 1, 2022, but employers who wish to implement changes permitted by the SECURE Act will likely need to amend their plans at the time those changes are implemented. Employers and plan administrators should watch for additional Client Alerts from us regarding the content and timing of appropriate amendments as anticipated guidance from the IRS is issued.

As indicated above, the SECURE Act made a number of changes that will influence retirement planning and plan design. The lawyers in our Employee Benefits and Executive Compensation Practice Group and Trusts and Estates Practice Group are ready to assist with any questions you may have and to advise on how best to address the effects of the SECURE Act on your plans and retirement/estate planning.

Contacts

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