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SECURE Act: The Wait is Finally Over

For the past three years, Congress has attempted to pass major retirement reform legislation. It has finally succeeded with the year-end passage of two spending packages meant to avert a government shutdown. One of the packages, the Further Consolidated Appropriations Act, 2020 (FCAA), includes multiple bills—including the Setting Every Community Up for Retirement Enhancement (SECURE) Act, which contains several major retirement-related provisions. These provisions are nearly identical to those included in an earlier version of the SECURE Act that was passed by the U.S. House of Representatives in May 2019. At the time of this publication, the President had not yet signed these bills into law. But it is widely anticipated that he will.

The SECURE Act provides the most comprehensive retirement reform package in over a decade. The primary goals of the SECURE Act are to expand retirement savings, improve plan administration, simplify existing rules, and preserve retirement income. The provisions summarized below will certainly give rise to questions in the coming days. Our aim is to provide an easy reference to the important retirement plan changes, while understanding that more federal guidance will be needed to resolve certain matters.

The FCAA also includes bills that provide disaster relief (discussed later) and new health and welfare provisions. The most significant health and welfare measure repeals the controversial "Cadillac Tax." The Affordable Care Act had created a 40 percent excise tax on the most expensive employer-sponsored health insurance plans when benefits exceeded a certain threshold. This tax was supposed to become effective in 2018, but was previously delayed until 2022.

New Incentives to Establish or Enhance Employer Plans

The following SECURE Act provisions create new incentives and modify existing incentives for employers to establish retirement plans. They also broaden the time frame for employers to establish plans.

- **Multiple employer plans (MEPs).** Employers can more easily participate in a MEP or a new variant, a "pooled employer plan," or PEP. Both have basic features in common, the latter to be administered by a pooled plan provider. *(Effective for 2021 and later plan years.)*
    - Multiple participating businesses with a common interest would generally be part of a MEP.
    - Multiple participating businesses with no common interest other than plan sponsorship would generally be part of a PEP.
    - Smaller MEPs and PEPs may be able to file a simplified short Form 5500-SF tax return for the plan.
    - Noncompliance by one participating employer will not disqualify the entire MEP/PEP arrangement, thus eliminating the "one bad apple" rule.
- **Deadline to establish a plan.** Employers may establish a qualified plan—such as a profit sharing or pension plan—as late as their business tax filing deadline, including extensions. (Under previous rules, employers had

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until the last day of their business year.) This extension will not apply to certain plan provisions, such as elective deferrals. *(Effective for 2020 and later taxable years.)*

- **Small employer plan startup credit.** The small employer retirement plan startup tax credit increases from $500 to a maximum of $5,000 per year, available to cover startup costs for the first three years that the plan is in effect. *(Effective for 2020 and later taxable years.)*
- **Automatic enrollment credit.** The SECURE Act provides a new tax credit to employers that include an automatic enrollment feature in their new or existing small 401(k) plans (100 or fewer employees) or SIMPLE IRA plans. The maximum annual tax credit is $500 for each of the first three years that the plan is maintained. *(Effective for 2020 and later taxable years.)*
- **Election of 401(k) nonelective safe harbor design.** Employers that make nonelective safe harbor plan contributions (versus a matching contribution) get two benefits: 1) they now escape the notice requirement, and 2) they have more time to amend their plans to implement this nonelective 401(k) safe harbor plan feature. Specifically, they may amend up to 30 days before the end of a plan year if they make a three percent contribution. But they may generally amend by the close of the following plan year if the plan is also amended to require a four percent nonelective safe harbor contribution. *(Effective for 2020 and later plan years.)*
- **Annuity selection safe harbor.** The SECURE Act creates a new safe harbor for a plan fiduciary to meet ERISA's "prudent man rule" when selecting an insurer and an annuity contract in order to offer lifetime income options under a plan. *(Effective on date of enactment.)*

New Ways to Save More in Employer Plans

The next set of provisions lets employers automatically increase employees' deferral contributions to a higher percentage, requires employers to give participants a future benefits projection, and promotes plan entry for certain part-time employees.

- **Higher cap on deferrals in safe harbor 401(k) plans.** Some 401(k) plans meet nondiscrimination requirements through automatic enrollment and automatic deferral increases. These qualified automatic contribution arrangements (QACAs) will now have a maximum 15 percent deferral rate instead of 10 percent. *(Effective for 2020 and later plan years.)*
- **Lifetime income disclosure.** Defined contribution plans must provide, at least annually, a projected lifetime income stream that a participant's accrued benefit could generate. This disclosure does not create employer liability for the amounts projected. *(Effective for benefit statements provided more than 12 months after the DOL issues guidance, including the interest assumptions to be used and a model disclosure. The bill prescribes that this guidance be completed within one year of the date of enactment.)*
- **Participation by less than full-time employees.** Employees who have three consecutive 12-month periods of 500 hours of service and who satisfy the plan's minimum age requirement must be allowed to make elective deferrals in an employer's 401(k) plan. The current, more restrictive, eligibility rules could continue to be applied to other contribution sources (e.g., matching contributions) and to ADP/ACP safe harbor plans. Employers may also exclude such part-time employees from coverage, nondiscrimination, and top-heavy test rules. *(Effective for 2021 and later plan years, but no 12-month period that begins before January 1, 2021, shall be taken into account.)*

More Targeted Provisions Affecting Employer Plans
The SECURE Act contains a number of additional, more targeted provisions that apply to employer plans.

- **Custodial accounts of terminating 403(b) plans.** Plan administrators or custodians of a 403(b) custodial account may distribute the account "in kind" to a participant or beneficiary when the employer is terminating the 403(b) plan. *(Retroactive; effective for 2009 and later taxable years.)*
- **Lifetime income portability.** Participants in a qualified plan, 403(b) plan, or governmental 457(b) plan may roll over lifetime income investments to an IRA or another retirement plan without a traditional distribution triggering event if their plan no longer permits such investments. *(Effective for 2020 and later plan years.)*
- **Higher penalties for plan reporting failures.** Retirement plan information reporting failures will result in the following increased penalties. (*Effective for filings and notices required January 1, 2020, and thereafter.*)
    - Form 5500, $250 per day, up to a maximum of $150,000
    - Form 8955-SSA (deferred benefit reporting), $10 per day, up to a maximum of $50,000 for failing to file, $10 per day, up to a maximum of $10,000 for failing to file a notification of change
    - Withholding notices, $100 per failure, up to a maximum of $50,000 for all such failures during any calendar year
- **Credit card loan prohibition.** Retirement plan loans enabled through a credit card (or a similar program) will be treated as distributed from the plan and subject to taxation. *(Applies to loans made after the date of enactment.)*
- **Shared Form 5500 filing.** Employers sponsoring defined contribution plans that have the same trustee, administrator, fiduciaries, plan year, and investment options may file a common Form 5500. *(Effective for 2022 and later plan years.)*
- **Nondiscrimination relief for closed pension plans.** Defined benefit pension plans that are closed to new participants will get nondiscrimination relief that protects benefits for older, longer serving participants. (*Effective upon enactment, or—if elected—for 2014 and later plan years).*
- **Community newspaper pension funding relief.** Sponsors of certain plans maintained for community newspapers may calculate defined benefit plan contributions with interest rates and amortization periods that reduce funding requirements. *(Effective for plan years ending after December 31, 2017.)*
- **Church retirement plan rules.** New rules clarify which employees may participate in retirement plans sponsored by church-controlled organizations. *(Effective for past, present, and future plan years.)*
- **Pension plans of cooperatives and charities.** Certain cooperatives and charities may reduce their Pension Benefit Guaranty Corporation (PBGC) insurance premiums for defined benefit plans. *(Effective for 2019 and later plan years)*.
- **Lower minimum age for in-service distributions.** This provision is not part of the SECURE Act, but is found in Division M—the Bipartisan American Miners Act, which is part of FCAA. This provision allows in-service distributions at age 59½ (instead of age 62 under current law) to participants in governmental 457(b) plans and certain pension plans. *(Effective for 2020 and later plan years.)*

New Provisions Affecting Employer Plans *and* IRAs
The following SECURE Act provisions affect both employer plans and IRAs.

- **More rapid payouts to nonspouse (and other) beneficiaries.** Most nonspouse beneficiaries of IRAs, qualified defined contribution plans, 403(b) plans, and governmental 457(b) plans will generally be required to distribute inherited amounts within 10 years. *(Effective for plan participant/IRA owner deaths in 2020 or later years; 2022 or later years for governmental plans; special delay to accommodate contracts of certain collectively bargained plans.)* Exceptions include those who, at the time of the account owner's death, are
  - disabled individuals,
  - certain chronically ill individuals,
  - beneficiaries whose age is within 10 years of the decedent's age,
  - minors (they would begin a 10-year payout period upon reaching the age of majority), and
  - recipients of certain annuitized payments begun before enactment of the SECURE Act.
- **Delayed age for beginning RMDs.** The age when required minimum distributions (RMDs) from Traditional IRAs, qualified plans, 403(b) plans, and governmental 457(b) plans must generally begin is increased from age 70½ to age 72. *(Effective for distributions required in 2020 and later years, for those who reach age 70½ in 2020 or a later year.)*
- **Birth/adoption excise tax exception.** The birth of a child or adoption of a child (or individual who is incapable of self-support) qualifies both as a plan distribution event and as an amount that is exempt from the 10 percent early distribution penalty tax (if applicable) for distributions of up to $5,000 in aggregate from IRAs and defined contribution qualified plans, 403(b) plans, and governmental 457(b) plans. These amounts may be repaid. *(Effective for distributions in 2020 and later years.)*
- "**Difficulty of care" payments treated as eligible compensation for retirement plan funding.** Because many home healthcare workers receive payment that is not taxable income, they haven't been able to contribute to a retirement plan. Now such "difficulty of care" payments will qualify as eligible compensation for IRA and other plan contributions. *(Effective upon enactment for IRAs, and for 2016 and later plans years for employer plans.)*

More Flexibility for IRA Contributions
The following provisions specifically affect IRAs.

- **Traditional IRA contributions at any age.** Taxpayers with earned income can make Traditional IRA contributions at any age, not just for years before reaching age 70½, as under current law. *(Effective for 2020 and later taxable years.)*
- **Graduate student IRA contributions.** Certain stipend, fellowship, and similar payments to graduate and postdoctoral students will be treated as earned income for IRA contribution purposes. *(Effective for 2020 and later taxable years.)*

New Eligible Expenses for 529 Plans
The SECURE Act also broadens the definition of eligible expenses for qualified tuition or "529" plans. Individuals may now take a qualified, tax-free 529 plan distribution to pay for registered apprenticeships. They may also distribute up to $10,000 in order to make repayments of student loans for a 529 plan beneficiary—or a beneficiary's sibling. (*Effective for distributions in 2019 and later years.)*

Disaster Relief Provisions

To provide relief for certain natural disasters that occurred during the last couple of years, the FCAA contains a bill entitled the Taxpayer Certainty and Disaster Tax Relief Act of 2019. Among other things, this bill provides disaster relief to individuals in presidentially declared disaster areas who have taken IRA and retirement plan distributions between January 1, 2018, and 180 days after enactment of this legislation. *(Applicable to plans that are amended on or before the last day of the first plan year beginning on or after January 1, 2020, or later, if the IRS allows.)*

- **Qualified disaster distributions.** Qualifying distributions of up to $100,000 from employer-sponsored retirement plans and IRAs are exempt from the 10 percent early distribution penalty tax and the normal withholding requirements. Individuals affected by more than one disaster may distribute up to $100,000 per disaster.
- **Repayment options.** Individuals may repay qualifying distributions within a three-year period. Distributions not repaid generally will be taxed ratably over a three-year period, unless individuals elect otherwise. Individuals may also repay distributions taken for cancelled home purchases.
- **Relaxed loan requirements.** Employers may allow participants to request a plan loan of up to $100,000. Participants may delay loan repayments for up to one year.

Effective Dates and Amendment Deadlines

Some effective dates are mere days away—January 1, 2020. These dates were retained from the May 2019 version of the legislation. But the final version of FCAA contains delayed amendment deadlines for employer-sponsored retirement plans. This will allow employers to implement changes immediately, while generally having until the end of their 2022 plan year (2024 for governmental and collectively-bargained plans) to amend for the changes.

As with any major piece of legislation, questions will arise as provisions are analyzed. We expect the IRS and Department of Labor to address these concerns in the coming months. Ascensus will continue to assess the effect of this legislation and any related guidance. Visit Ascensus.com for future updates.