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BENEFITS & COMPENSATION UPDATE

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The SECURE Act Passes the House of Representatives

On May 23, 2019, the House of Representatives passed, by an overwhelming majority, the Setting Every Community Up for Retirement Enhancement Act of 2019 (the "SECURE Act"). The Senate is considering a similar bill known as the Retirement Enhancement and Savings Act ("RESA"). Senate leadership has not announced plans to bring the SECURE Act or its counterpart RESA to a full Senate vote. If this legislation passes, it will be the first significant retirement benefit legislation in more than a decade.

The following is a summary of the key provisions in the SECURE Act. We note that if the SECURE Act is ultimately approved by both houses of Congress and President Trump, some of the below provisions may change. We will continue to keep you informed on important legislative updates with regard to the SECURE Act and RESA.

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 performs three consecutive years of service with at least 500 hours in each year. (This rule would 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.

New Nondiscrimination Relief for Closed Defined Benefit Plans: The SECURE Act provides relief from nondiscrimination 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.

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.

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 would be 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 would be increased from $1 to $10 per participant per day, not to exceed $50,000.
- The penalty for failure to provide a required tax withholding notice would be increased from $10 to $100 for each failure, not to exceed $50,000 for all failures during any calendar year.

Plan Distributions, Withdrawals and Loans

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

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 would be required to be completed within 10 years of the death of the employee or account owner. The following exceptions would apply:

- "Eligible Designated Beneficiaries" (defined below) could 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 could elect to defer distributions until the account owner would have attained his or her required beginning date (which would now be age 72 under the SECURE Act).

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 would be without penalty.

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.

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.

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 would continue 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 30th day before the close of the plan year. Alternatively, a plan can be retroactively amended after that time if the amendment (1) provides a non-elective contribution of at least 4% of an employee's compensation (instead of the typical safe harbor requirement of 3% of compensation) for all eligible employees for that plan year, and (2) is made no later than the last day of the following plan year.

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.

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 would protect 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 would 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 and obtaining certain written representations from the insurer. 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. This preserves a participant's annuity investments without additional surrender fees and charges.

"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. Under current guidance, the potential for unrelated employers to use a shared MEP is hindered by both Department of Labor guidance limiting the use of a single plan by employers without commonality and potential qualification issues under the Code. 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.

Other Noteworthy Items

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). Earlier versions of the SECURE Act included the ability to use 529 funds for homeschooling, but the final SECURE Act did not include this.

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.

Future Developments

The bipartisan support in the House for the SECURE Act is indicative of an acknowledgement across the political spectrum for the need to prioritize and encourage retirement savings. Over the next few months, the Senate may take up RESA (whether through a vote or more likely through committee conference). Ultimately, both the House and Senate versions will need to be reconciled and voted on again, meaning that some of the provisions discussed above may change.

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.

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