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SECURE Act – most significant piece of retirement legislation in years becomes law

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On December 20, 2019, the president signed into law a sweeping year-end spending bill, Further Consolidated Appropriations Act, 2020, which incorporates the provisions of the Setting Every Community Up for Retirement Enhancement Act (SECURE Act).

Background

On May 23, the House passed the SECURE Act, a bill that contained a bevy of retirement plan provisions, with near unanimity, but the bill's companion measure had stalled in the Senate. (See our April 4, 2019 *Legislate* for details on the House Ways and Means Committee version of the SECURE Act.) The last hope for the bill's SECURE Act's enactment this year rested on it being incorporated in a year-end government appropriations bill that would be approved by the Senate and signed by the president.

After months of inaction, last week, the House and Senate passed H.R. 1865, the Further Consolidated Appropriations Act, 2020 (FCAA 2020). The SECURE Act provisions in the FCAA are nearly identical to the manager's amendment of H.R. 1994, which we covered in our May 24, 2019 *Legislate* and are recapped below. The president signed FCAA 2020 into law on December 20, 2019.

Main provisions of SECURE Act in FCAA 2020

Age 72 is the new age 70½. To reflect mortality improvements, the minimum distribution required beginning date increases to age 72 for individuals attaining age 70½ after 2019.

Limits on "stretch payments" from IRAs and employer-sponsored DC plans. IRAs and defined contribution plan balances will have a new 10-year distribution maximum for death benefits so that most account holders are prevented from stretching out payments to non-spouse beneficiaries who are more than 10 years younger than the participant over extended periods of time. In the case where the non-spouse beneficiary is a minor child, the 10-year maximum distribution period is extended to

10 years after the end of the year in which the minor child attains age 18. (Non-designated beneficiaries, such as a decedent's estate, would still be limited to five years.) The provision would not apply to defined benefit plans, so the typical 10 and 15-year certain and continuous alternative distribution forms could remain in place. This provision is the main "pay-for" in the legislation and is effective for deaths after 2019. This will have a significant impact on the tax and estate planning of plan participants and beneficiaries.

Relief for defined benefit plans that have been closed to new participants. In addition to coverage and nondiscrimination testing relief, relief is also provided from the minimum participation rule (which generally requires qualified defined benefit plans to cover the lesser of 50 employees or 40% of the employer's employees). The changes are effective upon enactment, but employers can choose to apply them to any plan year beginning after 2013 and can restart benefits of closed class participants that had been frozen to prevent noncompliance with the current rules.

New options for safe harbor 401(k) plans. Safe harbor plans using automatic escalation can raise their cap after the first year of participation from 10% to 15% of compensation. Safe harbor notices are eliminated for plans using the nonelective contribution option, and employers can wait until 30 days before the end of the plan year to adopt the 3% nonelective safe harbor. Employers can also choose to add the nonelective safe harbor with an amendment by the end of the following year, but the amendment would need to provide 4% rather than 3% of compensation. These changes apply to plan years beginning after 2019.

Deferrals for part-time employees. Non-bargained 401(k) plans can no longer exclude long-term part-time employees from participation if they work at least 500 hours in each of three consecutive years and attain age 21. Previously such participants could be permanently excluded if they never worked 1,000 hours in a 12-month eligibility computation period. However, these participants can be excluded from safe harbor contributions and coverage, nondiscrimination, and top-heavy requirements. This requirement will apply for plan years beginning after 2020 and will not count prior service.

Lifetime income. Annual account statements for defined contribution plans will have to include a representation of projected lifetime income based on the participant's account balance. Fiduciaries will not be responsible for results if they use assumptions and model disclosures that the DOL will provide within one year of enactment, and plans will have a year from that date to begin the disclosures. To encourage plans to offer annuities:

- A new fiduciary safe harbor for annuity provider selection has been established.
- A new in-service distribution event will be allowed from qualified defined contribution plans (including 401(k) plans), 403(b) plans, and government 457(b) plans to allow in-service distributions of annuity contracts to be made from the plan or allow a rollover to another eligible retirement plan starting 90 days before the plan discontinues offering a lifetime income investment option.

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No more credit card loans. The law bans access to plan funds through credit card loans effective for loans made after the date of enactment.

New DC distribution reason and 10% premature distribution penalty exception for up to $5,000 withdrawal due to birth or adoption of child. Starting in 2020, defined contribution plans (including qualified plans such as 401(k) plans, 403(b) custodial account plans, and governmental 457(b) plans) can offer in-service distributions to participants who wish to take a qualified birth or adoption distribution of up to $5,000 per child — either within one year of the birth of an employee's child or the employee's adoption of a child who is either under age 18 or who is physically or mentally incapable of self-support. The $5,000 limit per child must be imposed across all plans sponsored by the same employer (and its controlled group, if applicable). Such distributions will not be treated as an eligible rollover distribution or subject to mandatory income tax withholding. (This will eventually require a revision to the "special tax notices" provided to recipients of eligible rollover distributions.)

Open multiple employer plans. Participating employers in defined contribution multiple employer plans will be shielded from the "one bad apple" rule and will not need to have a "common interest" if the plan has a "pooled plan provider." This becomes effective for plan years beginning after December 31, 2019.

Traditional IRA contributions now allowed for those over age 70½. Starting in 2020, employees over age 70½ are no longer precluded from making traditional IRA contributions. The $100,000 lifetime limit on qualified charitable distributions from IRAs will be reduced by the aggregate amount of IRA contributions made by a participant for taxable years ending after the year they attain age 70½.

IRS directed to issue guidance to facilitate plan termination for 403(b)(7) custodial accounts. Within six months of enactment, IRS is to issue guidance that permits the employer of a participant with a 403(b)(7) mutual fund custodial account to distribute the custodial account in-kind to the participant and have the account remain a 403(b) custodial account (in a manner similar to how a 403(b) annuity participant can be distributed an annuity contract at plan termination and have it remain a 403(b) annuity).

Penalty increases. Penalties have increased for forms and notices due after 2019 as follows: failing to timely file Form 5500 can be assessed up to $250 per day, not to exceed $150,000; failing to file Form 8955-SSA can be assessed up to $10 per day not to exceed $10,000; and failure to provide income tax withholding notices can be assessed a penalty of up to $100 for each failure, not to exceed $50,000.

Special relief provisions for certain DB plans. In addition to providing significantly lower PBGC premiums for Cooperative and Small Employer Charity (CSEC) plans, the law provides alternative minimum funding standards for community newspaper plans who elect them.

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Additional retirement plan provisions in FCAA 2020

Earlier minimum age for in-service distributions from qualified DB plans and governmental 457(b) plans. For plan years beginning after December 31, 2019, in-service distributions can be taken as early as age 59½ rather than starting at age 62.

Disaster relief provisions. These provisions allow eligible retirement plans (including qualified plans, 403(b) plans, governmental 457(b) plans, and IRAs) to offer “qualified disaster distributions” to individuals who lived in a presidentially declared disaster area during an event occurring between January 1, 2018 and the 60th day after enactment.

To be permitted to take a “qualified disaster distribution,” the participant must have suffered an economic loss and must take the distribution after the disaster struck and no later than 180 days after enactment. The distribution would be subject to a lifetime cap of $100,000 per disaster across all plans in the plan sponsor’s controlled group. Qualified disaster distributions are not considered eligible rollover distributions (and are not subject to mandatory federal income tax withholding) and are exempt from the 10% premature distribution penalty tax for distributions taken prior to age 59½.

Participants receiving qualified disaster distributions are also permitted to spread the taxation of their distribution over three years by including one-third of the taxable amount in income in each year over the three-taxable-year period beginning with the taxable year in which the distribution is received. Participants can also recontribute all or a portion of their qualified disaster distribution to the plan that issued it (if the plan so permits) within three years thereafter, (or can roll it over to another eligible retirement plan willing to accept it, such as an IRA) in which case, the distribution would be treated as a non-taxable rollover.

Plans can now allow a participant who took a hardship withdrawal to buy a principal residence but those whose purchase fell through due to a disaster can now recontribute some or all of the withdrawal amount within 180 days after enactment and have the repayment treated as a non-taxable rollover.

Disaster relief has also been provided for participant loans and loan repayments by:

- Increasing the applicable qualified plan non-taxable loan limits for individuals who lived in the disaster area and sustained an economic loss — from the normal limit (equal to the lesser of $50,000 or one-half of the vested accrued benefit) to the lesser of $100,000 or 100% of the present value of the vested accrued benefit.
- Permitting repayments to be delayed to the later of one year or 180 days after the date of enactment and extending the maximum loan term beyond five years for general purpose loans by that extension period. However, interest will continue to accrue on the loan during such period and must be repaid to avoid default.

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Plan amendments under SECURE Act and FCAA 2020

The law provides for an extended remedial amendment period. This means that although plans must comply with the SECURE Act provisions in operation starting with the effective dates specified in the law, plan documents can be updated to incorporate the required plan provisions by a later date — the last day of the first plan year beginning on or after January 1, 2022, unless the Secretary of Treasury provides an extension. For governmental plans and collectively bargained plans, the deadline will be no later than January 1, 2024.

A separate amendment deadline applies to the disaster relief provisions, which must be adopted no later than the last day of the plan year beginning on or after January 1, 2020 (or two years later in the case of a governmental plan).

In closing

The SECURE Act provisions, part of Further Consolidated Appropriations Act, 2020, provide significant changes to retirement plans — perhaps the most extensive since the Pension Protection Act of 2006. We expect that as the regulatory agencies digest the law, they will be issuing guidance to help plans comply with the numerous changes.

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