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SECURE Act and More: Year-End Spending Bill Packed with Changes to Employee Benefit Plans

On December 20, 2019, the President signed into law the Further Consolidated Appropriations Act, 2020 (the Act), which includes the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), the most expansive employer retirement plan legislation since the Pension Protection Act of 2006. While some of these changes take effect in the upcoming years, several changes became effective on the date of enactment and others on January 1, 2020.

The SECURE Act includes an extended remedial amendment period that provides anti-cutback relief and provides plans until the end of the 2022 plan year (2024 for certain governmental and collectively bargained plans) to adopt plan amendments required under the SECURE Act. However, plans must comply operationally with the provisions by the effective date specified in the Act.

The year-end spending package also includes important provisions impacting health and welfare plans.

Some of the key provisions of the Appropriations Act affecting qualified retirement plans and health and welfare plans include:

Retirement Plans

Changes Relating to Plan Distributions

Increased Age for Required Beginning Date for Mandatory Distributions. Prior to the SECURE Act, individuals were generally required to begin taking distributions from their retirement plan after attaining age 70-1/2. The Act increases this required minimum distribution age to 72. The change is effective for required distributions to individuals who attain age 70-1/2 after December 31, 2019.

While the required beginning date is delayed, plans may continue requiring participants to receive a distribution prior to a participant's attainment of age 72. Regardless of whether a plan elects to implement the later required beginning date, a plan amendment may be necessary to comply with the plan qualification requirements.

Plan Loans Through Credit Cards Prohibited. The Act prohibits qualified plans from providing loans to participants using credit cards or other similar

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arrangements, effective for plan loans made after December 20, 2019.

Penalty-Free Withdrawals for Birth and Adoption. Individuals are permitted to take penalty-free withdrawals of up to $5,000 from a qualified defined contribution, 403(b) and governmental 457(b) plan within one year of the birth or adoption of a child. If certain requirements are met, individuals may re-contribute this distribution to an eligible retirement plan. This change applies to distributions made after December 31, 2019.

Modification of Required Minimum Distribution Rules for Designated Beneficiaries. The Act extends the deadline by which a deceased participant's benefit under a defined contribution plan must be distributed to their beneficiary. Under the Act, post-death distributions to a beneficiary must be made by the end of the tenth calendar year following the year of the participant's death. However, the 10-year requirement does not apply to an eligible designated beneficiary, such as a surviving spouse or minor child of the participant. This change is generally effective for distributions made on behalf of participants who die after December 31, 2019. For governmental plans and certain collectively bargained plans, the change is effective for distributions made on behalf of participants who die after December 31, 2021.

Reduction in Minimum Age for In-service Distributions. In-service distributions are permissible from a pension plan or governmental 457(b) plan at age 59-1/2. Under pre-Act law, the voluntary in-service distribution age for these plans was 62. This change is effective for plan years beginning after December 31, 2019.

Changes Impacting 401(k) Plans

Participation by Long-term, Part-time Employees. The Act requires that 401(k) plans permit participation by long-term, part-time employees. Under pre-Act law, employees who worked fewer than 1,000 hours per year could be excluded from participating in 401(k) plans. However, under the Act, plans must permit employees who earn at least 500 hours per year for three consecutive years to participate. These long term, part-time employees also earn one year of vesting service in each year that they are credited with 500 hours of service after they begin participating in the plan. The Act provides nondiscrimination and top-heavy testing relief with respect to long-term, part-time employees and does not require plan sponsors to make contributions on behalf of these employees. These rules do not apply to collectively bargained plans and are effective for plan years beginning after December 31, 2020. However, 12-month periods beginning before

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January 1, 2021 are not taken into account for purposes of determining eligibility under this new rule. Accordingly, no long-term part-time employees will be impacted by this change prior to January 1, 2024.

Changes to Notice Requirements and Timing to Elect Nonelective Contribution 401(k) Safe Harbor. The SECURE Act eliminates the safe harbor notice requirement for non-elective contribution plans but maintains the requirement to allow employees to make or change an election at least once a year.

The legislation also allows plan sponsors to amend a plan to become a non-elective contribution 401(k) safe harbor plan at any time prior to the 30th day before the close of the plan year. Amendments after that time are also permitted if the amendment provides: (1) a nonelective contribution of at least 4 percent of compensation (rather than 3 percent) for all eligible employees for that plan year; and (2) the plan is amended by the deadline to distribute excess contributions. These changes apply for plan years beginning after December 31, 2019.

Increased Cap for Automatic Enrollment Safe Harbor. Caps on the default rate under an automatic enrollment safe harbor plan is increased from 10 percent of pay to 15 percent after the first year that an employee's deemed election applies. For the first deemed election year, a 10 percent default rate cap applies. This provision is effective for plan years beginning after December 31, 2019.

Changes Impacting Defined Benefit Plans

Nondiscrimination Relief for Certain Frozen Plans. The Act provides nondiscrimination testing, minimum coverage and minimum participation relief with respect to benefit accruals and benefits, rights, and features for existing participants under a closed defined benefit plan, provided certain requirements are met. This change is generally effective on December 20, 2019.

Changes Impacting 403(b) Plans

The Act requires the Secretary of Treasury issue guidance no later than six months after enactment of the Act, providing that when an employer terminates a 403(b) custodial account, the distribution to effectuate the plan termination may be the distribution of an individual custodial account in kind to a participant or beneficiary. The individual accounts will retain their tax-deferred status until amounts are actually paid out. The guidance will be effective retroactively for taxable years after December 31, 2008.

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Changes Related to Plan Administration

Combined Annual Reporting for Group of Plans. The Act directs the Internal Revenue Service (IRS) and Department of Labor (DOL) to modify the Form 5500 to allow a consolidated filing for members of a group. Plans eligible for combined filing must be defined contribution or individual account plans with the same trustee, named fiduciary, administrator and investment lineup. This change will apply to returns for plan years beginning after December 31, 2021.

Plan Adopted by Filing Due Date Treated as in Effect as of the Close of the Year. Under the Act, if a qualified retirement plan is adopted by an employer's tax return filing date (including extensions), the employer can treat the plan as having been adopted as of the last day of the taxable year. This provision applies to plans adopted for tax years beginning after December 31, 2019.

Lifetime Income Disclosure. The Act requires defined contribution plan sponsors to provide participants an annual estimate of the monthly income a participant would receive if a qualified joint and survivor annuity and a single life annuity were purchased with the participant's current account balance. This lifetime income disclosure must be included in participants' annual benefit statements. The Act directs the DOL to develop a model disclosure and assumptions that may be used in the disclosure. This rule applies to benefit statements furnished more than 12 months after the DOL issues a rule and provides model disclosures.

Changes Impacting Multiple Employer Plans

The Act allows unrelated employers to join together to participate in a new type of multiple employer plan called a Pooled Employer Plan (PEP) without any commonality requirement. PEPs will be treated as single plans under Employee Retirement Income Security Act of 1974 (ERISA). Under pre-Act DOL guidance, unrelated employers were prohibited from participating in a single plan unless the employers demonstrated sufficient commonality among the participating employers' industry and geographic location. A registered Pooled Plan Provider must serve as the ERISA section 3(16) plan administrator, be a named fiduciary for a PEP, register with the DOL and IRS, and provide written acknowledgement of its acceptance of its fiduciary duties.

The Act also provides relief from the "one bad apple rule" for covered multiple employer plans. Under this rule, a failure by one employer (or the plan) to meet the qualification requirements resulted in the disqualification of an entire plan. Now, a failure by one employer to meet the qualification requirements is

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attributable to only the employer, provided steps are taken to either correct the error or terminate the employer's participation in the plan.

These provisions are effective for plan years beginning after December 31, 2020. The delay is structured to allow both the IRS and the DOL time to provide model plan language and additional guidance addressing plan administration, plan termination and treatment of failing employers this coming year.

This change allows financial institutions and retirement plan service providers, such as insurance companies, banks, and recordkeepers, to sponsor multiple employer plans, which is expected to increase the availability of these arrangements to small employers.

Changes Impacting Lifetime Income Options

Portability of Lifetime Income Options. The Act provides new options to participants in defined contribution plans, 403(b) plans and governmental 457(b) plans when a lifetime income investment is no longer held as an investment option within the plan. Under the Act, participants invested in a lifetime income option may request either a direct "trustee-to-trustee" transfer of the investment to another employer-sponsored retirement plan or Individual Retirement Account or a distribution of the investment in the form of a qualified plan distribution annuity contract. This change is effective for plan years beginning after December 31, 2019.

Allowing participants to receive an in-kind distribution of the lifetime income investment could help the participant avoid significant fees related to the discontinuation. This change also provides additional flexibility to plan sponsors when considering a discontinuation of the lifetime income investment option.

Fiduciary Safe Harbor for Selection of Annuity Provider. Plan sponsors have a fiduciary obligation to prudently select and monitor all plan investment options, including its annuity providers. The Act creates an optional fiduciary safe harbor for plan sponsors who include a lifetime income benefit option in their defined contribution plan. Under the safe harbor, fiduciaries that take specified steps in the selection of an annuity provider would satisfy the prudence requirement for the selection of insurers and would be protected from liability that may result due to an insurer's inability to satisfy its contractual financial obligations.

The safe harbor applies only for the selection of a specific annuity provider and does not extend to the terms of the underlying annuity contract. Plan sponsors must

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continue to review and analyze the terms of the annuity contract under a separate fiduciary lens.

Increased Penalties

The Act increases penalties for individuals who fail to file tax returns and for plan sponsors who fail to file retirement plan returns, required notification of changes and withholding notices.

Penalty for Failure to File. Effective for returns due after December 31, 2019, the Act increases the failure to file penalty to the lesser of $435 or 100 percent of the tax due.

Penalties for Failure to File Retirement Plan Returns. The Act increases the penalties for failing to file a Form 5500 to $250 per day, not to exceed $150,000. The Act increases penalties for a failure to file a registration statement for deferred vested benefits to $10 per participant per day, not to exceed $50,000. The penalty for a failure to file a required notification of change also increases to $10 per day, not to exceed $10,000 per failure. The penalties for failing to provide a required withholding notice increase to $100 per failure, not to exceed $50,000 per calendar year. These increases are effective for returns due and notices required to be provided after December 31, 2019.

Health and Welfare Provisions

Repeal of Cadillac Tax

The Act completely and permanently repeals the Affordable Care Act's (ACA) so-called "Cadillac Tax" on high-cost employer-provided health coverage. The Cadillac Tax imposed a 40 percent excise tax on the cost of employer-provided health coverage over statutory thresholds. The tax was originally scheduled to take effect in 2018. Congress delayed the effective date multiple times and, most recently, until 2022. The repeal is welcome news to plan sponsors who have long awaited repeal of the tax.

Repeal of Excise Tax on Medical Devices

Amid concerns that the medical device tax would be passed through to health plans and covered individuals, the Act repeals the 2.3 percent excise tax on medical devices sold domestically. The excise tax repeal is effective for medical devices sold after 2019.

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Repeal of Tax on Health Insurance Providers

The Act repeals the tax on health insurance providers. Under the ACA, all entities providing health insurance were assessed an annual fee based on their market share of the written premiums. This tax was also expected to be passed through to health plans and covered individuals. The fee was effective beginning in 2015, but suspended beginning in 2017. The excise tax repeal is effective for calendar years beginning after 2020.

10-Year Extension of PCORI Fee

The Act extends funding for the Patient-Centered Outcomes Research Trust Fund, and reinstates the accompanying fee applicable to group health plans (PCORI fee) for an additional 10 years. Before the Act, this fee was set to expire in 2019.

The PCORI Fee is currently $2.45 per covered life and will continue to be subject to annual adjustments. Plan sponsors must continue to pay this fee until 2029 or 2030, depending on their plan year.

Extension of the Paid Family and Medical Leave Credit

The 2017 Tax Cuts and Jobs Act provided a business tax credit for certain employer-paid family and medical leave. This credit was originally provided for wages paid in 2018 and 2019. The Act extends the credit through 2020.

If you have any questions about the SECURE Act or the Appropriations Act and the potential impact these legal changes could have on your benefit plans, please contact your Reinhart attorney. For additional information regarding how the SECURE Act may impact your estate plan, our article may answer some questions for you.

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