Trucker ✦ Huss

SECURE Act Makes Significant and Immediate Pension Law Changes

CRAIG P. HOFFMAN

DECEMBER 2019

The most far-reaching pension reform legislation in 13 years was passed by Congress and is expected to be signed into law by President Trump today as part of the budget bill funding the federal government for the remainder of the fiscal year. The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE) was added as Division O to the Further Consolidated Appropriations Act, 2020 (H.R. 1865). Of critical importance to plan sponsors: The effective dates in the original bill were left unchanged. As a result, many of the new law's provisions will become effective on January 1, 2020.

The SECURE Act is very similar to the Retirement Enhancement and Savings Act of 2019 (RESA) (S. 972), which had been under consideration by Congress for a number of years. Like RESA, SECURE enjoys bipartisan support, having passed the House of Representatives earlier this year on a vote of 417–3. It was expected that the Senate would quickly approve the bill through an expedited process that would have required the unanimous consent of all senators. Several objected, and the bill languished until now. Adding it to the budget bill, which was considered "must-pass" legislation, was likely the last chance it had to be enacted in this Congress.

Many provisions of SECURE are intended to increase coverage of American workers in employer-sponsored savings arrangements. 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. A PEP has a single plan document, a single Form 5500 filing and a single independent plan audit. A PEP should also have a larger pool of assets, allowing for institutional mutual fund share classes which have lower expense ratios.

A PEP must be sponsored by a Pooled Plan Provider (PPP), which is likely to be a financial services company, third-party administrator, insurance company, recordkeeper, or similar entity. The PPP must serve as the ERISA section 3(16) plan administrator, as well as the named fiduciary for the plan. It is expected that the vast majority of PEPs will retain an ERISA section 3(38) investment advisor who would be responsible for selecting and monitoring the plan's investment menu. Consequently, the participating employers would only have fiduciary responsibility for prudently selecting and monitoring the PPP. This is expected to be very appealing to smaller employers who are concerned about the potential for fiduciary responsibility and liability. The PEP provisions are delayed a year and will be effective for plan years beginning after December 31, 2020. The IRS and DOL are expected to provide guidance in the coming year.

Another significant change in the bill intended to increase coverage is a new mandate to cover long-term part-time employees. Under SECURE, if an employer maintains a 401(k) plan, then any part-time employee who has not otherwise satisfied the plan's eligibility conditions must be permitted to participate and make elective contributions *if* the employee has completed 3 consecutive 12-month periods of employment and was credited with at least 500 hours of service in each of those periods. No employer contribution (including top-heavy minimum contributions) would be required until the employee has satisfied the plan's normal eligibility requirements. This new mandate is effective for plan years beginning after December 31, 2020. Twelve-month periods of service before January 1, 2021, however, need not be counted, which will further delay the date by which a part-timer might first enter a plan under this new mandate.

One further change in the law, intended to increase the number of workplace retirement plans, is a significant increase in the tax credit given to small employers who set up a new plan. Under SECURE, the tax credit for the first 3 years after adopting a new plan will equal 50% of the plan's startup costs up to the greater of $500 or $250, multiplied by the number of NHCEs eligible to participate up to a maximum of $5,000. 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. An additional small employer tax credit equal to $500 per year for up to 3 years is available if the plan sponsor adds auto enrollment to an existing plan or if it is included in a new plan. A "small" employer for purposes of the credit is defined as one who, in the preceding tax year, had no more than 100 employees receiving at least $5,000 in compensation. These changes are effective for taxable years beginning after December 31, 2019.

SECURE eliminates the so-called stretch IRA (which also applies to qualified plans and 403(b) plans). Under current law, after the death of a plan participant or IRA owner, a non-spouse beneficiary is permitted to stretch the required minimum distributions over the beneficiary's life based on his or her life expectancy. Under the new law, all amounts held by the plan or IRA must be distributed within 10 years of the plan participant's or IRA owner's death. An exception to the 10-year distribution rule is provided for an "eligible beneficiary," which includes a surviving spouse, minor child, disabled or chronically ill individual, or any other beneficiary who is no more than 10 years younger than the participant or IRA owner. An exception is also provided for certain binding annuities in effect on the date of enactment. These new distribution rules will generally apply with respect to participants or IRA owners who die after December 31, 2019. However, government plans will apply the new rules to employees dying after December 31, 2021, and collectively bargained plans will apply them to employees dying in calendar years beginning after the expiration of the current collective bargaining agreement or December 31, 2021, if earlier.

SECURE also makes a number of changes to the 401(k) plan rules, effective for plan years beginning after December 31, 2019. They include:

- The annual safe harbor notice would no longer be required for plans using the non-elective contribution approach.
- Traditional 401(k) plans can now be amended mid-year to become a non-elective contribution type safe harbor plan. (This option is not available for matching contribution safe harbor plans.) If the mid-year amendment is adopted fewer than 31 days before the end of the plan year, the non-elective safe harbor contribution must equal at least 4% of compensation and the actual amendment must be adopted no later than the end of the next plan year.
- The cap on automatic enrollment contributions is increased from 10% to 15% of compensation for qualified automatic contribution arrangement safe harbor plans.

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 60 days after the date of enactment. 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; and they may be included in income ratably over the 3-year period beginning in the year of the distribution. 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)). In addition, the participant loan limit is increased for these individuals from $50,000 to $100,000 for the 180-day period beginning on the date of enactment. To the extent a California wildfire disaster qualified under earlier relief provided by the Bipartisan Budget Act of 2018, the bill specifically denies a double benefit under both laws.

Additional provisions in SECURE would:

- Increase the age at which minimum distributions must begin to 72 (effective with respect to individuals who attain age 70½ after December 31, 2019);
- Repeal the maximum age limit on making IRA contributions (effective for tax years beginning after December 31, 2019);
- Permit a new plan to be treated as effective for the prior tax year if adopted no later than the due date of the prior year's tax return (effective for tax years beginning after December 31, 2019);
- Require a lifetime income illustration on participant benefit statements for defined contribution plans (effective for benefit statements issued 12 months after the release of DOL guidance);
- Allow for penalty-free withdrawals from retirement plans for expenses related to the birth of a child or for expenses related to an adoption (effective for distributions made after December 31, 2019);

- Prohibit plans from making qualified plan loans available through a credit card (effective on the date of enactment);
- Provide a more robust safe harbor to plan fiduciaries with regard to selecting an insurance company to provide participant annuities (effective on the date of enactment);
- Provide for portability of annuity or lifetime income options if a lifetime income investment is no longer authorized to be held as an investment option under the plan (effective for plan years beginning after December 31, 2019);
- Increase the late filing penalties for Form 5500 to $250 per day, not to exceed $150,000, and for Form 8955-SSA to $10 per participant per day, not to exceed $50,000 (applies to forms required to be filed after December 31, 2019);
- Modify the nondiscrimination rules for older long-service employees in defined benefit plans which are frozen or which have closed classes of participants (effective on the date of enactment).

Thankfully, when SECURE was added to the budget bill, a remedial amendment period was included in the bill. Given the short time remaining before much of SECURE becomes effective, it is a welcome addition. It will allow plans to operate in accordance with the new law without having to immediately amend the plan document. Instead, most plans will have until the end of the 2022 plan year to adopt conforming amendments. Government plans and collectively bargained plans will have an extended amendment period lasting until the end of the 2024 plan year.

SECURE will have a significant impact on retirement plan design and compliance in the years ahead. Retirement plan reform, however, is not over with SECURE's passage. Senators Rob Portman (R-OH) and Ben Cardin (D-MD) have introduced the Retirement Security and Savings Act of 2019 (S. 1431). This bill has been dubbed by many as "pension reform 2.0." Both senators have a long history of working together on a bipartisan basis going back to the years when they served together in the House of Representatives, spearheading the effort to enact the Economic Growth and Tax Relief Reconciliation Act of 2001 (P.L. 107-16). Their work is viewed very credibly by their colleagues in Congress and will certainly be given serious consideration as the lead bill in the next round of pension reform.

Trucker Huss will be presenting a complimentary webinar on SECURE on Tuesday, January 21, 2020, at 1:00 PM EST/10:00 AM PST. Registration information will be sent out shortly. Please join us.

__Craig P. Hoffman__ is Counsel to Trucker Huss where his practice focuses on ERISA and federal tax matters. Prior to Trucker Huss, Craig was General Counsel to, and a retirement policy lobbyist with, the American Retirement Association in Washington, DC.