TODAY'S WEBINAR WILL BEGIN SHORTLY

Please register today for our next Trucker Huss Webinar:
"Litigation Lessons and Minimizing Risks"

Date: March 10, 2020 from 10:00 – 11:00 a.m. Pacific Time

Description: Recent developments in ERISA litigation and tips on fulfilling your fiduciary duties.

Technical Issues

- If you experience technical difficulties during this webinar, please call Shawn Tenney at 415-277-8050.

MCLE Credit

- This program is eligible for Continuing Legal Education (CLE) credit. Please contact Joe Harrison at jharrison@truckerhuss.com to receive a CLE certificate of completion.

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Setting Every Community Up for Retirement Enhancement Act (SECURE)

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SECURE - RESA

Dueling Retirement Policy Bills in the House and Senate

SETTING EVERY COMMUNITY UP for RETIREMENT ENHANCEMENT ACT of 2019 (SECURE)

RETIREMENT ENHANCEMENT AND SAVINGS ACT of 2019 (RESA)

Bills in the Last (115th) Congress

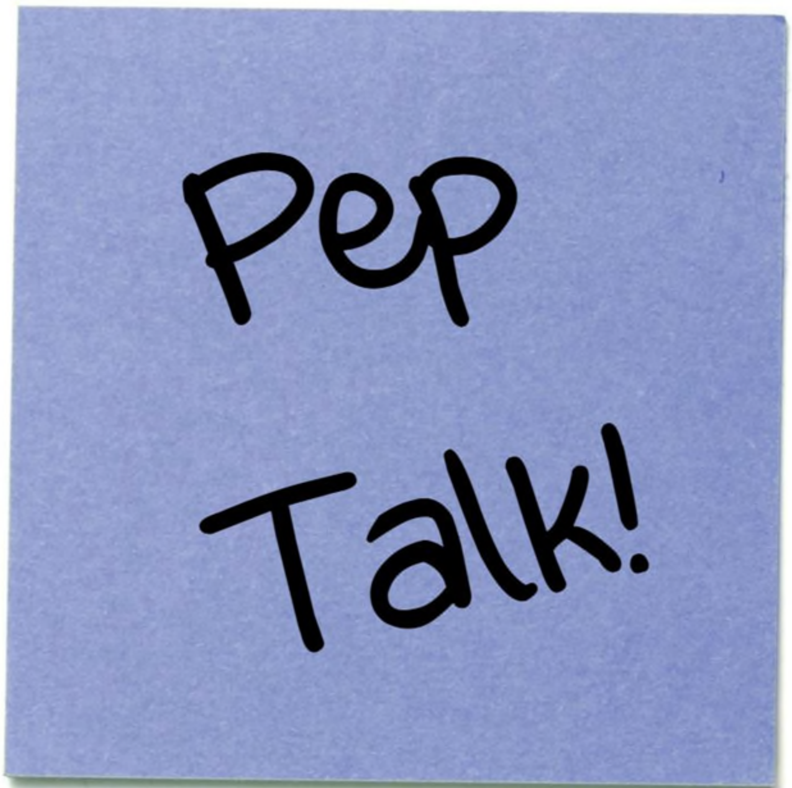
- On November 26, 2018, representative Kevin Brady (R-TX), Chairman of the House Ways and Means Committee introduced the Retirement Savings and Other Tax Relief Act of 2018 and the Taxpayer First Act of 2018 ("RSOTRA").
- Earlier in the year, Senators Orrin Hatch (R-UT) and Ron Wyden (D-OR) had jointly introduced the Retirement Enhancement and Savings Act of 2018 ("RESA").
- RSOTRA appeared to have been a negotiated compromise that reconciled the differences between RESA and the Family Savings Act of 2018 ("FSA"), which was passed by the House on September 27, 2018.
- It was hoped that RESA (or RSOTRA) would be passed in the lame duck session of Congress held after the 2018 mid-term elections but that did not come to pass.

The 116th Congress

- On April 1, 2019, Senators Chuck Grassley (R-IA) and Ron Wyden (D-OR) jointly introduced the Retirement Enhancement and Savings Act of 2019 (RESA) (S. 972).
- On May 24, 2019, the House passed the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE) (H.R. 1994) by a vote of 417-3.
- The bill moved to the Senate where the hope was it would pass by unanimous consent.
- Several senators objected, however, and they put a hold on the bill.

The 116th Congress

- SECURE was added as Division O to the Further Consolidated Appropriations Act, 2020 (H.R. 1865) which funded the federal government for the remainder of the 2020 fiscal year and was signed into law by President Trump on December 20, 2019.
- Added to SECURE were disaster-related rules for federally declared disasters in 2018 and 2019.
- Of critical importance to plan sponsors is that the effective dates in the original bill were left unchanged.
- As a result, many of the new law's provisions became effective on January 1, 2020.



POOLED EMPLOYER PLANS

Pooled Employer Plans (PEPs)

- SECURE provides for a new type of multiple employer plan called a Pooled Employer Plan (PEP).
- PEPs have been promoted as a way smaller employers can pool together to participate in a single plan and save on administrative costs.
- The PEP provisions are intended to remove impediments to the formation of so-called "open MEPs" under current law and regulatory guidance.

Pooled Employer Plans (PEPs)

- DOL regulations permit MEPs to be sponsored by Professional Employer Organizations (PEOs) and by groups of employers (typically organized as a trade association).
- PEPs are truly open MEPs and differ from the DOL requirements in that:
  - A PEP can be sponsored by a financial services company, bank, trust company, third-party administrator or similar entity;
  - Employers participating in a PEP are not required to have anything in common; and
  - A PEP may be formed for the sole basis of providing a retirement plan arrangement for participating employers.

Pooled Employer Plans (PEPs)

- Pooled Employer Plans ("PEPs")
  - Allows for Open MEPs with no commonality if certain requirements are met.
- PEP Benefits
  - Single Plan Document.
  - Single Form 5500 Filing.
  - Single Plan Audit.
- Significant compliance requirements.
- Effective for plan years beginning after December 31, 2020.

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Pooled Employer Plans (PEPs)

- A PEP must be organized as single 401(a) individual account plan with a tax-exempt trust or a plan of individual retirement accounts governed by IRC section 408.
  - The addition of IRAs as potential funding vehicle will be something entirely new.
  - Not quite clear how it will work.
- A PEP provides benefits to the employees of 2 or more participating, unrelated employers.

Pooled Employer Plans (PEPs)

- The PEP plan document must designate a "pooled plan provider" ("PPP").
- PPP is a named fiduciary under ERISA and acts as the 3(16) plan administrator.
- It is expected that the vast majority of PEPs will retain an ERISA section 3(38) investment advisor thereby relieving the employer from any fiduciary responsibility for plan investments.

Participating Employer Responsibility

- Employers retain fiduciary responsibility for:
  - Selection and monitoring of the PPP and other named fiduciaries; and
  - Investment and management of assets attributable to employees of that employer unless the PPP has delegated that 3(38) responsibility to another fiduciary.
- The significant reduction in potential fiduciary liability should make PEPs attractive to small employers.

Pooled Employer Plans (PEPs)

- PPP must make such disclosures to participating employers as may be required by DOL regulations, for example, information to assist the employer in selecting and monitoring the PPP.
- Employers must provide the PPP with the information necessary to administer the plan and to meet IRC section 401(a) or 408 qualification requirements.
- Disclosures and information may be provided in electronic form.

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Pooled Employer Plans (PEPs)

- PEPs are prohibited from imposing unreasonable restrictions, fees, or penalties for withdrawal or otherwise distributing or transferring assets from the plan.
- This is to ensure that it is easy for participating employers to change PEPs if circumstances dictate.
- It could also drive up the administrative costs of a PEP if there is high turnover of participating employers.

Pooled Plan Provider (PPP)

- The PPP is responsible for performing all administrative duties of the plan including:
  - Testing to ensure the PEP meets either 401(a) or 408 individual retirement account qualification requirements, whichever is applicable.
  - Ensuring that participating employers take the necessary actions and provide any information needed for the plan to meet compliance requirements.

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Pooled Plan Provider (PPP)

- The PPP must register with both DOL and IRS before it may operate as a PPP.
- DOL and IRS may audit, examine, and investigate PPPs as they wish.
- The PPP must acknowledge, in writing, that it is a named fiduciary and the ERISA section 3(16) plan administrator for the PEP.
- The PPP must ensure that anyone who is a fiduciary to the plan or handles plan assets is properly bonded (the cap for PEPs is raised to $1 million).

Guidance

- Both DOL and Treasury to issue guidance.
- No deadline by which the regulatory guidance must be issued.
- No restriction on adoption of a PEP before the guidance is issued.
- Until guidance is issued, good faith compliance is permitted.

Guidance

- Both agencies must identify the duties of the PPP in sponsoring and administering the PEP.
- Both to issue guidance on the spinning off of "bad apple" employers from the PEP to isolate the potential liability to just those "bad apples."
- Both can determine if spinning off of plan assets is in the best interest of participants.

Guidance

- DOL to determine disclosures the PPP must make to participating employers and the information participating employers must make available to the PPP.
- Treasury to issue procedures on plan termination if either PPP or participating employers "demonstrate a lack of commitment to compliance."
- Treasury to publish model language that can be adopted for a plan to be treated as a PEP.

Reporting Requirements

- PEP's annual report (Form 5500) must include:
  - A list of the PEP's participating employers;
  - A good faith estimate of % of total contributions attributable to each participating employer for the year; and
  - The name and EIN of the PPP.
- DOL may extend small plan audit rules to PEPs with fewer than 1,000 participants (if no employer has more than 100 participants).

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Aggregated Form 5500

- Form 5500 aggregation - consolidated filings for 414(i) defined contribution individual account plans that:
  - have the same trustee;
  - have the same one or more named fiduciaries;
  - have the same 3(16) plan administrator;
  - have plan years that begin on the same date; and
  - provide for the same investments or investment options.
    - Some have suggested that this provision will allow for significant cost savings similar to a MEP.
    - Avoids the one bad apple rule that applies to MEPs.
    - Effective for 2021 plan year returns.

Participation by Part-Timers

- Mandatory participation in a 401(k) plan by "long-term" part-time employees.
  - Employees who have attained age 21 and completed 3 consecutive 12-month periods with at least 500 hours of service would have to be eligible to make at least elective deferral contributions if the employer offers a 401(k) or similar plan.
  - These employees need not receive any employer contributions (including top heavy minimums) and may be "disaggregated" for coverage, ADP/ACP and 401(a)(4) testing.
  - Effective for plan years beginning after December 31, 2020.
  - Service in 12 month periods beginning before January 1, 2021 need not be taken into account.

Extended New Plan Adoption Date

- Extension of the deadline for adoption of a new plan to the due date of the plan sponsor's tax return.
  - For example, a calendar year C corp. could adopt a new plan for its 2020 tax year as late as April 15, 2021 (or October 15, 2021, if there is an extension).
    - However, a defined benefit plan must be funded within 8 ½ months after the tax year ends to be deductible (or September 15, 2021, in the example above).
  - Elective deferral contributions could only be made from compensation that is paid after the plan is actually adopted.
  - Some TPAs have complained that this will only make the "busy season" even busier.
  - Effective for new plans adopted for tax years after 2019.

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Non-Elective Safe Harbor Notice

- Safe harbor notice would no longer be required to be given for plans using the non-elective contribution approach to pass the ADP test.
- The annual notice would still be required for plan relying on the QNEC to also satisfy the ACP test.
- Participants would still need to receive an SPD and otherwise be able to change their deferral election at least once per year.
- Effective for plan years beginning after 2019.

Mid-Year Addition of Non-Elective Safe Harbor

- Permits a plan to be amended mid-year to become a non-elective contribution type safe harbor plan.
  - This is only available for non-elective contribution safe harbor plans (i.e., not matching contribution safe harbor plans).
  - If the amendment is adopted with less than 31 days before the end of the plan year:
    - the QNEC contribution must equal at least 4% of compensation; and
    - The amendment must be adopted no later than the end of the next plan year.
- Effective for plan years beginning after 2019.

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Plan Credit Card Loans Prohibited

- Qualified plan loans made through credit cards would be prohibited.
  - This prohibition has been included in various federal legislative proposals since Banc One of Ohio received a DOL advisory opinion permitting credit card plan loans (See AO 1995–17A).
  - SECURE prohibits credit card loans effective for loans made after December 20, 2019.

Annuity Purchase Safe Harbor

- Intended to encourage the offering of more lifetime income distribution options.
- Meant to address the fiduciary liability fears that the selection of an annuity provider will be judged in hindsight years later if the insurer goes belly up (think Executive Life).
- Essentially allows plan fiduciaries to rely on state insurance regulation and issuance of a certificate of authority by the home state that the insurer is financially sound.

Annuity Purchase Safe Harbor

- Under the new safe harbor, a plan fiduciary is deemed to have fulfilled his or her fiduciary duty with regard to the selection of an annuity provider if the fiduciary:
  - Engages in an objective thorough and analytical search to identify potential insurers;
  - Considers the financial capability of the annuity provider and the cost of the contract relative to the benefits, contract features and administrative services to be provided; and
  - Based on those considerations, concludes at the time of selection that the insurer is financially capable of satisfying its obligations and the relative cost of the annuity is reasonable.

Annuity Purchase Safe Harbor

- A fiduciary will be deemed to have satisfied the last two bullets on the previous slide if the fiduciary obtains a written representation from the insurer that:
  - The insurer is licensed to offer annuity contracts;
  - The insurer undergoes a financial examination by the insurance commissioner of its domiciliary state at least once every 5 years;
  - The insurer will notify the fiduciary of any change of circumstances that would preclude the insurer from making the same representation at the time of issuance of the contract; and

Annuity Purchase Safe Harbor

- Insurer written representation (cont'd.):
  - At the time of selection, the insurer (and for each of the immediately preceding 7 years):
    - Operated under a certificate of authority from the insurance commissioner of its domiciliary state;
    - Filed audited financial statements;
    - Maintains reserves which satisfy all states where the insurer does business; and
    - Is not operating under an order of rehabilitation, supervision or liquidation.

Annuity Purchase Safe Harbor

> The new law still requires a fair amount of due diligence by plan officials to ensure they have fulfilled their fiduciary duty.

> It remains to be seen if this change in the law will attract more annuity offerings.

> Effective on December 20, 2019.

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IRAs

- Age for required minimum distributions increased from 70½ to age 72.
  - The Joint Committee on Taxation estimates that this provision will reduce tax revenues by $8.8 billion over the next ten years.
    - Effective for distributions required to be made after December 31, 2019, with respect to individuals who attain age 70½ after such date.
- The maximum age limit for traditional IRA contributions is eliminated.
  - Effective for tax years after 2019.

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Small Employer Tax credit

- Small employer start-up tax credit for the first 3 years after adopting a new plan equal to 50% of the startup costs up to a maximum of the greater of:
  - $500; or
  - $250 multiplied by the number of NHCEs eligible to participate up to a maximum of $5,000 (20 NHCEs).
- This is a substantial increase from the current limit of 50% of the startup costs up to a maximum credit of $500 per year for the first 3 plan years.
- It should provide a welcome tool to those pension professionals who work with small employers.

Small Employer Tax credit

- An additional small employer tax credit equal to $500 per year for up to 3 years if plan adds auto enrollment to an existing plan or is included in a new plan.
  - Effective for tax years after 2019.
- A "small" employer is defined as one who, in the preceding year, had no more than 100 employees receiving at least $5,000 in compensation. (SIMPLE IRA plan eligibility standard).

Miscellaneous Changes

- PBGC premium relief for certain plans (e.g. Girl Scouts, rural electric co-ops).
  - Effective for plan years beginning after 2021.
- IRS directed to issue guidance permitting 403(b)(7) custodial account plans to terminate.
  - SECURE directs that the guidance be retroactively effective to plan years beginning after December 31, 2008.

Miscellaneous Changes

- Taxable non-tuition fellowships will count as compensation for purposes of making an IRA contribution for taxable years after 2019.
- Individuals who exclude from income (under IRC section 131) a qualified foster care payment which is a difficulty of care payment may count that payment as 415 compensation in a defined contribution plan.
  - Contributions allocated based on such compensation are treated as an after-tax contribution.
  - Retroactively effective for plan years beginning after 2015.

Miscellaneous Changes

- Automatic enrollment cap for QACA safe harbor plans increased to 15%.
  - Effective for plan years beginning after 2019.
- Provides nondiscrimination testing relief for frozen DB plans.
  - Effective on date of enactment but may be applied to plan years after 2013.
- Permits in-service distribution and rollover of lifetime income investment option if plan will no longer offer that option.
  - Effective for plan years beginning after 2019.

Revenue Raisers - Stretch IRA

- Eliminates the use of the "stretch" IRA as a distribution option at death and instead requires a total distribution to be made within 10 years of death.
- Exception available for "eligible beneficiary," i.e., a surviving spouse, minor child, a disabled individual, chronically ill, or anyone else no more than 10 years younger and certain binding annuities in effect on date of enactment.
- This is a significant change for many estate plans and many fear it will lead to fewer small employer plans.
- Raises approximately $15.7 billion in new tax revenue.

Revenue Raisers - Failure to File Penalties

- Raises the penalties for failure to file various IRS forms effective for forms due after December 31, 2019.
  - Form 5500 penalty would increase from $25 per day (maximum of $15,000 per year) to $250 per day (maximum of $150,000 per year).
  - Form 8955-SSA penalty would increase from $1 per participant per day (maximum of $5,000 per year) to $10 per participant per day (maximum of $50,000 per year).
  - The penalty for failure to provide the required income tax withholding notice to the recipient of a plan distribution would increase from $10 per failure (maximum of $5,000 per year) to $100 per failure (maximum of $50,000 per year).
  - Raises approximately $500 million in revenue.

Distributions for Birth/Adoption expenses

- New "qualified distributions" for child birth/adoption expenses which are exempted from IRC §72(t) 10% early distribution tax.
  - Would not violate in-service distribution rules for elective deferrals in 401(k), 403(b), or 457 plans.
  - Distribution amount capped at $5,000.
  - Can be repaid back into a qualified plan or IRA.
  - Effective for distributions after 2019.

Lifetime Income Disclosure

- Lifetime income disclosure added to pension benefit statements.
  - Would require defined contribution plans to include a calculation on the participant benefit statement that converts the account balance into an annuity payment stream.
  - DOL would issue model actuarial assumptions and a model disclosure form.
    - Effective for benefit statements furnished more than 12 months after the later of the issuance of:
      - Interim final regulations;
      - DOL model disclosure; or
      - DOL safe harbor assumptions.

Federal Disaster Relief

- A disaster relief provision, which was not originally part of SECURE, was added as Division Q under the 2020 budget bill.
- It will apply with respect to major disasters – as declared by the President under federal law – during the period beginning January 1, 2018 and ending February 29, 2020.

Federal Disaster Relief

- Under this provision, "qualified disaster distributions" of up to $100,000 are:
  - Exempt from the premature distribution penalty tax under IRC section 72(t);
  - They may be rolled back into a qualified plan or IRA for up to 3 years after the distribution;
  - They may be included in income ratably over the 3-year period beginning in the year of the distribution.
- In addition, the participant loan limit is increased for these individuals from $50,000 to $100,000 for the 180-day period beginning on December 20, 2019.

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Federal Disaster Relief

- A "qualified disaster distribution" is a distribution made to an individual who suffered an economic loss and whose principal residence is located in a qualified disaster zone during the period of the disaster (as specified by the Federal Emergency Management Agency [FEMA]).
- To the extent a California wildfire disaster qualified under earlier relief provided by the Bipartisan Budget Act of 2018, the 2019 bill specifically denies a double benefit under both laws.

Remedial Amendment Period

- An additional provision added to SECURE as part of the budget bill process was a remedial amendment period for plan amendments to conform to the new law and regulatory guidance.
- The plan must be operated in accordance with the new law and the amendment must retroactively reflect those operations.
- The deadline for conforming amendments will generally be the end of the 2022 plan year.
- Government and collectively bargained plans will have until the end of the 2024 plan year.

Questions

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