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Employee Benefits Corner

Plan Amendment Deadline for SECURE and CARES Amendments

By Elizabeth Thomas Dold and David N. Levine

With year-end amendments fast approaching, the Internal Revenue Service (“IRS”) provided much needed relief from the end of the 2022 Plan Year deadline for Setting Every Community Up for Retirement Enhancement Act of 2019 (“SECURE Act”) amendments (and one Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) amendment). Specifically, the IRS issued Notice 2022-33 on August 3, 2022, which provides an extension to the amendment deadlines for certain provisions of the SECURE Act, the Bipartisan American Miners Act of 2019 (“Miners Act”), and the CARES Act.

Set forth below is a summary of the key SECURE, Miners, and CARES Act amendments, in chart format, for both defined benefit (*see* Table 1) and defined contribution (*see* Table 2) plans. Then we look at the amendment deadlines that apply to these provisions.

What Was the Existing Deadline for the SECURE and CARES Act Amendments?

Under both the statute and Notice 2020-68, plan amendments were not required until the end of the 2022 plan year (2024 plan year for governmental plans). However, operational compliance was required as of the effective date of the change. This 2022 plan year deadline extended to both discretionary and requirement amendments made pursuant to the SECURE Act, Miners Act, and CARES Act. However, terminating plans must be amended in the year of termination.

What Is the New Deadline for the SECURE and CARES Act Amendments?

SECURE Act and Miners Act

- For non-governmental qualified and Code Sec. 403(b) plans, along with individual retirement accounts (“IRAs”), the amendment deadline is December 31, 2025.
- For governmental qualified and Code Sec. 403(b) plans, the amendment deadline is 90 days after the close of the third regular legislative session of

TABLE 1. QUALIFIED DEFINED BENEFIT PLAN AMENDMENTS		
Law Change	Summary of Provision	Effective Dates/Comments
Minimum Required Distributions—Required Beginning Date (SECURE Act)	Distributions must be made by April 1 of the calendar year following the year in which the employee turns age 70½ years (or retires, if later and not a 5% owner). The SECURE Act replaces age 70½ years with age 72 years for all tax-qualified plans (DC and DB), for employees who turn age 70½ years after December 31, 2019 (born after June 30, 1949); the prior rule continues for employees who already reached age 70½ years prior to January 1, 2020.	Generally required for distributions after December 31, 2019. Pending Code Sec. 401(a)(9) final regulations will provide additional guidance on this change. Proposed Code Sec. 401(a)(9) regulations were published in the Federal Register on February 24, 2022 and a number of comments were raised regarding this change. 87 FR 10504.
In-Service Distributions (Miners Act)	The Act allows in-service distributions under a pension plan (defined benefit or money purchase pension plan) at age 59½ years (rather than age 62 years as previously permitted for pension plans/money purchase pension plans). Notably, the change has no effect on a plan’s normal retirement age, however. For governmental Code Sec. 457(b) plans, the Act allows in-service distributions at age 59½ years (rather than age 70½ years as previously permitted).	Effective for plan years beginning after December 31, 2019. This is an optional provision and we note that there is still no corresponding relief under ERISA. Notice 2020-68 provides limited guidance. If elected, this provision will need to be reflected in a plan amendment.
2020 Funding Relief (CARES Act)	No payments required until January 1, 2021; 2019 AFTAP may be used for 2020.	Effective for 2020 plan years. This is an optional provision and most plan documents do not address such subjects in any event.
Nondiscrimination Testing—Closed/Frozen Plans (SECURE Act)	The SECURE Act provides nondiscrimination, minimum coverage, and Code Sec. 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.	Effective as of December 19, 2019, but sponsor may apply to plan years beginning after December 31, 2013. This is an optional provision, and typically does not warrant a plan amendment to take advantage of the relief.

the legislative body with the authority to amend the plan that begins after December 31, 2023.

- For governmental Code Sec. 457(b) plans, the amendment deadline is the later of (1) 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after December 31, 2023, or (2) the first day of the first plan year beginning more than 180 days after the date of notification by the IRS that the plan was administered inconsistent with Code Sec. 457(b) (if applicable). (Notably, there is no express extension for tax-exempt Code Sec. 457(b) plans.)

The Notice also extends anti-cutback relief to amendments made before these deadlines. In addition, the same deadlines apply to amendments to lower the in-service distribution age to 59½ years in pension and governmental Code Sec. 457(b) plans under the Miners Act.

CARES Act

With respect to amendments due under the CARES Act, the Notice extends the deadline solely with

respect to the 2020 waiver of required minimum distributions. The deadline to amend for this provision generally tracks the above deadlines—December 31, 2025 for non-governmental plans and, for governmental plans, 90 days after the close of the third regular legislative session of the legislative body with the authority to amend the plan that begins after December 31, 2023 (subject to the special rule for Code Sec. 457(b) plans). IRAs are not required to amend for this waiver.

So What’s That Leave Us for Year-End Amendments Under SECURE, Miners, and CARES Act?

With the Notice 2022-33 extension, the only year-end amendments that need to be made for the end of the 2022 Plan Year are for plans (not IRAs) that offered the optional CARES relief:

TABLE 2. QUALIFIED DEFINED CONTRIBUTION PLAN AMENDMENTS

Law Change	Summary of Provision	Effective Dates/Comments
Safe Harbor 401(k)/(m) Plans—Increase in Maximum Deferral Rate (SECURE Act)	The maximum automatic deferral rate is increased from 10% to 15% of compensation.	Effective for plan years beginning after December 31, 2019. This provision is optional.
Safe Harbor 401(k)/(m) Plans—Relaxed Notice and Timing Requirements for Nonelective Plan Design Contributions (SECURE Act)	A plan sponsor can adopt a nonelective employer contribution safe harbor plan (QACA or traditional) with no participant notice requirement (unlike a safe harbor using a matching contribution). Also, this safe harbor can be adopted via a plan amendment (1) by the 30th day before the close of the plan year, or (2) if at least a 4% nonelective employer contribution is made for the plan year, before the last day for distributing excess contributions for the plan year (i.e., generally the close of the following plan year).	Effective for plan years beginning after December 31, 2019. This provision is optional.
In-Service Withdrawals for Births and Adoptions (SECURE Act)	Withdrawals of up to \$5,000 are permissible within one year following the birth or legal adoption of a child, and are not subject to the 10% early withdrawal tax. These amounts may also be recontributed back to a plan (or IRA). Notably, similar to hardship withdrawals, they are treated as not eligible for rollover, and not subject to mandatory 20% withholding. Instead, a 10% withholding rate applies, unless the participant elects out.	Effective for distributions on and after January 1, 2020. This provision is optional (at plan level), but a participant may take advantage on his/her tax return. Additional guidance on this feature is set forth in Notice 2020-68.
Minimum Required Distributions—Required Beginning Date (SECURE Act)	Distributions must be made by April 1 of the calendar year following the year in which the employee turns age 70½ years (or retires, if later and not a 5% owner). The SECURE Act replaces age 70½ years with age 72 years for all tax-qualified plans (DC and DB), for employees who turn age 70½ years after December 31, 2019 (born after June 30, 1949); the prior rule continues for employees who already reached age 70½ years prior to January 1, 2020.	Generally required for distributions after December 31, 2019.
Minimum Required Distributions—Accelerated Post-Death Distributions (SECURE Act)	Distributions after death of the participant generally must be made by the end of the tenth calendar year following the year of death. However, payments can be made over the beneficiary's life expectancy if the beneficiary (called an eligible designated beneficiary) is (1) a surviving spouse, (2) a disabled or chronically ill individual (or certain trusts for the same), (3) a beneficiary no more than 10 years younger than the participant, or (4) a minor child of the participant (generally until the child reaches age 21 years). Non-designated beneficiaries are still subject to the prior rules (e.g., 5-year rule).	Generally effective with respect to employees who die after December 31, 2019. These provisions are required. The proposed Code Sec. 401(a)(9) regulations provide that the “at least as rapidly” rule still applies to mandate annual payments during the 10-year period if the participant died after reaching his or her required beginning date. A number of commentators raised concerns with this approach. Final regulations are pending that should give us the final answer on this issue.
Part-Time Employee Participation in 401(k) Plans (SECURE Act)	Starting with the 2021 Plan Year, 401(k) plan sponsors will need to track hours of service performed by part-time employees for eligibility and vesting purposes under, and will be required to permit certain part-time employees to make elective deferrals in, a 401(k) Plan beginning in the 2024 Plan Year. Long-term part-time employees (other than collectively bargained employees) must be eligible to contribute to a 401(k) plan once they have (i) reached age 21, and (ii) worked at least 500 hours in three consecutive 12-month periods. For vesting service, a year of service is a 12-month period during which the part-time employee earned at least 500 hours of service. There is nondiscrimination and top-heavy plan relief, and no requirement to provide any match or profit sharing contribution to these workers.	Effective for plan years beginning after December 31, 2020; service during periods beginning before 2021 are not taken into account for this new eligibility rule, but must be taken into account for vesting purposes for employees who enter the plan. This provision is required for a 401(k) plan. Notice 2020-68 provides limited guidance, and the IRS has indicated that additional guidance is pending.

TABLE 2. QUALIFIED DEFINED CONTRIBUTION PLAN AMENDMENTS (CONTINUED)

Law Change	Summary of Provision	Effective Dates/Comments
Portability of Lifetime Income Options (SECURE Act)	The SECURE Act allows for the distribution of a “lifetime income investment” that is a “qualified distribution” or the distribution of a “lifetime income investment” in the form of a “qualified plan distribution annuity contract.” The distribution event is tied to when the distribution option ceases to be made available under the plan (instead of other distribution events found in the Code, such as severance from employment).	Effective for plan years beginning after December 31, 2019. This provision is optional.
Coronavirus-Related Distributions (CARES Act) (Note, although not typical, this relief may extend to defined benefit plans for participants with a distributable event.)	Plans may allow withdrawals of up to \$100,000 at any time from March 27, 2020 through December 30, 2020 to eligible individuals. Such individuals include those <ul style="list-style-type: none"> • diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the CDC, • whose spouse or dependent is so diagnosed, or • who, due to the virus, experience certain adverse financial consequences. Favorable tax treatment is provided for these withdrawals. IRS Notice 2020-50 expands the definition of “eligible individual” in several ways.	Effective for specified 2020 distributions. This provision is optional (at the plan level), but a participant may take advantage on his/her tax return. Notice 2020-50 provided guidance on these CRD provisions, which was largely consistent with prior Katrina hurricane relief. Model language is set forth in the Code Sec. 403(b) List of Required Modifications.
Coronavirus-Related Loans (CARES Act)	Plans may provide for increased limits on <u>new</u> loans made through September 22, 2020, up to the lesser of \$100,000 or 100 percent of the present value of the member’s accrued benefit (from \$50,000 and one-half of the present value of the member’s accrued benefit). Payments on existing loans due during the applicable period (March 27, 2020–December 31, 2020) may also be delayed up to one year. The term of the loan will be extended for the length of the suspension period (even if it extends the loan beyond five years). During the suspension period, interest will continue to accrue and future payments should be adjusted to reflect the interest accrued during the delay. The eligibility and certification rules noted above for various distributions also apply here.	Effective for specified 2020 loans and payments. Notice 2020-50 provided guidance on these loan provisions, which was largely consistent with prior Katrina hurricane relief. Model language is set forth in the Code Sec. 403(b) List of Required Modifications (but mind the presumed typo in the effective date). This provision is optional.
Waiver of Certain Required Minimum Distributions (“RMDs”) (CARES Act)	Waiver of RMDs due in 2020, including 2020 RMD payments for individuals who <ul style="list-style-type: none"> • are already receiving RMDs (e.g., person attained 70½ years before 2019), and • have a required beginning date in 2020 (both the 2020 RMD payment and the 2019 RMD payment to the extent it was not made by December 31, 2019—e.g., person who turned age 70½ years in 2019). For post-death distributions, this one-year period is disregarded for purposes of the five-year post-death payout requirement.	Waiver generally required, but IRS sample amendment is structured to be at the election of the participant. Notice 2020-51 provides FAQs and a sample IRS amendment, largely tracking the approach taken in 2009 with the WRERA relief.

- Coronavirus-Related Distributions,
- Coronavirus-Related Loan Relief:
 - Increase in loan limits,
 - One-year delay on loan repayments.

This largely impacts defined contribution plans. (Pending any IRS clarification, tax-exempt Code Sec. 457(b) plans may want to take a more conservative approach and adopt all applicable SECURE and CARES Act amendments by the end of the 2022 Plan Year.) So, plan sponsors, please

review what you offered in the form of CARES Act relief and get drafting as year-end is coming!

Important update—at the time of publishing, the IRS issued Notice 2022-45 that extended the amendment deadline for these remaining CARES relief provisions as well, tracking the same timeline as noted above. (It similarly extended the amendment deadline for disaster relief set forth under the Taxpayer Certainty and Disaster Tax Relief Act of 2020.)

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