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# A Timeline for SECURE 2.0 and Health Act Changes to Group Health and ERISA-Covered Retirement Plans

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The Consolidated Appropriations Act, 2023 (the ''CAA'')[1] included a number of separate acts two of which impact employee benefit plans. The Health Extenders Improving Access to Medicare, Medicaid and CHIP, and Strengthening Public Health Act of 2022 (the ''Health Act'')[2] impacts group health plans, health savings accounts and high-deductible health plans. The second act, building on the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, impacts retirement benefits and is called the ''SECURE 2.0 Act'' or ''SECURE 2.0.''[3]

This article provides a general summary of changes to employee benefits provisions and it is not intended to cover every aspect of the SECURE 2.0 Act of the CAA. This article will first highlight provisions impacting employer-sponsored group health plans (excluding changes to governmental plans), and then will focus on changes for defined contribution retirement plans subject to the Employee Retirement Income Security Act of 1974 (''ERISA''), and then changes for defined benefit plans subject to ERISA and then applicable to both defined contribution and defined benefit plans. Certain provisions related to taxation of benefit payments.

The SECURE 2.0 Act changes discussed herein are generally organized within the types of plan or other heading based upon their effective date. While the effective date is key, many of these changes will require payroll, HRIS system and record keeper system reprogramming and may require data feed changes for transmitting information from employers to record keepers, so one should carefully assess when one needs to get prepared for a particular change based upon the requirements involved and the requirements of the record keeper to implement these changes.

This article does not address Individual Retirement Accounts, SEPs or SIMPLE Plans, or the individual income tax or the federal tax credits impacted by this legislation.

## HEALTH PLAN CHANGES IN THE CAA, AND CASE LAW DEVELOPMENTS

### Extension of Use of Telemedicine With High-Deductible Health Plans Without Loss of Health Savings Account Contributions

The Health Act extended the ability of employers to offer telehealth or telemedicine care with a high-deductible health plan while not impacting the employee's ability to make tax-deductible contributions to the employee's health savings account. This relief originally provided during the COVID-19 pandemic, as extended, lasts only through December 31, 2024.[4] So for 2023 and 2024 an employer may provide tele-

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[1] Pub. L. No. 117-328.

[2] *Id.*, div. FF.

[3] *Id.*, div. T.

[4] Health Act §4151.

medicine with a high-deductible health plan and not cause the employees to lose the ability to contribute to their individual health savings account and receive a federal income tax deduction for such contribution.

## State and Local Governmental Group Health Plans Lose Ability to Opt Out of Certain Requirements

Non-federal governmental plans (state and local government plans, such as a county plan or a city group health plan) have had the option to opt out of certain restrictions or requirements on benefits or requirements applicable to group health plans since it was first enacted with the Health Insurance Portability and Accountability Act of 1996.[5] The opt-out provisions are ending for the state and local governmental plans for elections made after December 29, 2022 and for any election which expires on or after June 27, 2023. There are special effective date rules for governmental health plans that are provided pursuant to a collective-bargaining agreement. State and local governmental plans should review the impact on their group health plans and when the changes become effective for the group health plan. The opt-out elections were made annually and filed with the U.S. Department of Health and Human Services.[6] It is important to review carefully the language related to the opt-out following the enactment of the Patient Protection and Affordable Care Act.[7]

## More Funds for Enforcing the Mental Health Parity and Addiction Equity Act

The Health Act provides additional funds for the enforcement of the Mental Health Parity and Addiction Equity Act (MHPAEA), which states can obtain via grants. Employers should expect increased enforcement and make certain they are obtaining the required comparative analysis of their compliance with the MHPAEA regulations. Additional enforcement efforts against MHPAEA violations are reported, so plan sponsors should check their plan design and with their third-party administrator for a comparative analysis of their benefits under the MHPAEA. Additional enforcement efforts against MHPAEA violations are reported, so group health plan should check their plan design. A recent Employee Benefit Security Administration blog focused on coverage for treatment of persons on the Autism Spectrum.

## Challenge to the PPACA Preventive Care Coverage Mandate

On March 30, 2023, a federal court in Texas delivered a new blow to PPACA in its decision in *Braidwood Management Inc. v. Xavier Becerra*.[8] The court found that the method adopted by PPACA for determining which preventive care was required to be covered by group health plans and insurance policies was unconstitutional. The court determined that all actions to enforce the mandates on or after March 23, 2010, are unlawful and that the U.S. Department of Health and Human Services is enjoined from enforcing the preventive care mandates under PPACA. On April 13, 2023, an appeal of this decision was filed with the Fifth Circuit Court of Appeals. Congress is also discussing changes to override the district court's decision. On May 15, 2023, the Fifth Circuit issued a stay on that decision[9] while the appeal is pending.

Group health plans and individual health insurance policies are unlikely to change before the end of the term of their respective insurance contracts or plan years. Any such mid-year changes will bring extra scrutiny as only amendments affecting a group of similarly situated employees effective on the first day of the plan year are not considered to be directed at an individual.[10] Group health plans that are self-insured and subject to ERISA will need to issue summaries of material reductions to all participants if they seek to make a change to the preventive services covered before the beginning of the next plan year.[11] The summary of material reduction must be issued within 60 days of adoption of the reduction in the health benefits.

Employers should watch for further developments on *Braidwood Management* as the time arrives for preparing renewals for the next plan year. They will need to address reductions in coverage with appropriate notices to the persons enrolled in coverage, and clearly describe to all new enrollees what is covered. Elimination of the coverage mandate will require employers to identify and describe what preventive care will be covered under their 2024 group health plan.

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[5] Pub. L. No. 104-191, enacting the ability of non-federal governmental plans to opt out of HIPAA under plan §2721(b)(2) of the Public Health Service Act when originally enacted. The opt-out subsequently was amended to apply to certain other coverage mandates.

[6] Health Act §1321 amending 42 U.S.C. 300gg-21(a)(2).

[7] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152.

[8] Case No. 4:20-cv-00283-O (N.D. Tex. Mar. 23, 2023) (Ft. Worth Div.).

[9] No. 23-10326, F.3d (5th Cir. May 15, 2023).

[10] Treas. Reg. §54.9802-1(b)(2)(i)(C).

[11] ERISA §104(b).


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## DEFINED CONTRIBUTION RETIREMENT PLAN CHANGES

While the health plan changes had a rapid timeline, the retirement plan changes become effective at a variety of times and will need to be watched over the coming years. The following summary addresses the changes in the order they will impact an employer's defined contribution retirement plan.

## 2023

### *De Minimis Financial Incentives for Contributions to 401(k) or 403(b) Accounts*

Employers may add a new incentive to encourage savings beyond the matching contribution. This is an option for employers to consider and it is not mandated. Both 401(k) and 403(b) plans can provide de minimis financial benefits or incentives to employees for making contributions (e.g., open a retirement savings account and receive a gift card for a coffee). It is effective for any plan year that begins after December 29, 2022.[12] The statute does not define what constitutes a de minimis financial incentive.

It is also not limited to just persons opening new accounts, so it could be provided annually to anyone saving. So it is not clear if incentives would include a gift card for a dollar value or if it must be limited to a certain amount, or if it only includes property, e.g., a toaster or a cappuccino. [13] Given the open questions on this and the fact it is already effective, guidance on how to interpret this new provision and what limits may apply for an incentive to be de minimis would be helpful. This is separate from the matching contributions permitted on qualified student loan repayments which are effective after 2023. There is no clear provision that addresses what happens to the prohibition of benefits other than matching contributions being contingent on deferrals.[14]

### *Small Employer Pension Start-Up Credit Increased in Amount but Limited in Its Application*

A modification to the small employer pension plan start-up cost credit increases the percentage of the cost available for the credit from 50% to 100% (up to the dollar limit), but it also decreases from 100 to 50 the limit on the number of employees who received compensation of $5,000 or more in the previous calendar year.[15] The SECURE 2.0 Act also added an additional credit for certain employers who meet the requirements. This only applies to eligible small employers starting a retirement plan.

[12] SECURE 2.0 Act §113.

[13] *Id.*

[14] Treas. Reg. §1.401(k)-1(e)(6).

[15] SECURE 2.0 Act §102.

### *Student Loan Payment Matching Contributions in Existence at Enactment*

After December 29, 2022, a 401(k) plan must treat a matching contribution with respect to a qualified student loan payment as a Roth contribution that is fully vested, and such amount will be included in the employee's taxable income. Employers that had student loan matching in place on December 29, 2022, will need to make this adjustment in the payroll system so the qualified student loan repayment match calculated on such matching contributions are taxed. There will need to be clarification on how these matching contributions and the tax withholding will be calculated and reported for true-up matching contributions that are frequently calculated and paid after the plan year end. This will require retirement plan record-keeping systems and plan administration to develop what they will use for the self-certification of student loan payments. While plans which previously sought rulings on matching student loan payments may be able to make immediate use of this, the effective date of this change preceded many employers' system readiness to implement on a widespread basis.[16] *Query:* Will an employer's matching contributions be treated the same as an employee's Roth contributions with respect to starting the clock on five years of participation in a Roth account for the individual?

### *403(b) Plans May Invest in Certain Non-Mutual Funds*

SECURE 2.0 Act allows 403(b) plans to invest not only in mutual funds, but also in collective trusts under Group Trust Ruling 81-100, effective for amounts invested after December 29, 2022. However, conforming amendments to other statutes are needed in order to facilitate this new investment alternative for 403(b) plans.[17]

## 2024

### *Student Loan Payment Matching Contributions for Plans Adding This Feature After 2023*

The SECURE 2.0 Act added a new optional way for employer-sponsored 401(k) plans that were not covered by the prior rulings to also provide student loan matching contributions to their participants after 2023. The law does not require employers to add it. Previously, matching contributions were the only benefit permitted to be made contingent on elective deferrals or Roth contributions due to the contingent ben-

[16] SECURE 2.0 Act §604.

[17] SECURE 2.0 Act §128.


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efit rule prohibiting any other type of benefit.[18] For plan years beginning after December 31, 2023, qualified student loan payments may be counted as if elective deferrals under the employer's 401(k) plan that are eligible for matching contributions. This applies to 401(k), 403(b), and 457(b) plans.[19] The employer will rely upon an employee's certification that he/she made qualified student loan payments during the year and the amount of such payments, and can count such qualified student loan payments in calculating its matching contributions. Employers must work with their record keepers to determine how to account for the loan payments, how the matching contributions will be calculated, and how to transfer the data on the student loan payments for purposes of calculating the Code §402(g) limit, and will need to develop a way to record the loan repayments and integrate such amounts into their payroll or other system. It is unclear how or when the prohibition on contingent benefit rules will be modified.[20]

The qualifying student loan payment amounts counted toward a matching contribution are limited. For each participant the amount counted is calculated starting with the lower of (a) the individual's limit on elective deferrals in the calendar year (currently $22,500), or (b) the annual limit on additions to the employee's retirement account in the plan which is the lesser of $56,000 or 100% of the participant's annual compensation. So for an individual employee earning over the dollar limit on annual deferrals, the calculation will start with the annual dollar limit on deferrals or $22,500 for 2024 (assuming that doesn't change). So if the employee contributed deferrals of $10,000, the employer could count up to $12,500 of qualifying student loan payments as eligible for the matching contribution.

The plan must provide that the matching contribution on behalf of student loan payments is only available to employees otherwise eligible to receive matching contributions. The plan must provide that all employees who are eligible to receive matching contribution on account of elective deferrals are also eligible to receive matching contributions on account of qualified student loan payments and that these contributions vest in the same manner.[21]

Use of the qualified student loan payments to support matching contributions will not be treated as a benefit, right or feature made available for nondiscrimination testing under Code §401(a)(4) just because it is a benefit limited to only those participants who have incurred educational loans. This means it is not subject to the additional nondiscrimination testing as a separate benefit, right or feature under Code §401(a)(4).[22] A plan may apply the requirements for the educational loan repayments with respect to all employees in the plan year once adopted. Adding the qualified student loan repayments as eligible for a matching contribution under a qualified defined contribution plan (or 403(b) or 457(b) plan) requires an amendment to the plan and verification that third-party administrators are capable of record-keeping for this additional type of contribution and incorporating it into applicable testing. Additional guidance will hopefully be forthcoming on matching contributions on qualified student loan payments which may be paid for participants at a different interval than other matching contributions under the plan. A plan adopting the qualified student loan repayment feature will need to establish records of the certifications to support the matching contribution from the employer. The guidance should address that employers can establish a deadline by which employees must submit proof that they made the qualified student loan payments for purposes of record-keeping and administration.[23]

### *Personal Emergency Distributions May Be Added to a Qualified Plan*

Effective for plan years after December 31, 2023, qualified plans may include a provision for a single emergency personal expense distribution in a calendar year. This optional provision is an amendment to Code §72(t). The emergency distribution may not exceed the lesser of (1) $1,000 or (2) the excess of the individual's vested benefit under the plan minus $1,000. The plan can rely on the individual's written certification that the employee meets the conditions for the personal emergency distribution. The emergency personal expense distribution is exempt from the 10% additional tax under Code §72(t) for early distributions provided it is for up to the limit above and it is the only such distribution in the calendar year. Only one such distribution per calendar year is permitted to be exempt from the Code §72(t) additional tax. The plan must allow the distribution to be repaid during the immediately following three calendar years. No distribution can be made as an emergency personal expense distribution during the immediately following the three years unless the individual has repaid the previous distribution, or if the individual's total amount of the elective deferrals and other employee contributions since the emergency personal expense distribution exceed the amount of the distri-

[18] Treas. Reg. §1.401(k)-1(e)(6).
[19] SECURE 2.0 Act §110.
[20] Treas. Reg. §1.401(k)-1(e).
[21] SECURE 2.0 Act §110.
[22] Treas. Reg. §1.401(a)(4)-1(b)(3).
[23] SECURE 2.0 Act §110.


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bution. Plans are not required to offer this provision, but may elect to add it.[24] An emergency expense distribution must be repaid within three years if a subsequent emergency expense distribution is granted in such three-year period. Such a distribution will not impact the plan's qualification as long as the limit on the frequency and dollar amount of the distribution is met.[25] This emergency distribution tax relief is not tied to the Pension-Linked Emergency Savings Account added by SECURE 2.0 as described below.

***Funds Available for Hardship Withdrawals***

Hardship withdrawals are permitted from qualified non-elective contributions, and qualified matching contributions and salary deferrals in a 403(b) plan for plan years beginning after December 31, 2023. In addition, participants in 403(b) plans are not required to take a loan from the plan in order to qualify for a hardship distribution.[26]

***Catch-Up Contribution Changes Intended and Needing Technical Correction***

All 401(k) plans with catch-up contributions will need to prepare in 2023 for a change in plan administration and in handling catch-up contributions in payroll for plan years beginning on or after January 1, 2024. Any employee who earned $145,000 or more in the previous calendar year (during 2023 for the 2024 calendar year) will only be able to elect catch-up contributions as Roth post-tax contributions. For such persons there will be no pre-tax catch-up contributions. This change needs to be communicated this year to all participants who are catch-up eligible or will be in 2024.

Plans that do not currently offer Roth contributions must amend their plan to add Roth contributions prior to January 1, 2024, and must verify that their payroll system can manage the testing and post-tax contributions. The system will need to track which employees earned more than $145,000 in wages (as defined in a certain Code section) in the prior calendar year (or the indexed limit in later years) and who are also catch-up contribution eligible. Participants who are found to have exceeded the $145,000 limit in the prior tax year must be allowed to change their election to change to Roth for catch-up contributions.[27]

However, SECURE 2.0 Act §603(b)(i) removes Code §402(g)(1)(C), which is the provision that enables pre-tax catch-up contributions. Presumably this change was in error, and it will hopefully be fixed in technical corrections. If no technical corrections are made, pre-tax catch-up contributions end on January 1, 2024, and any plan with catch-up contributions will need to change its payroll program for 2024.

***Retirement Funds Used to Purchase a Qualified Longevity Annuity Contact***

As of 18 months after the enactment of SECURE 2.0 (or by June 29, 2024), government-defined contribution plans may permit participants to use more than 25% of their account to purchase a qualified longevity annuity contract, as that percentage limit is to be removed from the regulations. The dollar limit that may be used to purchase the qualified longevity annuity contracts is increased by the statute to from $125,000 to $200,000, and will be adjusted for inflation.[28] There are special rules in the event of a participant's divorce.

***Pension-Linked Emergency Savings Accounts for Individual Account Plans***

The SECURE 2.0 Act also permits individual account retirement plans to add an emergency savings account to a defined contribution plan. This is an optional provision an employer may adopt. The Emergency Savings Plan permits non-highly compensated employees who elect to contribute to this Emergency Savings Account to save up to a maximum of $2,500 of post-tax money as Roth savings.[29] These new accounts are called ''Pension-Linked Emergency Savings Accounts.'' Such accounts are added to ERISA §3(45) and §801 through §804. The age and service requirements to enter the plan are not required to be satisfied to be eligible to contribute to these accounts, but they are only available to non-highly compensated employees.

The plan should not have a minimum contribution amount or minimal account balance and must allow for withdrawal. These pension-linked savings accounts are treated as Roth accounts and must be attached to a retirement plan, yet they have a different set of rules for access to funds, repayment of funds, record-keeping and accounting. There must be a governing provision in the plan document that provides for these accounts. The maximum amount an employee may contribute is tied to the individual's account balance, which cannot exceed the lesser of $2,500 or an amount determined by the plan sponsor. The $2,500 limit will be indexed after December 31, 2024. All employee contributions to the Emergency Savings account must be Roth contributions for tax purposes. There are optional provisions which can include an automatic contribution arrangement until someone opts out. The rules will need to be set out in

[24] SECURE 2.0 Act §115.

[25] Code §72(t)(2)(I)(v).

[26] SECURE 2.0 Act §602.

[27] SECURE 2.0 Act §603.

[28] SECURE 2.0 Act §201, §202.

[29] SECURE 2.0 Act §127.


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the plan and record-keeping will need to be set up for these additional accounts.

It will be interesting to see if the banking industry or another financial industry develops a product compliant with the "know your customer" requirements from the Patriot Act[30] that permit an employer to deduct savings account contributions from employee paychecks and deposit them into individual employee savings accounts that may provide an emergency savings account without the contribution and distribution limits and other requirements for the Pension-Linked Emergency Savings Accounts in a qualified retirement plan.

Pension-Linked Emergency Savings Accounts may not have a minimum balance, but the plan must place a maximum limit on each participant's account balance. The account must hold all amounts as Roth contributions. Since these accounts are not a tax qualification requirement, it will be interesting to see how prevalent this feature becomes.

Adding emergency savings accounts to a defined contribution plan results in additional disclosure requirements the plan administrator must satisfy. Additional participant communications and distribution of materials related to such accounts add to the employer's burden and costs of plan administration. Some of these communications appear to be customized to the individual regarding the limits applicable to the individual.

An employer can make a matching contribution to the amount an employee puts in the Pension-Linked Emergency Savings Account, but it must be uniform, and it will not go into that account, but rather into the individual's account in the retirement plan. If an employer pays matching contributions on contributions to the Pension-Linked Emergency Savings Account, the matching contributions to the individual account will be allocated first to employee salary deferrals under the 401(k) portion of a plan and second to the Pension-Linked Emergency Savings Account. The amounts in the Pension-Linked Emergency Savings Account are treated as Roth accounts and can be distributed as Roth distributions or rolled over to another Roth account.

ERISA was amended to pre-empt any state garnishment laws that might attempt to prevent automatic contribution arrangement to a Pension-Linked Emergency Savings Accounts. ERISA is also amended to address fiduciary duties with respect to these accounts. The new statute creates its own rules regarding appropriate investments for such accounts to protect the sponsor adding such accounts. If an employer decides to offer the such accounts for emergencies and makes matching contributions to them, the matching contribution rate must not exceed that of retirement plan accounts under 401(k).[31] Regulations to implement the Pension-Linked Emergency Savings Account are to be issued by December 29, 2023, and the provisions are to be effective as an option an employer may select in plan years after December 31, 2023.[32]

### *Start-Up Safe Harbor Employee Deferral-Only 401(k) Plans*

The SECURE 2.0 Act provision adding Employee Deferral-Only 401(k) Plans is for employers that do not have any retirement plan within its controlled group.[33] This option allows employers to create a new 401(k) plan provided such plan only receives deferral contributions from employees. These plans are treated as automatically meeting the ADP nondiscrimination testing requirements. Each employee's elective deferral is limited to $6,000 per year, and the Start-Up Deferral-Only 401(k) plan must provide for automatic enrollment and automatic escalation with enrollment notices. The automatic enrollment deferrals start at 3% and increase to 15% of compensation. The new Start-Up Deferral-Only 401(k) plans may also allow catch-up contributions. A safe harbor notice is required for the deferral-only 401(k) safe harbor plan. Employees may still be required to meet the minimum age and service of age 21 and one year of service.

A similar new plan is available for tax-exempt employers with no plans who are eligible to maintain a 403(b) plan and these plans are not subject to the top-heavy minimum contribution. The new start-up 401(k) plans for employers with no retirement plans are available effective after December 31, 2023.[34]

The Start-Up Deferral-Only 401(k) safe harbor plans whose employers engage in corporate transactions will use a special transition rule for the transaction similar to the ones for SIMPLE individual retirement accounts.[35] It is important for those engaging in corporate transactions to remember these start-up deferral-only plans are subject to transition rules other than the standard transition rule under Code §410(b)(6)(C).

[30] The Patriot Act is the United and Strengthening America by Providing Appropriate Tools to Restrict, Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56.

[31] SECURE 2.0 Act §127.

[32] *Id.*

[33] SECURE 2.0 Act §121.

[34] *Id.*

[35] *Id.*


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## 2025

### *'Long-Term Part-Time' Redefined, So Employers Need to Analyze Record-Keeping for This Group in 2023*

The SECURE 2.0 Act amended ERISA §202, adding new Code §401(k)(15)(B)(i) and §403(b)(12)(D), to reduce from three to two the number of consecutive 12-month periods in which an employee must work at least 500 hours in order to be considered long-term part-time and eligible to contribute to a 401(k) or 403(b) retirement plan.

This new rule is effective for plan years beginning on or after January 1, 2025,[36] meaning employers need to watch employee hours in rolling 12-month periods starting on or after January 1, 2023 (plan amendments may wait; see below for deadlines).

For vesting of long-term part-time employees who qualified under the three-consecutive-period standard of the original 2019 SECURE Act, periods before 2023 are not counted, but as of January 1, 2023, employers similarly need to track on a rolling month-by-month basis when each participating employee attains eligibility. Employees in this category can be excluded from safe harbor 401(k) matching or qualified non-elective contributions.

This requirement for long-term part-time employees continues not to apply to those who are employed by virtue of a collective-bargaining agreement or to non-resident aliens with no U.S.-source income with respect to a 401(k) plan.37 However, a 403(b) plan may exclude collectively bargained employees under Code §403(b)(12) flush language once the language subjecting the 403(b) plan to conditions in Code §410(b)(4) and ERISA §202(c) are effective after December 31, 2024, which contemplates the 403(b) plan being able to exclude such collectively bargained employees under Code §410(b)(3).38

### *Automatic Contribution Arrangement Mandate*

The SECURE 2.0 Act requires that any defined contribution retirement plan (401(k) or 403(b)) established after December 29, 2022, include an automatic contribution arrangement for plan years beginning after December 31, 2024. The automatic enrollment feature must start with an initial automatic contribution of between 3% and 10% of compensation with a 1% per year escalation up to 15%. Plans established after December 31, 2024, must include this provision. Plans in existence on December 29, 2022, are not required to add the automatic contribution arrangement. A new defined contribution plan established on January 1, 2023, does not need to include automatic enrollment or automatic escalation in 2023 or 2024, but does need to do so in 2025. The automatic contribution feature must permit withdrawal for contributions for which a refund/distribution was requested within the first 90 days of the date the first contribution was made. The automatic contributions are required to increase by 1% each year on January 1 of each plan year after the individual completes one year of participation.[39]

If a plan was designed with a safe harbor matching contribution or a qualified automatic contribution arrangement for a plan year ending before January 1, 2025, then automatic escalation need only reach 10% instead of 15%. The automatic contribution must be invested in a qualified default investment alternative.[40] The mandate to include the automatic contribution and automatic escalation provision does not apply to a 401(k) or 403(b) plan established before December 29, 2022.

Questions regarding when a plan was established are likely to come up in corporate transactions. For example, will a plan be exempt from complying with this new provision if it was created via a spin-off from a plan that is exempt? The mandated automatic enrollment and auto escalating rule does not apply to governmental plans or to church plans. There are special rules for multiple-employer plans and for plans of employers which normally employ less than 10 employees or that have been in existence for less than three years.[41]

### *Special Limited Age Additional Higher Catch-Up Contribution*

The SECURE 2.0 Act provides an optional provision to allow certain persons at age 60, 61, 62 and 63 to make a higher catch-up contribution. This provision, effective for tax years beginning on or after December 31, 2024, is available to 401(a), 403(b), and 457(b) plans, but not to SIMPLE 401(k) or SIMPLE IRA plans. Participants will be able to make a new increased catch-up contribution beginning during the tax year in which they attain age 60 and until the tax year in which they attain age 64.

This allows eligible persons to contribute the greater of $10,000, or an amount equal to 150% of the dollar amount in effect for a catch-up contribution for 2024. Individuals who do not attain age 60–63 after December 31, 2024, they remain subject to the $5,000 catch-up contribution limit as indexed, or an amount equal to 150% of the dollar amount that would have been in effect in 2025.

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[36] SECURE 2.0 Act §125.

37 Code §401(k)(15)(C).

38 See such language as effective after December 31, 2024.

[39] SECURE 2.0 Act §101, adding Code §414A.

[40] SECURE 2.0 Act §101, adding Code §414A and referencing 29 C.F.R. §2550.404c-5.

[41] *Id.*, adding new Code §414A(a)(e).


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Qualified defined contribution retirement plans may add this provision to allow the additional catch-up contribution for persons age 60 through 63 effective in tax years after December 31, 2024. This new additional catch-up contribution is not a required change to plans, but like other catch-up contribution under Code §414(v), it is not a qualification requirement. [42] It is not clear how this additional catch-up contribution will be handled with SECURE 2.0 Act §603's change to require certain catch-up contributions into Roth contributions.[43]

### *Changes in Defined Contribution Plan Disclosure*

By December 31, 2024, the IRS and U.S. Department of Labor will issue regulations regarding combination multiple disclosure requirements such as safe harbor, automatic contribution, and automatic escalation.[44]

By December 31, 2025, employers should watch for DOL regulations addressing a better disclosure of fees in an individual account plan.[45]

## 2026

Look for regulations to implement all these statutory changes.

## 2027

### *An Individual Tax Credit That Impacts Employer-Sponsored Plans*

A new Saver's Credit, also referred to as the Saver's Match, has been added as a tax credit for low-income individuals who make a contribution toward retirement savings, effective for taxable years after December 31, 2026.[46] The individuals must file for the credit on their tax returns and provide information so the Department of Treasury can deposit the savings match into their individual retirement account or into a qualified retirement plan account sponsored by their employer.

Employer-sponsored plans will be challenged administratively as there is no guarantee that an individual will still be employed by the same employer when the IRS actually deposits the match.

This means there can be an extra match in an employer's 401(k). This match should not be counted by the plan toward any of the applicable limits on contributions for qualified plans under rules for annual additions, catch-up contributions, and will not be counted with respect to whether the individual is owed a top-heavy minimum contribution.

The Saver's Match starts at 50%. The 50% credit is reduced to the extent a taxpayer's modified adjusted gross income exceeds the applicable limit (initially $41,000) and that otherwise bears to $30,000 for a person filing a married filing joint return. So persons with modified adjusted gross income over $71,000 should not be eligible.

Treasury is charged with educating taxpayers about the availability of the Saver's Match.[47] Employer-sponsored retirement plans and their record keepers will need to be prepared to receive this new Saver's Match and account for it separately from the other matching contributions under the plan if the employer employs individuals with modified adjusted gross income in the range to be eligible for the Saver's Match for periods after December 31, 2026 (which may be in the midst of fiscal plan years because the credit is tied to be effective with respect to the individual's tax year).[48]

Employers should inquire of their record keepers or third-party administrators regarding whether they are prepared for this new record-keeping obligation. With today's mobile workforce, the Lost and Found established by the Department of Labor may be a good tool for plan participants to use to find their Saver's Match.

## 2028

### *S Corporation Sale of Employer Securities to an ESOP*

The SECURE 2.0 Act extended the deferral of recognition of some of the gain on sale of qualifying employer securities to an Employee Stock Ownership Plan, provided the proceeds are invested in qualified replacement property to include securities of S corporations as well as C corporations. It is effective for sales occurring after December 31, 2027. The delayed effective date means the change in taxation will not have an immediate impact on the sale of S corporation shares to ESOPs.[49]

*Diversification Requirement for ESOPs*

Another ESOP-related change permits an ESOP with employer securities that are:

- the subject of price quotations by at least four dealers that have made a specified request;
- published and made continuously available on an interdealer quotation system (as defined in section 13 of the Securities Exchange Act of 1934);

[42] SECURE 2.0 Act §109.

[43] *Compare* SECURE 2.0 Act's §109 and §603.

[44] SECURE 2.0 Act §341.

[45] SECURE 2.0 Act §340.

[46] SECURE 2.0 Act §103, §104.

[47] SECURE 2.0 Act §102.

[48] SECURE 2.0 Act §103.

[49] SECURE 2.0 Act §114.


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- not a penny stock;
- issued by a company that is not an S corporation; and
- not treated as a publicly traded security

to treat such securities as publicly traded for purposes of the diversification requirement of Code §401(a)(35).[50] This change is effective for plan years beginning after December 31, 2027.

## REQUIRED MINIMUM DISTRIBUTION CHANGES

## 2022

### *Partial Annuitization of Benefits and Calculation of RMDs*

SECURE 2.0 Act eliminates a penalty on individuals who partially annuitize their accounts in a defined contribution plan by purchasing an annuity. The purchase of a partial annuity is complicated by the required minimum distribution being calculated by looking at the account balance as of the last valuation date in the immediately preceding calendar year, including the value of annuity contracts held by the account and then determining the RMD based on such account balance. The change then permits the RMD so calculated to be reduced by the amount of all annuity distributions from all annuity contracts that were held by the account in the year. The change is effective as of December 29, 2022, and regulations are to be revised to conform to this change.[51]

## 2023

### *Excise Tax on Failure to Take RMD or on Excess Accumulation*

For tax years 2023 and later, the excise tax that applies to failure to take the required minimum distributions in Code §4974 has been reduced from 50% to 25%. The tax rate may be decreased further in certain circumstances.[52]

### *New RMD Rules for Start Date*

Required minimum distributions start mandatorily at age 70½ for individuals born on or before June 30, 1949. For those born after June 30, 1949, the 2019 SECURE Act[53] changed the required beginning date to the year of attainment of age 72, if such occurred on or before December 31, 2022.[54]

It is important to note that IRS News provides an expanded explanation of the interaction of the various changes to the RMD rules. The changes are effective for persons who attain the age of 72 years after December 31, 2022 (and who were born on or after January 1, 1951) and for distributions required to be made after December 31, 2022. For individuals who reach age 72 years in 2022 and are not still working, or who are still working and a 5% owner of the employer, the individual's first required minimum distribution is to occur by April 1, 2023 (using the delay for the first payment, and it is based on account balance as of December 31, 2021.[55]

For persons who were born from 1951 to 1959 the required beginning date is their attainment of the age of 73 years on or before January 1, 2033 (assuming they are not working or 5% owners). For individuals who attain the age of 74 after December 31, 2032, the required beginning date will be age 75. The most recent proposed regulations on the required beginning date will likely require revision for the additional age trigger changes.[56] Since these changes are effective for distributions required after December 31, 2022, with respect to persons who attain the age of 72 after such date, the new age requirements must be considered by record keepers, financial advisors and plan administrators for any RMDs starting in 2023 or later. There were similar changes to the required beginning date for traditional IRAs. Please note that Roth IRA accounts are not subject to the RMD rules after December 31, 2023.[57] Designated Roth accounts in a 401(k) or 403(b) plan are subject to the RMD rules for 2022 and 2023, but will not be in 2024 and later years.[58]

### *Special Needs Trusts*

For special needs trusts, new RMD rules become effective for any calendar year beginning on or after December 1, 2023.[59]

### *Coordination With Purchase of Annuities*

Effective in calendar year 2023, the RMD regulations require an amendment to address the purchase of

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[50] SECURE 2.0 Act §123.

[51] SECURE 2.0 Act §204.

[52] SECURE 2.0 Act §301.

[53] SECURE Act §114.

[54] SECURE 2.0 Act §107(c), adding Code §401(a)(9)(C)(v).

[55] *See also* the IRS Employee Plans News issued on March 22, 2023, expounding on the RMD changes.

[56] SECURE 2.0 Act §107.

[57] Code §402A(d)(5).

[58] *See also* the IRS Employee Plans News issued on March 22, 2023, expounding on the changes to Required Minimum Distributions, Code §402(d)(5) as amended by CAA.

[59] SECURE 2.0 Act §337.


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life annuities without violating the RMD rules. RMDs are to be calculated as the excess of the amount calculated based on the individual's total account (including the annuity contract purchased in the plan) over the amount of the annuity payments for the year.[60]

The SECURE 2.0 Act further permits commercial annuities that are issued to a defined contribution plan to increase by a constant percentage of 5% per year, or to allow some payments that result in the shortening of the payment. An annuity may have forms which provide for acceleration of future payments, or accelerate the receipt of annuity payments that are scheduled in 12 months, and it can permit a distribution that is in the nature of a dividend or similar distribution, or permit on death a final payment which does not exceed the excess of the amount paid for the annuity over plan distributions or payments made under the annuity contract. This change permits other variations on the type of annuities that can be issued to a defined contribution plan to provide for all or a portion of the benefit and still be in compliance with the RMD rules.[61]

## 2024

### *RMD Calculation for 403(b), 457(b) and Roth*

Section 325 of the SECURE 2.0 Act makes it clear that a Roth account in a 403(b) plan or in a 457(b) plan is not required to satisfy the RMD requirements or the incidental benefit requirements prior to the individual's death. This change only applies to distributions beginning in plan years on or after January 1, 2024.[62]

### *Surviving Spouse RMD*

The RMD rules were modified for calendar years beginning after December 31, 2023, so that a surviving spouse may elect to be treated as if the employee under Code §401(a)(9).[63]

# DEFINED BENEFIT PLAN CHANGES

## 2023

### *PBGC Variable Rate Premium*

Pension plan changes include a freeze on the variable rate premium by capping at $52 per $1,000 of unfunded liabilities. This premium rate has increased with inflation resulting in financially burdensome premiums.[64] This change is effective as of December 29, 2022.[65]

### *Cash Balance*

Cash balance plans also received some relief in the legislation. The way the cash balance plans credit interest in the plan at one rate or using a variable or market-based rate of interest to project future benefits, and determining the anti-back loading rules the lines is now changed, so that there is now a limit on the rate for purposes of projecting the rate of benefit accrual.[66] The cash balance changes are effective for plan years beginning after December 29, 2022.

## 2024

### *Mortality Table*

Mortality rates change for improved longevity and other factors. Mortality rates are used for valuation of benefits obligations and can have a significant impact on a pension plan. SECURE 2.0 places a limit on how much the IRS can adjust the longevity in the mortality tables in any one year and requires keeping the rate updated. This is a change employers should discuss with the plan's actuaries.[67]

This change requires implementing regulations. On or before June 29, 2024, the Secretary of Treasury is to update the mortality tables for defined benefit pension plans with respect to calculating the minimum funding requirements. Once the mortality tables are updated for valuation dates occurring, during or after 2024, a plan is not required to assume for years beyond the plan's valuation date future mortality improvements at any age that is greater than 0.78% per year. This means the mortality increases will be limited and plans are limited in making extended predictions of mortality improvements. The mortality tables for determining present values under defined benefit plans are effective for valuations dates occurring on or during 2024. The SECURE 2.0 Act indicates the amendments in the regulations related to this change are to be issued in 2024, but the change is deemed to be effective as of the date of enactment of December 29, 2022, will be applied in all respects.[68] Further clarification on this change is required.

### *Lump-Sum Window*

Plan sponsors considering offering participants a lump-sum window program to cash out benefits need

[60] SECURE 2.0 Act §204.
[61] *Id.*
[62] SECURE 2.0 Act §325.
[63] SECURE 2.0 Act §327.
[64] SECURE 2.0 Act §349.
[65] *Id.*
[66] SECURE 2.0 Act §248.
[67] SECURE 2.0 Act §335.
[68] *Id.*


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to be aware of a new ERISA notice requirement which will apply on the date the final regulations are issued, which is expected by December 29, 2023. This new disclosure requirement could have a rapid effective date if the regulations are issued quickly. The regulations will be effective no sooner than one year after they are issued. The notice must be provided to participants and beneficiaries at least 30 days before they can take a lump-sum distribution and no more than 90 days before they may elect to take the lump-sum distribution option.

The notice must include the estimated monthly benefit the participant or beneficiary would receive at normal retirement age, whether there is a subsidized early retirement option or if there is a qualified joint and survivor annuity option that is fully subsidized, the monthly benefit amount if the payments begin immediately, and the lump-sum amount available. The notice should include an explanation of how the lump sum was calculated including the interest rate mortality assumption and whether any additional plan benefits were included in the lump-sum retirement subsidies. The notice must be provided in a manner similar to that for a qualified joint and survivor annuity. The notice must describe the relative value of a lump-sum option for a terminated participant compared to the value of a single life annuity or other standard form of benefit and the value of a qualified joint and survivor annuity. The notice must indicate that a commercial annuity comparable to the annuity available from the plan may cost more than the lump sum and advise the participant to consult an advisor regarding this point to the beneficiaries considering a commercial annuity. The notice must explain the potential ramifications of accepting a lump sum including the longevity risk and the risk of loss of the monthly benefit guaranteed by the Pension Benefit Guaranty Corporation if the plan terminates with insufficient assets, and the loss of specifications as well as the loss of protection from creditors and of other protections under ERISA. The notice also must explain the general tax rules related to accepting a lump sum including rollover options and must include a disclaimer stating that the plan does not provide tax, legal or accounting advice and suggesting that the participant and beneficiaries consult their own tax, legal and accounting advisors regarding whether to accept the offer. The plan administrator must explain how to accept or reject the offer, the deadline for the response, and whether the participant's spouse is required to consent to the election. Notice must include contact information for the point of contact for the plan administrator for participants and beneficiaries to get more information or to ask questions.

All of the required content for this notice must be written in the manner that is to be understood by the average participant. The Secretary of Labor is to provide a model notice as much of this will need to be customized to the individual plan and each participant, with the relative value of different options have been required to be disclosed for some time, the expensive disclosure in this notice will require significant time and effort to prepare each participant's notice for a lump-sum window program.[69] Such notice must be provided to the agencies no later than 30 days before the participants are first given the opportunity to elect one of the window program benefits.

Sponsors contemplating a window program now must notify the PBGC and Department of Labor, providing the total number of participants and beneficiaries eligible for the lump-sum option, the length of the limited period during which the lump sum is offered, an explanation of how the lump sum was calculated including the interest rate, mortality assumption, and whether any additional plan benefits, such as early retirement subsidies apply, and a sample of the notice to go to participants and beneficiaries.

Within 90 days after the conclusion of the window program, sponsors must report to the same entities the number of participants and beneficiaries who accepted the lump-sum offer. Other information to be included may be specified in regulations. The information provided will be made public by the Secretary of Labor in a manner that protects the confidentialities of the involved parties.[70]

### *New Defined Benefit Annual Funding Notice*

For plan years after December 31, 2023, defined benefit pension plans will need to issue a new annual funding notice with different calculations if it no longer relies on the adjusted funding target attainment percentage but instead relies on disclosure of assets and liabilities for the plan year and the two preceding plan years. These values must be presented in the tabular format with a statement that include specified descriptions and other disclosures.[71]

### *Pension De-Risking Through Annuity Purchase Disclosures*

Employers with defined benefit plans considering doing a pension risk transfer by purchasing annuities should be aware that Congress has mandated increased disclosures about such risk transfers. Disclosures must include the impact on the participants' benefits to be reviewed for transfers after December 29, 2023.[72]

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[69] SECURE 2.0 Act §342.

[70] *Id.*

[71] SECURE 2.0 Act §343.

[72] SECURE 2.0 Act §321.


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### 2025

***Overfunded Defined Benefit Plans Transfers to Retiree Health Accounts***

This change assumes that there is an overfunded defined benefit plan after the 2022 and 2023 year-to-date market performance. The time frame in which an overfunded defined benefit pension may transfer excess assets to a retiree health plan is extended from the initial expiration date of December 31, 2025, to December 31, 2032.[73] The changes added a rule for de minimis transfers occurring after December 29, 2022.[74]

## CHANGES APPLICABLE TO BOTH DEFINED CONTRIBUTION AND DEFINED BENEFIT PLANS

### Recovery of Overpayments of Benefits

Overpayment of benefits has long been a compliance issue for plan administrators. SECURE 2.0 amends ERISA to permit both pension plans and individual account plans to recover benefit overpayments, and the requirements are different. SECURE 2.0 provides new guidance to fiduciaries and plan sponsors on recovery of overpayments, and when overpayments can be permitted to exist as long as the employer makes corrective contributions or has forfeitures to make up the funds lost to the plan. There are restrictions on how the overpayments would be corrected and when they must be corrected. The new overpayment correction restrictions are effective on and after December 29, 2022.[75] *See ERISA §206(h) and new Code §414(aa).*

It is important to understand the parameters of the alternatives for collecting overpayments. The repayment provisions also enable custodians of individual retirement accounts in ERISA plans to recover overpayments. When a beneficiary has received overpayments as rollovers, the beneficiary may send them back to the qualified plan without risk of adverse tax consequences or may treat the receipt as a distribution. A defined benefit plan fiduciary may exercise its discretion to not seek recovery from any participant or beneficiary, provided the fiduciary determines that failure to recover all or a part of the overpayment faster than required under the funding rules would materially affect the plan's ability to pay benefits obligated to other participants and beneficiaries. Provided also that the plan has established prudent procedures to prevent or minimize overpayments, the fiduciary's issuance of the overpayments will not constitute a breach of fiduciary duty.

A fiduciary for an individual account plan, such as a 401(k) plan, subject to ERISA, will not be in breach of its fiduciary duties if there is an overpayment to a participant or beneficiary and it decides to not seek recovery, provided that the amount needed to prevent or restore any participant's or beneficiary's account or any impermissible forfeiture, that arises in connection with the overpayment, is allocated to such account separately and independently of the overpayment.[76] A plan fiduciary may consider the hardship the participant or beneficiary would suffer from the recoupment in determining whether to pursue recoupment, and must give a specified notice regarding the overpayment.

A plan fiduciary can also reduce future benefit payments. The employer may also cover the overpayment by contributing to meet the minimum funding requirement or to prevent or restore an impermissible forfeiture. A plan fiduciary may also decide, in its discretion, to seek recovery of the overpayment, but not interest or additional amounts (e.g., earnings). There are special rules for recovery from annuity payments. Any attempts to recover an overpayment must not be accompanied with threats of litigation, or use of a collection agency or similar third party. A plan fiduciary may not seek to recover overpayments that occurred more than three years before the employee is first notified in writing of the error. Participants and beneficiaries must be given the rights to use the ERISA claim and appeal procedures to dispute attempts to recover overpayments.

The changes to the Code for overpayments permit a plan to remain qualified even if it fails to recover the overpayment, or if the sponsor amends the plan to decrease future benefits payments. The employer must still satisfy funding obligations. The plan must comply with compensation and benefit limits. The portion of the overpayment which is treated as an eligible rollover remains an eligible rollover. This is effective for tax years beginning on and after January 1, 2023.

The new recoupment of overpayment provisions is effective as of December 29, 2022. For any overpayment dealt with prior to that date, plan fiduciaries may rely upon a reasonable good faith interpretation of existing administrative guidance. and may continue any attempt to recoup or offset overpayments.[77]

[73] SECURE 2.0 Act §606.

[74] *Id.*

[75] SECURE 2.0 Act §301.

[76] *Id.*

[77] SECURE 2.0 Act §301.


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## Increased Cash-Out Limit

The limit on distributions cashing out a participant's benefit without their consent under the Code and under ERISA, is increased from $5,000 to $7,000, effective for any distributions to be made after December 31, 2023.[78] The cash-out limit had not been updated for many years.

## Lost and Found

By December 29, 2024, the Secretary of Labor is to establish a searchable database for retirement savings lost and found for participants and beneficiaries to use to locate the administrators of plans, and to assist individuals in locating those plans. This allows Secretary of Labor to update that database with information on plan mergers, consolidations, bankruptcy, termination or to change the plan or change to the plan name. Searches of the database to locate new retirement benefits found, and it is established under ERISA for ERISA plans. The database will require a recording of the name of the plans and changes in the names of plans.[79]

Administrators must provide information on when participants' benefits transfer to an annuity or when they were reported on the Form SSA and provide such information to the Department of Labor.

## New Distributions or Distribution Repayments

***Repayment of Birth or Adoption Distributions***

Effective for birth or adoption distribution after December 29, 2022, such distributions must be repaid within three years from the date of the distribution. For birth or adoption distributions that occurred prior to the December 29, 2022, the distribution, or the elected withdrawal, must be repaid before January 1, 2026.[80]

***Distribution to Terminally Ill***

For any distribution from a qualified retirement plan after December 29, 2022, the distribution to an individual who is individual employee who is terminally ill and not expected to survive 24 months may be treated as a distribution to a terminally ill individual, if that employee's physician has certified that the individual is not expected to live beyond 24 months. Such distribution to a terminally ill employee is not subject to the additional 10% tax under Code §72(t).[81] The action of the distribution to a terminally individual as being exempt from the additional Code §72(t) tax did not include a provision addressing the impact of making such a distribution is tax qualification.

***Qualified Federally Declared Disaster Distribution***

Since Hurricane Katrina, there have been repeated, limited duration, disaster relief distributions from qualified retirement plans to provide relief from the financial impact of the disaster on the participants. In the SECURE 2.0 Act, Congress enacted a permanent qualified disaster recovery distribution that is not subject to the penalty tax for an early distribution from a qualified retirement plan. Qualified disaster relief distributions are limited to $22,000 per participant for a qualifying disaster in all taxable years in all plans as a cumulative matter from all qualified retirement plans in the controlled group of corporations. A qualified disaster recovery distribution may be repaid by the individuals out any time during the three-year period from the date that it was paid. The qualified disaster recovery distribution can be repaid from an eligible retirement plan. A transfer to repay the distribution is treated as an eligible rollover distribution, provided it is transferred to the plan within 60 days of distribution from the individual retirement account or qualified plan. The participants income inclusion from the qualify disaster recovery distribution is automatically a pro rata 1/3 per year for three years unless they elect to include amounts early. In order for a distribution to be a qualified disaster distribution, there must be a Presidentially declared disaster under §401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act after December 27, 2020. The qualified disaster distribution provisions are effective retroactively to the enactment of the Taxpayer Certainty Tax Relief Act after 2021.[82] A qualified disaster recovery distribution is addressed in the statute as being treated as a permitted distribution from a qualified plan even though no amendment is made to the statute governing the qualified plan's requirements to permit such distribution.[83] This change is effective after December 29, 2022.

***Qualified Disaster Loan Relief***

A qualified disaster relief distribution is not subject to the additional tax under Code §72(t). Similarly, a qualified disaster relief loan is protected from tax under Code §72(p) above the standard plan loan limits for participants residing in the designated areas and

[78] SECURE 2.0 Act §304.

[79] SECURE 2.0 Act §303.

[80] SECURE 2.0 Act §311.

[81] SECURE 2.0 Act §326.

[82] SECURE 2.0 Act §331.

[83] *Id.*


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that incur a loss during the incident period.[84] This change is effective after December 29, 2022.

#### *ADP/ACP Failure Distribution Relieved From Early Distribution Penalty Tax*

The SECURE 2.0 Act also adds a provision in Code §72(t) excluding amounts distributed, including earnings on such amounts, when a plan fails the ADP/ACP test effective on or after December 29, 2022.[85]

#### *Qualified Long-Term Care Contracts Distribution*

The SECURE 2.0 Act permits employers to amend their defined contribution retirement plans to allow a qualified long-term care insurance distribution equal to the lesser of: the actual premium paid by an employee during the taxable year for the employee, spouse or a family member for qualified long-term care insurance; 10% of the present value of the amount of the full accrued benefit of the employee under the plan; or $2,500 (to be indexed after December 31, 2024).[86] The employee must provide a certified long-term care insurance certificate to get the reimbursement.

Employer plans are not required to add this provision, but will not be disqualified if they do. 401(k) plans have added this as a permitted distribution. While this new type of distribution was added to Code §401(a)'s qualification requirements, the wording reads as permitting a provision instead of mandating it — and most if not all other requirements in Code §401(a) are mandated to the respective types of qualified plans. Additional guidance on whether this is to be a requirement for qualification would be helpful. This new distribution will not be subject to the additional tax under Code §72(t) on early distributions from a retirement plan. This provision applies to distributions on or after December 29, 2025. If this option is added to a plan, the administrator must comply with disclosure requirements for qualified long-term care insurance distributions.[87]

#### *Hardship Distribution Rules Relaxed*

Effective for plan years beginning on or after January 1, 2023, an employee requesting a hardship distribution can self-certify the amount of the financial need and the plan administrator may rely on such self-certification. So a hardship distribution not exceeding the self-certified amount for an immediate and heavy financial need shall be distributed as long as the employer does not have any actual knowledge to the contrary. This applies to 401(k) plans, 403(b) plans and 457(b) plans.[88]

## MISCELLANEOUS CHANGES

### Top-Heavy Plan Relief

For plan years beginning after December 31, 2023, employers in applying the top-heavy plan rules to a defined contribution plan may limit the top-heavy protections when the plan also covers individuals who do not otherwise meet the age-21 and one-year-of-service requirements. In testing a plan for whether it is top heavy, the employer will be able to exclude employees who otherwise would not have been eligible to participate in the plan under Code §410(a).[89]

### Change in Controlled Group and Affiliated Service Group Rules

For plan years beginning on or after January 1, 2024, the SECURE 2.0 Act has clarified the application of the controlled group and affiliated service group rules with respect to family attribution rules. Closely held businesses and professionals should reevaluate their status and determine whether the clarified rules impact their employee benefit plans.[90] The rules were revised to require that community property laws be disregarded when determining ownership and attribution of ownership in certain circumstances relating to minors.

### Miscellaneous Disclosure Changes

#### *Benchmark Investment Disclosures*

Many investment consultants compare investment lineup options under the plan to benchmark investment funds. By December 29, 2024, the DOL is directed to issue regulations regarding disclosures that a plan may provide to participants regarding benchmark investments. Employers will need to review this regulation to determine the scope and application regarding their benchmark investments.[91]

#### *Reduced Disclosure Requirements*

For plan years beginning after December 31, 2022, the SECURE 2.0 Act reduced the disclosure requirements with regard to any individual who is eligible to enroll in the plan but is not participating in or contrib-

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[84] *Id.*
[85] SECURE 2.0 Act §333.
[86] SECURE 2.0 Act §334, adding Code §401(a)(39).
[87] *Id.*
[88] SECURE 2.0 Act §312.
[89] SECURE 2.0 Act §310.
[90] SECURE 2.0 Act §315.
[91] SECURE 2.0 Act §318.


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uting to the plan (assuming such person was provided a summary plan description and any other notices about eligibility to enroll). The plan administrator must provide any documents requested by a participant. The annual notice about electing to contribute to a safe harbor 401(k) plan, and the benefits, is required to be given to participants who are eligible.[92]

***Electronic Delivery of Plan Statement***

For defined contribution and defined benefit plans, the SECURE 2.0 Act permits electronic delivery of statements to individual shareholders, provided there is a paper delivery once a year (once every three years for defined benefit plans). The Department of Labor is to issue regulations by December 31, 2024, to conform to these changes.[93]

## WHEN TO AMEND?

### Plan Amendment Deadlines

Amendments to plan documents to comply with a SECURE 2.0 Act must be made before the last day of the first plan year that begins on or after January 1, 2025, unless a later date is promulgated by the Secretary of Treasury. If a plan is entitled to a later amendment date, it must comply. The statutory requirements, beginning on the effective date in the legislation, for the change and ending on the date the plan's amendment must comply retroactively. The SECURE 2.0 Act also extends the amendment deadlines for the original SECURE Act and the CARES Act as well as for certain changes included in the Taxpayer Certainty and Disaster Relief Tax Relief Act of 2020 and in the Consolidated Appropriations Act, 2021.[94]

### Relief on Amendment Timing for Changes in Discretionary Contributions

Some employers want to make contributions for the prior year after determining their income for the prior year. Historically, discretionary increases to benefits require a plan amendment but such amendment could not be made after the end of the plan year. Beginning with plan years starting on or after January 1, 2024, employers will be able to amend a plan effective for the prior plan year to implement an increased contribution. The amendment must be adopted by the extended due date of the employer's federal income tax return.[95] This means, for example, an employer may decide to make a contribution for 2024 in March 2025 and adopt an amendment by the deadline for its 2024 tax return in 2025. *Query:* Will this include adding some of the discretionary changes in such law?

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[92] SECURE 2.0 Act §320.

[93] SECURE 2.0 Act §338–§340.

[94] SECURE 2.0 Act §501.

[95] SECURE 2.0 Act §316.


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