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IRS Issues Guidance on Miscellaneous SECURE 2.0 Changes

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On Wednesday, December 20, the IRS published IRS Notice 2024-02 (the Notice). Framed as a series of questions and answers, the Notice provides additional guidance on several major topics under the Setting Every Community Up For Retirement 2.0 Act of 2022 (the Act). While this alert focuses on a handful of provisions addressed in the Notice, the Notice also provides guidance regarding certain tax credits for small employers, financial incentives for contributing to a plan and changes to the rules regarding SIMPLE plans.

Expansion of Automatic Enrollment: Established Arrangements to be Exempt

Section 101 of the Act requires new 401(k) and 403(b) plans, including established defined contribution plans adding a 401(k) feature, to include an eligible automatic contribution arrangement (EACA). The Notice confirms that a qualified cash or deferred arrangement (CODA) or section 403(b) plan established before December 29, 2022, will be exempt from the automatic enrollment requirement. The Notice clarifies that a qualified CODA is deemed established on the date of adoption rather than the effective date of the feature. These arrangements are deemed "pre-enactment" qualified CODAs or section 403(b) plans.

The Notice provides additional detail as to how plan mergers, spin-offs, and when an employer adopts a plan maintained by multiple employers impacts the EACA requirement:

- Generally, if two plans with pre-enactment qualified CODAs merge, then the continuing plan will remain exempt.
- If a plan including a pre-enactment qualified CODA merges with a plan including a qualified CODA subject to the automatic enrollment requirement, then the plan will be subject to the EACA requirement unless the plan merger occurs following a corporate transaction.
- If an employer adopts a plan maintained by multiple employers after December 29, 2022, then the automatic enrollment requirement will apply to that employer as if it were a new plan.
  - **Reinhart Comment:** The discussion draft of the SECURE 2.0 Technical

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Corrections Act of 2023 (the Corrections Act) provides that this language was intended to cover multiple employer plans, but not multiemployer plans. Under the Corrections Act, an employer who enters a multiemployer plan after December 29, 2022, would not be subject to the EACA requirement.

Distributions for Participants Diagnosed with a Terminal Illness

Section 326 of the Act created an exception to the early withdrawal penalty for terminally ill participants. While the Notice indicates that the IRS intends to issue further regulations regarding early withdrawal penalty exceptions, it provides clarification on several outstanding questions:

- Most importantly, the Notice confirms that while the Act created an exception to the early withdrawal penalty, it did **NOT** create a new in-service distribution option. As a result, a distribution for terminal illness may only be made if (1) the individual has separated from employment; or (2) the individual is otherwise eligible for an in-service distribution, such as a hardship or disability distribution.
- The Notice provides that an individual may not self-certify their terminal illness, and instead must present written certification from a qualified physician (a licensed MD or DO). The certification must include certain elements described in the Notice, including a narrative description of the evidence used to support the statement of illness or physical condition and the certifying physician's name and contact information. While the certification must be provided to the plan administrator, the documentation underlying the certification is not required to be provided.
    - **Reinhart Comment:** The Corrections Act suggests that participants will be permitted to self-certify their condition.
- The distribution will be includable in the individual's gross income for the year the distribution is made.
- If a plan chooses not to offer distributions for terminal illness a participant may reclassify any distribution as a distribution for terminal illness on his or her federal income tax return.
- A participant may recontribute any portion of the distribution they received due to terminal illness to a qualified retirement plan (other than a defined benefit plan) in which the employee is a beneficiary and to which a rollover is

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permitted.

Rules Regarding Cash Balance Plan Benefit Accruals

Section 348 of the Act provides that, effective for plan years beginning after December 29, 2022, sponsors of cash balance plans that use a variable interest crediting rate may use a reasonable projection of the variable interest credit rate, not to exceed 6 percent, for purposes of the benefit accrual rules. The Notice elaborates on section 348 as follows:

- The Notice provides that an amendment to a cash balance plan will be considered to be made pursuant to section 348 only if (1) the plan is currently providing for principal credits that increase with a participant's age or service, and the amendment is to change the plan's interest crediting rate; or (2) the plan is implementing such a pattern of principal credits as part of the amendment.

- In order to qualify for the safe harbor under section 501 of the Act (discussed below), a plan amendment must not reduce a participant's accumulated benefit.

Safe Harbor Correction Method for Employee Elective Deferral Failures

Section 350 of the Act created a safe harbor for corrected mistakes made related to automatic enrollment, affirmative enrollment and automatic escalation features within a retirement plan. Section 350 provides that it is effective for any errors for which "the date referred to in section 414(cc)" is after December 31, 2023. The Notice provides the following additional information regarding Section 350:

- The safe harbor applies to active and terminated employees.

- "The date referred to in section 414(cc)" is the earlier of (1) the date of the first paycheck made to the employee on or after the last day of the 9.5-month period following the plan year during which the implementation error first occurred; or (2) in the case of an employee who notifies the plan sponsor of the error, the date of the first paycheck made to the employee on or after the last day of the month following the month in which the employer was notified.

- Generally, a plan sponsor may correct an implementation error by following the

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safe harbor correction method described in the Employee Retirement Correction Resolution System.

- The Notice states corrective allocations of matching contributions must be made within a "reasonable period," based on the relevant facts and circumstances. This is generally six months from the date the corrective deferrals begin (for errors beginning prior to 2024, within three years).

Election to Treat Employer Contributions or Nonelective Contributions as Roth Contributions

Section 604 of the Act allows plan sponsors to permit participants to designate employer matching or nonelective contributions as Roth contributions. The Notice provides the following clarifications regarding section 604 of the Act:

- General Roth rules apply, including that (1) a designation of employer contributions as Roth must be made no later than the time the contribution is allocated to the participant's account; (2) the designation must be irrevocable with regard to the specific contributions; and (3) participants must be permitted to change the tax treatment of employer contributions at least once per year.
- A designated Roth employer contribution is includible in the participant's gross income for the taxable year in which the contribution is allocated to the participant's account.
- A plan is permitted to restrict the Roth election to only participants fully vested in the type of contribution for which the election is made.
- Designated Roth employer contributions are generally not considered wages for purposes of FICA or FUTA taxes.
- Qualified Roth contribution programs may, but are not required to, include every type of designated Roth contribution. For example, a plan may permit elective contributions to be designated as Roth contributions without permitting the same designation for matching or nonelective contributions. Similarly, a plan may permit matching or nonelective contributions to be designated as Roth contributions without doing the same for elective contributions.

The Notice also extends the retroactive amendment period and anti-cutback relief for changes required or permitted under the SECURE Act, CARES Act and the Act

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as follows:

- Generally, the deadline to make amendments relating to these provisions is December 31, 2026.
- For collectively bargained plans, the deadline is December 31, 2028.
- For governmental plans (within the meaning of section 414(d)), the deadline is December 31, 2029.

Please contact Martha Mohs or your Reinhart benefits attorney with questions regarding the impact of the Act and the Notice on your qualified retirement plans.

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