

House Passes Bipartisan Retirement Reform Legislation

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On May 23, the House overwhelmingly passed the *Setting Every Community Up for Retirement Enhancement Act of 2019* (the “SECURE Act,” [H.R. 1994](#)) on a vote of 417-3. Its passage marks significant progress for retirement legislation after years of negotiations among lawmakers and various retirement industry groups. However, the bill still faces hurdles in the Senate that could delay or prevent enactment.

Background

The SECURE Act retains the key provisions of the *Retirement Enhancement and Savings Act* (“RESA,” [H.R. 1007](#)), which was unanimously passed by the Senate Finance Committee in 2016, including permitting “open” multiple employer plans and creating a fiduciary safe harbor for in-plan lifetime income options. RESA never received a vote in the full Senate, despite bipartisan support. As part of GOP leadership’s second round of tax reform bills in 2018, many of RESA’s key provisions were included in the Family Savings Act (“FSA,” [H.R. 6757](#)). This spring, Ways and Means Committee Chairman Richard Neal (D-MA) negotiated a new version of RESA – renamed the SECURE Act – adding a few provisions from the FSA and new provisions. The Ways and Means Committee passed the SECURE Act by voice vote on April 2.

The SECURE Act passed by the House on May 23 is similar to the bill approved by the Ways and Means Committee in April, with two notable changes. First, the House-passed bill removed a provision permitting tax-favored 529 college savings plans to be used for certain homeschooling school expenses in the face of strong opposition from public school advocacy groups and teachers’ unions. The House-passed bill would still expand 529s to be used for apprenticeship program expenses and qualified student loan repayments. Second, the House-passed bill added a provision to correct a provision of the *Tax Cuts and Jobs Act* that resulted in additional taxes on children of military members and first responders killed in the line of duty. A summary of the bill’s pension-related provisions is below.

Senate leadership is now considering whether and how to move the SECURE Act. At this point, it does not appear that Majority Leader McConnell (R-KY) will bring the bill up for a full floor consideration

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this year, so Senate leadership is attempting to move the bill via unanimous consent, which is only possible if no Senator objects. Currently, there appears to be at least one objection. Another possible option is to attach the SECURE Act to a larger, must-pass bill, such as a spending bill later this year.

Summary of SECURE Act Provisions

A. Encouraging Employer-Provided Plans

- *Pooled Employer Plans (Section 101)*. The SECURE Act would permit unrelated employers (i.e., those without so-called “commonality”) to pool their resources by participating in a new type of MEP, provided certain conditions are met. The new plans – referred to as Pooled Employer Plans – would be treated as a single plan under the Employee Retirement Income Security Act of 1974 (“ERISA”). The legislation is necessary because of Department of Labor (“DOL”) guidance, which generally prevents unrelated employers from participating in a single plan. The SECURE Act also amends the Internal Revenue Code of 1986 (the “Code”) to provide a procedure for ensuring that one employer’s qualification problem would not lead to the disqualification of an entire Pooled Employer Plan (and certain association-sponsored plans). Effective for plan years beginning after December 31, 2020.
- *Increase to Small Employer Plan Start-Up Credit (Sections 104 and 105)*. Under current law, an eligible employer with 100 or fewer employees may receive a nonrefundable income tax credit for qualified start-up costs of adopting a new qualified retirement plan. The SECURE Act would increase the amount of the credit (up to \$5,000 for three years) and provide for an additional nonrefundable credit for small employers (up to \$500 for three years) that establish plans that include automatic enrollment or add automatic enrollment as a feature to an existing plan. Effective for taxable years beginning after December 31, 2019.
- *Plan Adoption Date (Section 201)*. The SECURE Act would allow an employer to adopt a qualified retirement plan after the close of a taxable year so long as it is adopted before the deadline for filing the employer’s tax return for the taxable year. Effective for plans adopted for taxable years beginning after December 31, 2019.

B. Lifetime Income Provisions

- *Lifetime Income Disclosure (Section 203)*. The SECURE Act would require employers to provide defined contribution plan participants with an estimate of the amount of monthly annuity income the participant’s balance could produce in retirement (if benefits were received in a qualified joint and survivor annuity and a single life annuity). The new lifetime income disclosure would be included on participants’ annual benefit statements, and employers and plan fiduciaries will not have fiduciary responsibility for providing estimates in accordance with DOL assumptions and guidance. The SECURE Act directs DOL to issue model lifetime income disclosures and prescribe assumptions that may be used in converting participant

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account balances to lifetime income stream equivalents. Effective upon DOL's publication of an interim final rule or other related publications.

- *Fiduciary Safe Harbor for Selection of Lifetime Income Provider (Section 204)*. The SECURE Act would create a new fiduciary safe harbor for employers who opt to include a lifetime income investment option in their defined contribution plan. In 2008, DOL published a safe harbor for annuity selection in defined contribution plans, but many view the rules as too challenging to provide meaningful relief, particularly given the difficulty in evaluating the financial capability of the insurer. The SECURE Act would specify the measures that a plan fiduciary may take with respect to the selection of an insurer to comply with his or her fiduciary duties. Specifically, a fiduciary would be deemed to have satisfied its fiduciary requirements with respect to the financial capability of the insurer if the fiduciary receives certain representations from the insurer as to its status under and satisfaction of state insurance laws.
- *Portability of Lifetime Income Options (Section 109)*. The SECURE Act would permit participants to make direct trustee-to-trustee transfers (or transfer annuity contracts) to an eligible employer plan/IRA of "lifetime income investments" that are no longer authorized to be held as investment options under a qualified defined contribution, 403(b) plan, or governmental 457(b) plan, without regard to any plan restrictions on in-service distributions. Effective for plan years beginning after December 31, 2019.

C. Changes Affecting Plan Distributions

- *Post-Death Required Minimum Distribution Rules (Section 401)*. The current post-death required minimum distribution ("RMD") rules vary depending on whether an employee or IRA owner dies on or after or before the required beginning date and whether the employee or IRA owner has a designated beneficiary. The SECURE Act would change the post-death RMD rules for non-defined benefit plans to generally require that all distributions after death (for distributions to a designated beneficiary) be made by the end of the tenth calendar year following the year of death. The 10-year distribution requirement generally does not apply if the designated beneficiary is an eligible beneficiary, which is defined as any beneficiary who, as of the date of death, is a surviving spouse, disabled, or chronically ill, or is an individual who is not more than 10 years younger than the employee (or IRA owner), or is a child of the employee (or IRA owner) who has not reached the age of majority. Generally effective for distributions by reason of a participant's death after December 31, 2019 (December 31, 2021 for governmental plans). Plan amendments reflecting these changes are required by the last day of the first plan year beginning after December 31, 2021 (December 31, 2023 for governmental plans).
- *Increase in Age for Required Beginning Date (Section 114)*. The SECURE Act would increase the age at which required minimum distributions must begin from 70 ½ to 72. Effective for individuals turning 70 ½ after December 31, 2019.

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- *Child Birth or Adoption Withdrawals (Section 113)*. The SECURE Act would permit individuals to take penalty-free withdrawals of up to \$5,000 (on a controlled group basis) from their qualified defined contribution, 403(b), and governmental 457(b) plans and IRAs for expenses related to the birth or adoption of a child for up to one year following the birth or legal adoption. Effective for distributions after December 31, 2019. Subject to certain requirements, these distributions may be recontributed to an applicable eligible retirement plan to which a rollover can be made.
- *Limits on Loans through Credit Cards (Section 108)*. The SECURE Act would prohibit plan loans made through credit cards. Effective for loans made after the date of enactment.

D. Changes Affecting Plan Administration

- *Part-Time Employees (Section 112)*. The SECURE Act would require that 401(k) plans permit participation by long-term, part-time employees who work at least 500 hours in three consecutive 12-month periods (and have reached age 21). The provision would provide nondiscrimination and top-heavy testing relief with respect to long-term, part-time employees, as no employer contributions are required for these employees. For vesting purposes, a year of service is a 12-month period during which the part-time employee earned at least 500 hours of service. Effective for plan years beginning after December 31, 2020.
- *Increase on Limit on Automatic Enrollment QACA Safe Harbor Default Rate (Section 102)*. The automatic enrollment safe harbor to the 401(k) plan nondiscrimination rules imposes a 10 percent limit on default automatic contribution rates. The SECURE Act would increase this limit to 15 percent (10 percent cap during the participant's first year of participation). Effective for plan years beginning after December 31, 2019.
- *Nonelective 401(k) Safe Harbor Changes – Applicable To Traditional and QACA Safe Harbors (Section 103)*. The SECURE Act would make the following changes to the rules that apply to nonelective contribution 401(k) safe harbor plans: (1) eliminates the safe harbor notice requirement with respect to nonelective 401(k) safe harbor plans; (2) permits a plan to be amended to become a nonelective 401(k) safe harbor plan at any date before the 30th day before the close of the plan year; and (3) permits a plan to be amended to become a nonelective 401(k) safe harbor plan after the 30th day before the close of the plan year if the plan is amended to provide for a nonelective contribution of at least four percent of compensation for all eligible employees and the amendment is made by the last day for distributing excess contributions for the plan year (i.e., generally by the close of the following plan year). Effective for plan years beginning after December 31, 2019.
- *Consolidation of Reporting (Section 202)*. The bill directs the IRS and DOL to work together to modify Form 5500 so that all members of a group of plans may file a consolidated Form 5500. In general, a group of plans would be eligible for a consolidated form if all the plans in the group (1) are defined contribution plans (or individual accounts); (2) have the same trustee, the same named fiduciary(ies) and the same administrator; (3) use the same plan year; and (4) provide

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the same investments or investment options to participants and beneficiaries. Effective for plan years beginning after December 31, 2021.

- *Increased Penalties for Failure to File Retirement Plan Returns (Section 403)*. The SECURE Act would increase the Code penalties for failing to file a Form 5500 to \$105 per day (but not to exceed \$50,000). It would increase the penalties for failing to provide a required withholding notice to \$100 per day (but not to exceed \$50,000 maximum penalties per year). It also would increase penalties for failures to file a registration statement for deferred vested benefits or file a required notification of change generally to \$10 per day (but not to exceed \$50,000 and \$10,000, respectively). Effective for returns due after December 31, 2019.
- *Increase in Penalty for Failure to File (Section 402)*. The bill would increase the Code penalty for a late tax return to the lesser of \$400 (adjusted for inflation) or 100 percent of the amount required to be shown as tax on the return. Effective for returns with due dates (including extensions) after December 31, 2019.

E. Defined Benefit Plan Provisions

- *Community Newspaper Plans (Section 115)*. The SECURE Act would permit certain frozen “community newspaper plans” to elect to apply alternative funding rules to the plan and other plans sponsored by members of the controlled group. Effective retroactively to plan years ending after December 31, 2017.
- *PBGC Premiums for CSEC Plans (Section 206)*. The SECURE Act would set Pension Benefit Guaranty Corporation insurance premiums for cooperative and small employer charity (“CSEC”) plans at \$19 per participant and \$9 for each \$1,000 of unfunded vested benefits. Effective for plan years beginning after December 31, 2018.
- *Nondiscrimination Flexibility for Frozen Plans (Section 205)*. The SECURE Act would provide nondiscrimination, minimum coverage, and 401(a)(26) relief with respect to benefit accruals and benefits, rights and features for a closed class of participants under a defined benefit plan that has been closed for new hires, provided that the plan satisfies certain requirements. This change is particularly important to “soft” frozen plans, with more mature, highly compensated participant populations. Generally effective upon enactment.

F. Changes Affecting IRAs

- *Repeal of Maximum Age for Traditional IRA Contributions/Deductions (Section 107)*. The SECURE Act would repeal the prohibition on contributions (and deductions) to a traditional IRA for individuals who have attained age 70-1/2 by the end of a year. Effective for contributions made for taxable years beginning after December 31, 2019.
- *Stipends and Difficulty of Care Payments Treated as Compensation (Sections 106 and 116)*. The SECURE Act would treat as compensation amounts includible in income and paid to aid individuals in their pursuit of graduate or postdoctoral study or research for IRA contribution purposes. Similarly, the SECURE Act would permit income excludable under the Code section

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131 “difficulty of care” exemption to be treated as compensation for purposes of making contributions to a defined contribution plan (as after-tax contributions) or IRA. Stipend provision effective for taxable years beginning after December 31, 2019. Difficulty of care provision effective for plan years beginning after December 31, 2015 for defined contribution plans, but for IRAs it applies to contributions after the date of enactment.

G. Other Provisions Affecting Specific Plan Types

- *529 Plans (Section 302)*. The SECURE Act would allow tax-free distributions from 529 plans for certain apprenticeship program and qualified student loan repayments. Effective for distributions made after December 31, 2018.
- *Treatment of 403(b) Custodial Accounts Upon Plan Termination (Section 110)*. The SECURE Act provides that the Secretary will issue guidance that will provide that, if an employer terminates a 403(b) plan, the account can be distributed in kind to a participant or beneficiary. The individual custodial account will be maintained on a tax-deferred basis as a 403(b) custodial account until paid out, subject to compliance with the 403(b) rules in effect at the time that the individual custodial account is distributed. Retroactively effective for plan years beginning after December 31, 2008.
- *Clarification of Church Plan Rules (Section 111)*. The SECURE Act would clarify that employees of nonqualified church-controlled organizations may be covered under a Code section 403(b) plan that consists of a retirement income account. Effective for years beginning before, on, or after enactment.
- *Benefits for Volunteer Firefighters and Emergency Medical Responders (Section 301)*. The SECURE Act reinstates, for one year, the exclusions for state or local tax benefits and qualified reimbursement payments provided to members of volunteer emergency response organizations.
- *Benefits for Children of Military Members and First Responders Killed in the Line of Duty (and other parents with unearned income of minor children) (Section 501)*. The SECURE Act reverses a provision that resulted in unexpectedly high taxes for parents with unearned income of minor children, particularly children of military members and first responders killed in the line of duty. Optionally retroactively effective for tax years beginning after December 31, 2017.

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