

Publications

2023 Retirement Plan Year-End Amendments and Operational Compliance

ATTORNEYS & PROFESSIONALS

Randy Bunnellrbunnell@groom.com

202-861-5441

Allison Ullmanaullman@groom.com

202-861-6336

PUBLISHED

10/13/2023

SOURCE

Groom Publication

SERVICES

Employers & Sponsors

- Fiduciary & Plan Governance
- Retirement Programs

As the end of 2023 approaches, it's again time for plan sponsors to review their plan documents and plan operations to ensure compliance with increasingly complex qualification requirements and moving deadlines. While there are no mandatory plan amendments due this year, plan sponsors must remain diligent about discretionary amendment deadlines, operational compliance with changes in law, and ensuring later-adopted plan amendments accurately reflect plan operations.

Year-End Plan Amendments

There are no generally applicable amendments that are required to be adopted by the end of 2023 per the [Required Amendments List](#). However, Plan amendments may need to be adopted by the end of 2023 for plan design changes. Generally, plan documents should be amended by plan year-end for any "discretionary" changes implemented during 2023. These discretionary changes may include plan design changes (other than required compliance amendments described below), changes in plan administration impacting the plan document, and changes to plan provisions pursuant to collective bargaining agreements. An earlier deadline applies to plan sponsors who choose to adopt a 401(k) safe harbor plan design for 2023, using a 3% nonelective contribution. The safe harbor plan provisions must be adopted, and disclosures provided to participants, at least 30 days before the end of the plan year (*i.e.*, by December 1, 2023 for calendar year plans).

Congress passed the SECURE 2.0 Act of 2022 ("SECURE 2.0") on December 29, 2022 as part of the Consolidated Appropriations Act of 2023. While several SECURE 2.0 provisions became effective on or soon following the date of enactment or will become effective on January 1, 2024, plan amendments are not yet due. Plan sponsors have until the end of the 2025 plan year (or the end of the 2027 plan year in the case of governmental and collectively bargained plans) to adopt SECURE 2.0-related amendments. See Sec. 501 of SECURE 2.0. SECURE 2.0 also extended the plan amendment deadline for the SECURE Act and the CARES Act until the end of the 2025 plan year (or the end of the 2027 plan year in the case of governmental and collectively bargained plans).

However, plan sponsors may consider amending their plans now for certain changes in law, or to reflect plan operations, even though amendments are not yet required. For example, although most plan sponsors have

until the end of the 2025 plan year to adopt CARES Act amendments, delaying those amendments may present challenges in determining how the plan was administered in 2020.

Operational Compliance

The IRS maintains an [Operational Compliance List](#) (“OC List”) (last updated February 2023) that describes statutory and regulatory changes in requirements for 401(a) and 403(b) plans. Plan sponsors should review this list to ensure their plans are operationally compliant with the relevant provisions.

- **No Requirements Listed Yet for 2023.** There are no additions to the OC List that are effective in 2023. However, the OC List does not include annual, monthly, or other periodic changes that routinely occur (such as cost-of-living increases, spot segment rates, and applicable mortality tables.) You can find these on the [Employee Plans Recent Published Guidance](#) webpage.

Several operational provisions of SECURE 2.0 went into effect upon or soon following the passage of the act on December 29, 2022, and numerous sections will become effective for plan years beginning after December 31, 2023. Below is a brief overview of some of the more noteworthy SECURE 2.0 provisions coming into effect in early 2024. For the latest updates and to access Groom’s complete library of SECURE 2.0 resources, please visit www.secureretirementact.com.

- **Roth plan distribution rules (Sec. 325).** Exempts Roth amounts in 401(k), etc. plans from pre-death required minimum distribution (“RMD”) rules. This change is effective generally for taxable years beginning after December 31, 2023, but not with respect to distributions that are required for years beginning before January 1, 2024 but permitted to be paid on or after such date.
- **Surviving spouse election to be treated as employee (Sec. 327).** Allows a spousal beneficiary to irrevocably elect to be treated as the employee for RMD purposes, and, if the spouse is the employee’s sole designated beneficiary, the applicable distribution period after the participant’s year of death is determined under the uniform lifetime table. This section is effective for calendar years beginning after December 31, 2023.
- **Treatment of student loan payments as elective deferrals for purposes of matching contributions (Sec. 110).** Permits employers to make matching contributions based on an employee’s student loan repayment, so long as certain requirements are satisfied. This section is effective for plan years beginning after December 31, 2023.
- **Increased dollar limit for mandatory distributions (Sec. 304).** Increases the involuntary cash-out limit from \$5,000 to \$7,000, effective for distributions after December 31, 2023.
- **Penalty-free withdrawals for certain emergency expenses (Sec. 115).** Allows one withdrawal of up to \$1,000 per year for “unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses” that is not subject to the 10% tax imposed on early distributions. The withdrawal may be repaid within three years. Only one withdrawal per three-year repayment period is permitted if the first withdrawal has not been repaid. This change is effective for distributions made after December 31, 2023.
- **Penalty-free withdrawals from retirement plans in cases of domestic abuse (Sec. 314).** Permits certain penalty-free in-service withdrawals in the case of domestic abuse in an amount not to exceed the lesser of \$10,000 (indexed) or 50% of the value of the employee’s vested account under the plan. This change is effective for distributions made after December 31, 2023.
- **Emergency savings accounts linked to individual account plans (Sec. 127).** Permits a plan sponsor to amend its plan to offer short-term emergency savings accounts (“ESAs”) as part of a defined contribution plan. This section is effective for plan years beginning after December 31, 2023.

While many plan sponsors anticipated a busy year end preparing to implement, beginning in 2024, the SECURE 2.0 requirement to make catch-up contributions on a Roth basis for participants having in excess of \$145,000 of compensation, [Notice 2023-62](#) created a two-year administrative transition period to assist in the implementation of this requirement. As a result, until tax years beginning after December 31, 2025: (i) catch-up contributions made by affected participants will be treated as compliant, even if they are not made on a Roth basis; and (ii) plans that do not currently offer a Roth contribution option will be treated as compliant, without the need to add a Roth option at this time.

In addition, under the SECURE Act, long-term part-time employees who are not collectively bargained must generally be eligible to participate in a 401(k) plan once they have (i) reached age 21, and (ii) worked at least 500 hours in three consecutive 12-month periods beginning in 2021. Long-term part-time employees who have worked the required 500 hours in the three prior years will first be eligible to contribute under this SECURE Act rule on January 1, 2024.[\[1\]](#)

Regardless of the legal deadline for amending plan documents, plan amendments must accurately reflect how the plan was administered for tax-qualification purposes. Thus, it is critical for sponsors and plan service providers to be in alignment on when and how changes in plan operation are implemented.

Looking Ahead – Timing Considerations for Future Plan Changes

Many plan sponsors are already looking ahead and evaluating potential future changes to their retirement plans. As part of this process, plan sponsors should take into account the following:

- **Prospective Amendments for 2024 Plan Design Changes.** While plan sponsors generally have until the end of the plan year to adopt discretionary plan design amendments, there are numerous exceptions. For example, plan sponsors that wish to implement a safe harbor 401(k) plan design based on matching contributions must amend their plans before the beginning of the plan year and provide advance notice to participants. In addition, changes that reduce future benefits or are otherwise subject to anti-cutback rules generally must be adopted on a prospective basis, and may also require advance notice to participants. Moreover, a reduction of matching or non-elective/profit sharing contributions, or changes to plans that use a 401(k) safe harbor design, may also be subject to the prospective amendment rules.
- **Plan Termination Amendments.** Plans that are terminating must be amended to reflect all discretionary and required amendments, including SECURE 2.0, SECURE Act, and CARES Act changes by the plan termination date. This is the case even if the plans would have an extended deadline had they not terminated.
- **Future Retirement Plan Enhancements.** These enhancements may include student loan repayment assistance, automatic reenrollment features (designed to help employees maximize matching contributions), new non-elective employer contributions, and financial wellness and investment advice/managed account offerings in defined contribution plans. Plan sponsors should talk to counsel prior to making these changes to ensure they are implemented in an intentional and compliant manner, particularly changes that require advance notice to participants or changes to service-provider agreements and related fees.

Next Steps for Plan Sponsors

In the coming weeks, plan sponsors should take the following steps to ensure their plan documents and plan operations are compliant:

- **Review and Amend Plan Documents.** Review and amend plan documents to ensure they timely reflect all discretionary plan changes (including design changes that became effective during the year or, in some cases, will become effective next year).
- **Review Plan Operations.** Review plan operations to determine whether conforming plan amendments may be required and to ensure that changes in law are timely implemented.
- **Consider EPCRS for Any Plan Amendment or Operational Compliance Issues.** If the plan document and operational review indicates potential non-compliance, talk to counsel to evaluate possible corrective measures in accordance with the Employee Plans Compliance Resolution System (“EPCRS”). The newly-expanded EPCRS allows an indefinite self-correction period for all “eligible inadvertent errors,” so long as the correction follows the updated EPCRS standards. In June of 2023, the IRS issued [Notice 2023-43](#), which contains interim guidance in advance of the update to Rev. Proc. 2021-30, which is expected sometime next year (See [SECURE 2.0 Guidance Process Begins—Self Correction for Inadvertent Failures Is First Up](#) for an overview of this interim guidance).
- **Consider Eligibility for IRS Determination Letter.** Consider seeking an IRS determination letter for any new individually-designed 401(a) plan, or an updated determination letter for plan changes related to certain merger and acquisition activity or plan terminations. Please see [IRS Reopens Determination Letter Program for Two Significant Groups of Plans](#) for additional information.
- **Evaluate Potential Future Plan Changes.** Consider whether future plan changes may require a prospective amendment and stay in front of changes that may require advance notice to participants and changes to service-provider agreements and related fees.

In addition to the above, plan sponsors should confirm that legally-required participant notices (e.g., 401(k) safe harbor notices, QDIA/automatic enrollment notices, fee disclosures) are compliant in form and are being provided by the applicable deadlines using the appropriate delivery method. Plan sponsors should also review participant communications, and remember to provide an updated

summary plan description (or summary of material modifications) for any material plan changes within 210 days after the end of the plan year in which the changes are adopted.