

Publications

IRS Gives Plans Two Years to “Catch Up”

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On Friday, August 23, 2023, the IRS issued [Notice 2023-62](#), which provides long-awaited relief regarding the SECURE 2.0 requirement that age 50 catch-up contributions for higher income participants in Section 401(k), 403(b), and governmental 457(b) plans be designated as Roth contributions (the “mandatory Roth catch-up” provision). Notice 2023-62 affords a two-year transition period (through December 31, 2025) and signals future guidance to facilitate ongoing implementation efforts.

Background

Section 603 of SECURE 2.0 added a mandatory Roth catch-up contribution requirement in Code Section 414(v)(7) for higher income retirement plan participants. The new provision generally requires that catch-up contributions made by participants with more than \$145,000 in prior-year FICA wages^[1] from the employer sponsoring the plan (“affected participants”) be made on a Roth basis beginning January 1, 2024. If a plan offers catch-up contributions and has affected participants subject to the new requirement, the plan must also offer all catch-up eligible participants – those who will be age 50 or older in a given year – the ability to make catch-up contributions on a Roth basis.

Compliance with the mandatory Roth catch-up provision by January 1, 2024 has proven to be fraught with complexity. For example:

- Payroll systems need to be programmed to track the \$145,000 earnings threshold for retirement plan purposes (different than earnings used to determine highly compensated employee status), and even then may not be able to relay the information in time for plans to ensure affected participants made their catch-up contributions on the mandatory Roth basis beginning January 1.
- Plan administration systems also need to be programmed and the changes communicated to affected participants, ideally before their catch-up contribution elections take effect in 2024.

There are numerous questions about the mandatory Roth catch-up provision, including how it applies across varying plan designs and to plans that do not currently offer a

Roth option. Groom attorneys have shared these concerns to Treasury, the IRS, and Congress since the beginning of 2023 and actively requested transition relief for our clients.

The Relief and Future Guidance

Notice 2023-62 puts an end to the concern that no catch-up contributions were allowed beginning in 2024 because of a drafting glitch. It also provides some of the requested relief in what is styled as a two-year “administrative transition period,” and indicates some of the anticipated guidance that Treasury and IRS, after taking into account any comments, expect to provide.

Administrative Transition Period: Without expressly delaying the effective date, Notice 2023-62 provides a two-year transition period to facilitate an orderly transition for compliance with the SECURE 2.0 provision. Until tax years beginning after December 31, 2025:

- Catch-up contributions made by affected participants will be treated as compliant, even if they are not made on a Roth basis.
- 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.

While this relief is welcome, Notice 2023-62 reflects an emphasis on “transition” by signaling future guidance in an effort to answer questions needed to move forward with implementation.

Guidance Under Consideration: To assist with implementation, Notice 2023-62 signals future guidance on certain issues that have been raised by plan sponsors, service providers and practitioners:

- **Participants with no prior-year FICA wages.** Questions have arisen about treatment of individuals who have no prior-year FICA wages from the employer/sponsor. This group would include, for example, partners (with K-1 income) and other self-employed individuals and certain State or local government employees whose services are not “employment” under Code Section 3121(b)(7) (*i.e.*, not subject to FICA because the government employee is covered by a FICA replacement plan). The IRS expects that future guidance will clarify that the mandatory Roth catch-up provision does not apply to these individuals.
- **Plan-designated Roth catch-ups.** Questions have also arisen about the ability to have a plan “override,” where the plan treats an employee’s pre-tax catch-up election as Roth in the absence of the employee’s designation as such. The law currently requires that the Roth designation must be made by the employee at the time of the deferral election. This raises issues for plans that automatically treat contributions as catch-ups once they “spillover” the deferral limit, and plans that carry over deferral elections from year-to-year until changed by the employee. The IRS expects that future guidance will allow employers to treat a pre-tax catch-up election as a Roth election for affected participants.
- **Application to plans maintained by more than one employer.** The SECURE Act clearly states that prior-year FICA wages are taken into account only “from the employer sponsoring the plan.” This rule is more straightforward when applied to a plan maintained by only one employer, but less so for plans maintained by more than one employer (including multiemployer plans). The IRS expects that future guidance will clarify that wages would not be aggregated across participating employers within a single plan. Hopefully this guidance will also specifically address FICA wages paid from participating (and non-participating) employers that are part of the same controlled group or affiliated service group.

Other Potential Guidance: In contrast to the above, Notice 2023-62 requests comments on one of the critical questions about the SECURE 2.0 provision, without signaling what the answer may be:

- **Are plans with affected participants required to offer a Roth feature?** While more common in recent years, not all employers choose to offer a Roth option in their retirement plans. Among other reasons, Roth options bring along administrative complexity and costs, including additional information for participants. Moreover, adding a Roth feature may raise collective bargaining issues, or in the case of State and local governments, require a legislative change. Can these plans comply with the SECURE Act by simply not allowing affected participants to make catch-up contributions?

Next Steps

Notice 2023-62 provides welcomed relief and guidance to plan sponsors, providers and participants by allowing time to implement the mandatory Roth catch-up provisions without triggering plan qualification issues, and minimizing the potential disruption for affected participants. It also indicates that further guidance is forthcoming, taking into account comments that are provided by October 24, 2023. Further guidance will be welcome, given the numerous technical questions that still remain about SECURE 2.0’s mandatory Roth catch-up provision. We have already begun working on comments for a number of firm clients on a number of these issues.

If you have any questions or would like to submit any comments, please contact the authors or your regular Groom attorney.