CLIENT ALERTS

The SECURE Act in 2020

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Overview

With the year-end spending bill come significant retirement plan and IRA changes. The Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act) was signed into law on December 20 as part of the Further Consolidated Appropriations Act, 2020, a gigantic compromise spending package. Although a version of the SECURE Act was reported by the Senate Finance Committee as long ago as 2016 and the House approved its own version last May with almost no dissent, the legislative wheels ground slowly. Until a few days before passage, there was real doubt that the Act would reach the finish line this year.

The SECURE Act's headline grabbers (to the extent that pension legislation ever grabs headlines) include changes to the minimum required distribution rules (both postponing the age at which distributions must begin from 70½ to 72 and shortening the period over which many beneficiaries can spread distributions), liberalization of the rules governing "multiple employer plans", which its advocates hope will expand retirement plan coverage for small business employees, and a requirement that part-time workers be given greater opportunity to participate in 401(k) plans. But other provisions also deserve attention and will have a significant impact on retirement planning. This advisory summarizes the Act's most significant changes, most of which became effective on January 1, 2020.

Multiple Employer Plans. While the overwhelming majority of workers at large US companies can participate in tax-favored retirement plans, coverage falls rapidly for smaller employers, whose owners are often discouraged by the cost, complexity, and potential legal risk of qualified plans.[1]

Accessibility Statement

The SECURE Act takes what its drafters hope will be a major step toward making plans more attractive to small business by expanding a previously obscure concept: the "multiple employer plan" or "MEP." A multiple employer plan allows numerous small, unrelated companies sign up for a centrally administered retirement plan whose sponsor takes on the burdens of choosing investment providers, tracking contributions and account balances, communicating with employees, making distributions to participants and beneficiaries, dealing with qualified domestic relations orders, filing required government reports, and resolving claims disputes. Thanks to economies of scale, combining many employers into a single plan offers the potential of lower recordkeeping and other administrative costs, as well as to improved investment returns through the investment of a larger pool of assets under more professional management. Larger size also provides readier access to other professional expertise, so that MEPs should be better able to avoid legal and operational difficulties. When problems do arise, the MEP sponsor will ordinarily be in a better position to address them than a small individual employer would be.

Actions Taken by the Federal Government Relating to MEPs Before the SECURE Act

In 2018, a Presidential executive order directed the Department of Labor (DOL) to "clarify and expand the circumstances under which United States employers, especially small and mid-sized businesses, may sponsor or adopt a MEP as a workplace retirement option for their employees, subject to appropriate safeguards" and also directed the Internal Revenue Service to review the qualification requirements for MEPs.

In response to the executive order, the DOL published final regulations (29 C.F.R., §2510.3-55) regarding the sponsorship of MEPs by employer associations and professional employer organizations ("PEOs"). The regulation does not, however, allow banks, insurance companies, broker-dealers, recordkeepers, third party administrators, or other financial services firms to sponsor MEPs, thus stopping well short of the "open MEPs" desired by many MEP proponents.

Also as a response to the executive order, the IRS published proposed regulations on July 3, 2019, designed to mitigate a perceived deterrent to MEPs, the so-called "one bad apple" rule, under which the failure by a single participating employer to observe all qualification requirements could potentially result in the disqualification of the entire plan, with adverse effects on all participating employers and employees. The proposed regulation would formalize "the unified plan rule" (the IRS's moniker for the "one bad apple" rule) and at the same time set forth a mechanism for avoiding its application. A plan administrator that knew or had reason to believe that a participating employer has not complied with qualification requirements would be obliged to give notice to the employer. Three courses of action would then be possible:

- The employer could take action to correct the defect.
- The employer could request that its portion of plan assets and liabilities be spun off into a separate single employer plan. It would thereafter be solely responsible for taking corrective action.
- If the employer did neither of the preceding, the plan administrator could unilaterally spin off the noncomplying portion of the plan into a separate plan, terminate it, and distribute its assets to participants. Despite the qualification failure, the proposed regulations provide that participants would be able to roll over their distributions tax-free to IRAs or other eligible rollover plans, though the IRS could (and probably would) deny rollover treatment or take other action with respect to participants whom it deemed responsible for the qualification failure.

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These steps would require notices by the MEP to the employer and sometimes to its participants. The Treasury regulation is only a proposal and does not provide relief to defined benefit pension plans. Employers may not rely on it until it is adopted in final form, nor will they need to. It has been largely preempted by the MEP provisions in the SECURE Act.

MEPs Under the SECURE Act

The SECURE Act creates a new species of multiple employer plan: a "pooled employer plan" (PEP) administered by a "pooled plan provider" (PPP), effective for plan years beginning on or after January 1, 2021. The delay leaves a year for preliminary guidance from the DOL and the IRS, each of which is responsible for a portion of the new MEP rules.

Pooled employer plans, unlike other MEPs, will not be limited to employers that are in the same industry or geographic area, have a degree of common ownership, or contract with the same PEO.

PEPs must be defined contribution plans. Most will probably be 401(k) plans, possibly including matching and nonelective contributions as well as elective deferrals by participants. In most respects, they will be subject to the same ERISA and Internal Revenue Code rules as plans of a single employer. For example, they will file only one Form 5500 annual report rather than a separate report for each participating employer, plan assets will be held in a commingled trust fund, and plan administration will be unified under the aegis of the pooled plan provider.

Two important exceptions to the "single plan" concept are nondiscrimination testing, which must be performed on an employer-by-employer basis, and the correction of plan qualification defects. The Act repeals the "one bad apple" rule (though only for defined contribution MEPs) but requires that, if a bad apple is found in the barrel, it must either be restored to compliance or spun off from the plan. The spin-off rules are closely similar to those in the IRS's proposed regulation.

The expectation is that PPPs will include financial institutions (that is, entities that cannot sponsor MEPs under the DOL regulation), such as insurance companies, banks, and mutual fund families. PPPs must register with the DOL and the IRS.

The PEP document must designate the PPP as its named fiduciary and plan administrator, and the PPP must acknowledge in writing its acceptance of those duties. PPPs will be responsible for the selection of investment providers (a corollary of named fiduciary status), "the performance of all administrative duties (including conducting proper testing with respect to the plan and the employees of each employer in the plan)" that are necessary to comply with all applicable qualification and other tax requirements, and ensuring that all plan fiduciaries and persons who handle plan funds are bonded in accordance with section 412 of ERISA. The maximum bonding requirement will be $1,000,000 rather than the normal $500,000 (but without any change to the exemptions for banks, insurance companies and registered broker-dealers).

PPPs that are banks or insurance companies may be able to take advantage of statutory prohibited transaction provisions to include their own products as PEP investments. Similarly, financial institutions affiliated with open end investment companies may be able to take advantage of class exemptions, such as PTE 77-4, to include their affiliated mutual funds among the investment choices.

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Regulatory responsibility for PEPs is divided. The DOL will issue rules on the administrative and fiduciary responsibilities of PPPs and on disclosures to participants, the IRS on the correction of qualification defects and the spinoff of noncompliant portions of plans. It has also been given the task of preparing a model plan document. Use of this document will not be mandatory. Given that most PPPs will almost certainly be institutions will considerable retirement plan experience, including the preparation of plan documents, fashioning a model plan may not be the optimal use of IRS resources.

Key MEP Issues

The success of the new MEP rule will depend primarily on how small employers react. From the perspective of an employer evaluating a PPP, some of the key considerations are these:

- Fees will naturally be an important issue. Providers will probably split between per-participant and revenue sharing models, each of which has advantages and drawbacks.
- Participating employers, though relieved of many other responsibilities, have a fiduciary duty to select a competent PPP and monitor its performance.
- PEPs are likely to vary, too, in the degree of flexibility that they offer participating employers. A bare bones plan may provide only for immediate eligibility to participate, the use of a 401(k) nondiscrimination safe harbor, limited options for employer contributions, and immediate full vesting. Other plans may offer a choice of entry dates, nondiscrimination testing methods and vesting schedules.
- Many of the tasks assigned to them will be familiar to PPPs from their experience with prototype plans, but others will not, such as adjudicating claims disputes, approving qualified domestic relations orders, and tracking credit for vesting service (for which MEPs follow somewhat different rules from single employer plans).
- Most importantly, the employer should be able to leave the PEP easily (say, at the end of any year with some advance notice to the PPP and to participants) and have its portion of the plan spun off either to become an individual plan of the employer or be transferred to a more attractive MEP/PPP.

Contributions to Individual Retirement Accounts After Age 70½. Under prior law, contributions (including nondeductible contributions) to "traditional" IRAs were prohibited after age 70½. That restriction never applied to Roth IRAs. It has now been repealed entirely, starting with contributions for calendar year 2020.

A cautionary note: Contributions for 2019 can be made as late as April 15, 2020. The right to make those contributions is limited to taxpayers who are under age 70½. The first post-70½ contributions will be for 2020 and may be made between January 1, 2020, and April 15, 2021.

There is one twist that affects IRA owners who take advantage of the exclusion of "qualified charitable distributions" ("QCDs") from gross income. QCDs are transferred directly from an IRA to a section 501(c)(3) charitable organization. They are possible only after the IRA owner reaches age 70½ and are capped at $100,000 per year. Starting in 2020, the exclusion will be reduced if the IRA owner makes deductible IRA contributions after age 70½. Nondeductible contributions will have no effect on the QCD limitation.

A charitable distribution that exceeds the QCD limitation is included in gross income and is deductible under the normal rules of section 170. Hence, the reduction in the limitation affects only taxpayers who wish to contribute more than the charitable deduction percentage limitation or who have reasons to minimize their adjusted gross income (*e. g.*, to reduce Medicare premiums).

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Later Mandatory Commencement of Distributions. The SECURE Act sets a later required beginning date for distributions from plans and IRAs. Previously, the general rule was that distributions must start no later than April 1 of the calendar year following attainment of age 70½ (or, for employer-sponsored qualified, 403(b) and 457(b) plans, severance from employment by participants who work past age 70½).

The Act changes 70½ to 72 for plan participants and IRA owners who reach age 70½ after December 31, 2019. Someone born on July 1, 1949, will be 70½ on January 1, 2020. (The IRS regulations provide that one reaches age 70½ on the six month anniversary of one's 70th birthday.) His first required distribution calendar year under the law before the Act would have been 2020, but because the new rule will apply, the first year will be 2022. Someone born a day earlier, on June 30, 1949, is stuck with 2020 as his first distribution calendar year. During the transitional period, while the key age is 72 for some and 70½ for others, participants, plan administrators, and IRA custodians must be careful to distinguish the different age cohorts.

There is a seeming anomaly, which does not appear to have been a legislative oversight. Under present law, a participant in a defined benefit plan who retires after age 70½ and then begins receiving a pension, must receive an actuarially increased benefit that has the same value as a benefit beginning at age 70½.[2] The SECURE Act did not amend that section (I.R.C. §401(a)(9)(C)(iii)), to change "70½" to "72". Because the change *was* made elsewhere in the same subparagraph, it is hard to believe that it was left unaltered in (C)(iii) by accident. Presumably, the reason for retaining "70½" in this one instance is to avoid cutting back on the benefit protection that current law provides to older participants who remain in the work force.

The later required beginning date reflects the fact that life expectancy has increased since the minimum distribution requirement's enactment in 1986. For the same reason, the IRS recently published proposed regulations that, when adopted in final form, will allow distributions to be taken more slowly after the required beginning date. For example, the current regulations require a divisor of 25.6 at age 72, whereas the divisor at that age in the proposed regulations is 27.3. The regulations are proposed to go into effect for 2021. The combined effect of the SECURE Act and the updated regulations would be a one or two year delay in the commencement of required distributions and a reduction in the required distribution at age 72, from 3.9% under the current IRS tables (which use a 25.6 divisor at age 72) to 3.66% under the updated tables (using a 27.3 divisor).

Accelerated Distribution Requirements After Death. As a revenue raising measure, to offset the cost of other provisions, the SECURE Act greatly shortens the period over which some beneficiaries of IRAs and defined contribution plans must receive distributions of their inherited account balances. (There is no impact on defined benefit plans.) The new rules delineate three classes of beneficiary:

- Most favored are "eligible designated beneficiaries", who are defined as –
  - surviving spouses,
  - children younger than the age of majority (who cease to be "eligible designated beneficiaries" when they reach that age),
  - beneficiaries who are totally and permanently disabled or who are chronically ill and are medically certified as reasonably expected to remain so for a "lengthy" period,[3] and
  - beneficiaries who are no more than ten years younger than the account owner.

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Eligibility apparently is to be determined at the time of the account owner's death and, except for minor children, will not be reevaluated thereafter (so that someone who recovers from disability or chronic illness remains "eligible"). For these beneficiaries, the pre-Act rules remain in effect. They may, with proper planning, spread the distribution of the inherited account over a period equal to the beneficiary's life expectancy at the time of the decedent's death, using longevity tables published by the IRS (including the new proposed tables). As a result, young beneficiaries are required to take out only a minute percentage of the account in early years, and the balance can continue to grow for a long time.

The "age of majority" is not necessarily the age under the law of the child's home state. Rather, existing regulations state, "A child may be treated as having not reached the age of majority if the child has not completed a specified course of education and is under the age of 26." Regulations will be needed to define "specified course of education" and to deal with the effect of gaps in enrollment. For those not enrolled in any "specified course of education", their home state age of majority (18 in all but three states) presumably controls.

- A natural person who is identified as a beneficiary by the terms of the plan or IRA (either by name or by relationship to the decedent) is a "designated beneficiary." Non-eligible "designated beneficiaries," such as grandchildren, formerly followed the same distribution rules as "eligible" beneficiaries. Now they are required to receive the entire balances of their inherited accounts no later than the end of the tenth calendar year after the account owner's date of death. Minor children have ten years after reaching their majority to empty their accounts. There is no prescribed distribution pattern. Indeed, the account may, if the beneficiary has no need for the funds, be left to compound until December 31 of the tenth year.
- If the account owner dies before his required beginning date, beneficiaries that are not natural persons and those who inherit through the decedent’s estate (or, in some circumstances, through a trust) rather than under the terms of the plan or IRA must receive the entire account balance by the end of the fifth calendar year after the year of the account owner’s death. That was the rule before the SECURE Act and has not been changed.
- Also unchanged is the pre-SECURE Act rule for distributions to non-natural persons, trusts whose beneficiaries include non-natural persons, and takers through estates, if the account owner dies after the required beginning date. In that case, the distribution may be spread over the decedent's remaining life expectancy as of his date of death. That period may be longer than 10 years, so that these otherwise disfavored beneficiaries may, under the new law, have longer distribution periods than non-eligible designated beneficiaries.
- On the other hand, multi-beneficiary trusts with only natural persons as beneficiaries are generally *not* "eligible" beneficiaries, even if all of the trust beneficiaries meet the criteria for "eligible" status. To avoid the 10-year rule, the trust must be divided into separate trusts no later than the account owner's death. The distribution rule for each of the successor trusts is then the same as if the trust beneficiary were directly named as the beneficiary of the account. There is an exception for multi-beneficiary trusts whose beneficiaries are all disabled or chronically ill. Because these rules are already effective, estate planners will want to revisit their clients' trust structures at the earliest feasible opportunity.

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The object of the new rules is to move money more rapidly from tax-sheltered accounts into the tax-paying world. The prime targets are "stretch IRAs," a popular estate planning technique in which young children (or, often, grandchildren or great-grandchildren) of the account owner are designated as IRA beneficiaries.

Example: Henrietta is the beneficiary of her mother Marie's IRA. She is one year old when Marie dies in 2020. Until she reaches the age of majority, her minimum required distribution is ascertained by consulting the "Single Life Table" in Treas. Regs., §1.401(a)(9)-9, Q&A-1. The first minimum required distribution must be made in 2021, the year after Marie's death. Henrietta will become two years old during that year. The updated IRS table, which is expected to be in effect in 2021, gives the life expectancy of a two-year-old as 82.7 years. Therefore, at least 1.21% (1÷82.7) of the account balance as of the end of 2020 must be distributed during 2021. If the account earns more than a 1.21% return, the balance will be higher at the end of the year than at the beginning. In the next year, 2022, Henrietta will have to receive 1.22% (1÷81.7) of the account balance as of the end of 2021.

Under prior law, Henrietta could continue in the same way until the account was exhausted (in 2101!). Under the new law, the situation changes at the age of majority. She then ceases to be an "eligible designated beneficiary", and the balance of her inherited account must "be distributed within 10 years after such date."

If Henrietta were Marie's grandchild, the stretch technique would be all but useless. The entire account balance would have to be distributed within 10 years, by December 31, 2030.

On the other hand, suppose that Marie didn't name a beneficiary, that the IRA provided that, in the absence of a beneficiary designation, the account would go her estate, that she named Henrietta in her will as the recipient of the interest in the IRA, and that she died in 2021 (after the updated regulations went into effect) at age 73. Her life expectancy at age 74 (her birthday in 2022, Henrietta's first distribution calendar year) is shown in the IRS's revised table as 15.6 years, allowing Henrietta a 50% longer distribution period than if she were a designated beneficiary. Of course, if Marie lived too long, the period would shorten to less than 10 years (*e. g.*, to 8.6 years at age 84).

Some estate planners have suggested the strategy of initially designating a trust as the IRA owner's beneficiary with the objects of the owner's bounty as trust beneficiaries. If the owner dies with a life expectancy longer than 10 years, distributions can be stretched out further than the 10-year rule will allow. Once life expectancy is shorter than 10 years, the trust can be dissolved and its beneficiaries made direct beneficiaries of the IRA.

The new distribution rules can't be avoided by having the account purchase an annuity contract. After the account owner's death, payments to a non-eligible designated beneficiary must cease after ten years. As a result, joint-and-survivor annuities will be possible only if the survivor annuitant is an "eligible designated beneficiary", such as the participant's spouse, or the term of the survivor annuity is limited to ten years. Excepted from the new rules are annuities under which payments began, or a distribution option was irrevocably elected, before December 20, 2019, the date on which the President signed the SECURE Act into law. Hence, existing annuity contracts in pay status are unaffected.

This portion of the statute has a few obvious drafting errors, such as erroneous cross-references, that should eventually be the subject to technical corrections. Regulatory guidance will also be needed on a number of points.

Accessibility Statement

The new rules apply to beneficiaries of account owners who die on or after **January 1, 2020.** There are later effective dates for governmental plans (January 1, 2022) and for collectively bargained plans (the earlier of the expiration of the collective bargaining agreement or January 1, 2022).

Encouragement of Annuity Options in Defined Contribution Plans. Many retirement theoreticians believe that participants in 401(k) and other defined contribution plans would have greater financial security in retirement if they used their account balances to purchase insurance company annuities. That option is rarely available and isn't often chosen when it is. (The exception is section 403(b) tax-sheltered annuities, which have historically been closely tied to the insurance industry.)

The SECURE Act takes two (small) steps toward encouraging annuities.

- Defined contribution plans will be required to disclose to participants estimates of the monthly income that they would receive if they invested their account balances in annuities. The estimates are to be based on interest rates and longevity assumptions prescribed by the Department of Labor. Results must be shown for both a life annuity and a joint-and-survivor annuity with a beneficiary of the same age as the account owner.

This requirement won't become effective until 12 months after the DOL publishes (i) interim final regulations, (ii) a set of assumptions on which to base income estimates and (iii) a model disclosure written in a manner understandable by participants and cautioning them that they cannot rely on being able to obtain the estimated income stream.

That guidance will not be as easy to develop as Congress apparently believed, and the mandated assumptions may yield results so approximate as to be useless, if not seriously misleading. For example, a joint-and-survivor annuity estimate that isn't based on the *actual* age of the account owner's spouse could be far off base.

Also raising a dilemma is the question of sex-distinct versus unisex longevity assumptions. If the DOL prescribes unisex assumptions, it will understate (for males) or overstate (for females) the income stream that is in fact available to most account owners. Most individuals can obtain annuities only through IRAs, which generally cannot find unisex annuities in the marketplace. Sex-distinct assumptions will be misleading for participants in those employer plans that do offer annuity options, because those plans, unlike IRAs, are prohibited by the Equal Pay Act from providing sex-distinct annuities.

- The Act very slightly relaxes the fiduciary standards for selecting annuity providers. The one significant provision is a safe harbor: An insurance company is presumed able to meet its annuity commitments if it has complied with all state audit and reserve requirements for the preceding seven years, undergoes examination by the state insurance commissioner at least every five years, and is not in supervision, rehabilitation or liquidation. The Act also states explicitly, as was fairly clear under existing law, that plan fiduciaries are not required to select the lowest cost annuity provider. The criterion is the cost of the contract "in relation to the benefits and product features of the contract and administrative services to be provided under such contract."

Expansion of 401(k) Plan Eligibility. Under the SECURE Act, 401(k) plans will be required to accept elective deferrals by employees who have completed more than 500 hours of service in each of three consecutive 12-month periods but have not otherwise met the plan's service requirement for participation. In practice, this change isn't imminent, because service before January 1, 2021, will not count toward eligibility. January 1, 2024, is the earliest date on which anyone will qualify for participation under the new rule. For the moment, employers need only make sure that they track part-timers' hours in order to identify those who may have to be offered participation in the future.

All that workers gain by entering the plan in this way is the ability to make elective deferrals. Employers will be permitted to exclude them from matching and nonelective contributions and to disregard them for purposes of nondiscrimination testing. Hence, their probably low rates of participation will not adversely affect nondiscrimination test results. On the other hand, if they do receive matching or nonelective contributions, they must be credited with a year of vesting service for each year in which they complete more than 500 hours of service. For this purpose, years before 2021 count.

This provision does not apply to collectively bargained plans.

Changes to 401(k) Safe Harbor Rules. The Act modifies the 401(k) rules in a few other ways, all relating to "safe harbor" plans, that is, plans that provide specified levels of matching or nonelective contributions in lieu of annual nondiscrimination testing:

- Plans that satisfy the nondiscrimination safe harbor through nonelective contributions will no longer be required to distribute notices to participants before the beginning of each plan year. The notice describing the safe harbor served little, if any, useful purpose. In fact, it might have counterproductively encouraged some workers to forgo elective deferrals, knowing that they were going to receive employer contributions in any event. Notices continue to be required for plans utilizing a matching contribution safe harbor, since participants need that information in order to decide how much to defer under the plan.
- A plan that doesn't utilize a safe harbor may be amended to adopt the nonelective contribution safe harbor in the middle of a plan year. Previously, safe harbors could be adopted only before the start of the year, and that is still the rule for matching contribution safe harbors. The new deadline for adoption is (i) the 31st day before the end of the plan year (November 30 for calendar year plans) if the employer makes nonelective contributions equal to 3% of compensation or (ii) the last day of the *following* plan year if the nonelective contribution rate is at least 4%. An employer may wait until after the year ends, perform nondiscrimination testing, and then, if the test isn't passed, decide whether to refund elective deferrals to highly compensated employees or instead make a 4% nonelective contribution for all nonhighly compensated employees.
- A safe harbor automatic contribution arrangement may have a default deferral percentage as high as 15% of compensation (up from the previous 10% maximum). The minimum automatic deferral rates to qualify for the safe harbor are unchanged.

These provisions are effective for plan years beginning after December 31, 2019.

Revised Nondiscrimination Rules for Closed Defined Benefit Plans. Companies that freeze their defined benefit pension plans often mitigate the impact on older, longer service workers by either allowing them to continue accruing benefits under the pension plan or providing additional, "make-whole" contributions to their defined contribution plan accounts. They might, for instance, be given more generous 401(k) plan matches or larger nonelective contributions than other participants.

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That benign purpose can be undercut by the qualified plan nondiscrimination standards. The grandfathered group, being generally older and more senior than average, tends to have a higher concentration of highly compensated employees. As the group shrinks through retirement, demonstrating that the remaining members' benefits are nondiscriminatory can become increasingly problematic. The IRS provided temporary, *ad hoc* relief in 2014 and has extended it year-by-year. The SECURE Act furnishes a statutory solution along the same lines. Plans that were nondiscriminatory before they were closed are given tools for demonstrating continued compliance with the nondiscrimination standards.

Where the closed group is allowed to continue benefit accrual under the pension plan, several special rules are available if the plan satisfied the nondiscrimination standards in the year of the closure and has continued to satisfy them, without the benefit of the special rules, for the following two plan years:

- For nondiscrimination testing purposes, the closed plan may be aggregated with one or more defined contribution plans and tested on a "benefits basis", even if none of the normal "gateways" permitting that form of testing can be passed. Benefits-basis testing converts allocations under defined contribution plans to actuarially equivalent pension benefits. Since the allocations for younger workers have a longer time to grow before retirement, they translate into more valuable benefits, a fact that generally improves nondiscrimination testing results.
- Aggregation is permitted with matching contributions, 403(b) plans and ESOPs. Ordinarily, none of those may be aggregated with a defined benefit plan for testing purposes.
- The plan's "benefits, rights and features," a term that includes optional forms of benefit, benefit commencement dates and other features beyond the amount of benefit accrual, are automatically deemed nondiscriminatory.
- If the plan complied with section 401(a)(26) (requiring defined benefits plans to cover at least 50 employees or 40% of the employer's workforce, whichever is less) at the time when it was closed, it is excused from future compliance.

To forestall manipulation, relief is limited to plans that were adopted at least five years before they were closed and that have not had a "substantial increase" in the number of participants or the average rate of benefit accrual during the five years before closure. "Substantial increase" is defined in great detail but can be thought of as an increase of 50% or more, though increases in participation resulting from mergers or acquisitions are disregarded. "Old and cold" plans – those that were closed before April 5, 2017 – are exempt from these conditions.

Where the closed group doesn't continue accruing benefits under the defined benefit plan but instead receives make-up contributions elsewhere, special rules are available if the defined benefit plan met the anti-manipulation conditions at the time when it was frozen and the closed group satisfies the minimum coverage standards of section 410(b) for the year of the closure and the following two years. During that period, the plan under which the make-up contributions are made must satisfy the regular nondiscrimination standards. Once it passes that hurdle, the following rules apply:

- The plan may be tested on a benefits basis, whether or not it would otherwise be eligible for that technique.
- The test may take into account matching contributions, 403(b) plans and ESOPs.
- "Benefits, rights and features" provided to the closed group but not to other participants are not considered discriminatory. This rule is particularly important when the former participants in a defined benefit plan receive their make-up contributions in the form of enhanced [illegible]ons, which are considered to be "benefits, rights or features" and ordinarily must be provided to a nondiscriminatory classification of employees.

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Eligibility for the special rules is lost if a plan amendment affecting the closed group "discriminate[s] significantly in favor of highly compensated employees". The meaning of that restriction will be determined by the IRS.

These provisions became effective when the SECURE Act was signed, just in time to succeed to the administrative relief provided by the IRS, whose latest extension applied only to plan years beginning before 2020. Because the statute is somewhat more liberal than the administrative relief, it should not create any new difficulties for plans that have been relying on the latter.

Extended Deadline for Adopting New Plans. Ever since qualified plans first came into being, the IRS has taken the position that a plan must be adopted no later than the end of the first tax year in which the employer will claim deductions for contributions. The SECURE Act extends that deadline. After December 31, 2019, if a plan is adopted by the due date, including extensions, of an employer's income tax return for a particular tax year, it may be treated as having been adopted on the last day of that year.

Example: Tardis Ltd., a corporation on a June 30 tax year, adopts a calendar year profit sharing plan on April 15, 2021, the extended due date of its tax return for the year ended June 30, 2020. Under prior law, the plan could have been effective as of January 1, 2021, but no earlier. Under the Act, the company may retroject the date of adoption to June 30, 2020. The plan may, if desired, be effective as early as January 1, 2020.

Consolidated Form 5500 Reports. The SECURE Act directs the IRS and DOL to revise the Form 5500 series annual reports so that groups of defined contribution plans can file a single, consolidated report. Consolidated filing is to be allowed for plans that have the same trustee, same named fiduciary, same plan administrator, same plan year, and same investments or investment options. Whether the return must be filed electronically will depend upon the number of plans that it covers.

This provision will be useful primarily to aggregations of single employer plans, such as those maintained by some professional associations, *e. g.*, the American Bar Association Retirement Funds Program.

Other Provisions. Also included in the new law are a variety of miscellaneous provisions, some of extremely limited interest (such special minimum funding rules for defined benefit plans of community newspapers) and some mere technical corrections. The following are, however, worthy of note:

- As a further revenue offset (in addition to the acceleration of minimum required distributions), penalties for late filing of various returns related to employee benefit plans have been decupled. Most notably, late filing of Form 5500 annual reports will from now on cost $250 a day to a maximum of $150,000, up from the current $25 a day and $15,000. The new penalties apply to reports required to be filed after December 31, 2019, thus including Form 5500s for plan years ending after May 31, 2019. Whether the IRS will reinforce this measure by becoming less lenient about waiving penalties is unknown. In any event, the Department of Labor's Delinquent Filer Voluntary Compliance ("DFVC") Program remains in effect and makes it possible to reduce Form 5500 late filing penalties to modest amounts, so long as the employer takes advantage of it before the DOL notifies it that the report is late.

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- IRA owners and participants in defined contribution plans will be allowed, beginning in 2020, to withdraw up to $5,000 for childbirth or adoption expenses. These withdrawals will be exempt from the 10% excise tax on premature distributions (generally, distributions received before age 59½). In-service withdrawals are allowed even if they would otherwise conflict with other distribution restrictions. Hence, 401(k) plans may make them available to active employees who are under age 59½.

Also, and uniquely, the withdrawals may be repaid to an IRA (or, in some cases, to the defined contribution plan from which they were taken), in which case they will be treated as having been rolled over (and therefore not subject to income tax). The details of the tax treatment will have to be provided by regulations. Since there is no deadline for repayment, the deemed rollover may take place in a different year from the withdrawal. Will the earlier year's return, showing the withdrawal as taxable income, be amended after repayment (in contravention of the annual accounting principle), or will the amount be deducted from taxable income in the year of repayment (when the individual's marginal tax rate may be higher or lower than when the withdrawal was initially taxed)? Neither treatment is entirely satisfactory.

- Companies with 100 or fewer employees are eligible for a tax credit – 50% of the cost for establishing a qualified plan and communicating it to employees – for the year of establishment and the following two tax years. In the past, the credit was limited to $500. The SECURE Act expands it to $250 per nonhighly compensated employee covered by the plan, with the proviso that the credit will not be less than $500 nor more than $5,000. The increase is effective for tax years beginning after December 31, 2019.
- A new tax credit is created for small employers that amend their 401(k) plans to add automatic contribution arrangements, under which elective deferrals are made by default unless employees opt out. The credit is $500 for the year in which the arrangement is incorporated into the plan and for each of the following two years (provided, of course, that the arrangement isn't discontinued during that time). There is no minimum default contribution, but very tiny deferrals are inherently discouraged by the cost of maintaining the resulting accounts. The provision is effective for tax years beginning after December 31, 2019.
- The Act prohibits qualified plans from making loans to participants through credit cards or similar mechanisms. This restriction is effective on the date of signing, December 20, 2019.
- The IRS is instructed to issue guidance that will make it possible for 403(b) plan custodial accounts to maintain their favorable tax treatment after the employer terminates the plan. Section 403(b) annuity contracts already enjoy this protection under guidance issued in 2011.

[1] Alternatives such as "Simplified Employee Pensions", "Simple Retirement Accounts" and "deemed IRAs" have made little visible headway. Some States have reacted by adopting laws – only partially implemented at this point and facing legal challenges – to compel employers without retirement plans to make State-run IRA-like savings programs available to their workers. Many others have adopted or are considering similar legislation, though generally without mandatory features.

[2] An actuarial increase in this circumstance derives from three elements: the risk of death during the period from age 70 ½ to age 72, interest for that same period, and the participant's shorter life expectancy at age 72.

[3] "Chronically ill" is defined by reference to I.R.C., §7702B(c)(2), which requires a certification by a licensed health care practitioner (a physician, registered professional nurse or licensed social worker). Presumably, though the SECURE Act doesn't say so specifically, one of these

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so certify that the illness is reasonably expected to be lengthy.

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