



DECEMBER 26, 2019

## BENEFITS & COMPENSATION UPDATE

By: Norman J. Misher, Allen J. Erreich, Judy M. Hensley, Chase B. Steinlauf, Ariel B. Woldar  
and Charles C. Shulman

---

### *Update - The SECURE Act is Signed into Law*

---

On December 20, 2019, President Trump signed into law the Setting Every Community Up for Retirement Enhancement Act of 2019 (the "SECURE Act"). This legislation is the first significant retirement benefit legislation in more than a decade, and certain provisions will have an immediate impact on retirement plans.

The following is a summary of the key provisions in the SECURE Act, including the effective dates applicable to each of the summarized provisions.

#### ***Plan Administration and Compliance***

**Plan Participation for Part-Time Workers:** Under current law, part-time employees who do not work at least 1,000 hours in a 12-month period may be excluded from participating in a 401(k) plan. The SECURE Act requires employers to allow long-term part-time employees to participate in the elective deferral portion of their 401(k) plans so long as the employee works three consecutive 12-month periods with at least 500 hours in each period. (This rule does not apply to collectively bargained 401(k) plans.) With respect to long-term part-time employees who are eligible for a plan solely due to the changes in the SECURE Act, matching or other employer contributions are not required, and the SECURE Act provides relief from the nondiscrimination and top-heavy rules for such coverage. Employers remain unable to exclude part-

time employees who work at least 1,000 hours in a 12-month period.

***Effective Date:*** Plan years beginning after December 31, 2020.

***Note:*** For purposes of counting hours under the new 500 hour rule, only service performed after December 31, 2020 is required to be taken into account, and plan sponsors can disregard earlier service periods. Plan sponsors and recordkeepers may need to update their systems to track this new category of eligible employees.

#### **New Nondiscrimination Relief for Closed Defined**

**Benefit Plans:** The SECURE Act provides relief from nondiscrimination, minimum coverage and minimum participation rules for defined benefit plans that are closed to new participants but allow existing participants to continue to accrue benefits. This relief is subject to the plan satisfying certain requirements, including that the plan's benefits were nondiscriminatory during the year in which the plan was closed and the two following years.

***Effective Date:*** Generally, on the date of the enactment of the SECURE Act, although plan sponsors may elect an earlier effective date.

**Combined Annual Reports for Group Plans:** The SECURE Act directs the IRS and DOL to allow the filing of a consolidated Form 5500 for similar plans. In order to be eligible, defined contribution plans must have the same trustees, named fiduciaries, administrator, plan year, and investments or investment options. This change reduces administrative costs, especially for duplicative efforts, and potentially makes it easier for smaller employers to sponsor a retirement plan.

*Effective Date:* Applies to annual reports to be filed for plan years beginning after December 31, 2021.

**Increased Penalties:** The SECURE Act increases the penalties for failure to file and/or provide retirement plan returns and notices, including the following:

- The penalty for failure to file a Form 5500 has been increased from \$25 to \$250 per day, not to exceed \$150,000.
- The penalty for failure to file a registration statement for deferred vested participants has been increased from \$1 to \$10 per participant per day, not to exceed \$50,000.
- The penalty for failure to provide a required participant notice regarding rollover availability and tax withholding has been increased from \$10 to \$100 for each failure, not to exceed \$50,000 for all failures during any calendar year.

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

### ***Plan Distributions, Withdrawals and Loans***

**Increase in Required Minimum Distribution ("RMD") Beginning Date:** Currently, an individual generally must begin receiving RMDs from his or her retirement plan or IRA following the attainment of age 70½. The SECURE Act increases the RMD age from 70½ to age 72.

*Effective Date:* Applies to distributions required to be made after December 31, 2019 for individuals who attain age 70½ after such date.

**Modified RMD Rules upon Death of Participant:** The SECURE Act modifies the rules relating to the timing of distributions from defined contribution plans and IRA accounts after the death of the employee or account owner. Specifically, subject to the rules described below, distributions are required to be completed within 10 years of the death of the employee or account owner. The following exceptions apply:

- "Eligible Designated Beneficiaries" (defined below) can elect, within 1 calendar year of the account owner's death, to receive distributions over their lifetime. Eligible Designated Beneficiaries include a surviving spouse, disabled or chronically ill individuals, individuals who are not more than 10 years younger than the employee or account owner, and children of the employee or account owner who have not reached majority.
- As is the case under current law, surviving spouses may elect to defer distributions until the account owner would have attained his or her required beginning date (which is now age 72 under the SECURE Act).

*Effective Date:* Generally applies to distributions with respect to employees who die after December 31, 2019. A delayed effective date applies to plans maintained pursuant to a collective bargaining agreement.

### **In-Service Distributions under Pension Plans:**

Under current law, defined benefit and money purchase pension plans may not allow in-service distributions to active employees until the employee has attained age 62. The new law permits these plans to offer in-service distributions beginning at age 59½. (Note: While this provision was not technically part of the SECURE Act, it was adopted by Congress as part of the year-end spending bill.)

*Effective Date:* Plan years beginning after December 31, 2019.

**Plan Withdrawals for Birth or Adoption:** Except in limited circumstances, a 10% early withdrawal penalty applies to withdrawals from retirement plan accounts before age 59½. The SECURE Act

provides an additional exception from the penalty after the birth or adoption of a child. Specifically, withdrawals of up to \$5,000 in the 1-year period following the qualified birth or adoption of a child are now without penalty.

*Effective Date:* Applies to distributions after December 31, 2019.

**Restrictions on Plan Loans:** The SECURE Act precludes plans from permitting participants to access plan loans through credit cards (or similar arrangements). This rule is intended to prevent the use of plan loans for routine or small purchases, which could exhaust retirement savings before retirement.

*Effective Date:* Applies to loans made after the enactment of the SECURE Act.

### *Safe Harbor 401(k) Plans*

**Increased Cap for Automatic Enrollment:**

Currently, for safe harbor 401(k) plans that provide for automatic enrollment under a "qualified automatic contribution arrangement," there is a cap on the default contribution rate at 10% of an employee's compensation. The SECURE Act increases this cap to 15% of an employee's compensation for any year after the first year of participation. By increasing the cap to a larger percentage of an employee's compensation, this should result in larger retirement savings for employees.

*Effective Date:* Plan years beginning after December 31, 2019.

**New Rules for Non-Elective Safe Harbor Plans:**

Non-elective safe harbor 401(k) plans are those that provide employer contributions of at least 3% of an employee's compensation regardless of whether the employee makes deferrals. The SECURE Act provides for the following changes regarding these plans:

- **Removal of Notice Requirement:** Currently, all safe harbor 401(k) plans must provide plan participants with an annual notice that meets all prescribed rules and regulations. The SECURE Act eliminates this special safe harbor notice

requirement for non-elective safe harbor plans. Such requirement continues to apply to matching contribution safe harbor plans. The SECURE Act does make it clear that all safe harbor 401(k) plans must continue to provide the other notices that are required for all 401(k) plans.

- **Plan Amendments to Become Non-Elective Safe Harbor Plan:** Under the SECURE Act, there are two ways that plan sponsors can retroactively convert their 401(k) plan to a non-elective safe harbor plan. First, a plan can be retroactively amended to become a non-elective safe harbor plan any time before the 30<sup>th</sup> day before the close of the plan year. Alternatively, a plan can be retroactively amended after that time if the amendment (i) provides a non-elective contribution of at least 4% of an employee's compensation (instead of the safe harbor requirement of 3% of compensation) for all eligible employees for that plan year, and (ii) is made no later than the last day of the following plan year.

*Effective Date:* Plan years beginning after December 31, 2019.

### *Focus on Lifetime Income*

**Disclosure:** In order to provide more transparency to participants, the SECURE Act amends ERISA to require defined contribution plans to provide participants with an annual benefit statement that includes a "lifetime income disclosure." This disclosure outlines to participants the monthly payments that they would receive if their current account balance were provided as an annuity. The purpose of the disclosure is to show participants their potential lifetime income from plan benefits in terms of monthly payments. In addition, the SECURE Act directs the DOL to issue regulations and develop a model disclosure. The SECURE Act limits ERISA liability for plan fiduciaries, plan sponsors, or other persons if the disclosures are provided in accordance with the assumptions and guidance provided in the DOL regulations and contain the explanations required in the model disclosure.

Effective Date: Applies to benefit statements furnished more than 12 months after the latest to occur of the DOL issuing (i) interim final rules, (ii) the model disclosure or (iii) the assumptions that may be used in the disclosure.

#### **Annuity Options under Defined Contribution**

**Plans:** The SECURE Act provides for the following two changes in order to encourage the use of annuity options in defined contribution plans:

- **Safe Harbor for Selecting Providers:** The SECURE Act provides a safe harbor for plan fiduciaries electing to include annuity options. Specifically, the safe harbor protects fiduciaries when selecting insurers for a guaranteed retirement income contract from liability due to the insurer's inability to fulfill its financial obligations under the terms of the contract. In order to benefit from the protection, fiduciaries need to take steps to ensure that the chosen insurance provider meets the requirements prescribed in the SECURE Act. This includes following a thorough search process, obtaining certain written representations from the insurer, and confirming that fees and commissions are reasonable. It is also advisable for fiduciaries to periodically monitor the suitability of the insurer and annuity product with respect to the plan.
- **Portability:** If an annuity option ceases to be offered under a current qualified defined contribution plan, the SECURE Act allows for (i) direct rollovers of such investments to other employer-sponsored retirement plans or IRAs or (ii) distributions of such investments to the participant in the form of a qualified plan distribution annuity (in either case, regardless of whether distributions would otherwise be permitted under the plan). This preserves a participant's annuity investments without additional surrender fees and charges.

Effective Dates: The fiduciary safe harbor provision is effective on the date of enactment of the SECURE Act, and the portability provision is effective for plan years beginning after December 31, 2019.

#### **"Pooled" Open Multiple Employer Plans (MEPs)**

Over the past few years, there has been discussion of expanding the use of MEPs to allow unrelated small employers the opportunity to offer a single retirement plan. MEPs can reduce individual administrative costs by sharing these costs with a group of employers. The SECURE Act creates a new type of MEP known as a "pooled employer plan" which provides an avenue for unrelated employers to offer a single employer plan. The SECURE Act addresses both the commonality requirements under ERISA and the qualification requirements under the Code for these new pooled MEP plans, including potential relief from the disqualification of the entire plan upon one employer's failure to comply with the qualification rules.

Effective Date: Plan years beginning after December 31, 2020.

#### **Other Noteworthy Items**

**Timing of Adoption of New Plans:** If an employer adopts a qualified retirement plan after the end of a tax year but before the tax filing date for that year (including extensions), the employer may treat the plan as being adopted as of the last day of that tax year.

Effective Date: Plans adopted for tax years beginning after December 31, 2019.

**Expansion of Section 529 Plans:** The SECURE Act expands 529 education savings accounts to cover costs associated with registered apprenticeships and up to \$10,000 of qualified student loan repayments (including those for siblings).

Effective Date: Distributions after December 31, 2018.

**Repeal of Maximum Age for Traditional IRA Contributions:** In order to allow older employees the opportunity to continue to contribute towards retirement, individuals who have attained age 70½ will no longer be prohibited from contributing to traditional IRAs.

*Effective Date:* Calendar years beginning after December 31, 2019.

### ***Plan Amendment Deadline***

Tax-qualified retirement plans will need to be formally amended to reflect the requirements of the SECURE Act. The deadline for such amendments is the end of the first plan year beginning on or after January 1, 2022 (January 1, 2024 for collectively

bargained and governmental plans). However, as many provisions of the new law are effective as early as 2020, tax-qualified plans must be operated in accordance with the new law before the amendments are required.

### ***Next Steps***

The SECURE Act contains many changes to the retirement landscape, some of which immediately impact the administration of retirement plans. You should review the new changes and consult your retirement and tax advisors to discuss implementing the SECURE Act, including the required operational changes, plan amendments and communications.

***This update is not intended to provide legal advice with respect to any particular situation, and no legal or business decision should be based solely on its content.***

---

*If you have any questions about this update, please contact:*

Norman J. Misher	212-903-8733	<a href="mailto:nmisher@rhtax.com">nmisher@rhtax.com</a>
Allen J. Erreich	212-903-8769	<a href="mailto:aerreich@rhtax.com">aerreich@rhtax.com</a>
Judy M. Hensley	212-903-8737	<a href="mailto:jhensley@rhtax.com">jhensley@rhtax.com</a>
Charles C. Shulman	212-903-8687	<a href="mailto:cshulman@rhtax.com">cshulman@rhtax.com</a>
Chase B. Steinlauf	212-903-8736	<a href="mailto:csteinlauf@rhtax.com">csteinlauf@rhtax.com</a>
Ariel B. Woldar	212-903-8718	<a href="mailto:awoldar@rhtax.com">awoldar@rhtax.com</a>

The **Employee Benefits and Executive Compensation Group of Roberts & Holland LLP** concentrates on a wide variety of employee benefits and executive compensation matters in both the transactional and compliance contexts. We focus on tax, ERISA and other legal considerations relating to all aspects of employee benefit plans, programs and arrangements, including design, administration and compliance of tax-qualified plans and ERISA fiduciary matters for investment funds and plan fiduciaries. We also regularly represent clients in designing, negotiating and drafting equity compensation arrangements and nonqualified deferred compensation plans, as well as executive employment, severance and change-in-control agreements and provide advice on the associated ERISA and tax implications.