

# Alert

## The Secure Act Improves Retirement Security With a Grab Bag of New Rules

January 27, 2020

Below is an overview of the key employee benefits provisions of the “Setting Every Community Up for Retirement Enhancement Act of 2019” or SECURE Act, which was signed into law on Dec. 20, 2019 as part of the Further Consolidated Appropriations Act, 2020. The SECURE Act ushers in the most comprehensive set of changes for retirement plans since the Pension Protection Act of 2006. The legislation seeks to expand retirement plan coverage, improve savings and retirement readiness, lessen certain burdens on employers sponsoring retirement plans and enhance coverage and access for individuals. Many of the provisions became effective on Jan. 1, 2020.

The table below outlines what rules are changing and the action that plan sponsors may and should be taking:

<b>Pooled Employer Plans Permitted for Unrelated Employers</b>	<b>Effective Date</b>
<p>Pooled Employer Plans (PEPs), which are an open type of defined contribution multiple employer plans, may be established where unrelated employers have no common interest and may have the sole reason to provide a retirement plan arrangement jointly. The benefits of a PEP include having a single plan document, single Form 5500 and single audit. The PEP provider must be a named fiduciary and may be a financial services company, bank, trust company or third-party administrator. The PEP provider must register with the Secretary of the Treasury and acknowledge its fiduciary status. Special 5500 rules will apply. Model language will be made available by the IRS.</p>	<p>Plan years after Dec. 31, 2020.  (SEC. 101).</p>
<b>One Bad Apple Rule Eliminated for Multiple Employer Plans and Pooled Employer Plans</b>	<b>Effective Date</b>
<p>A plan’s tax-qualified status is protected from disqualification for a qualification failure where the noncompliance is limited to a single participating employer (known as the bad apple), provided that the plan sponsor holds the offending employer responsible for all liabilities arising from the noncompliance and, in certain cases, removes the noncompliant employer’s assets from the plan through a spin-off to another plan.</p>	<p>Plan years after Dec. 31, 2020.  (SEC 101).</p>

<b>10% Auto Escalation Cap Increased to 15% After First Plan Year</b>	<b>Effective Date</b>
<i>Optional Plan Amendment.</i> Plan sponsors may increase the maximum automatic escalation percentage for automatic enrollment safe harbor plans (known as the “qualified automatic contribution arrangement” or “QACA” safe harbor) from 10 to 15% of compensation for plan years following the participant’s first year of plan participation.	Plan years after Dec. 31, 2019.  (SEC. 102).
<b>Election of 401(k) Safe Harbor Status Simplified</b>	<b>Effective Date</b>
The safe harbor notice requirement for plans that make non-elective safe harbor contributions is eliminated, giving employers more flexibility to add non-elective safe harbor contributions mid-year. Note that the notice requirement for safe harbor matching contributions continues to apply.  Sponsors are permitted to switch to a safe harbor plan with non-elective contributions during a plan year if at least a 4% non-elective contribution is made for all eligible employees.	Plan years after Dec. 31, 2019.  (SEC. 103).
<b>Increased Tax Incentives for Small Employers to Offer Retirement Plans</b>	<b>Effective Date</b>
For the first plan year and each of the next two taxable years, the amount of tax credit for new plans and 403(b) plans is increased from \$500 to the greater of (i) \$500 or (ii) the lesser of \$250 for each non-highly compensated employee of the employer who is eligible to participate in the plan, or \$5,000.  There is also an additional tax credit of up to \$500 for the first three years after adopting a plan that automatically enroll employees or converts a plan to one with an automatic enrollment program.	Taxable years after Dec. 31, 2019.  (SECS. 104 & 105).
<b>Graduate and Postdoctoral Stipends and Fellowships Are Treated as Compensation for IRAs</b>	<b>Effective Date</b>
Compensation for purposes of making contributions to an IRA now includes amounts paid to an individual such as non-tuition fellowships and stipends that aid in the pursuit of graduate and postdoctoral studies.	Taxable years beginning after Dec. 31, 2019.  (SEC. 106).
<b>Repeal of Age Limit for IRA Contributions and Coordination of IRA Contributions with Qualified Charitable Distributions</b>	<b>Effective Date</b>
The prohibition on traditional IRA contributions after age 70½ is eliminated. Individuals may continue to make traditional contributions to IRAs, like Roth IRAs, provided that they have earned income. After age 70½ the amount of distributions not included in gross income because they are for charitable purposes will be reduced by:	Taxable years beginning after Dec. 31, 2019.  (SEC. 107).

<p>(i) the aggregate amount of reductions allowed to the taxpayer under section 219 (traditional IRA contributions) for all taxable years ending on or after the taxpayer turn 70 ½,</p> <p style="text-align: center;"><i>Minus</i></p> <p>(ii) the aggregate amount of reductions due to charitable distributions for all years preceding the current taxable year.</p>	
<b>Plan Loans Cannot be Offered Through Credit Cards</b>	<b>Effective Date</b>
Plans are prohibited from making plan loans through credit cards or any other similar arrangement by providing that any loan made through a credit card or similar arrangement will be treated as a taxable distribution.	<p>This change applies immediately for loans made after Dec. 20, 2019.</p> <p>(SEC. 108).</p>
<b>Lifetime Income Options Made Portable</b>	<b>Effective Date</b>
For the first time, defined contribution plans, 403(b) plans and 457(b) plans are permitted to allow a trust-to-trust transfer of lifetime income investments or annuity contracts that are eliminated as an investment option in the plan.	<p>Plan years beginning after Dec. 31, 2019.</p> <p>(SEC. 109).</p>
<b>Distribution of 403(b) Plan Custodial Accounts In Kind upon Termination of a 403(b) Plan</b>	<b>Effective Date</b>
Upon a termination of a 403(b) plan, the plan may now distribute an individual’s custodial account in kind to the participant or beneficiary of the plan, which will allow for the continued tax-deferred status of the account until it is paid out.	<p>This change is effective no later than six months after the date of enactment and is retroactive for all taxable years that begin after Dec. 31, 2008.</p> <p>(SEC. 110).</p>
<b>Church Plan Rules Clarified</b>	<b>Effective Date</b>
Employees eligible to be covered under a 403(b) Plan maintained by a church-controlled organization is clarified to include duly-ordained, commissioned or licensed ministers, regardless of the source of compensation; employees of a tax-exempt organization, which is controlled by or associated with a church or a convention or association of churches; and certain employees who have separated from service with a church, a convention or association of churches.	<p>This change is effective immediately, for plan years beginning before, on, or after Dec. 20, 2019.</p> <p>(SEC. 111).</p>

<b>Part-time Employee Eligibility for 401(k) Plans Expanded</b>	<b>Effective Date</b>
401(k) plans must permit part-time employees who complete 500 hours during <i>three</i> consecutive 12-month periods to make elective deferrals, lowering the threshold from 1,000 hours in one 12-month period, if such part-time employees meet the necessary age requirements under the plan. For example, if an employee completes at least 500 hours in 2021, 2022 and 2023, the employee must be able to make deferrals in 2024. Furthermore, the nondiscrimination and top-heavy rules will not apply to 401(k) plan participants who work between 500 and 1,000 hours. Employers will not be required to make non-elective or matching contributions on behalf of such part-time employees working fewer than 1,000 hours per year. Employee who have at least 500 hours of service in a 12-month period will be treated as completing one year of service for vesting purposes. This provision does not apply to employees covered by collective bargaining agreements.	Plan years after Dec. 31, 2020.  (SEC. 112).
<b>Penalty-free Withdrawals are Allowed in Event of Birth or Adoption</b>	<b>Effective Date</b>
In-service distributions of up to \$5,000 are permitted for a qualified birth or adoption, which are subject to income taxes but the 10% early distribution tax penalty will not apply, provided that the distribution is made during the one-year period after the date of the child’s birth or legal adoption. Further, the participant is permitted to contribute the amount of the distribution back into the plan or IRA.	This section applies to distributions made after Dec. 31, 2019.  (SEC. 113).
<b>Increase in Required Beginning Date for Mandatory Distributions to Age 72</b>	<b>Effective Date</b>
The age at which participants in qualified plans, 457(b) Plans and IRAs must start their required minimum distributions is increased to age 72 from age 70½. Even with this change, plan sponsors will have to make distributions by April 1, 2020 for participants who reached age 70½ in 2019, as well as continue distributions that commenced in prior years.	These changes are effective prospectively for distributions required to be taken after Dec. 31, 2019.  (SEC. 114).
<b>New Plan Adopted Retroactively by Filing Due Date for Year May be Treated as in Effect as of the Close of the Year</b>	<b>Effective Date</b>
Plan sponsors may treat a qualified retirement plan adopted before the due date (including extensions) of the tax return for the taxable year as having been adopted as of the last day of the taxable year. A company could adopt a new plan for 2020 as late as Oct. 15, 2021 (with extensions) to make company contributions. However, a written plan document must still be in place before any elective deferrals can commence.	This change applies to plans adopted for taxable years after Dec. 31, 2019.  (SEC. 201).

<b>Combined Annual Report for Group of Plans</b>	<b>Effective Date</b>
Certain eligible plans that fall within the same group (e.g., defined contributions plans with the same trustee, the same named fiduciary(ies) under ERISA, the same plan administrator, same plan year and provide for the same investment options) may file one consolidated annual Form 5500.	This new consolidated filing option will be implemented by Jan. 1, 2022 and will apply to returns for plans years after Dec. 31, 2021.  (SEC. 202).
<b>Disclosure Regarding Lifetime Income</b>	<b>Effective Date</b>
Benefit statements for defined contribution plan participants must include a lifetime income disclosure at least once during any 12-month period. The disclosure must illustrate the estimated monthly payments the participant would receive if the total account balance were used to provide lifetime income streams, including a qualified joint and survivor annuity for the participant and the participant's surviving spouse and a single life annuity. The Secretary of Labor is directed to develop a model notice and model actuarial assumptions.	This requirement applies to pension benefit statements furnished more than 12 months after the DOL issues interim final rules, the model disclosure and assumptions.  (SEC. 203).
<b>Fiduciary Safe Harbor for Selection of Lifetime Income Provider</b>	<b>Effective Date</b>
A new safe harbor is available for fiduciaries with respect to their selection of lifetime income providers. A fiduciary is deemed to satisfy the safe harbor if it engages in an objective search considering the financial capability of the insurer and considers the cost of the guaranteed income contract in relation to the benefits and features of the contract.	This change is effective immediately, for plan years beginning after Dec. 20, 2019.  (SEC. 204).
<b>Modification of Nondiscrimination Rules to Protect Older, Longer Service Participants</b>	<b>Effective Date</b>
Large employers with defined benefit plans that are closed to new entrants are relieved from conducting nondiscrimination testing such as benefits, rights and features relief for the closed participant class, benefit accrual relief for the closed participant class and minimum participation requirement relief.	Effective immediately (Dec. 20, 2019).  (SEC. 205).

<b>Expansion of Distributions from 529 Plans</b>	<b>Effective Date</b>
The law expands the definition of a tax-free or qualified distribution from 529 Plans to include repayment of up to \$10,000 in qualified student loans, and expenses for certain apprenticeship programs.	This change is effective retroactively for distributions made after Dec. 31, 2018.  (SEC 302).
<b>Acceleration of Post-Death Distributions</b>	<b>Effective Date</b>
The requirement that defined contribution plans had to distribute benefits within five years of death or over the life expectancy of the beneficiary is changed to ten years following a participant's date of death, except for certain eligible designated beneficiaries (such as surviving spouse, minor children, disabled or chronically ill) who can continue to receive benefits over their lifetimes.	These changes apply with respect to plan participants who die after Dec. 31, 2019.  (SEC. 401).
<b>Increased Penalties for Failing to File</b>	<b>Effective Date</b>
<p>The penalties for failing to file Retirement Plan Returns is increased:</p> <ul style="list-style-type: none"> <li>• The dollar threshold to determine the penalties for failing to file a return for taxes is increased to \$435.</li> <li>• The penalty for a failure to file the Form is \$105 per day, not to exceed \$50,000.</li> <li>• The penalty for a failure to file a registration statement of deferred vested participants is \$2 per participant per day, not to exceed \$10,000.</li> <li>• The penalty for a failure to file a required notification of a change in plan status is \$2 per day, not to exceed \$5,000.</li> </ul> <p>The penalty for a failure to provide a required withholding notice for periodic pension payments is \$100 for each failure, not to exceed \$50,000 for all failures during any calendar year.</p>	This section applies to returns the due date for which (including extensions) is after Dec. 31, 2019.  (SECS. 402 & 403).
<b>Remedial Amendment Period</b>	<b>Effective Date</b>
The remedial plan amendment period runs through the 2022 plan year or a later date if Treasury provides for any plan amendment required under the SECURE Act.	Plan years ending in 2022 or later date if extended.  (SEC. 601).

**Call to Action:**

Now is a good time to review your plan design and work with your attorney to determine which plan amendments are necessary and make conforming changes to your summary plan description and other employee communications.

Authored by [Mark E. Brossman](#), [Ian L. Levin](#), [Susan E. Bernstein](#), [Melissa J. Sandak](#) and [Radhika V. Tahiliani](#).

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

Schulte Roth & Zabel  
New York | Washington DC | London  
[www.srz.com](http://www.srz.com)

This communication is issued by Schulte Roth & Zabel LLP for informational purposes only and does not constitute legal advice or establish an attorney-client relationship. In some jurisdictions, this publication may be considered attorney advertising. ©2020 Schulte Roth & Zabel LLP. All rights reserved. SCHULTE ROTH & ZABEL is the registered trademark of Schulte Roth & Zabel LLP.