SECURE 2.0 reported out of Ways and Means with unanimous bipartisan support

May 10, 2021

On May 5, 2021, the House Ways and Means Committee approved the Securing a Strong Retirement Act of 2021 (SECURE 2.0) on a unanimous voice vote. The bill now goes to the House for approval.

In this article we review that bill, focusing on some key provisions, including: mandatory auto-enrollment/escalation in 401(k) plans; a student loan repayment provision that addresses the nondiscrimination testing issue; and a comprehensive "missing participant" solution (the Retirement Savings Lost and Found).

Not in SECURE 2.0: A proposal to expand the Saver's Credit was dropped because of concerns about the cost (to revenues). And Chairman (of Ways and Means) Neal's automatic retirement plan proposal, which would (with some very limited exceptions) require every US employer to maintain an "automatic contribution" retirement plan. Presumably that proposal was left out to secure bipartisan support.

401(k) plans adopted after the date of enactment must include automatic contribution/escalation and default investment to QDIA

New (post-date-of-enactment) 401(k) plans must default participants into the plan at a contribution rate of at least 3% of pay, escalating each year by 1% up to at least 10%. Contributions as to which the participant has not made an investment election must be defaulted into a qualified default investment alternative (QDIA) (generally, a target date or balanced fund or a managed account).

The new rule does not apply to plans adopted before the date of enactment, for the first 3 years of a new employer's existence, or to employers of 10 or fewer employees.

Easing of rules for 401(k) matching contributions for student loans

Sponsor contributions to a 401(k) plan that "match" student loan repayments would generally be treated as "regular" 401(k) employer matching contributions. This would solve a number of the technical issues.

For purposes of the matching contribution rules under 401(k) (and 401(m)) testing safe harbors, student loan repayments would be treated as elective deferrals. For instance: a plan qualifies for the "general" safe harbor if the employer matches 100% of elective contributions up to 3% of pay and 50% of elective contributions in excess of 3% up to 5% of pay. The employer "match" for student loan repayments would count as a match for purposes of this rule.

Student loan repayments would not be treated as elective deferrals for any other purpose. In some circumstances, this would make the ADP test more difficult to satisfy. However, under the SECURE 2.0 proposal, plans would be permitted to perform the ADP test separately for those participants receiving matching contributions on loan repayments. This is a significant change from prior proposals that will ease ADP testing under student loan matching contribution programs for some sponsors.

Retirement Savings Lost and Found

SECURE 2.0 includes a number of provisions with respect to mandatory distributions/transfers of small benefits (associated with the "missing participant" problem) and implementing a new Retirement Savings Lost and Found.

Mandatory transfers/distributions – generally

Under current rules, if a participant's benefit is valued at more than $5,000, it cannot be distributed to her without her consent. If a participant's benefit is valued at not more than $5,000, the benefit may be distributed without the participant's consent subject to two requirements. First, the participant must be given the opportunity to elect a direct rollover to an IRA or similar vehicle. And second, if the participant's benefit is valued at more than $1,000, and the participant does not make an affirmative election (e.g., of a direct rollover or a cash distribution), the benefit must be transferred to an IRA or similar vehicle designated by the plan administrator.

SECURE 2.0 would increase the cap on mandatory distributions to $6,000.

With respect to amounts of $1,000 or less, the sponsor would generally be required to notify the participant that he is entitled to the benefit or attempt to pay the benefit directly to him. If, within 6 months, the participant does not make a distribution election or accept direct payment, the plan administrator must transfer the benefit to the Office of the Retirement Savings Lost and Found (discussed below). That Office would then periodically search for this "non-responsive participant."

Investment of mandatory distributions

To receive ERISA section 404(c) fiduciary protection with respect to amounts over $1,000 that under these rules are transferred to an individual retirement plan selected by the plan administrator, the transfer must be to a target date or life cycle fund or a principal preservation investment "that provides a reasonable rate of return."

Retirement Savings Lost and Found

SECURE 2.0 instructs the Secretaries of Labor, the Treasury, and Commerce to, within 2 years of enactment, establish an Office of the Retirement Savings Lost and Found, to be managed by the Pension Benefit Guaranty Corporation. The Secretaries must also, within

3 years of enactment, establish an online searchable database, managed by the PBGC, known as the "Retirement Savings Lost and Found."

Individuals would be allowed to search the database for plan contact information. PBGC could use the database to assist participant searches and is to update the database's plan contact information for, e.g., plan/corporate mergers.

Reporting

Finally, SECURE 2.0 would significantly increase required reporting with respect to mandatory transfers, supporting the RSLF database.

Clarification of fiduciary duties with respect to "missing participants"

SECURE 2.0 also instructs the Secretary of Labor (in consultation with the Secretary of the Treasury) to issue a request for information within 1 year of enactment, and a final rule within 3 years of enactment, defining:

> The steps a plan sponsor must take to locate a deferred vested participant in order to meet its fiduciary duty under [ERISA] section 404 … with respect to locating that participant.
>
> The ongoing practices and procedures a plan sponsor must institute in order to meet such fiduciary duty with respect to maintaining up-to-date contact information on deferred vested participants.

Sponsors have been asking for this guidance for years. Instead, to date, DOL has enforced its view on these matters via an audit program.

Increase required beginning date to age 75

SECURE 2.0 would increase the required beginning date for required minimum distributions (RMDs) to age 73-75 depending on age, as follows.

Age/Year	*Required beginning age*
Age 72 after December 31, 2021, and age 73 before January 1, 2029	73
Age 73 after December 31, 2028, and age 74 before January 1, 2032	74
Age 74 after December 31, 2031	75

Limit catch-up contributions to Roth only, increase the catch-up contribution limit to $10,000 for ages 62-64

As a revenue raiser, under SECURE 2.0 catch-up contributions could only be made on a Roth basis – taxed when going in but not taxed when going out. This will limit the utility of catch-up contributions for individuals currently paying taxes at a higher rate than they expect to pay in retirement.

This “raising revenue through Roth-ification” is reminiscent of a move to “Roth-ify” 401(k) contributions as part of Trump Administration 2017 tax reform legislation – opposed by Democrats and ultimately left out of the final bill. It will be interesting to see whether there is any resistance to this SECURE 2.0 proposal.

The 401(k) catch-up contribution limit – which currently allows participants age 50 or older to contribute an additional $5,000 – would be increased to $10,000 for eligible participants who have attained age 62, but not age 65, during the year.

Other provisions

SECURE 2.0 also includes:

An additional credit for small employers (100 or less employees) for employer contributions in the first four years.

An instruction to DOL to produce regulations allowing benchmarking of funds (e.g., for required participant disclosure) that include multiple asset classes (e.g., balanced funds and target date funds) based on a benchmark that is a blend of different broad-based securities market indices.

An instruction to DOL, Treasury and the PBGC, after consultation with “a balanced group of participant and employer representatives,” to (within 18 months) recommend ways to “consolidate, simplify, standardize, and improve” reporting and disclosure requirements.

Simplified annual disclosure for “unenrolled” DC participants.

A relaxation of the RMD annuity rules.

A reduction of the excise tax on failure to make an RMD.

Elimination of the limit on the value of a deferred annuity (under current RMD rules) to 25% of the participant’s account.

Additional time to correct automatic enrollment and automatic escalation errors.

New rules for recovery (or non-recovery) and rollover of overpayments.

A reduction in the service requirement for "long-term part-time employees" (working more than 500 but less than 1,000 hours per year) from 3 to 2 consecutive years.

An expansion the Employee Plans Compliance Resolution System (EPCRS).

A requirement that participants be given a paper annual statement at least annually (for DC plans) or every three years (for DB plans) unless (1) they are given (at least) a one-time initial paper notice of their right to request paper disclosures and (2) non-employee participants are given a paper statement annually, unless they elect electronic disclosure.

A provision allowing the employer to rely on an employee hardship certification for 401(k) hardship withdrawals.

A provision allowing prior-year (retroactive) benefit increases until the tax return due date (with extensions).

A provision allowing matching contributions to be made as Roth contributions.

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SECURE 2.0 has broad bipartisan support, and there is a significant likelihood that it will pass this year, either as a standalone or as part of broader legislation.

We will continue to follow this legislation.

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