ECKERT
SEAMANS
ATTORNEYS AT LAW

January 2020

Employee Benefits Alert

Summary of Important Elements of the SECURE ACT Legislation

On December 20, 2019, the Further Consolidated Appropriations Act, 2020, which includes landmark legislation impacting employer-provided retirement plans known as the SECURE Act ("Setting Every Community Up for Retirement Enhancement Act) and several other provisions impacting employer-provided plans, was enacted into law.

Below is a summary of the more important elements of the legislation that have an impact on employer-sponsors of retirement and welfare plans. For example, the SECURE Act provides new eligibility rules for part-time employees, new minimum distribution requirements, increased penalties for failure to file required reports, and some new notice requirements.

Some of the changes are required to be implemented for 2020, and sponsors will need to implement the provisions into their operations. Others are optional or have delayed effective dates. The changes, to the extent required or adopted at the discretion of the plan sponsor, will require plan amendment. While the deadline to amend a plan for the SECURE Act provisions is generally the last day of the first plan year beginning on or after January 1, 2022 (2024 for governmental plans), other provisions in the legislation have sooner amendment deadlines, as noted below.

Please give us a call if you would like to discuss these matters further.

Changes Effective with the Act's Passage

<u>Fiduciary safe harbor added for selection of annuity providers.</u>

When a plan sponsor selects an annuity provider for the plan, the sponsor is considered a plan "fiduciary," which generally means that the sponsor must discharge his or her duties with respect to the plan solely in the interests of plan participants and beneficiaries (this is known as the "prudence requirement").

Fiduciaries now have an optional safe harbor to satisfy the prudence requirement in their selection of an insurer for a guaranteed retirement income contract, and are protected from liability for any losses that may result to participants or beneficiaries due to an insurer's future inability to satisfy its financial obligations under the terms of the contract. Removing ambiguity about the applicable fiduciary standard eliminates a roadblock to offering lifetime income benefit options under a plan.

<u>Disaster Relief</u>

A plan may provide that participants whose principal place of abode were within federally declared disaster areas from January 1, 2018 through February 18, 2020 and for which was incurred an economic loss may take "qualified disaster distributions" up to $100,000. The distribution is exempt from the early distribution penalty tax, and the income tax consequences may be spread over a three year period. Participants would have until June 17, 2020 to request such a distribution. Additionally, a plan may provide for an increased loan amount of up to the lesser of 100% of the participant's vested account or $100,000 (ordinarily 50% or $50,000) to participants meeting the criteria for the qualified

© Eckert Seamans Cherin & Mellott, LLC, 2020, all rights reserved.

hardship distribution. The legislation also provides for repayment relief by suspending periods for up to one year, or until June 17, 2020, if later. Plans that provide this relief must be amended by the end of the first plan year beginning on or after January 1, 2020.

Qualified employer plans barred from making loans through credit cards and similar arrangements.

Plan loans may no longer be distributed through credit cards or similar arrangements. This change is intended to ensure that plan loans are not used for routine or small purchases, thereby helping to preserve retirement savings.

Nondiscrimination rules modified to protect older, longer service participants in closed plans.

Plans with closed groups of participants that continue to accrue benefits can be problematic under the nondiscrimination rules applicable to qualified plans as over time, the closed group may consist of more and more highly compensated employees. The IRS has addressed this issue in the last several years with temporary relief, and now Congress has acted to provide permanent relief.

Effective as of the date of enactment of the legislation, or at the election of the sponsor for plan years beginning after 2013, the nondiscrimination rules as they pertain to closed pension plans (i.e., plans closed to new entrants) are being changed to permit existing participants to continue to accrue benefits. The modification will protect the benefits for older, longer-service employees as they near retirement.

Effective after 2019

Required minimum distribution age raised from 70½ to 72.

Before 2020, retirement plan participants and IRA owners were generally required to begin taking required minimum distributions, or RMDs, from their plan by April 1 of the year following the year they reached age 70½. The age 70½ requirement was first applied in the retirement plan context in the early 1960s and had not been adjusted to account for increases in life expectancy.

For distributions required to be made after Dec. 31, 2019, for individuals who attain age 70½ after that date, the age at which individuals must begin taking distributions from their retirement plan or IRA is increased from 70½ to 72.

The Act also modifies the manner in which distributions are made to beneficiaries of employees who die after December 31, 2019. Generally, distributions must be completed to the beneficiary within 10 years of the date of death. There are exceptions for certain eligible designated beneficiaries (surviving spouses, children who have not attained their majority, certain chronically ill individuals, and individuals not more than 10 years younger than the employee) that permit for distributions over the life expectancy of the beneficiary (or until a child attains his or her majority), plus an additional 10 years from the death of the beneficiary or attainment of a child's majority.

Age for in-service distributions from pension plans lowered.

For distributions after 2019, the Act lowers the age in-service distributions may be taken from defined benefit pension plans from age 62 to age 59 ½.

Credits for small employers

The Act makes available credits to defray the cost of plan start up and implementation of automatic enrollment features for small employers. A small employer is defined as an employer with no more than 100 employees who receive at least $5,000 in annual compensation; the Act adds a new tax credit of up to $500 per year to employers to defray start-up costs for new 401(k) plans and SIMPLE IRA plans that include automatic enrollment. The credit is in addition to an existing plan start-up credit, and is available for three years. The new credit is also available to employers who convert an existing plan to a plan with an automatic enrollment design. Also, the existing credit for plan start-up costs for small employers is increased, beginning this year, by changing the calculation of the flat dollar amount limit on the credit to

© Eckert Seamans Cherin & Mellott, LLC, 2020, all rights reserved.

the greater of (1) $500, or (2) the lesser of: (a) $250 multiplied by the number of nonhighly compensated employees of the eligible employer who are eligible to participate in the plan, or (b) $5,000. The credit applies for up to three years.

Increase in maximum default deferral rate for safe harbor automatic contribution arrangements

The Act increases the cap on the default rate that may be used in automatic contribution arrangement safe harbor plans. The new rules increase the cap on the default rate under an automatic enrollment safe harbor plan from 10% to 15%, but only for years after the participant's first deemed election year. For the participant's first deemed election year, the cap on the default rate is 10%.

Loosen notice requirements and amendment timing rules to facilitate adoption of nonelective contribution 401(k) safe harbor plans.

The actual deferral percentage nondiscrimination test is deemed to be satisfied if a 401(k) plan includes certain minimum matching or nonelective contributions under either of two plan designs (referred to as a "401(k) safe harbor plan"), as well as certain required rights and features, and satisfies a notice requirement.

The new rules change the nonelective contribution 401(k) safe harbor to provide greater flexibility and facilitate plan adoption. The new rules eliminate the safe harbor notice requirement for nonelective safe harbor contribution plans. The rules also permit amendments to elect the application of the nonelective contribution safe harbor at any time before the 30th day before the close of the plan year. Amendments after that time are allowed if the amendment provides (1) a nonelective contribution of at least 4% of compensation (rather than at least 3%) for all eligible employees for that plan year, and (2) the plan is amended no later than the last day for distributing excess contributions for the plan year (i.e., by the close of following plan year).

Expansion of portability of lifetime income options.

The new rules permit certain retirement plans to make a direct trustee-to-trustee transfer to another employer-sponsored retirement plan, or IRA, of a lifetime income investment or distributions of a lifetime income investment in the form of a qualified plan distribution annuity, if a lifetime income investment is no longer authorized to be held as an investment option under the plan. This change permits participants to preserve their lifetime income investments and avoid surrender charges and fees.

Plans adopted by filing due date for year may be treated as in effect as of close of year.

Employers can elect to treat qualified retirement plans adopted after the close of a tax year, but before the due date (including extensions) of the tax return, as having been adopted as of the last day of the year. The additional time to establish a plan provides flexibility for employers who are considering adopting a plan, and the opportunity for employees to receive contributions for that earlier year.

Increased penalties for failure-to-file retirement plan returns.

The new rules modify the failure-to-file penalties for retirement plan returns. The penalty for failing to file a Form 5500 (for annual plan reporting) is changed to $250 per day, not to exceed $150,000. A taxpayer's failure to file a registration statement incurs a penalty of $10 per participant per day, not to exceed $50,000. The failure to file a required notification of change results in a penalty of $10 per day, not to exceed $10,000. The failure to provide a required withholding notice results in a penalty of $100 for each failure, not to exceed $50,000 for all failures during any calendar year.

Effective in 2021

Relaxation of Consequences of Employer Qualification Failures for Multiple Employer Plans

A multiple employer plan (MEP) is a single plan maintained by two or more unrelated employers. Prior to the SECURE Act, a failure by one employer with respect to the qualification requirements applicable to the MEP could disqualify the

© Eckert Seamans Cherin & Mellott, LLC, 2020, all rights reserved.

entire plan (the “one bad apple rule”). Starting in 2021, the new rules reduce the barriers to creating and maintaining MEPs by removing the one bad apple rule for MEPs that consist of employers with a common interest other than the MEP and for certain MEPs maintained by pooled plan providers.

Allow long-term part-time employees to participate in 401(k) plans.

Currently, employers are generally allowed to exclude part-time employees (i.e., employees who work less than 1,000 hours per year) when providing certain types of retirement plans---such as a 401(k) plan--to their employees.

Starting in 2021, a new rule will require most employers maintaining a 401(k) plan to have a dual eligibility requirement under which an employee must complete either a one-year-of-service requirement (with the 1,000-hour rule), or three consecutive years of service where the employee completes at least 500 hours of service per year. The new rule requires only that the long-term part-time employees be eligible to make deferrals under the 401(k) portion of the plan, and does not obligate the employer to make other contributions on behalf of such employees. To this end, the Act provides relief from nondiscrimination requirements that might otherwise be problematic for plan sponsors with these long-term part-time employees.

For Plan Years after 2021

The IRS and DOL are directed by the legislation to implement consolidated Form 5500 returns beginning with reports for plan years beginning after December 31, 2021 for individual account plans maintained within a controlled group that share the same trustee, same one or more fiduciaries, same plan administrator, same plan year, and same investment options.

Special Effective Dates

New annual disclosures required for estimated lifetime income streams.

The new rules will require that plan participants' benefit statements include a lifetime income disclosure at least once during any 12-month period. The disclosure will have to illustrate the monthly payments the participant would receive if the total account balance were used to provide lifetime income streams, including a qualified joint and survivor annuity for the participant and the participant s surviving spouse and a single life annuity. The rules will not be effective until at least 12 months after the Department of Labor has issued interim final rules, assumptions for use in the life income disclosures, and a model disclosure. The Department has until December 20, 2020 to issue the foregoing.

In-kind distributions from terminating custodial 403(b) plans

The legislation directs the Department of Treasury issue guidance within six months of enactment providing that individual 403(b) custodial accounts may be distributed in-kind to a participant or beneficiary in the event of a 403(b) plan termination, with the guidance retroactively effective for taxable years beginning after December 31, 2008. Restrictions on the investment of assets in 403(b) plans made it difficult to distribute all assets as is required in order to terminate plan. The direction is intended to provide a mechanism by which such plans may be terminated.

Elimination and Delay of Certain Taxes

Permanently repealed are the so-called Cadillac Tax on high-cost employer-sponsored plans, the medical device tax, and certain fees on health insurance providers. Generally, these taxes had already been delayed on a temporary basis through prior legislation. The repeal of the fee on health insurance providers is delayed until calendar years after 2020. Past legislation provided only for a delay on this fee through 2019. Unless additional legislation is forthcoming, that means that health insurance providers will have to pay the applicable fees for 2020.

© Eckert Seamans Cherin & Mellott, LLC, 2020, all rights reserved.

This Employee Benefits Alert is intended to keep readers current on matters affecting employee benefits, and is not intended to be legal advice. If you have any questions, please call Christine B. Bowers at 412.566.6181, William S. Carter at 412.566.6016, Kathryn A. English at 412.566.1226, Heather Stone Fletcher at 412.566.6112, Michael J. Herzog at 412.566.6130, Sandra R. Mihok at 412.566.1903, Paul M. Yenerall at 412.566.1944, or any other attorney with whom you have been working.

© Eckert Seamans Cherin & Mellott, LLC, 2020, all rights reserved.