Preparing Your Clients for 2024

Presenter Information

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What we'll cover

- 401(k) Strategies
- Form 5500 Changes
- Plan Amendments
- SECURE 2.0 Changes (2024)
- Long-term Part-Employee rule
- Top Heavy Changes
- Distributions
- Required Minimum Distributions
- EPCRS
- Miscellaneous Provisions

401(k) Strategies available before start of plan year

Exclude part-time employees
Exclude nondeferring EES
Limit HCE deferrals
Use Roth deferrals
Automatic contribution arrangements
Safe Harbor 401(k)/ QACA

Can we exclude part-time EEs as a classification?

- IRS can attack exclusion as a “disguised service condition”
    - Any exclusion category that defines itself by service (examples: temporary, seasonal)
- Code §410(a) establishes parameters of service condition (1,000 hours)

February 14, 2006 Quality Assurance Bulletin

- Instructed agents to challenge part-time EE exclusions based on hours of service
- QAB provides guidance on how to design a part-time EE exclusion:

1. Plan can exclude part-time as long as part-time defined as EE scheduled to work less than 1,000 HOS
2. Must also include fail-safe language for part-time EE who actually works 1,000 HOS

New 401(k) Part-Time Employee Provision

- Except in the case of collectively bargained plans, the SECURE Act will require employers maintaining a **401(k) plan** to have a dual eligibility requirement
- An employee must be treated as satisfying the plan's eligibility service requirement on the earlier of completing:

1. one year of service requirement (with the 1,000-hour rule), or
2. 3 consecutive years of service where the EE completes at least 500 hours of service

Effective for plan years beginning after 2023

*Effective for plan years **beginning after 2024**, SECURE 2.0 changes the 3 years to **2 years***

LTPT: 2024 vs. 2025

- 2024 plan years must apply SECURE 1.0 Rules
  - 3-year eligibility rule
  - BUT the new vesting and TH rules apply as though in SECURE 1.0
- 2025: begins new LTPT Rules (SECURE 2.0)
  - 2-year eligibility

Excluding non-deferring categories of employees

- Coverage rules do not require plan to cover all EEs
  - Must cover sufficient % to satisfy coverage rules
  - May use almost any criteria in defining exclusion classification
    - job classification, method of payment, date of hire, etc.
  - Exclusion classification must be reasonable if plan uses avg. benefit test
- If a particular group does not defer or has a high turnover rate, ER may want to exclude
- If group is not eligible, EEs are not in ADP or ACP tests

Example

- LTD maintains 401(k) plan w/ match
  - 3 month eligibility
  - 4 HCEs; 50 NHCEs
- Phone representatives (7) experience high level of turnover
- Delivery persons (5) are not interesting in deferring
- Plan excludes phone representatives and delivery persons
  - Not in ADP or ACP tests
- Coverage ratio: 76% (38/50 ÷ 4/4)

Limit HCE Deferrals

- Plan may set limit, or
- Plan may permit ER to announce limit from year to year
  - Must announce at beginning of year to accommodate catch-up contributions
- Reduces likelihood of failure
- Prevents lower-paid HCEs from causing failure

Simple Example

- Owner
  - Comp $290,000
  - Defers $19,500
  - ADR 6.72%
- Manager
  - Comp $140,000
  - Defers $14,000
  - ADR 10%
- NHCE ADP 5%

- Plan fails ADP thanks to Manager
- But Owner gets the refund of excess contributions: $3,808
- Limit deferrals to 7% and Owner is safe

Use Roth to get more "bang from the buck" for limited deferrals

- Roth deferrals are tailor made for HCEs who can't defer all they'd like to defer
- Roth won't fix a failed ADP test
  - But if the HCE stays in the same tax bracket, a $10,000 Roth deferral is equivalent to a pretax deferral of ($10,000 + the tax on $10,000)
  - Takes the sting out of low NHCE deferrals

Roth Example

- Nan, age 47, wants to defer $22,500
  - W-2 gross compensation: $300,000
  - 40% combined tax rate
  - Only HCE at her company
  - Doesn't want safe harbor plan
- Employees, on average, defer 3%
  - ADP test limits her to deferring $15,000 (5%)
- Assume Nan's deferral will triple in value before she withdraws it at age 60 retirement

Nan doesn't have to defer full 5% to get same effect with Roth

Nan defers $15,000 pretax	
Deferral	$15,000
Tax savings	$6,000
Cost to defer	$9,000
Account at 60	$45,000
Tax on distrib	$18,000
After-tax distribution	$27,000

Nan defers $15,000 Roth	
Deferral	$15,000
Tax savings	$0
Cost to defer	$15,000
Account at 60	$45,000
Tax on distrib	$0
After-tax distribution	$45,000

Nan doesn't have to defer full 5% to get the same effect with Roth

Automatic contribution arrangements (ACA) can increase NHCE deferrals

- Let inertia work for you
  - DOL reports EEs deferring increases 26%
- PPA makes sure state law doesn't interfere
  - Give annual notice
- Can use EACA rules to allow permissible withdrawals

Adopt Safe Harbor 401(k) Plan

- Requires a fully vested employer contribution
- Generally, SH Match plan must be in effect before PY begins
  - Some ability to add mid-year
- Notice is a requirement of a SH Match plan but not a SH Nonelective plan

SH or QACA

- Either way, ER is buying its way out of the ADP test
  - And under either, ER also may avoid ACP test on matching
- Under either, ER may make a minimum 3% nonelective contribution OR a fixed match
  - SH required match is a maximum of 4% of compensation
  - QACA required match is a maximum of 3½% of compensation

Safe harbor contribution alternatives

Basic match

- 100% of deferrals up to 3% of comp
- 50% of deferrals from 3% to 5% of comp
- Max = 4%

Nonelective

- At least 3% of comp
- Whether or not EE defers

Enhanced match

1. Get at least as much as basic match no matter how much you defer
2. No HCE has higher match at any level of deferrals than any NHCE
3. Rate of match doesn't climb as deferrals increase

ACP safe harbor requirements

- Satisfy ADP safe harbor
  - Either classic or QACA
  - Can use match or nonelective for ADP safe harbor
- The document must require that all matching contributions under plan satisfy four conditions:
  1. No HCE has higher match at any level of deferrals than any NHCE
     - Prohibits allocation conditions for any matching formula in plan
  2. Rate of match doesn’t climb as deferrals increase
  3. No matching formula can take into account deferrals/after-tax contributions > 6% of comp
  4. Total amount of discretionary match cannot exceed 4% of comp

Triple stacked match

Players only – Triple Stacked Match – Step 1

	Net Comp	Deferrals	Basic Match	Discretion Match	Fixed Match	Total
Sam	$400,000	$26,000	$11,600			$63,500
Sue	$350,000	$19,500	$11,600			$57,000
Anne	$90,000	$6,000	$3,360			
Maria	$60,000	$2,000	$1,870			
Tony	$40,000	$1,000	$1,000			
Frank	$24,000	$0	$0			
Total	$964,000	$54,500	$29,430			

- Deferrals plus basic safe harbor match
  - 4% enhanced match would cost $298 more
- Uses net compensation because we aren't trying to encourage deferrals

Players only – Triple Stacked Match – Step 2

	Net Comp	Deferrals	Basic Match	Discretion Match	Fixed Match	Total
Sam	$400,000	$26,000	$11,600	$11,600		$63,500
Sue	$350,000	$19,500	$11,600	$11,600		$5,000
Anne	$90,000	$6,000	$3,360	$3,360		
Maria	$60,000	$2,000	$1,870	$1,333		
Tony	$40,000	$1,000	$1,000	$667		
Frank	$24,000	$0	$0	$0		
Total	$964,000	$54,500	$29,430	$28,560		

- Discretionary match limited to 4% of comp
  - Can't consider deferrals over 6% of comp
- Formula = 2/3 of deferrals up to 6% of comp

Players only – Triple Stacked Match – Step 3

	Net Comp	Deferrals	Basic Match	Discretion Match	Fixed Match	Total
Sam	$400,000	$26,000	$11,600	$11,600	$14,300	$63,500
Sue	$350,000	$19,500	$11,600	$11,600	$14,300	$57,000
Anne	$90,000	$6,000	$3,360	$3,360		
Maria	$60,000	$2,000	$1,870	$1,333		
Tony	$40,000	$1,000	$1,000	$667		
Frank	$24,000	$0	$0	$0		
Total	$964,000	$54,500	$29,430	$28,560		

- Owners need $14,600 to reach 415 limit
- Can only consider $16,800 of deferrals (6% of comp)
- Fixed match = 14,300/17,400 = 82.18% of deferrals up to 6% of comp

Players only – Triple Stacked Match – Step 4

	Net Comp	Deferrals	Basic Match	Discretion Match	Fixed Match	Total
Sam	$400,000	$26,000	$11,600	$11,600	$14,300	$63,500
Sue	$350,000	$19,400	$11,600	$11,600	$14,300	$57,000
Anne	$90,000	$6,000	$3,360	$3,360	$4,438	$17,158
Maria	$60,000	$2,000	$1,870	$1,333	$1,644	$6,847
Tony	$40,000	$1,000	$1,000	$667	$822	$3,489
Frank	$24,000	$0	$0	$0	$0	$0
Total	$964,000	$53,000	$28,630	$27,760	$35,504	$147,944

- Total employee cost = $18,494 (12.50%)
  - $1,863 cheaper than integrated SH + disc. match
- Compare with $10,700 for pure XT plan with same EEs
- Potential XT sticking point: Age
- Potential triple stacked match sticking point: Deferrals

3 choices for QACA employer contributions

1. 3% nonelective contribution

- Same as classic SH
- Can be greater

2. Basic QACA match

% of comp	Match rate
Up to 1%	100%
1% to 6%	50%

3. Enhanced QACA match

- At least as good as basic QACA at all levels of deferrals
- Rate of match doesn't climb
- No HCE has rate of match > any NHCE

Notice requirement

- Notice before beginning of year required for safe harbor <u>match</u> and QACA match
  - So, no real way to convert existing ADP-tested plan into safe harbor match plan midyear
- But can add safe harbor nonelective 401(k) plan midyear to existing 401(k) plan
  - No notice requirement

Changing HCE Definition

- Top-paid group election
  - **Without:** HCEs are 5% owners; and EEs with comp over $150,000 ($135,000 for 2022)
  - **With:** HCEs are 5% owners; and EEs with comp over $150,000 ($135,000 for 2022) who are in top 20% of EEs
- Plan amendment required for change
- Change needs to be made by the close of the 2024 plan year
- Must make change simultaneously for all plans, including welfare plans
- Choice doesn't affect 5% owners

Family Members – HCEs by Attribution

- Put family members of owners on payroll (spouse, children)
  - Make certain they are performing legitimate work
    - Must satisfy eligibility requirements by end of 2024
  - HCE by way of attribution
  - Have family members defer 0% or at least less than other HCEs
  - Will reduce HCE average ADP

Form 5500 Changes

2023 Changes (Reporting in 2024)

- On February 24th, the Employee Benefits Security Administration (DOL), IRS, Treasury, and PBGC released Final forms revisions and Final Rules related to the Form 5500
  - These Form 5500 changes are effective for the 2023 reporting year
- This package of Form 5500 changes includes reporting rules related to:
  - defined contribution “groups of plans” or DCGs,
  - changes to Schedules MB, SB and R for defined benefit plans,
  - the addition of IRS compliance questions, and
  - a change to the counting method for determining whether a defined contribution plan is subject to audit

MEP Reporting

- The final rules implement a new **Schedule MEP** for all types of retirement MEPs, including PEPs, association MEPs and professional employer organization (PEO) MEPs
- Schedule MEP reflects the content requirements that DOL finalized for 2021 and 2022 plan-year filings, with adjustments to reflect SECURE 2.0's introduction of 403(b) MEPs
  - MEPs will continue to report required information on an attachment for the 2022 plan year

Group of Defined Contribution Plans (DCGs)

- The SECURE Act directed that the Form 5500 be modified to allow certain groups of defined contribution plans (“DCGs”) to file a single consolidated annual return
- The final rules implement this directive by creating an optional DCG filing arrangement starting in 2023 (delayed from 2022)
- The agencies believe this provision of the SECURE Act is “primarily aimed” at:
  - Single-employer DC plans sponsored by unrelated small employers that have adopted a preapproved plan with the same provider, even though the act doesn’t restrict group filing eligibility to those plans

Conditions for DCG eligibility

- The SECURE Act made new group filings available to DC plans that have the same
  - trustee,
  - named fiduciary,
  - plan administrator,
  - plan year, and
  - investment options
- The final rules include some additional conditions, but respond to public comments by eliminating the more controversial elements of the proposal

Same trust not required

- Each plan must have a **common trustee**, either named in the trust or plan instrument or appointed by a named fiduciary of the participating plan
  - In a departure from the proposal, plans participating in a DCG don't need to (but could) have the same trust
  - The agencies didn't extend the DCG filing alternative to plans without trustees, such as those funded through insurance products or custodial accounts.
  - As a result, a DCG filing is not an option for 403(b) plans

Same Named Fiduciary and Plan Administrator

- Consistent with the proposal, the employer of a plan participating in a DCG filing can serve as a named fiduciary for its own plan, but other named fiduciaries must be common to all participating plans
- Plans participating in a DCG filing must also have the same designated plan administrator
  - the plan sponsor can't be the default plan administrator for this purpose

Same Investment Options

- All plans participating in a DCG filing arrangement must offer the same investments or investment options
- Although the proposal included additional restrictions on permissible investments, the final rule provides greater flexibility:
  - The final rule eliminated the proposed requirement for plans to be fully invested in assets that have a readily determinable fair market value and are held or issued by regulated financial institutions, such as banks, insurance companies and registered investment companies
  - DOL expects that as a practical matter, the DCG same-investment and audit requirements will effectively limit participating plans to these types of investments

Same Investment Options

- Plans holding employer securities generally can't participate in a DCG filing
  - However, DOL clarified that this restriction doesn't apply to publicly traded employer securities held indirectly through a diversified pooled investment fund, such as a collective investment trust, and offered as an investment option by all of the plans
- The agencies added flexibility for DCG plans to offer a single dedicated brokerage window that only permits investments in assets with a readily determinable fair market value held or issued by regulated financial institutions
  - The brokerage window must be available through a single designated provider that is a registered broker-dealer

Audit Requirements

- With the elimination of the same trust requirement, DCGs won’t have to obtain a trust-level audit, contrary to the original proposal
  - Large plans (generally those with 100 or more participants) that participate in a DCG filing will still need to obtain an annual audit, including an IQPA report, as required for other large plans
  - Small plans currently exempt from the IQPA audit requirement will remain exempt
- DOL explains that these audit requirements are consistent with SECURE 2.0’s direction that DCG filing arrangements can only require audits for participating plans that would have to obtain an audit if filing an individual Form 5500

Excluded Plans

- MEPs and multiemployer plans can't participate in a DCG filing arrangement

Filing Requirements

- A DCG will file Form 5500 with applicable schedules and attachments reporting aggregate information for the group, along with
  - a separate **Schedule DCG** for each participating plan, and
  - each large plan's IQPA report (as applicable)

Filing Requirements

- Schedule DCG will provide information ordinarily reported on Form 5500 for an individual plan, such as identifying details, financial information, applicable plan characteristic codes, compliance questions and information relating to the accountant opinion (if applicable)
  - Information for schedules other than Schedule DCG will be reported in the aggregate
  - For example, the $5,000 threshold for reporting a service provider on Schedule C is based on the provider's total compensation from all plans participating in the DCG filing
- DCGs <u>can't</u> file Form 5500-SF, even if they have fewer than 100 participants in total

Filing Due Date

- DCG filings will have the same due dates that apply to individual Form 5500 filings
- The final revisions allow a DCG to request an extension of the filing deadline by filing a single Form 5558 that lists all participating plans
  - The proposal would have required a separate Form 5558 filing for each participating plan

Summary Annual Report (SAR)

- DOL provided model SAR language for plans participating in a DCG
  - The model language informs participants that the plan participates in a consolidated Form 5500 filing arrangement, the SAR provides aggregate information on all participating plans
  - The consolidated filing includes a Schedule DCG with plan-specific information and participants have a right to request the Schedule DCG relating to their plan

Annual Audit

- The final revisions change how to determine whether a DC plan is subject to the annual IQPA audit requirement for plans with 100 or more participants
  - Starting with the 2023 plan year, DC plans will determine large-plan status using the number of participants with account balances at the beginning of the plan year
  - Employees who are eligible but not participating don't count toward the audit threshold
  - The existing rules (which remain in effect for 2022 plan-year filings) count all eligible employees, even if they haven't contributed and don't have a balance in the plan
- Though the SECURE Act doesn't require this change, DOL believes the act's expanded eligibility requirements for long-term part-time employees (which take effect in 2024) would otherwise subject many small plans to the audit requirement

IRS Compliance Questions

- Several changes will help IRS target audits toward plans likely to have compliance issues:
- **Nondiscrimination testing.** Retirement plans (except for MEPs and PEPs) will have to answer two new nondiscrimination testing questions:
  - Whether the plan satisfied the **coverage** and **nondiscrimination** requirements using the permissive aggregation rules
  - Whether a 401(k) plan uses a design-based safe harbor, prior-year ADP testing or current year testing to satisfy 401(k) and 401(m)

IRS Compliance Questions

- **Preapproved plans.** To help IRS identify plans that haven't been timely updated for changes in law, an employer that adopted a preapproved plan (including a preapproved 403(b) plan) must indicate whether the plan received a favorable IRS opinion letter, and if so, give the <u>letter's date and serial number</u>
  - Employers that have made more than minor modifications to a preapproved plan are no longer preapproved plan adopters and won't complete this question

Future Changes

- With these final changes completed, the agencies expect to propose broader Form 5500 changes
- DOL's most recent regulatory agenda indicates that this project will make investment and other information on the Form 5500 more data-mineable and may revise group health plan reporting requirements
- The agencies also may reconsider the following aspects of the 2021 proposal that weren't finalized:
  - Standardized and enhanced asset schedules for retirement and welfare benefit plans filing Schedule H
  - Qualified loan-offset reporting on Schedule H
  - Trust information reporting
  - Changes to reporting on multiple-employer welfare agreements (MEWAs) that file Form M-1

Plan Amendments

2025 Amendment Deadline

- No operational failure if amended by last day of first plan year beginning on or after 1/1/2025
  - IRS can grant later deadline
  - Governmental and union plan deadlines extended two years
  - Amendment must be retroactively effective
- Anti-cutback relief also available
- Must operate in accordance with law and amendment as ultimately adopted

Act Section
501
Qualified
Yes
403(b)
Yes
457(b)
Yes
Eff. Date
N/A

More On Amendments

- Presumably, deadline for terminating plans is termination date
- Will not be included in 403(b) restatements now being submitted to the IRS
- 2025/2027 deadline also applies to amendments for
  - SECURE 1.0
  - CARES
  - Taxpayer Certainty and Disaster Tax Relief Act of 2020

SECURE 2.0 Changes

Catch-Ups Must Be Roth

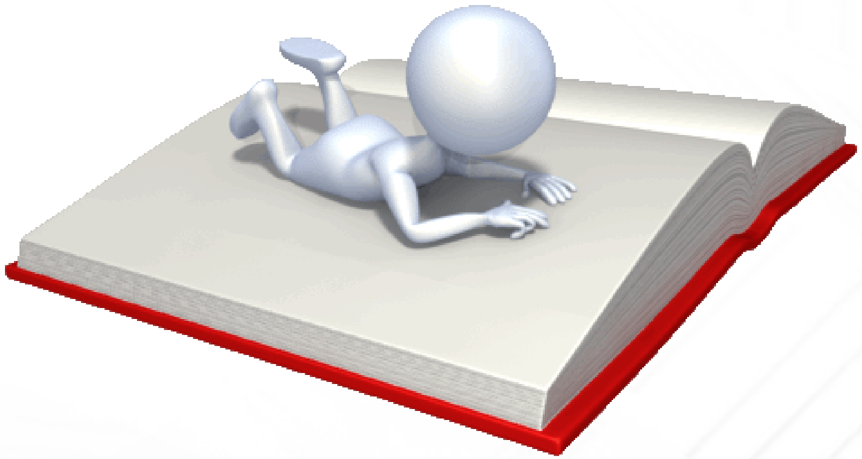
- Catch-ups must be Roth
  - Means non-Roth plan cannot take catch-ups
  - Applies to participants whose prior calendar year FICA wages from the employer exceeded $145,000 (indexed)
    - Arguably this excludes self-employed
- Does not apply to SARSEP or SIMPLE IRA

Act Section
603
Code Section
414(v)
Qualified
401(k)
403(b)
Yes
457(b)
Govt
Eff. Date
Tax Years after 2023

Catch-Ups Must Be Roth

- If catch-up eligible participant has 402(g) violation when deferrals from two plans are added together, needs to
  - advise the plan(s) of amount to refund; or
  - determine catch-up limit and request reclassification of that amount to Roth.

That's pretty complex for a participant…



Act Section
603
Code Section
414(v)
Qualified
401(k)
403(b)
Yes
457(b)
Govt
Eff. Date
Tax Years after 2023

Questions for which we need guidance:

- Implementation challenges for plans using spillover and separate contribution elections;
- Use of a special definition of wages for purposes of applying the $145,000 limit;
- Impact of the $145,000 limit on mid-year hires and employees with variable pay;
- Ability to require all employees, not just those making more than $145,000, to make catch-up contributions on a Roth basis; and
- Inability to prevent employees who exceed the $145,000 limit from making catch-up contributions without eliminating catch-up contributions from the plan entirely.

Roth Employer Contributions

- Vested employer contributions can be Roth
  - Matching contributions
    - Including match on student loan repayments
  - Nonelective contributions
    - Arguably could apply to a straight PS or MPP plan
- Participant election to designate as Roth
  - Presumably follow rules for Roth deferrals
- How will these contributions be reported?

Act Section
604
Code Section
402A
Qualified
DC
403(b)
Yes
457(b)
Govt
Eff. Date
Contrib. after Enactment

Retroactive Sole Proprietor Deferrals

- SECURE 1.0 allowed retroactive plan adoption
  - Up to extended due date of return
  - Only applied to employer contributions
- New law allows retroactive elective deferral elections
  - Limited to unincorporated sole proprietor with <u>no employees</u>
  - Deferral election made after end of tax year, but by filing deadline, treated as made before end of first plan year for retroactively adopted plan

Act Section
317
Code Section
401(b)
Qualified
401(k)
403(b)
No
457(b)
No
Eff. Date
Plan Years After 2022

Retroactive Sole Proprietor Deferrals

- Limitations:
  - Not applicable to partners in a partnership (like lawyers, doctors, etc.)
  - Not applicable to anyone with employees
  - Only applies to retro adoption
  - Why limit to only proprietors and only if no employees?
    - All self-employed individuals have the same issues regarding determining earned income after year end

Act Section
317
Code Section
401(b)
Qualified
401(k)
403(b)
No
457(b)
No
Eff. Date
Plan Years After 2022

Example

- Mary Smith's (sole proprietor) accountant contacts you on March 1, 2024 and shares with you that 2023 was a good year for Mary and she would like to reduce her tax liability by establishing a retirement plan
- *Can she establish a plan retroactively for 2023? Can the plan be a 401(k) plan? Yes, Yes*
- *How much can she contribute? $66,000 + $7,500 (catch-up)*
- *What if she had one employee? She could establish the Profit Sharing plan retroactively but not the 401(k) portion of the plan*

Retroactive Increase in Employer Contributions

- Allows employer to amend plan to retroactively increase benefits or nonelective employer contributions
  - Doesn't apply to matching contributions
  - Deadline is extended tax return due date
  - Must be consistent with other requirements (such as nondiscrimination)
- Can treat the amendment as having been adopted on the last day of the prior plan year

Act Section
316
Code Section
401(b)
Qualified
Yes
403(b)
No
457(b)
No
Eff. Date
Plan years after 2023

401(k) Long-Term Part-Time (LTPT) Employee Provision

SECURE Act 1.0
SECURE Act 2.0

Long-Term Part-Time Employee Coverage Changes

- LTPT rules added to ERISA §202 and to Code §403(b)(12)(D)
- LTPT is EE who has 2 consecutive eligibility computation periods with 500 – 999 HOS and attained age 21
  - SECURE 1.0: 3 consecutive years
- Technical corrections:
  - Years before 2021 are disregarded for 401(k) vesting (applies immediately; 2023 for 403(b) vesting)
  - Safe harbor plan not TH just because LTPT don't get SH

Act Section
125
Code Section
401(k)(15)
Qualified
401(k)
403(b)
Yes
457(b)
No
Eff. Date
Plan Years after 2024

LTPT: 2024 vs. 2025

- 2024 plan years must apply SECURE 1.0 Rules
  - 3-year eligibility rule
  - BUT the new vesting and TH rules apply as though in SECURE 1.0
- 2025: begins new LTPT Rules
  - 2-year eligibility

Eligibility Rules

- **Age requirement.** The LTPT employee also must satisfy the plan's age requirement to enter the plan
- **Entry dates.** In applying the new long-term part-time employee provision, the plan may apply plan entry date provisions – early of the first day of the plan year or 6 months following completion of the eligibility requirements (e.g., semi-annual entry dates)
- **Service periods.** In apply the service requirements, the plan determines the service periods (12-month periods) in the same manner as it determines years of service
  - Anniversaries of the employment commencement date or the plan may switch to the plan year
- **Crediting service.** A plan doesn't have to begin crediting eligible service until 2021
  - First entry would be in 2024

Example

- Company X maintains a calendar year 401(k) plan
  - Eligibility: 1 YOS/age 21/semi-annual entry dates
  - Eligibility computation period: switches to plan year after first year
- Mary is a part-time employee (50hrs/month)
  - Commenced employment on December 1, 2023
  - She will complete 2 consecutive years under LTPT rule on December 31, 2024 and enter the plan on January 1, 2025
- Assume the same facts except the plan measures computation periods on anniversaries of the employment commencement date
  - Mary will complete 2 consecutive years on November 30, 2025 and enter the plan on January 1, 2026

Employer Nonelective and Matching Contributions

- The new LTPT employee rule <u>only</u> requires the plan to make elective deferrals available to such employees
- The plan does not need to provide employer nonelective or matching contributions for the LTPT employees
  - However, an employer **may** provide employer contributions to LTPT employees

Nondiscrimination Testing

- **Exclude LTPT employees.** In the case of employees who are eligible <u>solely</u> by reason of the new rule (500 HOS in three consecutive years), the employer may elect to <u>exclude</u> such employees from:
  - Coverage and nondiscrimination testing, including the ADP and ACP tests
  - If the employer elects to provide employer nonelective or matching contributions to LTPT employees, the employer may elect to excude such employees from nondiscrimination and testing
- **Cross-testing plans.** An employer may find that providing nonelective contributions to LTPT employees and including them in the nondiscrimination testing may be beneficial
  - Employers have the option to include the LTPT employees

Top Heavy

- Employees who are eligible to participate in the plan solely because of the new part-time provision are excluded from the vesting and benefit provisions of the top heavy rules
  - Such employees also are **not** included in determining whether the plan is top heavy
- A Safe Harbor 401(k) plan that is designed to be top heavy exempt will <u>not</u> lose its top heavy exempt status because a LTPT employee doesn’t receive Safe Harbor 401(k) nonelective or match

Vesting

- **Vesting YOS.** If the part-time employee receives an employer contribution, the plan will determine his/her vesting percentage, the plan will treat each 12-month period for which the employee has at least 500 hours of service as a year of service
- **BIS rules.** The plan will apply the break-in-service rules by substituting ‘at least 500 hours of service’ for ‘more than 500 hours of service
- **Crediting vesting YOS.** Years before 2021 are disregarded for 401(k) vesting (applies immediately). *SECURE 2.0 Technical Correction to SECURE 1.0*
  - Unless an exception exists (e.g. disregarding of years of service prior to age 18), a LTPT employee will receive credit for all service from January 1, 2021 for purposes of vesting

Employees Who Become Full-Time Employees

- The new LTPT employee provision will cease to apply (with the exception of the vesting provision) to any employee as of the first plan year beginning after the plan year in which the employee meets the plan's normal eligibility requirements

Exclusions

- If the LTPT employee is part of a plan exclusion class (e.g., mailroom employees, division A employees, truck drivers), will the employee be excluded even if he/she satisfies the eligibility requirements?
  - **Questionable. We will need to see additional guidance from the IRS. An exclusion could be used to undermine the new provision.**
  - **Ex.: All the LTPT employees worked in the mailroom**
- If the plan excludes part-time employees, will a LTPT employee be excluded from participating?
  - **Probably not. The part-time employee exclusion is effectively a service requirement and not an exclusion. Accordingly, if an employee satisfied the conditions of the LTPT employee provision, the plan would need to allow them to participate in the 401(k) plan irrespective of the part-time employee exclusion.**

Example

- Forbes Family Dentistry (FFD) maintains a 401(k) plan
  - Eligibility requirements: 1 YOS/Age 21
  - Semi-annual entry dates: 1/1 and 7/1
  - Matching and Profit Sharing contributions
  - Top heavy
- Ann, a dental assistant, has worked part-time (600-800 HOS/year) for FFD since 2018
  - Because of the plan's eligibility requirements she has never participated in the plan

Example (cont.)

- *Will Ann be eligible under the new law? If so, when?*
- *Will Ann be eligible for the match? Profit sharing contribution? Top heavy minimum?*
- *Will Ann be included in the coverage test? ADP test? ACP test? Top heavy determination?*
- *If the plan excluded all dental assistants, would Ann be eligible to participate in the plan?*
- *If the plan excluded part-time employees, would Ann be eligible to participate in the plan?*

Example

- Corporation X maintains a 401(k) plan with one YOS/age 21 eligibility conditions and semi-annual entry dates (1/1 and 7/1)
  - Plan provides for deferrals, matching contributions and profit sharing contributions
  - In addition to its 30 full-time employees, X employs 4 part-time employees who have been with the company for several years
- **How will the new LTPT employee rule affect their participation in the 401(k) plan?**

Example

- Corporation X maintains a 401(k) plan with one YOS/age 21 eligibility conditions and semi-annual entry dates (1/1 and 7/1)
  - Plan provides for deferrals, matching contributions and profit sharing contributions
  - In addition to its 30 full-time employees, X employs 4 part-time employees who have been with the company for several years
- *How will the new LTPT employee rule affect their participation in the 401(k) plan?*

	Ann	Ben	Cathy	Don
2021	500	500	400	500
2022	500	1000	400	500
2023	500	500	400	400
2024	500	500	500	400
2025	500	500	500	500
2026	400	500	400	500

	Ann	Ben	Cathy	Don
2021	500 V E	500	500	500
2022	500 V E	1000	400	500
2023	500 V E	500	500	400
2024	500 V P (enters plan)	500	500	400
2025	400 P	500	500	500
2026	500 V P	500	500	500

	Ann	Ben	Cathy	Don
2021	500	500 V E	400	500
2022	500	1000 V	400	500
2023	500	500 V P	400	400
2024	500	500 V P	500	400
2025	500	500 V P	500	500
2026	400	500 V P	400	500

	Ann	Ben	Cathy	Don
2021	500	500	500 V E	500
2022	500	400	400	500
2023	500	500	400	400
2024	500	500	500 V E	400
2025	500	500	500 V E	500
2026	400	500	400 P (enters plan)	500

	Ann	Ben	Cathy	Don
2021	500	500	500	500 V E
2022	500	400	400	500 V E
2023	500	500	400	400
2024	500	500	500	400
2025	500	500	500	500 V P (enters plan)
2026	400	500	400	500 V P

Plan Fees

- LTPT participating in a 401(k) plan will be subject to per participant fees
- Participant notifications
  - if plan sponsor doesn't choose to use SECURE 2.0 §320 (Notices to "Unenrolled" Participants"),
  - then cost of preparing and distributing all notices to LTPT employees may be significant

Avoiding the LTPT employee rule by plan design?

- Corporation X amends 401(k) plan (with discretionary match and profit sharing) with 1 YOS/age 21 to 6 months/500 hos to avoid application of the LTPT employee rule
  - Does it work? **No. Why not?**
- For any EE that doesn't satisfy the 6 months/500 hos requirement, most plans will then shift to the 1 YOS rule for subsequent eligibility computation periods
  - This will trigger the application of the LTPT employee rule
- For plans that continue to apply the 6 months/500 hos for EEs who don't satisfy the requirement initially (continually "roll" 6 months/500 hos), this also will not eliminate the LTPT rule
  - **Ex.:** Ann works 300 hos in the first 6 months and 300 hos in her second 6 months. Under the plan provision, she doesn't enter, but under LTPT rule she will

Avoiding the LTPT employee rule by plan design?

- Corporation X amends SH 401(k) match plan (top heavy exempt) with 1 YOS to 6 months/500 hos for elective deferrals (SH match continues to apply 1 YOS) to avoid the application of the LTPT employee rule
  - Relies on SECURE 2.0 §310 to retain top heavy exempt status (i.e., no longer need to provide TH minimum to otherwise excludible EEs)
- Does it work? **No and No. Why not?**
  - **LTPT employee rule** – for the same reasons explained in the previous slide
  - **Top heavy exempt status** – Under Section 310, a plan will not need to provide TH minimums to the otherwise excludible employees. However, Section 310 doesn't permit a SH plan with dual eligibility to retain TH exempt status

Avoiding the LTPT employee rule by plan design?

- Can you avoid the LTPT employee rule by amending your eligibility requirements for elective deferrals to immediate eligibility?
- **Apparently yes. However, the plan should weigh the costs in adopting such an amendment**

LTPT Questions and Issues

- Does the new LTPT employee provision apply to 457(b) plans?
  - **No.**
- Are LTPT employees part of Form 5500 participant account?
  - **Should be. However, if they don’t defer, they will not affect the participant count.**

Top Heavy Changes

Secure Act 2.0 §310

Top-Heavy and Otherwise Excludable Employee

- If plan covers otherwise excludable employees (less than 1 YOS), can treat them as a separate group for purposes of top-heavy minimum contribution in defined contribution plan
  - Typically means they don't need to receive the TH minimum

Act Section
310
Code Section
416
Qualified
DC
403(b)
No
457(b)
No
Eff. Date
Plan years after 2023

Example

- Law firm maintains a safe harbor 401k plan
  - One YOS/age 21 eligibility requirements
  - In addition to deferrals, the plan provides a basic SH match and PS contributions
  - For 2023, the law firm doesn't make a profit sharing contribution
  - The plan is top heavy exempt and the firm doesn't have to make an additional TH minimum contribution

Example: Law Firm, Inc. (2023)

Name	Position	Net Comp	Deferral	Basic SH Match	TH Minimum	Fulltime?	1 YOS?
Sam	Shareholder	$330,000	$30,000	$13,200	$0	Full	Yes
Sue	Shareholder	$330,000	$22,500	$13,200	$0	Full	Yes
Anne	Associate	$84,000	$6,000	$3,360	$0	Full	Yes
Maria	Office Manager	$58,000	$2,000	$1,870	$0	Full	Yes
Tony	Secretary	$39,000	$1,000	$1,000	$0	Full	Yes
Frank	Filing Clerk	$24,000	$0	$0	$0	Full	Yes
Tina	Secretary	$30,000	$0	$0	$0	Full	No
Carl	Law Clerk	$13,500	$0	$0	$0	800 HOS	No

- Eligibility: 1 YOS/age 21 (so Tina and Carl don't participate)
- Safe harbor 401(k) plan is top heavy exempt
- The firm doesn't need to make a TH minimum contribution for Tony and Frank

Example

- Assume the same facts as in the previous example, except the law firm amends the plan to provide immediate eligibility for deferrals (one YOS/age 21 continues to apply for the SH match) and excludes part-time employees
  - For 2023, X applies the OEE rule for coverage and nondiscrimination
  - Under the OEE rule, the upper group plan is SH and doesn’t need to apply the ADP or ACP tests
  - Since the OEE doesn’t apply for TH purposes, X will have to make TH minimum contributions for all eligible EEs, including those EEs with less than a year of service (Tony, Frank and Tina)

Example: Law Firm, Inc. (2023)

Name	Position	Net Comp	Deferral	Basic SH Match	TH Minimum	Fulltime?	1 YOS?
Sam	Shareholder	$330,000	$30,000	$13,200	$0	Full	Yes
Sue	Shareholder	$330,000	$22,500	$13,200	$0	Full	Yes
Anne	Associate	$84,000	$6,000	$3,360	$0	Full	Yes
Maria	Office Manager	$58,000	$2,000	$1,870	$0	Full	Yes
Tony	Secretary	$39,000	$1,000	$1,000	$200	Full	Yes
Frank	Filing Clerk	$24,000	$0	$0	$720	Full	Yes
Tina	Secretary	$29,500	$500	$0	$900	Full	No
Carl	Law Clerk	$13,500	$0	$0	$0	800 HOS	No

- Safe harbor 401(k) plan is NOT top heavy exempt
- Tony, Frank and Tina must receive the TH minimum

Example

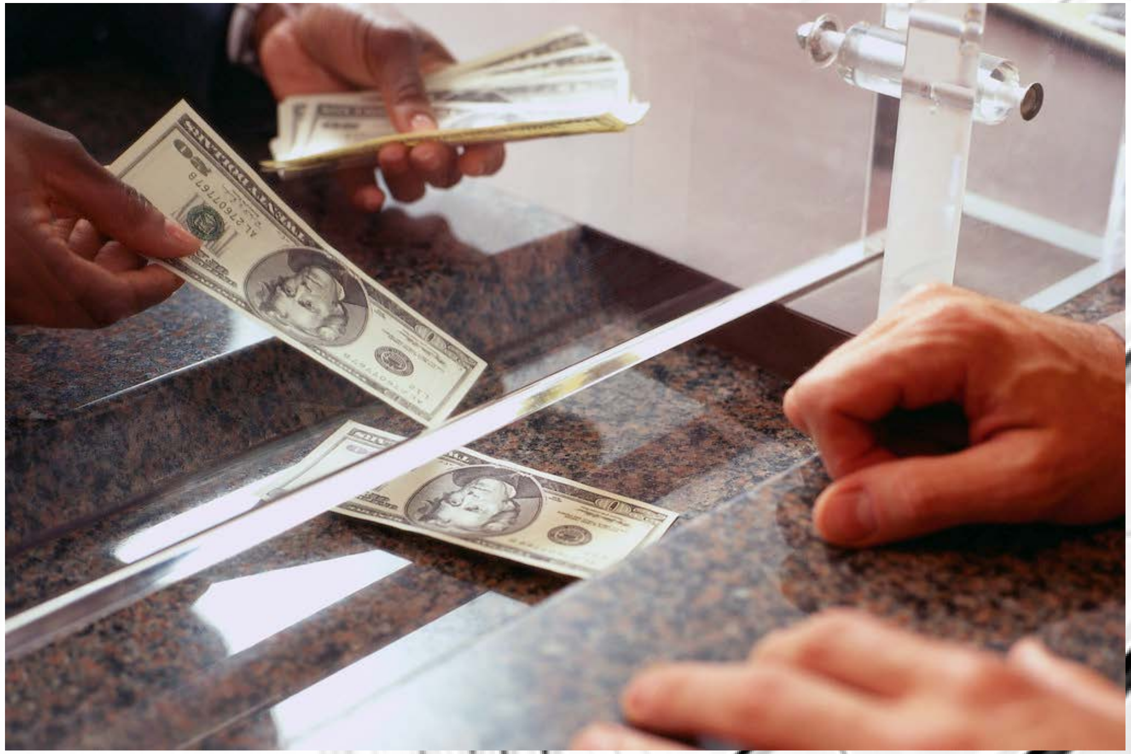
- Assume the same facts as in the previous example, except the plan year is 2024
  - For 2024, X applies the OEE rule for coverage and nondiscrimination
  - Carl is eligible to defer under LTPT employee rule
  - Under the OEE rule, the upper group plan is SH and doesn't need to apply the ADP or ACP tests
  - Commencing in 2024, Section 310 provides that the firm will not need to make a TH minimum contribution to the OEEs (Tina)
  - Unfortunately, Section 310 doesn't address the top heavy exemption for the "upper" group
    - Accordingly, the firm will need to make a TH minimum contribution for the upper group employees

Example: Law Firm, Inc. (2024)

Name	Position	Net Comp	Deferral	Basic SH Match	TH Minimum	Fulltime?	1 YOS?
Sam	Shareholder	$330,000	$30,000	$13,200	$0	Full	Yes
Sue	Shareholder	$330,000	$22,500	$13,200	$0	Full	Yes
Anne	Associate	$84,000	$6,000	$3,360	$0	Full	Yes
Maria	Office Manager	$58,000	$2,000	$1,870	$0	Full	Yes
Tony	Secretary	$39,000	$1,000	$1,000	$200	Full	Yes
Frank	Filing Clerk	$24,000	$0	$0	$720	Full	Yes
Tina	Secretary	$29,500	$500	$0	$0	Full	No
Carl	Law Clerk	$13,500	$0	$0	$0	800 HOS	No

- Eligibility: Immediate eligibility for deferrals (Tina can defer) and Carl can defer under LTPT employee rule; 1 YOS/age 21 for SH match (so Tina, Carl and Carl don't participate)
- SECURE §310 states that the plan doesn't need to give TH minimum to OEE (Tina), however, it doesn't preserve TH exemption (Tony and Frank)

Distributions



Employer Can Rely on Employee Certification for Hardships

- Allows plan to rely on employee's written certification that:
  - Distribution is on account of deemed immediate and heavy financial need under safe harbor regulations
    - Or 457(b) unforeseeable emergency
  - Distribution doesn't exceed amount of need
  - Employee doesn't have other resources
- IRS can issue regulations addressing:
  - When employer has contrary knowledge
  - Cases of employee misrepresentation

Act Section
312
Code Section
401(k)(14)
Qualified
401(k)
403(b)
Yes
457(b)
Yes
Eff. Date
Plan Years after 2022

Hardship Distributions from 403(b) Plans

- Allows 403(b) hardship distributions to be like 401(k)
- Can distribute from:
  - Deferrals
  - QNECs, QMACs, Safe harbor contributions
  - Custodial accounts
  - Earnings
- No requirement to take loan first

Act Section
602
Code Section
403(b)(17)
Qualified
No
403(b)
Yes
457(b)
No
Eff. Date
Plan Years after 2023

Increase Cash-Out Limit

- Cash-out limit is currently $5,000
- Impacts
  - Auto rollovers
  - Distributions without consent
  - Distributions exempt from QJSA
- Increased to $7,000 (not indexed)
- Last changed in 1997

Act Section
304
Code Section
411(a)(11)
Qualified
Yes
403(b)
Yes
457(b)
No
Eff. Date
Distributions after 2023

Distributions for Emergency Personal Expenses

- Effective for distributions beginning in 2024, SECURE 2.0 permits a participant to receive a distribution of up to $1,000 for the purpose of meeting unforeseen or immediate financial needs relating to necessary personal or family emergency expenses
- Participants would be limited to one emergency distribution each calendar year
- The plan administrator is permitted to rely on the employee's self-certification that he or she is eligible for the emergency distribution
- This is an optional plan feature that may be added to the plan
- Subject to 411(d)(6) cutback prohibition unless IRS regulations provide an exception

Act Section
115
Code Section
72(t)
Qualified
Yes, except pension
403(b)
Yes
457(b)
No
Eff. Date
Distributions after 2023

Distributions for Emergency Personal Expenses

- The amount distributed is taxable but exempt from 20% withholding and the additional income tax under IRC §72(t)
- Emergency distributions may be repaid within 3 years of the distribution date
- Emergency distributions are not permitted for 3 years after the original distribution unless the distribution has been fully repaid (or the aggregate amount of elective deferrals and after-tax voluntary contributions made after the distribution are at least equal to the amount of the prior distribution).

Student Loan Repayments Can Be Matched Like Deferrals

- Applies to "Qualified Student Loan Payment"
  - Incurred on behalf of employee
  - For qualified higher education expenses
    - Carrying at least half-time full student load
  - Can't exceed 402(g) limit minus elective deferrals
- Employee must annually certify payment made on loan
  - Employer may rely on certification
- Also applies to SIMPLE IRA

Act Section
110
Code Section
401(m)
Qualified
401(k)
403(b)
Yes
457(b)
Govt
Eff. Date
Plan Years after 2023

Required Minimum Distributions (RMDs)

Increased RBD

- Required Beginning Date was April 1 of calendar year following year participant turned 70½ (or retired)
  - It's going up and up and up!
  - Ambiguity on people born in 1959

Year	
2020	72
2023	73
2033	75

Date of birth	Required beginning date
Before 7/1/49	Based on 70 ½
7/1/49 – 12/31/50	Based on 72
1/1/51 – 12/31/59	Based on 73
After 12/31/58	Based on 75

Surviving Spouse RMDs

- Surviving spouse has been able to convert IRA into spouse’s own IRA without a rollover
  - RMDs based on spouse’s age using ULT
- Will now be able to do that in an employer plan
  - Treat as though the spouse was the employee
  - Includes tax-exempt 457(b)

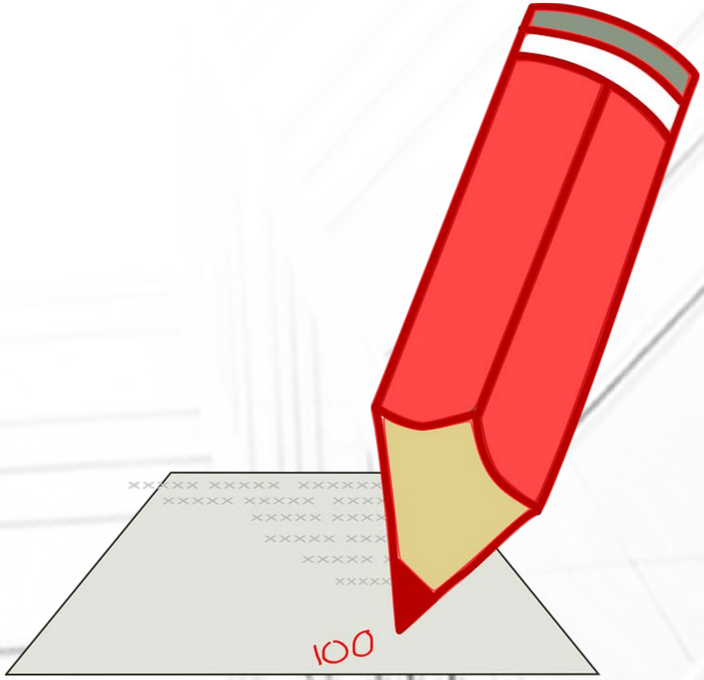
Act Section
327
Code Section
401(a)(9)
Qualified
Yes
403(b)
Yes
457(b)
Yes
Eff. Date
Plan years after 2023

No Lifetime RMDs From Roth Plans

- Roth IRAs are exempt from distributing RMDs during owner's lifetime
- Not so for Roth plans currently
- SECURE 2.0 repeals the lifetime RMD requirement for Roth accounts
  - Also repeals incidental death benefit requirement for Roth accounts

Act Section
325
Code Section
402A
Qualified
DC
403(b)
Yes
457(b)
Govt
Eff. Date
DCYs after 2023

EPCRS Changes



Unlimited Self-Correction

- Any **eligible inadvertent failure** to comply with the rules may be self-corrected
- No time limit! Unless:
  - IRS catches failure prior to "any actions which demonstrate a specific commitment to implement a self-correction with respect to such failure," or
  - Self-correction is not completed within a reasonable period after failure is identified

Act Section
305
Code Section
EPCRS
Qualified
Yes
403(b)
Yes
457(b)
No
Eff. Date
Enactment

Eligible Inadvertent Failures

- Eligible inadvertent failures (EIF) includes:
  - Plan document failures
    - Restatement
    - Interim and discretionary amendments
  - Demographic failures (coverage, nondiscrimination, minimum participation)
  - Employer or related employer failing to adopt plan
  - Scrivener's error?

Notice 2023-43 – Good news!

- The IRS Notice provides us with two pieces of really good news
  1. It authorizes the use of the Section 305 changes immediately
  - Therefore, plans can now self-correct many more types of failures and the permissible correction period is longer than before
  2. The Notice authorizes the more flexible correction process to be used for failures that occurred before SECURE 2.0 was enacted

Eligible Inadvertent Failure vs. Insignificant Error (more good news!)

- Under the current EPCRS (Rev. Proc. 2021-30), an employer can correct an insignificant error at any time, including if the error is caught in an IRS audit
- Under the SECURE Act 2.0 changes, will the ability to correct an insignificant error at any time still be available (including those identified in an IRS audit)?
- *The restriction on self-correcting an EIF that is identified in an IRS audit applies only to significant failures*
- *If a failure is **insignificant**, self-correction is still permitted even if the plan is under examination*
- *This is the rule under EPCRS, and the Notice explicitly provides that it continues to be the rule*

Unlimited Self-Correction - Loans

- Also includes participant loan failures
  - Self-correction satisfies DOL VFCP
  - DOL can impose reporting or procedural requirements
    - Perhaps like the proposed regulations for self-correction of late deferrals
- Self-correction of inadvertent IRA failures
  - Including waiver of RMD penalty tax
  - Including errors in rolling over inherited IRAs

Unlimited Self-Correction – Methods, Failures

- IRS can require specific correction methods
  - And provide general principals for other situations
  - Eligible inadvertent failure is a failure that occurs despite practices and procedures
    - Doesn’t include:
      - Egregious failures
      - Diversion or misuse of assets
      - Abusive tax avoidance transaction

Unlimited Self-Correction – Guidance

- Correction must be in conformity with correction principles in Code, regulations, EPCRS, and other guidance
- IRS to update EPCRS within 2 years

Correction of Inadvertent Benefit Overpayments

- Gives plan fiduciary the option of not trying to recoup prior overpayments
  - Not ERISA fiduciary breach
- Plan sponsor can amend plan to increase past or decrease future payments to adjust for prior overpayments
- Doesn't relieve employer of funding obligations
- Plan must comply with §415 and compensation limits

Act Section
301
Code Section
414(a)(aa)
Qualified
Yes
403(b)
Yes
457(b)
No
Eff. Date
Enactment

Inadvertent Overpayments

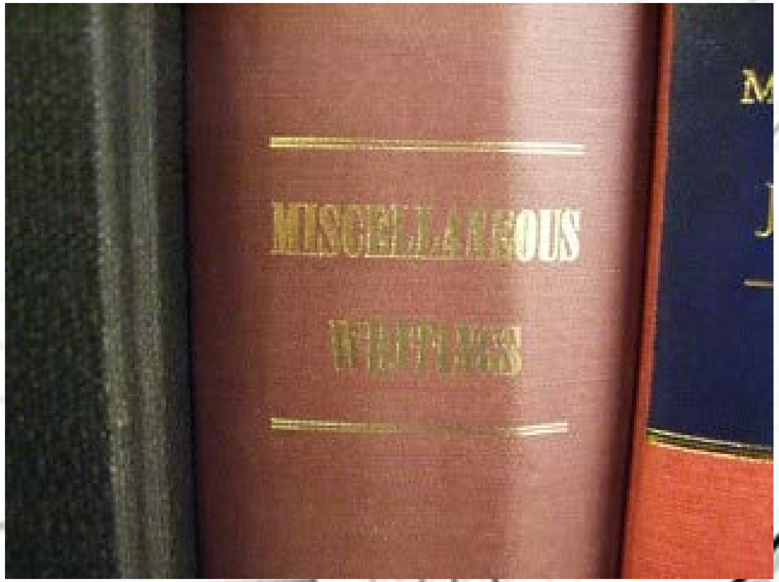
- If overpayment has been rolled over:
  - The rollover is ok if plan does not seek to recoup
  - If plan does seek to recoup, can roll the money back without tax
- Can continue prior installment payments or benefit reduction
- Many details in new ERISA §206(h) to protect innocent recipient
  - If fiduciary decides to recoup, no interest or collection fees
  - Can't recoup overpayments to participant from spouse or beneficiaries
  - 3-year statute of limitations on recoupment

Safe Harbor Correction – auto enrollment

- EPCRS has 0% QNEC “safe harbor” correction of deferral in auto enrollment/auto escalation plan if corrected 9 ½ months after end of plan year
- Sunsets 12/31/2023
- Congress made it permanent; no sunset!
- Other rules to qualify for the safe harbor still apply

Act Section
350
Code Section
414(cc)
Qualified
Yes
403(b)
Yes
457(b)
Yes
Eff. Date
Failures after 2023

Miscellaneous Provisions



What’s in effect in 2024 (*Mandatory)

- Match student loan repayments
- LTPT vesting changes*
- Starter 401(k)/Safe harbor 403(b)
- Midyear conversion from SIMPLE to SH 401(k)
- Expanded 403(b) hardship sources
- Emergency savings accounts
- Catch-ups must be Roth*
- 10% higher SIMPLE deferral
- Roll from 529 savings to Roth IRA

Mandatory Automatic Enrollment

- New 401(k) and 403(b) plans required to have automatic enrollment EACA
- Default deferral percentage
  - First year 3% to 10%
  - Auto increase of 1%/year thereafter
    - Capped at 10 – 15%
- QDIA unless participant makes different choice
- Must allow permissible withdrawals (up to 90 days after first auto deferral)
- **Will apply to LTPT employees**

Act Section
101
Code Section
414A
Qualified
401(k)
403(b)
Yes
457(b)
No
Eff. Date
Plan Years after **2024**

Exemptions

- SIMPLE 401(k)
- Plans established before 12/29/2022
- Governmental and church plans
- Plans sponsored by employer that normally employs fewer than 11 employees
  - Exemption expires 1 year after close of first tax year after employer goes over limit
- New business: exempt during first 3 years of existence of the business or a predecessor business

THANK YOU