

# Retirement Plans Update

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## Today's Topics

- SECURE 2.0
- Brief overview of EPCRS and related SECURE 2.0 changes
- IRS Notice 2023-43 – IRS guidance on self-corrections
- IRS Notice 2023-54 – RMD relief following SECURE 2.0 changes
- Technical problems under SECURE 2.0
- Approval process for 403(b) plans

# SECURE 2.0

## SECURE 2.0 Overview

- Consolidated Appropriations Act, 2023
- Passed by Congress on December 23, 2022
- Signed by the President on December 29, 2022
- More “tinkering” with retirement plan rules

## SECURE 2.0 – More “Tinkering”

- Division T – SECURE 2.0 Act of 2022
  - Title 1: Expanding Coverage and Increasing Retirement Savings
  - Title 2: Preservation of Income
  - Title 3: Simplification and Clarification of Retirement Plan Rules (bulk of the changes – 50 sections)
  - Title 4: Technical Amendments (primarily SECURE 1.0)
  - Title 5: Administrative Provisions (amendment deadlines)
  - Title 6: Revenue Provisions (many Roth provisions)

## Amendment Deadline

- Generally, the deadline is the last day of the first plan year beginning on or after January 1, 2025
- Government and union plans have two additional years
- Plans must be operated in compliance with SECURE 2.0 based on the applicable effective dates
- Same deadlines apply to SECURE 1.0 and CARES Act amendments

## SECURE 2.0 Immediate Changes in 2023

## Incremental Delay in Required Beginning Date

- The RMD age change (again)

Date of Birth	Required Beginning Date Age Trigger
Before July 1, 1949	70½
July 1, 1949 – December 31, 1950	72
January 1, 1951 – December 31, 1959	73
1960 or later	75

- Letter dated May 23, 2023 from House Ways and Means and Senate Finance committee leaders to the Treasury Department confirms that individuals who were born in 1959 have age 73 required beginning date age

## Other RMD Changes

- 50% excise tax for failing to make timely RMDs reduced to 25% for missed RMDs occurring on or after January 1, 2023
- Pre-death required minimum distributions are no longer required for Roth accounts – Effective for tax years beginning on or after January 1, 2024
- Commercial annuities are now easier to include in a DC plan due to changes in the RMD rules – Effective immediately
- Surviving spouses may elect to be treated as the employee for calculation of RMD payments – Effective January 1, 2024

## Roth Employer Contributions – Section 604

- Plans now have the option to offer matching and nonelective contributions on a Roth basis.
  - Will be included in an employee’s gross income for the tax year in which they are made
  - Employers must withhold the employees’ portion of taxes from another source of income if they make these contributions
  - Limited to vested contributions only
  - Recordkeepers will need time to reprogram systems
  - In-plan Roth conversions eliminate the need for this

## Self-Certification of Hardship Distributions

- Employers may choose to permit employees to self-certify their need for a hardship distribution
  - Deemed immediate and heavy financial need
  - Distribution does not exceed the extent of the need
  - Employee does not have other resources to meet that need
- Similar to self-certifications of need for “coronavirus-related distributions” under the CARES Act
- Should reduce HR workload
- Cannot accept certification if employer has “actual knowledge” to the contrary

## Tax Relief for Terminal Illness Withdrawals

- The 10% early withdrawal penalty is eliminated for “terminally ill” participants
  - An individual who has been certified by a physician as having an illness or physical condition that can reasonably be expected to result in death in 84 months or less after the date of the certification
  - Participant is required to provide “sufficient evidence” of the terminally ill diagnosis to the plan administrator
  - “Sufficient evidence” is to be defined in future guidance
  - The distribution may be repaid to the plan within three years of the distribution
  - Unclear whether this is a new distributable event

## Expansion of 403(b) Investment Options\* and PEPs

- Previously, 403(b) investments could only be made in annuities, custodial accounts investing in mutual funds, or retirement income accounts (for church plans only)
  - SECURE 2.0 permits 403(b) plans to invest in “collective investment trusts”
  - \*Further legislation required to make this work – as a practical matter, CITs are not yet available for 403(b) plans
- “Pooled employer plans” (PEPs) now expressly permitted for 403(b) plans

## Other “Optional” Changes for 2023

- May offer “de minimis” incentives for participating in the plan
- No longer required to send disclosures and other notices to eligible participants who have elected not to participate in the plan
  - Participants must have received the standard set of documents that they are required to receive when they initially became eligible (e.g., the SPD, QDIA notice, etc.)
  - Must also receive an “annual reminder notice” that includes the eligibility rules and description of benefits of participation
- Employers may permit withdrawals of retirement funds for participants affected by a federally-declared disaster

## Changes for Governmental Employers

- No more first day of month requirement for making elective deferral changes to governmental 457(b) plans (not tax exempts)
- Exclusion from gross income of distributions of up to \$3,000 for health and long term care premiums of public safety officers extended to payments made to participants who self-certify that distribution qualifies for exemption
- Exemption from 10% penalty on early withdrawal for public safety officers:
  - Now applies after 25 years of service at any age or age 50
  - Extended to corrections officers and certain forensic security employees

## Other Misc. Changes for 2023

- QACA Notice Technical Correction
  - Annual safe harbor notice required for QACA ACP safe harbor, even if QACA contribution is nonelective
- Cash balance interest crediting rate for variable rate must be reasonable and not exceed 6% (defined benefit plans)
- Variable rate PBGC premium replaced with flat \$52/\$1,000 unfunded vested benefit (defined benefit plans)
- Qualified Birth and Adoption Distribution recontribution deadline is 3 years after distribution

## Changes Effective in 2024 or Later

## Part-Time Employee Protections – Section 125

- SECURE 2.0 reduces part-time employee eligibility requirements to 500 hours of service over two consecutive 12-month periods
  - Applies to 401(k) and 403(b) plans (subject to ERISA)
  - Effective for plan years beginning after December 31, 2024
  - 12-month periods must be counted starting January 1, 2023
  - For calendar year plans, first group could become eligible on January 1, 2025
  - However, the three year requirement still applies under SECURE 1.0 as of January 1, 2024 (or potentially earlier for non-calendar year plans)
  - Employer contributions not required for this group of participants

## Part-Time Employee Protections – Section 125 (Cont.)

- Top-Heavy Test Eased
  - Plan may conduct top-heavy test separately for excludable and non-excludable employees
  - Intended to encourage employers with top heavy plans to let employees contribute without a waiting period
  - Effective for plan years beginning in 2024
  - Consider eliminating all waiting periods?

## Automatic Enrollment Required for New Plans – Section 101

- New 401(k) and 403(b) plans must include automatic enrollment provisions
  - Effective for plans established on or after January 1, 2025
  - Initial default contribution rate between 3% and 10%
  - Automatic escalation of 1% per year up to a maximum between 10% and 15%
  - Must allow “permissible withdrawals” within 90 days
  - Exceptions: existing plans, and new plans established by new businesses (fewer than 3 years), employers with fewer than 11 employees, and governmental and church employers will be exempt

## Matching Contributions on Student Loan Payments – Section 110 (Cont.)

- Allows employers to make matching contributions on behalf of participants for “qualified student loan payments”
  - Treats student loan payments as elective deferrals (including 402(g) limit) for purposes of matching contributions
  - Applies to 401(k) plans, 403(b) plans, SIMPLE IRAs and governmental 457(b) plans
  - Separate nondiscrimination testing permitted for this group
  - “Qualified” basically means a payment made by a participant toward a loan incurred to pay for qualified education expenses
  - This provision is effective for plan years beginning on and after January 1, 2024

## Increased Catch-Up Contribution Limits – Section 109

- Catch-up contributions for participants age 60-63 are increased to greater of \$10,000 or 150% of the normal catch-up limit in place for 2024 (will be adjusted periodically for inflation)
- Effective for taxable years beginning on or after January 1, 2025

## Roth Catch-Up Contributions – Section 603

- SECURE 2.0 requires plans (other than SIMPLE IRAs and SEP plans) that offer catch-up contributions to treat them as Roth contributions
- Employees with compensation of \$145,000 or less are exempt from this requirement
- Originally scheduled to take effect for taxable years beginning on or after January 1, 2024:
  - IRS Notice 2023-62 – Treasury Department and IRS announced an “administrative transition period”
  - Two-year delay of the Roth catch-up mandate
  - This change is now scheduled to take effect for taxable years beginning on or after January 1, 2026

## Roth Catch-Up Contributions – Section 603 (Cont.)

- As drafted, the provision arguably can be read as disallowing all catch-up contributions (Roth and pre-tax)
- Letter from House Ways and Means and Senate Finance committee leaders to Treasury and the IRS confirms that the legislators did not intend that result
- In Notice 2023-62, the Treasury Department and IRS confirmed that catch-up contributions are still permitted after this year, despite the apparent drafting error under SECURE 2.0
- Comments on Notice 2023-62 are due October 24, 2023

## Increased Cash Out Limit – Section 304

- The mandatory cash out limit for former employees' accounts is increased from \$5,000 to \$7,000
- This change is effective for distributions made on or after January 1, 2024

## Retirement Plan Emergency Savings Accounts – Section 127

- Individual account plans may offer an emergency savings account to non-highly compensated employees beginning in plan years starting on and after January 1, 2024
- Can offer enrollment in savings portion of plan or automatically enroll participants (at 3% up to account max)
- Contributions made like Roth contributions (after-tax)
- Participants can withdraw all or part of account balance at any time
- Contributions may no longer be made once the account balance reaches \$2,500 (adjusted for inflation)

## Mid-Year Changes to SIMPLE IRAs

- General rule is that a SIMPLE IRA plan must remain in place for an entire calendar year
  - Sometimes complicates M&A deals
- New rule: Employer may replace a SIMPLE IRA mid-year with a SIMPLE 401(K) plan or other “safe harbor” 401(k) plan
- Deferral limit is pro-rated by day between SIMPLE and 402(g) elective deferral limit
- Also eliminates the two year holding period for SIMPLE IRA funds rolled over to the replacement plan
- Effective for plan years after 2023

## Miscellaneous Changes

- Employers should also note these additional changes made by the SECURE 2.0 Act:
  - New national online searchable “lost and found” database to address missing participants
  - Self-correct auto-enrollment/increase failures (cures expiration of prior guidance)
  - Allows access to \$1,000 penalty-free withdrawal for “unforeseeable or immediate financial needs relating to personal or family emergency expenses”
  - Allows for penalty-free withdrawals of \$10,000 or 50% (whichever is less) for victims of domestic abuse

## Miscellaneous Changes (Cont.)

- Allows for repayment of withdrawals related to the birth or adoption of a new child to be repaid and treated as rollover contributions if repaid within 3 years (new limitation)
- Saver’s Credit is now deposited into participants’ accounts
- Allows 403(b) plans to participate in “multiple employer” plans
- 403(b) plans to apply same hardship rules as 401(k) plans
- Distributions of up to \$2,500 to pay for long term care insurance premiums

# Brief Overview of EPCRS and Related SECURE 2.0 Changes

## Correction Under Rev. Proc. 2021-30

- IRS Rev. Proc. 2021-30: the “Employee Plans Correction Resolution System” (EPCRS)
  - Describes the process for correcting retirement plan errors
  - Generally split between “plan document failures” and “operational failures”
  - Three general approaches:
    - Self-Correction – employer corrects on its own, keeps a record of the correction, and establishes new processes to avoid the error in the future
    - Voluntary Correction – employer submits proposed correction to the IRS and requests approval, filing fee applies, and significant backlog of cases
    - Audit Closing Agreement Program – employer negotiates a correction and penalty to pay (often in connection with an audit, but not always)
  - Prior rule - only certain “failures” are eligible for self-correction and “significant failures” must be self-corrected within a limited window (end of the third plan year after the year of the failure)

## SECURE 2.0 Expands Self-Correction

- Under Section 305, all “eligible inadvertent failures” may now be self-corrected
- An “eligible inadvertent failure” is any failure that:
  - Is not “egregious”;
  - Does not involve the misuses or diversion of plan assets; and
  - Is not “an abusive tax avoidance transaction”
- Some limitations
  - Must have established practices and procedures to prevent errors
  - Must have a “specific commitment” to correct before receiving notice of an IRS audit
  - The failure must be corrected within a “reasonable” time after discovery

## SECURE 2.0 Expands Self-Correction (Cont.)

- No longer any “last day” time limit for significant failures, except as otherwise provided in the Code or IRS guidance
- The DOL must accept participant loan failures corrected under EPCRS
- IRS must expand EPCRS to cover correction of IRA failures

## Self-Correction of Overpayments

- Overpayments
  - More options for (and more limitations on) handling inadvertent benefit overpayments
    - Good changes:
      - Employers generally don't have to recover overpayments unless there is a loss to another participant or if defined benefit plan is underfunded
      - Doesn't affect recovery arrangements in place before SECURE 2.0
    - Bad changes:
      - Employers can't recover overpayments if the first overpayment occurred more than three years before the participant or beneficiary received written notice about the error (except in cases of fraud or misrepresentation);
      - No interest or fees can be charged;
      - If participant is receiving payments, recovery must be spread over at least 10 years and can't reduce annual benefit by more than 10%
      - Employers can't use third-party collection agency or threaten litigation

## Notice 2023-43: Good News

- “Interim” guidance regarding Section 305 – applies until IRS formally updates EPCRS
- Confirms that employers may self-correct any “eligible inadvertent failure” before EPCRS is formally updated
- Permits employers to self-correct eligible inadvertent failures that arose before SECURE 2.0's passage
- Confirms that the time period for correcting any “eligible inadvertent failure” is “indefinite” – i.e., the “third plan year” limitation no longer applies

## Notice 2023-43: More Good News

- Removes certain limits on the types of errors that can be self-corrected:
  - An IRS determination letter is no longer a precondition
  - Removes (with limitations) prohibition against self-correcting “demographic failures” and “employer eligibility” failures
  - May self-correct “insignificant” errors at any time, including during or after an IRS audit
  - May continue to self-correct “significant” errors, despite being notified of an IRS audit, so long as employer made a “specific commitment” to correct it before coming under audit
    - Previously, the correction had to be “substantially complete”
    - “Specific commitment” means actively working toward correcting it

## Notice 2023-43: Limitations

- Some errors or correction methods cannot be self-corrected at this point:
  - The failure to adopt a plan document
  - Failures involving an orphan plan
  - Significant failures in a terminated plan
  - Demographic failures, except as permitted under Reg. 1.401(a)(4)-(11)(g)
  - Retroactive plan amendments that reduce benefits
  - Certain other failures involving SEP, SIMPLE IRAs, and ESOPs
- Eligible inadvertent failures must be corrected within a reasonable time after discovery – generally 18 months

## Notice 2023-43: Limitations

- Employer should have documents that:
  - Identify the failure and plan years involved, the number of employees affected, and the date the failure was discovered;
  - Explain how the failure occurred and the practices and procedures in effect at the time of the failure that were designed to promote compliance;
  - Identify and substantiate the correction method that applies and the date correction is completed;
  - Identify any changes to the procedures to prevent the failure in the future

## IRS Notice 2023-54 – RMD Relief Following SECURE 2.0 Changes

## RMD Relief Following SECURE 2.0 Changes

- IRS Notice 2023-54 issued on July 14, 2023 provides multiple forms of RMD relief
- Delayed effective date of upcoming RMD final regulations
  - Final RMD regulations will apply no earlier than the 2024 distribution calendar year
  - Proposed RMD regulations were issued before SECURE 2.0

## RMD Relief Following SECURE 2.0 Changes

- Relief for changes to the required beginning date for participants who are born in 1951 (i.e., turn age 72 in 2023)
  - Distributions between January 1, 2023 and July 31, 2023, that would otherwise have been an RMD are not required to be treated as eligible rollover distributions
  - Gives plan sponsors and recordkeepers the ability to retain the initial distribution and withholding treatment for mistaken RMD payments without concern about plan qualification

## RMD Relief Following SECURE 2.0 Changes

- Notice 2023-54 also extended 60-day indirect rollover period through September 30, 2023, for amounts described on the previous slide
- The extended deadline also applies to mischaracterized distributions from IRAs – Notably, this rollover is permitted even if the IRA owner or surviving spouse has rolled over a distribution within the last 12 months

## Relief from the “At Least as Rapidly” Rule

- The SECURE Act replaced the “stretch” life expectancy distribution rule with a fixed 10-year rule for most non-spouse beneficiaries
- A defined contribution plan that failed to make a “specified RMD” (a certain type of RMD that would otherwise have been required in 2023) will not be treated as having failed to satisfy Section 401(a)(9) of the Internal Revenue Code because it did not make that distribution
- Taxpayers who did not take a “specified RMD” in 2023 will not be subject to the 25% excise tax for a missed RMD that would otherwise have been due

# Technical Problems Under SECURE 2.0

## SECURE 2.0 Requires Technical Corrections

- Several provisions of SECURE 2.0 are either unclear or clearly wrong:
  - “Starter” 401(k) plans are limited to \$6,000 in contributions per year, which is less than the limit that will apply to payroll reduction IRAs when “starter” 401(k) plans go into effect
  - Confusion regarding whether the \$5,000 small employer startup credit includes the separate \$1,000 per employee credit for employer matching contributions to those plans
  - Missing paragraph in the legislation seems to prohibit any catchup contributions (Roth or pretax) in 2024 and beyond

## More SECURE 2.0 Technical Corrections

- Confusion regarding whether a “starter” 401(k) plan may replace a SIMPLE IRA plan mid-year
- Distributions for “terminal illness” are not subject to the 10% excise tax for early distributions – but unclear whether this is an independent distributable event
- Special vesting rule for “long-term part-time employees” appears to contain the wrong cross-reference to ERISA, referring to eligibility service instead of vesting service
- Higher catch-up limit for ages 60-63 refers to the wrong limit (2024 limit instead of 2025)
- RMD provision increasing age to 75 makes no sense for people born in 1959

## Committee Letter Addresses Some Issues

- On May 23, 2023, the Senate Finance and House Ways and Means Committees sent a letter to the Treasury and IRS “to ensure that Congressional intent is carried out . . . .”
  - Confirms that Congress did not intend to eliminate catch-up contributions - Also addressed in IRS Notice 2023-62
  - Confirms that the small employer “startup credit” of up to \$5,000 is in addition to any other credit
  - Confirms that the increase in the required beginning age to age 75 applies to anyone who turns age 73 after December 31, 2032
  - Clarifies that contributions (including Roth contributions) to a SIMPLE IRA or SEP plan are not counted in determining whether a person has exceeded the Roth IRA contribution limit

## Committee's Conclusion

- “We intend to introduce technical corrections legislation to correct erroneous statutory language, which may include items not addressed in this letter, so that the provisions carry out Congressional intent.”

## Approval Process for 403(b) Plans

## Background

- When the 403(b) regulations were finalized in 2009, they imposed a written plan document requirement for 403(b) plans
- While the IRS began approving plan documents for “pre-approved” 403(b) plans in 2013, no mechanism was available for the IRS to review and approve individually designed 403(b) plan documents
- The IRS previously issued private letter rulings on 403(b) plans, but no longer does

## Revenue Procedure 2022-40

- Revenue Procedure 2022-40, issued by the IRS on November 7, 2022, creates a limited determination letter program for individually designed 403(b) plans
- 403(b) plan sponsors can request an IRS determination letter for their individually designed 403(b) plans:
  - On initial plan qualification;
  - On plan termination; or
  - In other limited circumstances to be established by the IRS
- The program opens June 1, 2023, with a staggered schedule for initial plan qualification requests

## Initial Plan Qualification

- In general, a plan is eligible to apply for initial plan qualification if it has not previously filed for a determination letter on Form 5300
- Revenue Procedure 2022-40 provides guidance on when a plan is eligible to apply for initial plan qualification
- For example, a determination letter issued under a Form 5307 filing for a pre-approved plan does not preclude a subsequent Form 5300 filing under the program

## Staggered Schedule for Initial Plan Qualification Requests

- 403(b) plans applying for an initial determination letter will be eligible to file on a staggered basis over the next three years depending on the sponsoring employer's EIN:

If the EIN of the Plan Sponsor ends in:	A determination letter application may be submitted beginning on:
1, 2, or 3	June 1, 2023
4, 5, 6, or 7	June 1, 2024
8, 9, or 0	June 1, 2025

## Plan Terminations

- 403(b) plan sponsors can request an IRS determination letter for their individually designed 403(b) plans upon plan termination
- Applications for a determination letter upon plan termination must be filed by the later of:
  - One year from the effective date of the termination; or
  - One year from the date on which the action terminating the plan is taken, but in no event later than 12 months from the date of distribution of substantially all plan assets in connection with such termination

## In Other Limited Circumstances to be Established by the IRS

- 403(b) plan sponsors can request an IRS determination letter in other limited circumstances to be established by the IRS
- The IRS has not yet established any other circumstances

## Scope of Review

- The scope of the IRS's review for ongoing plans will include the requirements provided on all Required Amendments Lists issued on or before the last day of the second calendar year preceding the year in which the application is submitted
- For example, for 403(b) plans eligible to apply on June 1, 2023 that submit applications before the end of 2023, the IRS will review requirements reflected on the Required Amendments Lists for 2021 and prior years

## Scope of Review (Cont.)

- The IRS will also review any other section 403(b) requirements that are not included on a Required Amendments List, but which were in effect on or before the last day of the second calendar year preceding the year in which the application is submitted
- For terminating plans, the review will encompass any amendments required to be adopted to reflect 403(b) requirements that apply at the time of termination, regardless of whether they are included on a Required Amendments List

## Favorable Determination Letter

- Receipt of a favorable letter confirms the IRS's approval of the plan document's terms and could help streamline any inquiry relating to prior plan documents in the event of an audit

# Questions?



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