

Publications

SECURE 2.0 Grab-Bag Brings Holiday Treats

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This holiday week, the IRS issued its long-anticipated guidance on miscellaneous changes under SECURE 2.0 Act of 2022 (“SECURE 2.0”) that are effective now (or in short order). Specifically, [Notice 2024-2](#) (“Notice”), covers, in question and answer format, twelve provisions of SECURE 2.0. The guidance brings increased and much-needed clarity to a number of important provisions. A brief review of the guidance is set forth below.

Items Applicable to Most Plan Sponsors

1. Mandatory Automatic Enrollment (plan years beginning after 12/31/24)

The Notice addresses which plans with a cash or deferred arrangement (“CODA”) are covered by the new automatic enrollment mandate under Section 101 of SECURE 2.0. A CODA that was established before the date of the enactment of SECURE 2.0 (December 29, 2022) is generally exempt (*i.e.*, grandfathered) from this requirement. The guidance focuses largely on M&A activity and the impact of merging with another plan, including a plan maintained by more than one employer. In general, (a) a merger of two grandfathered plans will not result in the loss of grandfathered status and (b) a plan will not lose its grandfathered status by merging with a plan maintained by more than one employer that includes a grandfathered CODA. Notably, if a plan that is not grandfathered is merged into a grandfathered plan, the ongoing plan will generally not be grandfathered. However, where a non-grandfathered plan is merged into an ongoing grandfathered plan, the ongoing plan will remain grandfathered, if the merger occurs within the 410(b)(6)(C) transition period (*i.e.*, the transition period that provides for relief from the minimum coverage requirements in the M&A context).

2. Distribution for Terminal Illness (distributions made after 12/29/22)

The Notice provides important guidance for plan sponsors on the new exception to the 10% additional tax under Section 72(t) of the Internal Revenue Code of 1986, as amended (the “Code”) for distributions made to a terminally ill individual under Section 326 of SECURE 2.0. The Notice makes two key clarifications for this new distribution option:

- (a) A self-certification is not sufficient to demonstrate eligibility for this option, and

(b) SECURE 2.0 provides an exception to the 72(t) tax, but does not provide an exception to the distribution restrictions under 401(k)/403(b). This means that the terminally ill individual must be otherwise eligible for an in-service distribution, such as a hardship or disability distribution.

In addition, the Notice provides details on: the plans that are impacted, what qualifies as a “terminal illness,” the documentation needed (and when it is needed) to support the relief, recontribution rights, and the employee’s right to treat an otherwise permissible in-service distribution as a terminally ill distribution (via Form 5329 with their income tax return) if not offered under the plan. Finally, the Notice clarifies that plans are not required to offer this relief (and a plan amendment would be needed, if offered).

3. Safe Harbor for Correcting Missed Deferrals (generally after 12/31/23)

The Notice provides insight regarding the new permanent relief under Section 350 of SECURE 2.0 allowing plans to correct administrative errors relating to automatic enrollment/escalation features, and clarifies that the permanent relief can apply to active and terminated employees. The Notice explains the errors that are covered by the new rules, the correction method to be used (generally tracking the existing safe harbor that is expiring for correcting automatic enrollment/escalation failures in Rev. Proc. 2021-30, App. A.05(8)) and the timing of any corrective matching contributions that must be made within a reasonable period (generally 6 months from when corrective deferrals begin, or the existing 3-year correction period for errors that begin pre-2024).

4. Employer Roth Contributions (contributions made after 12/29/22)

The Notice provides detailed guidance on how to implement Section 604 of SECURE 2.0, which allows employer contributions to be treated as Roth contributions, and clarifies that:

- Rules similar to the existing rules for Roth elective deferrals apply.
- The employee must be fully vested in their matching or nonelective contributions to be eligible, but the plan can still have a vesting schedule (the Notice provides benefits, rights and features (BRF) testing relief).
- The applicable reporting and taxation of the employer Roth contributions are as follows: (1) contributions are subject to income tax in the year allocated to the account, but are not subject to employment taxes (no federal income tax withholding, no FICA taxes, no FUTA taxes, although special FICA rules apply for eligible governmental plans), and (2) contributions are reported as an in-plan Roth rollover on Form 1099-R for the year allocated.
- These contributions are not counted under Code section 415 safe harbor definitions of compensation.
- This feature can be added to a plan without Roth elective deferrals, but that design may raise BRF testing issues. In-plan Roth rollovers are also permitted for plans that just permit employer Roth contributions.
- A separate account solely for employer Roth contributions is eligible for rollover to another Roth account or Roth IRA.

5. De Minimis Financial Incentives for Contributing to a 401(k)/403(b) Plan (plan years beginning after 12/29/22)

The Notice provides details regarding the new exception to the contingent benefit rule that historically has prohibited any benefits being conditioned (directly or indirectly) on the employee electing to make, or not to make, elective deferrals (Section 113 of SECURE 2.0). The Notice provides that: (a) *de minimis* means \$250 or less in value, (b) the relief is only available to employees that do not have an existing deferral election under the plan, (c) a matching contribution cannot be a *de minimis* financial incentive, (d) a *de minimis* financial incentive is not treated as a plan contribution, (e) a *de minimis financial* incentive provided by an employer is generally treated as taxable wages, and (f) these rules apply to both 401(k) and 403(b) plans. The Notice also specifically asks for comments on incentives provided by a party other than the employer.

6. Cash Balance Guidance (plan years beginning after 12/29/22)

The Notice explains how a cash balance plan can be amended to reflect the new SECURE 2.0 rules without violating the anti-cutback rules under Code Section 411(d)(6). Previously, if a cash balance plan with a variable interest crediting rate provided pay credits that increased with a participant’s age or service, that plan could run into a potential anti-backloading issue. Under Section 348 of SECURE 2.0, there is no need to provide a fixed annual minimum interest crediting rate to avoid violating the anti-backloading rules. Per the Notice, this type of cash balance plan can be amended prospectively to make certain changes specified in the Notice to the interest crediting rate (including eliminating the fixed minimum interest rate), and the amendment will not violate the anti-cutback rule of Code Section 411(d)(6) if it is done by the deadline noted in Item 7 below. The Notice states that Section 348 does not impact statutory hybrid plans that are not cash balance plans and specifically asks for comments regarding situations where a cash balance plan would be amended “pursuant to Section 348 of SECURE 2.0” beyond those situations listed in the Notice.

7. Plan Amendments

The Notice generally provides for a one-year extended deadline for plan amendments (both required and discretionary) to reflect the various legislative changes (including the CARES Act, the SECURE Act, and the SECURE 2.0) until December 31, 2026 (December 31, 2028 for collectively bargained plans, and December 31, 2029 for governmental plans (or if later, the first day of the first plan year beginning more than 180 days after the date of notification that a governmental 457(b) plan does not meet Code Section 457(b))). These amendment deadlines have anti-cutback relief, which is not available for amendments made after the deadline. For IRAs, the amendment deadline is December 31, 2026.

Items Primarily Applicable to Small Plan Sponsors

8. Small Employer Start-Up Costs Credit (beginning in 2023)

The Notice provides a number of important details regarding the availability and calculation of the start-up credits available to small employers (generally, no more than 100 employees) under Code Section 45E (Section 102 of SECURE 2.0).

9. Small Employer Military Spouse Credit (beginning in 2023)

As with the start-up credits, the Notice provides important details regarding the availability of the new military spouse credit under Code Section 45AA (Section 112 of SECURE 2.0) for small employers (no more than 100 employees) offering defined contribution plans that cover military spouses.

10. Increased Contribution Limits for SIMPLE Plans (beginning after 12/31/23)

The Notice provides information on the new increased deferral and catch-up limits under Section 117 of SECURE 2.0 for SIMPLE 401(k) and SIMPLE IRAs that apply automatically for employers with no more than 25 employees, or at the employer's election for larger employers who make a special employer contribution. The Notice provides details on who is eligible for the increased limits, along with the election (for larger employers) and notice requirements.

11. Replacing SIMPLE IRAs with Safe Harbor 401(k) Plans (plan years beginning after 12/31/23)

The Notice provides details on how to terminate a SIMPLE IRA and replace it with a safe harbor 401(k) Plan under Section 332 of SECURE 2.0. The details include the actions that are needed to terminate the SIMPLE IRA, when the contributions must cease, when employees must be notified, how the contribution limits apply for a mid-year termination, what amounts may be rolled over within two years of participation, and that a safe harbor notice must be distributed and must describe the special contribution limit due to a mid-year termination.

12. SIMPLE and SEP Roth IRAs (after 12/31/22)

The Notice provides details on expanding SIMPLE IRAs and SEPs to permit Roth contributions under Section 601 of SECURE 2.0. The Notice clarifies a number of important points, including how (and when) the Roth contributions are taxed and reported (W-2 wages for salary reductions, Form 1099-R for employer contributions in the year made), how the employee elections are made (affirmative election required), and that existing SEP and SIMPLE plan documents (model form or prototype) can be used until further guidance is issued.