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SECURE 2.0 Provisions Impacting Employer-Sponsored Retirement Plans

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Background

The SECURE 2.0 Act of 2022 ("SECURE 2.0") was signed into law by President Biden on December 29, 2022, as part of the Consolidated Appropriations Act of 2023, a $1.7 trillion omnibus spending bill. SECURE 2.0 comes after many in the retirement plan community predicted that further legislation was poised to be enacted following the passage of the Setting Every Community Up for Retirement Enhancement Act ("SECURE 1.0") on December 19, 2019. SECURE 2.0 is a consolidation of the following three bills that passed in the spring and summer of 2022:

- The Securing a Strong Retirement Act (H.R. 2954) approved by the House of Representatives on March 29, 2022;
- The Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg (RISE & SHINE) Act approved unanimously by the Senate Health, Education, Labor and Pensions (HELP) Committee on June 14, 2022; and
- The Enhancing American Retirement Now (EARN) Act, approved unanimously by the Senate Finance Committee on June 22, 2022.

Building upon the retirement improvements made by SECURE 1.0, SECURE 2.0 aims to expand retirement coverage and increase retirement savings.

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Trucker ✦ Huss is pleased to announce…

Director Joseph Faucher has been selected to the 2023 Southern California Super Lawyers list.

Joe has consistently been recognized as a Southern California Super Lawyer since 2005.

SECURE 2.0 also includes provisions intended to simplify and clarify plan rules and provisions that generate revenue for the U.S. Department of the Treasury ("Treasury"). SECURE 2.0 contains more than 90 substantive changes to retirement plan law; the key provisions impacting employer-sponsored retirement plans are discussed below.

Provisions Impacting Qualified Retirement Plans (and 403(b) Plans)

Requirement for Automatic Enrollment in New Plans

- New 401(k) and 403(b) plans are required to include an eligible automatic contribution arrangement (EACA) with (1) a default deferral rate of between 3%, and 10%, (2) an automatic escalation of 1% per year up to at least 10%, but not more than 15%, and (3) a 90-day permissive withdrawal feature. Governmental and church plans, SIMPLE plans, businesses with 10 or fewer employees, and employers that have been in business for less than three years are exempt from this provision.
- Effective Date: Plan years beginning after December 31, 2024.

TRUCKER HUSS COMMENT: A new 401(k) or 403(b) is a plan adopted after December 29, 2022. An employer that adopts a preexisting multiple employer plan (MEP) after such date is considered, for purposes of this rule, to have adopted a new plan. This new requirement means that any 401(k) or 403(b) plan first adopted after December 31, 2024, will ultimately need to provide for automatic enrollment. For plans adopted prior to 2025, the issue is whether to provide for the arrangement as an initial matter or to wait and amend the plan effective for 2025.

Increase in Age for Required Minimum Distributions

- The required minimum distribution (RMD) age for qualified retirement plans (and individual retirement accounts (IRAs)) is increased to (1) age 73 for a participant who attains age 72 after December 31, 2022, and (2) age 75 for a participant who attains age 74 after December 31, 2032.
- Effective Date: Distributions made after December 31, 2022.

TRUCKER HUSS COMMENT: This provision is effective in 2023, but the impact will be delayed until 2025 because the first participants to become subject to the new rule will attain age 73 in 2024 and, therefore, will not have to be paid until April 1st of the following year (or their date of retirement, if later). Nevertheless, this effective date may pose some compliance issues for employers until third party

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administrators (TPAs) are able to update their systems and procedures. Plan amendments will be necessary to provide for the increased RMD age.

Changes to Catch-up Contributions

- The limit on catch-up contributions to 401(k), 403(b) and governmental 457(b) plans has been increased for individuals age 60–63 to the greater of (1) $10,000 or (2) 150% of the regular catch-up amount for 2024. For SIMPLE plans, the limit on catch-up contributions for individuals age 60–63 has been increased to the greater of (1) $5,000 or (2) 150% of the regular catch-up limit amount for 2025. The annual catch-up contribution limits are indexed for inflation beginning in 2026.
- Catch up contributions to 401(k), 403(b) and governmental 457(b) plans must be made on a Roth basis, except for eligible participants whose prior year wages do not exceed $145,000. The wage threshold will be adjusted annually for inflation beginning in 2025 (rounded down to the lowest multiple of $5,000).
- Effective Date: The increased catch-up contribution limit is effective for taxable years beginning after December 31, 2024, and the Roth requirement is effective for taxable years beginning after December 31, 2023.

  TRUCKER HUSS COMMENT: These changes give participants who delayed saving for retirement a chance to make up for lost time by increasing their retirement savings. It will be interesting to see whether the Roth requirement impacts the number of participants who make catch-up contributions, given that the amounts are taxable when contributed (but the earnings will be distributed tax free if the Roth rules are met). The new rules may also complicate the administration of catch-up contributions, due to the additional complexity involved in tracking who is eligible for catch-ups and how much they can contribute. Plan amendments will be necessary to reflect these contribution changes.

Optional Treatment of Employer Matching or Nonelective Contributions as Roth Contributions

- Code section 401(a), 403(b) and governmental 457(b) plans may provide participants with the option of receiving employer matching and non-elective contributions as Roth contributions. Student loan matching contributions (discussed below) may also be designated as Roth contributions. The contributions are taxed when made and must be 100% vested.
- Effective Date: December 29, 2022.

  TRUCKER HUSS COMMENT: Prior law permits employer contributions to a participant's account to be converted to Roth if the plan provides for in-plan Roth conversions, but this change permits the conversion to be made at the time of initial contribution. The new law provides additional flexibility for employees who want more Roth contributions made to their account; at the same time, it may add additional administrative complexity. If a plan sponsor wants to offer this feature, the plan will have to be amended to specifically provide for it.

Treatment of Student Loan Payments as Elective Deferrals for Purposes of Matching Contributions

- Employers are permitted to make matching contributions under a 401(k), 403(b) or governmental 457(b) plan or a SIMPLE IRA with respect to "qualified student loan payments" as long as certain requirements are met. The term "qualified student loan payment" means a payment made by an employee in repayment of a qualified education loan (as defined in section 221(d)(1) of the Internal Revenue Code (Code)) incurred by the employee to pay qualified higher education expenses. A plan may treat a qualified student loan payment as an elective deferral for purposes of the matching contribution requirements under the safe harbor plan requirements. Employers are permitted to apply the average deferral percentage (ADP) test separately to employees who receive matching contributions on account of qualified student loan payments. Employers may reasonably rely on employee certifications of loan payments made.

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- Effective Date: Plan years beginning after December 31, 2023.

  TRUCKER HUSS COMMENT: Employers have been generally hesitant to match student loan payments, even though the Internal Revenue Service (IRS) approved of such an arrangement in a 2018 private letter ruling. By codifying this arrangement and addressing some of the uncertainties (notably the issue of how to confirm the loan payments), it is anticipated that more employers will consider adding this feature to their retirement plans. Student loan repayment support can be an effective way to attract and retain employees. If a plan sponsor wants to offer this feature, the plan will have to be amended to specifically provide for it.

Small Immediate Financial Incentives for Contributing to a Plan

- Employers are now permitted to provide de minimis financial incentives (e.g., low value gift cards) to participants for contributing to a 401(k) or 403(b) plan. Such incentives will be exempt from the contingent benefit rule and, therefore, will not trigger the prohibited transaction rules under the Code or the Employee Retirement Income Security Act of 1974 (ERISA), as long as the incentives are not paid with plan assets.
- Effective Date: Plan years beginning after December 31, 2022.

  TRUCKER HUSS COMMENT: The "contingent benefit rule" has prohibited 401(k) and 403(b) plan participants from receiving financial incentives (other than matching contributions) for contributing to a tax-qualified retirement plan. The hope is that the elimination of these restrictions, with respect to small financial incentives, will result in greater participation in employer-sponsored retirement plans.

Withdrawals for Certain Emergency Expenses

- A qualified retirement plan, 403(a) annuity, 403(b) plan and governmental 457(b) plan may allow for one penalty-free withdrawal of up to $1,000 per year for "unforeseeable or immediate financial needs relating to personal or family emergency expenses." The withdrawal must be repaid within three years to render the original distribution non-taxable. Only one withdrawal per three-year repayment period is permitted if the first withdrawal has not yet been repaid. Also, plans may rely on a participant's certification that the distribution requested is for "unforeseeable or immediate financial needs relating to personal or family emergency expenses."
- Effective Date: Plan years beginning after December 31, 2023.

  TRUCKER HUSS COMMENT: These withdrawals are exempt from the standard 10% penalty on early withdrawals before attainment of age 59½. Unlike hardship withdrawals, these withdrawals are not subject to the same certification requirements and are not taxable if timely repaid. While the repayment component complicates the administration of these withdrawals, TPAs have experience with such repayment provisions due to their administration of CARES Act distributions and other disaster-related withdrawals. Another administrative consideration is how these withdrawals will be handled if the expense also qualifies as a hardship withdrawal. Plan amendments may be necessary to provide for such withdrawals.

Exception to Penalty on Early Distributions from Qualified Plans for Individuals with a Terminal Illness.

- Distributions from a qualified retirement plan, 403(a) annuity and 403(b) plan to a participant who is otherwise eligible for a distribution and who has been determined by a physician to have an illness reasonably expected to result in death within 84 months will not be subject to the 10% early withdrawal penalty.
- Effective Date: December 29, 2022

  TRUCKER HUSS COMMENT: Unlike other provisions added by SECURE 2.0, this is not a new withdrawal feature. Instead, this provision requires the participant to be terminated from employment or

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otherwise eligible for a distribution. The distribution would need to be coded on the Form 1099-R as exempt from the 10% early withdrawal penalty and, thus, may require updates to the Form 1099-R instructions. This provision raises a number of considerations for TPAs in the administration and reporting of these distributions.

Penalty-Free Withdrawals for Cases of Domestic Abuse

- A defined contribution plan (excluding a defined contribution plan subject to the joint and survivor annuity rules) may permit in-service distributions to participants up to the lesser of $10,000 or 50% of the participant's account balance, if the participant certifies that he or she has experienced physical, psychological, sexual, emotional, or economic domestic abuse within a one-year period immediately preceding the withdrawal request. The amount withdrawn will not be subject to the 10% early withdrawal penalty, and the individual has the opportunity to repay the withdrawn amount over a three-year period following the distribution. The participant will be refunded the taxes paid on any repaid amounts.
- Effective Date: Plan years beginning after December 31, 2023.

TRUCKER HUSS COMMENT: This provision adds a new limited withdrawal feature for participants who are victims of domestic abuse, with distribution and repayment provisions similar to those for qualified birth and adoption distributions added by SECURE 1.0. Plan amendments may be necessary to provide for such withdrawals.

New Rules for Qualified Federally Declared Disasters

- A qualified retirement plan, 403(a) annuity, 403(b) plan and governmental 457(b) plan may permit participants living in a federal disaster area to make a withdrawal of up to $22,000 within 180 days after the disaster, without being subject to the 10% early withdrawal penalty. Amounts can be taken into income over three years and may be repaid to the plan within three years. In addition, plans may increase the maximum loan amount to the lesser of $100,000 or 100% of a participant's vested account balance and extend the repayment period for up to one year (with respect to payments due within 180 days of the disaster). Finally, hardship distributions used to purchase a home may be recontributed to a plan or account if those funds were to be used to purchase a home in an area that became a disaster area before the funds were used.
- Effective Date: Disasters occurring on or after January 26, 2021.

TRUCKER HUSS COMMENT: In recent years, plan distribution and loan rules have been eased in the wake of individual federally declared disasters. SECURE 2.0 makes such relief permanent, so that Congress no longer has to enact specific relief after each disaster. Plan sponsors should be aware that the $22,000 distribution limit applies to all plans maintained within a single controlled group of employers. Plan amendments may be necessary to provide for these new rules.

Repayment of Qualified Birth or Adoption Distributions

- The period to repay qualified birth or adoption distributions under a qualified defined contribution plan, 403(a) annuity, 403(b) plan and governmental 457(b) plan has been set to three years for such repayments to qualify as rollover distributions.
- Effective Date: For distributions made after December 29, 2022. Note that distributions made prior to December 29, 2022, must be repaid by December 31, 2025.

TRUCKER HUSS COMMENT: SECURE 1.0 added qualified birth or adoption distributions of up to $5,000, but did not limit the repayment period. This was considered by many to be an oversight, and it is now clarified. The three-year repayment period aligns with the statute of limitation rules applicable to refunds on individual tax returns.

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One-Year Reduction in Period of Service Requirement for Long-Term, Part-Time Workers

- Eligibility for part-time workers has been expanded by reducing, from three years to two years, the maximum number of years an employer may require a part-time employee to serve before such part-time workers are eligible to contribute to a retirement plan. Pre-2021 service is also disregarded for purposes of the vesting of employer contributions, just as such service is disregarded for eligibility purposes under SECURE 1.0. SECURE 2.0 also extends the long-term, part-time coverage rules to 403(b) plans that are subject to ERISA.
- Effective Date: Plan years beginning after December 31, 2024; however, the clarification that pre-2021 service may be disregarded for vesting purposes is effective for plan years beginning after December 31, 2020, because it is treated as part of SECURE 1.0.

  TRUCKER HUSS COMMENT: Under SECURE 1.0, 401(k) plans could choose to implement hours-based participation exclusions until an employee worked at least 500 hours per year with the employer for at least three consecutive years and met the minimum age requirements of the plan by the end of the three-year consecutive period. The reduction from three years to two years reflects Congress's belief that SECURE 1.0 did not go far enough to enhance retirement security for long-term part-time workers. We note that tracking long-term, part-time employees is challenging; therefore, some employers have amended their plans to provide immediate eligibility for their part-time employees. It should be noted that these rules do not apply to eligibility for employer matching or non-elective contributions (which may be more flexible). Plan amendments will be necessary to reflect the new eligibility requirements.

Reliance on Employee Certification of Hardship

- Plan administrators may rely on a participant's self-certification that they have had a safe harbor event that constitutes a deemed hardship for purposes of taking a hardship withdrawal from a 401(k) plan or a 403(b) plan.
- Effective Date: Plan years beginning after December 31, 2022.

  TRUCKER HUSS COMMENT: Previously, an employer could rely on a participant's certification regarding the amount necessary to address the hardship, but not their certification regarding the existence of the hardship event. Now, neither the plan sponsor nor the TPA is required to substantiate hardship — they can rely on the employee's certification for this purpose. The new rules are intended to ease hardship withdrawal administration. Depending on current plan language, plan amendments may be necessary or appropriate to reflect the new self-certification rule.

Amendments to Increase Benefit Accruals for a Prior Plan Year

- An employer may adopt discretionary amendments to its qualified retirement plan, 403(a) annuity and 403(b) plan that increase benefits for an immediately preceding plan year, provided the amendment is adopted by the due date of the employer's tax return for the year in which such amendment is effective.
- Effective Date: Plan years beginning after December 31, 2023.

  TRUCKER HUSS COMMENT: This change extends the deadline from the current requirement to amend by the end of the applicable plan year. For example, an employer could now add a profit-sharing contribution for a plan year, as long as the amendment is adopted by the due date of the employer's tax return for that year.

Reduction in Excise Tax on Certain Accumulations

- The excise tax imposed on a participant or beneficiary for a failure to take RMDs is reduced from 50% to 25% of the shortfall. There is also a further reduction to 10% if the participant or beneficiary corrects the shortfall during a two-year correction window.
- Effective Date: Tax years beginning after December 29, 2022.

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TRUCKER HUSS COMMENT: This provides relief to participants and beneficiaries for untimely commencement of RMDs, which is often the result of an administrative error and not their own doing. Employee Plans Compliance Resolution System (EPCRS) provides for circumstances under which the excise tax can be waived, and we anticipate these rules will remain in place at this time. This reduction in the excise tax penalty is implemented in tandem with the creation of a retirement savings lost and found (described below), designed to more efficiently connect retirees with their retirement assets.

Updating Dollar Limit for Mandatory Distributions

- The involuntary cash-out limit is increased to $7,000 from $5,000. This change applies to both defined contribution and defined benefit plans. If the balance is over $1,000, the amount must still be rolled over to an IRA if the participant does not consent to the distribution.
- Effective Date: Distributions made after December 31, 2023.

TRUCKER HUSS COMMENT: A plan may continue to involuntarily cash-out benefits at $5,000 or less, but given the desire to reduce the number of small account balances and prevent the participants who hold such accounts from later becoming missing participants, we anticipate most plans will increase the cash-out threshold. If a plan sponsor decides to increase the cash-out limit, plan amendments will be necessary.

Emergency Savings Account Linked to Individual Account Plans

- Employers have the option to offer emergency savings accounts that permit non-highly compensated employees to make after-tax contributions to a special savings account within the plan. Employers may also automatically enroll such employees in the program. Eligible employees may defer up to 3% of compensation, up to a total contribution of $2,500 (adjusted for inflation after 2024). An employee's contributions to the emergency savings account must be eligible for matching contributions at the same matching rate established under the plan for elective deferrals. Employees may take at least one tax-free, penalty-free distribution from the savings account per calendar month. Upon termination of employment, the employee may choose to roll the amount over into a Roth defined contribution plan or Roth IRA, or to take the special account balance as cash.
- Effective Date: Plan years beginning after December 31, 2023.

TRUCKER HUSS COMMENT: This change will make it easier for participants to set aside money for emergency expenses and retrieve such monies when necessary. If a plan sponsor decides to offer this feature, plan amendments will be necessary.

Recovery of Retirement Plan Overpayments

- A fiduciary is not considered to have violated their fiduciary duty under ERISA, and a 401(a), 403(a), 403(b) and governmental 457(b) plan shall not fail to meet the tax requirements of the Code, if the fiduciary (or plan sponsor of a non-ERISA plan) decides not to recover from the recipient any inadvertent overpayments and (in most cases), decides not to require the plan sponsor to restore those overpayments to the plan, assuming that the plan complies with applicable tax limitations on benefits and the minimum funding rules. For fiduciaries or plan sponsors that attempt to recoup overpayments, additional restrictions are imposed, including a prohibition on charging interest and limits on the recoupment from future benefit payments.
- Effective Date: December 29, 2022. With respect to corrections of inadvertent benefit overpayment recoupments and recoveries made prior to December 29, 2022, plan fiduciaries are entitled to rely on reasonable good faith interpretations and implementation of prior administrative guidance.

TRUCKER HUSS COMMENT: EPCRS includes various procedures for correcting overpayments made from

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defined benefit and defined contribution plans. We anticipate there will be changes to EPCRS to reflect the changes made by SECURE 2.0.

Expansion of Employee Plans Compliance Resolution System

- The EPCRS correction rules (as currently set forth in Revenue Procedure 2020-31) have been revised to permit any "eligible inadvertent failure" to be self-corrected at any time (regardless of whether the error is significant or insignificant) unless (1) the IRS identified the failure before self-corrective measures commenced, or (2) the self-correction was not completed in a reasonable period after the failure was identified. Eligible inadvertent failures related to plan loans — including errors previously required to be submitted through VCP or Audit CAP— are now eligible for self-correction. An "eligible inadvertent failure" is defined broadly to encompass any plan failure to meet the requirements of Sections 401(a), 403(a), 403(b), 408(p), or 408(k) of the Code which occurs despite the existence of the plan sponsor's practices and procedures reasonably designed to promote compliance-applicable law and guidance. An eligible inadvertent failure does not include any failure which is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction.
- Effective Date: December 29, 2022.

  TRUCKER HUSS COMMENT: Prior to the passing of SECURE 2.0, plan sponsors had only limited opportunities to self-correct plan errors under EPCRS. As a result of this expansion of the IRS remedial programs, eligible inadvertent failures related to plan loans that are self-corrected under EPCRS must now be treated by the Department of Labor (DOL) as meeting the requirements of the DOL's Voluntary Fiduciary Correction Program (subject to any additional reporting and procedural requirements the DOL may impose). Effective immediately, the Treasury is directed to expand EPCRS to add preapproved correction methods for eligible inadvertent failures and to update Revenue Procedure 2021-30 for these changes within two years.

Retirement Savings Lost and Found

- The DOL is directed to create an online searchable "Lost and Found" database to collect information on benefits owed to missing, lost or non-responsive participants and beneficiaries in tax-qualified retirement plans and to assist such plan participants and beneficiaries in locating those benefits.
- Effective Date: The DOL is to create the database within two years after the enactment of SECURE 2.0.

  TRUCKER HUSS COMMENT: This directive is consistent with current initiatives implemented by both the DOL and IRS to ensure participants and beneficiaries are timely paid their retirement benefits. Plan sponsors should anticipate being required to provide the information needed to populate the database.

Eliminating Unnecessary Plan Requirements/ Notices Related to Unenrolled Participants

- Plan sponsors are no longer required to provide certain intermittent notices to employees who have not elected to participate in the employer's defined contribution retirement plan (i.e., "unenrolled participants"). However, plan sponsors are still required to send an annual reminder notice regarding eligibility and any applicable election deadlines to unenrolled participants. "Unenrolled participants" for this purpose includes any individual who is eligible for the defined contribution plan, received the summary plan description when initially eligible (and any other required notices related to eligibility), and is not participating in the defined contribution plan.
- Effective Date: Plan years beginning after December 31, 2022.

  TRUCKER HUSS COMMENT: This change will reduce the administrative burden on plan sponsors and limit the number of communications a defined contribution retirement plan must provide to

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unenrolled participants, while still encouraging participation in such plans.

Requirement to Provide Paper Statements in Certain Cases

- Defined contribution plans must provide a paper benefit statement at least once annually and defined benefit plans must provide a paper benefit statement at least once every three years, unless the plans follow the 2002 electric disclosure safe harbor rules released by the DOL, or the plan participant or beneficiary requests that such statements be provided electronically. The DOL is directed to update the relevant sections of their regulations and corresponding guidance by December 31, 2024.
- Effective Date: Plan years beginning after December 31, 2025.

TRUCKER HUSS COMMENT: This new requirement appears to tighten the electronic disclosure rules by requiring at least one paper notice.

Consolidation of Defined Contribution Plan Notices

- The Secretary of the Treasury and the DOL are directed to adopt regulations by December 29, 2024, to allow, but not require, plan sponsors to consolidate two or more mandatory notices for defined contribution plans under ERISA Sections 404(c)(5)(B) and 514(e)(3) and Code Sections 401(k)(12)(D), 401(k)(13)(E), and 414(w)(4) into a single notice.
- Effective Date: To be completed by December 29, 2024.

TRUCKER HUSS COMMENT: This new requirement will reduce the administrative burden on plan sponsors of defined contribution plans and limit the number of communications such plans must provide to participants and beneficiaries. Because SECURE 2.0 specifically provides that this provision shall not be interpreted as preventing the consolidation of any other notices required for defined contribution plans under ERISA or the Code (to the extent otherwise permitted), we anticipate that TPAs will be working on more streamlined approaches to defined benefit plan disclosures once the consolidation regulations have been finalized.

Safe Harbor for Correction of Employee Elective Deferral Failures

- SECURE 2.0 creates a safe harbor for 401(k), 403(b), and governmental 457(b) plans that incur a reasonable administrative error in implementing automatic enrollment, automatic escalation features, or by failing to offer an affirmative election due to the employee's improper exclusion from the plan, so long as that error is (1) corrected within 9½ months of the end of the plan year in which the error occurred (or the date on which an employee notifies the plan sponsor of the error, if earlier), (2) resolved favorably toward the participant and without discrimination toward similarly situated participants, and (3) an IRS prescribed notice is provided within 45 days of the date on which correct deferrals begin. This new safe harbor does not require a corrective contribution for missed deferrals, but the plan sponsor must contribute any missed matching contributions, plus earnings.
- Effective Date: Effective for errors with a 9½-month correction deadline occurring after December 31, 2023.

TRUCKER HUSS COMMENT: This change simplifies the correction and reduces the cost of common compliance errors incurred by defined contribution plans. The new rules are welcome news for plan sponsors and TPAs, as they essentially codify the current safe harbors for correcting automatic enrollment failures under EPCRS, which is set to expire on December 31, 2023.

Provisions Only Applicable to Code Section 403(b) Plans

Multiple Employer 403(b) Plans ("MEPs")

- Code Section 403(b) plans can now operate as MEPs, including pooled employer plans ("PEPs"). Also, this change includes 403(b) plan relief from the "one-bad-apple" rule.

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- Effective Date: Plan years beginning after December 31, 2022.

  TRUCKER HUSS COMMENT: This change aligns Code Section 403(b) plans with the rules applicable to Code Section 401(k) plans and will likely encourage smaller employers to adopt retirement programs because they will be able to join existing and well-established plans, and pool administrative costs.

Code Section 403(b) Plan Hardship Rules Conformed to Similar Rules for Code Section 401(k) Plans

- In the case of hardship, Code Section 403(b) plans may now distribute qualified non-elective contributions (including earnings), qualified matching contributions (including earnings), and earnings on elective deferrals, and participants are not required to take all available participant loans prior to taking a hardship distribution.
- Effective Date: Plan years beginning after December 31, 2023.

  TRUCKER HUSS COMMENT: The Bipartisan Budget Act of 2018 ("BBA") expanded hardship withdrawals, but Code Section 403(b plans were left out of the law. This apparent oversight has now been fixed. Plan amendments will be necessary if a 403(b) plan sponsor decides to offer the expanded hardship provisions.

Provisions Only Applicable to Defined Benefit Plans

Enhancing Retiree Health Benefits in Pension Plans

- The sunset date under section 420 of the Code is extended to the end of 2032 for an employer to use assets from an overfunded pension plan to pay retiree health and life insurance benefits, provided the transfer is no more than 1.75% of plan assets and the pension plan is at least 110% funded.
- Effective Date: For transfers made after December 29, 2022.

  TRUCKER HUSS COMMENT: The rules permitting these transfers were set to expire at the end of 2025 but have now been extended, thus giving employers with surplus pension benefits the ability to keep their retiree benefit commitments for a longer duration.

Correction of Mortality Tables

- For purposes of the minimum funding rules, a pension plan may not assume, beyond the plan's valuation date, future mortality improvements at any age greater than 0.78%. The Secretary of the Treasury is also directed to update the minimum funding regulations to apply a cap on mortality improvement rates.
- Effective Date: December 29, 2022.

  TRUCKER HUSS COMMENT: This is a change from the current rules, because the mortality improvement rates that are used to update the mortality tables are not capped or limited under current regulations.

New Notice and Disclosure Requirements for Lump-Sum Windows

- A special notice must now be provided to participants offered a temporary lump-sum distribution option under a pension plan. This special notice must be provided at least 90 days before the first date participants could elect the lump sum. Plan sponsors are also required to provide notification of the lump sum offering to the Pension Benefit Guaranty Corporation (PBGC) and the DOL.
- Effective Date: Pending DOL final regulations.

  TRUCKER HUSS COMMENT: Temporary lump-sum windows have become increasingly popular in recent years as pension plans try to minimize or transfer their liabilities. These new notice requirements will increase administrative burdens and, for that reason, have the potential to make such offerings less desirable. At the same time, plan participants will likely benefit from the additional information before making a decision about whether to participate in the offering.

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Interest Crediting Rates For Cash Balance Plans

- Cash balance plans with variable interest crediting rates may use a projected interest crediting rate that is "reasonable" but not in excess of 6%.
- Effective Date: Plan years beginning after December 29, 2022.

  TRUCKER HUSS COMMENT: This change will allow plan sponsors to provide larger pay credits for older, longer service workers without the risk of failing the anti-backloading rules. Plan amendment may be necessary or appropriate to reflect the interest credit changes.

Termination of Variable Rate Premiums

- PBGC variable rate premiums will no longer be indexed and are permanently set at $52 per each $1000 of unfunded vested benefits.
- Effective Date: December 29, 2022
- **TRUCKER HUSS COMMENT:** This change reduces the cost of PBGC premiums and may require plans to update their cost projections. In addition, employers that were subject to the variable rate premium cap may not be subject to the cap for as long.

Additional Annual Funding Notice Requirements

- Plan administrators must include additional information in their annual funding notices to participants, beneficiaries and the PBGC.
- Effective Date: Plan years beginning after December 31, 2023.

  TRUCKER HUSS COMMENT: There is additional information required for all plans subject to Title IV of ERISA (including multiemployer plans) and specific items related solely to single employer plans.

Provisions Applicable to New or Small Employers

Starter Retirement Plans for Employers with No Retirement Plan

- Employers that do not sponsor a retirement plan may now adopt two new retirement plan designs: (1) a "starter 401(k) deferral-only arrangement"; (2) a "safe harbor 403(b) plan." Among other requirements, the new plan designs require an auto enrollment arrangement with a deferral rate of 3% to 15% of compensation. The limit on annual deferrals is $6,000 (the IRA limit for 2022), with an additional $1,000 catch-up beginning at age 50, with both limits indexed for inflation.
- Effective Date: Plan years beginning after December 31, 2023.

  TRUCKER HUSS COMMENT: This provision is designed to encourage new or small employers to adopt a retirement plan for their employees. Note that many states have already mandated these or similar types of programs.

Modification of Credit for Small Employer Pension Plan Startup Costs

- The small business startup credit is increased from 50 percent to 100 percent for employers with up to 50 employees for 3 years and up to an annual cap of $5,000, for defined contribution plans. For defined benefit plans, an additional credit is added which generally will be a percentage of the amount contributed by the employer on behalf of employees, up to a per-employee cap of $1,000. This full additional credit is limited to employers with 50 or fewer employees and phased out for employers with between 51 and 100 employees. The applicable percentage is 100 percent in the first and second years, 75 percent in the third year, 50 percent in the fourth year, 25 percent in the fifth year — and no credit for tax years thereafter
- Effective Date: Taxable years beginning after December 31, 2022.

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TRUCKER HUSS COMMENT: This change increases the small business startup credit and should help increase employer-sponsored retirement plans for small startup businesses.

Military Spouse Retirement Plan Eligibility Credit for Small Employers

- Employers with up to 100 employees are eligible for a tax credit if they make military spouses eligible for their retirement plans within two months of their hiring date, ensure that each military spouse is 100% vested in all employer contributions, and guarantee that every military spouse is eligible for any matching or nonelective contribution that they otherwise would only have qualified for at two years of service. The tax credit is equal to $200 per military spouse plus up to $300 in employer contributions per individual for up to three years.
- Effective Date: Taxable years beginning after December 29, 2022.

TRUCKER HUSS COMMENT: Military spouses may not remain employed long enough to become eligible for their employer's retirement plan or to vest in employer contributions. This change provides small employers with tax relief to help address these issues.

Looking Ahead

SECURE 2.0 will have a significant impact on employer-sponsored retirement plan for years to come and, just like SECURE 1.0, will require guidance from the IRS and the DOL. Such guidance will help to clarify and refine the changes.

Plan sponsors have until the last day of the first plan year beginning on or after January 1, 2025 (2027 for governmental plans and certain collectively bargained plans), to amend plans pursuant to SECURE 2.0, provided they operate their plans in accordance with such amendments as of the applicable effect dates. SECURE 2.0 further provides that plan amendment deadlines under SECURE 1.0 and the CARES Act are the same as the SECURE 2.0 dates.

Plan sponsors should begin considering now each of the following:

- Which of the SECURE 2.0 provisions are applicable to their retirement plans.
- Timely coordination with their TPAs, as the new provisions may affect plan administration.
- When to prepare plan amendments and update relevant summary plan descriptions, service provider agreements, forms, notices, policies and procedures, and any relevant employee communications materials.

We will keep you advised on any guidance released by the IRS or the DOL. We are also available to consult with you on the application of SECURE 2.0 to your retirement plan programs and to advise you on any steps needed to properly implement the new law. Finally, please watch for our announcement of a webinar regarding SECURE 2.0, tentatively scheduled for the first full week in February.

The Trucker ✦ Huss Benefits Report is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of Benefits Report are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

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In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this Benefits Report.

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