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CLIENT ALERT

SECURE Act Makes Significant Changes to Retirement Plan and IRA Rules

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On December 20, 2019, President Trump signed into law the Further Consolidated Appropriations Act, 2020 (the "**Appropriations Act**") that provides necessary funding to maintain the federal government through September 30, 2020. Included in the Appropriations Act is an additional piece of legislation, the Setting Every Community Up for Retirement Enhancement Act of 2019 (the "**SECURE Act**"). The SECURE Act contains a number of provisions that will affect the administration and operation of qualified retirement plans and individual retirement accounts ("**IRAs**"), including provisions intended to encourage additional retirement savings and lifetime income options, promote the adoption of retirement plans by small employers, and accelerate the distribution of retirement benefits of deceased retirees. A summary of the significant provisions of the SECURE Act follows.

Plan Coverage and Participation Amendments

Pooled Employer Plans: Under present guidance issued by the Department of Labor (the "**DOL**"), unaffiliated employers are precluded from adopting and participating in so-called open multiple employer plans. The SECURE Act will allow unrelated employers to adopt a single pooled employer plan ("**PEP**") and thereby reduce the administrative burdens associated with maintaining a qualified retirement plan by smaller employers. A PEP provider must register with the DOL and will serve as the plan's administrator and named fiduciary for purposes of the Employee Retirement Income Security Act of 1974 ("**ERISA**"). Each participating employer in a PEP will be relieved of most of the fiduciary concerns associated with an ERISA retirement plan, provided the employer prudently selects and continues to monitor the performance of the PEP provider. A participating employer in a PEP will also be relieved of liability for plan noncompliance matters caused by other participating employers, thereby eliminating the "one-bad-apple" rule. The PEP rules are effective for plan years beginning after December 31, 2020.

Tax Credit Increase for Plan Start-Up Costs: The SECURE Act increases the 50% tax credit for retirement plan start-up costs. The $500 maximum tax credit to defray plan start-up expenses that is currently available to employers with 100 or fewer employees is increased to the greater of (i) $500 or (ii) the lesser of $5,000 or $250 times the number of non-highly compensated employees who participate in the plan. An additional $500 tax credit is available for small employers that adopt plans that include an auto-enrollment feature. The tax credit is available for tax years beginning after December 31, 2019, and applies for up to three years after plan adoption.

Plan Adoption Deadline Extended: Employers will have an extended time for adopting a qualified retirement plan for their employees. Plans adopted before the due date (including extensions) of an employer's tax return may be treated as having been adopted as of the last day of the prior tax year. The change is effective for plans adopted for tax years beginning after December 31, 2019.

Plan Coverage for Part-Time Employees: Under current rules, employees who have not attained age 21 or who work less than 1,000 hours in a 12-month period can be excluded from plan participation, which frequently results in the exclusion of many part-time workers. Under the SECURE Act, 401(k) plans (but not pension or profit sharing plans) will be required to include part-time employees as participants if they have attained age 21 and worked at least 500 hours in three consecutive 12-month periods. The new rule only allows an eligible employee to make elective deferral contributions to the plan. However, no employer contributions (*e.g.*, matching, profit sharing or top-heavy contributions) need be made for any part-time employee who satisfies the alternative coverage requirements. The new rule is effective for years beginning after December 31, 2020, although no service needs to be taken into account prior to the effective date, which will effectively further delay the change.

Frozen Defined Benefit Plan Coverage: Defined benefit plans for which benefit accruals are limited to a closed group of employees ("soft-frozen" plans) are subject to running afoul of applicable plan qualification requirements as the closed population ages and becomes more highly compensated when compared to the general workforce. The SECURE Act provides relief from the nondiscrimination, coverage and participation testing rules that would otherwise apply to such closed plans. This relief applies to plans that were frozen before April 5, 2017, or that have been in effect for at least five years without a substantial increase in coverage or benefits in the preceding five years. These changes are immediately effective or, if the employer elects, for plan years beginning after December 31, 2013.

Lifetime Income Provisions

Disclosure of Annuity Value: At least once each year, benefit statements issued to participants in defined contribution plans will need to include an estimate of the monthly income a participant could expect to receive in the form of a single life and a joint and survivor annuity. The DOL is directed to issue model disclosure statements and actuarial assumptions that employers may rely on in providing the lifetime income disclosures. The annuity disclosure requirements are effective one year after the DOL issues interim final rules implementing the changes.

Safe Harbor for Selecting a Lifetime Income Provider: To encourage employers to offer lifetime income options under defined contribution plans, the SECURE Act includes a new fiduciary safe harbor that employers can rely on when selecting a lifetime income investment option. In 2008, the DOL issued a safe harbor for selecting a lifetime income option for a plan, but many employers considered the DOL's guidance more challenging than simply offering customary mutual fund investment alternatives. Plan sponsors (or other plan investment fiduciaries) that satisfy the SECURE Act requirements for selecting a lifetime income provider are protected from liability in the event that the annuity provider is unable to satisfy its obligation to pay the required benefits under the annuity contract. The lifetime income safe harbor provisions are effective immediately.

Transfer of Lifetime Income Options: In order to remove some of the impediments to offering lifetime income investment options (such as surrender charges and similar penalties), the SECURE Act allows for trustee-to-trustee transfers to another plan or IRA without penalty when such options are removed from a plan's investment lineup. The change is effective for plan years beginning after December 31, 2019.

Retirement Plan Withdrawal and Distribution Changes

Required Minimum Distribution Commencement Date Increased to Age 72: In general, a participant in a qualified retirement plan must currently commence minimum distributions by April 1 of the year following the year in which the participant attains age 70½ or terminates employment, whichever is later. (Traditional IRA owners must currently commence minimum distributions by April 1 of the year following the year in which the owner attains age 70½, without regard to employment.) The required minimum distribution age is increased by the SECURE Act to age 72 for both retirement plans and traditional IRAs. This change is effective for individuals who attain age 70½ after December 31, 2019.

Commencement of In-Service Distributions for Pension Plans: Under current rules, a pension plan (*e.g.*, defined benefit plans, cash balance plans and money purchase pension plans) may not commence benefit distributions prior to the attainment of age 62. Effective for plan years beginning after December 31, 2019, a pension plan may allow for in-service distributions commencing at age 59½.

Required Minimum Distributions for Beneficiaries: Under current rules, qualified retirement plans and IRAs may allow for the distribution of a designated beneficiary's interest to be made over the beneficiary's remaining life expectancy (often referred to as the "stretch" IRA). The SECURE Act modifies the minimum distribution requirements for defined contribution plans and IRAs by requiring that all distributions be completed by December 31 of the tenth calendar year following the year of a plan participant's or an IRA owner's death. The 10-year rule generally will not apply to a beneficiary who, as of the date of the participant's or IRA owner's death, is a surviving spouse, a minor child (until reaching the age of majority), a disabled or chronically ill person, or any person not more than 10 years younger than the decedent. The new distribution requirements generally apply with respect to individuals who die after December 31, 2019, subject to certain exceptions for governmental plans, employees subject to collective bargaining agreements and annuity contracts in effect on the date of enactment.

Credit Card Loans: In order to ensure that plan loans are not used for minor purchases, the SECURE Act prohibits a retirement plan from making a loan using a credit card or similar credit arrangement. The change is effective for loans made after the date of enactment.

Child Birth and Adoption Distributions: Effective for distributions made after December 31, 2019, defined contribution plans and IRAs may make distributions of up to $5,000 for expenses related to the birth or adoption of a child without application of the early distribution penalty tax. The adopted child must be either under age 18 or physically or mentally incapable of self-support. An eligible distribution must occur during the one-year period following the birth or adoption of the child. An eligible distribution can be repaid to the plan at a later date (but repayment is not required).

Safe Harbor 401(k) Plans

Safe Harbor Notice for 401(k) Plans Utilizing Non-Elective Contributions: For 401(k) plans that satisfy the safe harbor nondiscrimination requirements through the use of employer non-elective contributions (rather than employer matching contributions), the annual safe harbor notice requirement is eliminated. As a result of the change, plan sponsors may amend an existing plan to utilize safe harbor non-elective contributions to satisfy applicable nondiscrimination requirements (i) at any time before the 30^{th} day preceding the close of the plan year, or (ii) after that date, so long as the safe harbor non-elective contribution is at least 4% of compensation (rather than 3% under the general rule) and the amendment is adopted by the last day for distributing excess contributions for the plan year (*i.e.*, the end of the following plan year). The change is effective for plan years beginning after December 31, 2019.

Safe Harbor Plans with QACAs: For safe harbor 401(k) plans that utilize a qualified automatic contribution arrangement (QACA), the maximum limit on the default employee deferral percentage is raised from 10% to 15% of compensation (other than the first year of participation). The change is effective for plan years beginning after December 31, 2019.

Annual Reporting and Penalties

Combined Annual Report for Multiple Plans: The SECURE Act permits the filing of a consolidated Form 5500 (Annual Return/Report of Employee Benefit Plan) for similar defined contribution plans that (i) have the same trustee, plan administrator and named fiduciary(ies), (ii) have plan years beginning on the same date, and (iii) provide the same investments or investment options to participants and beneficiaries. The Internal Revenue Service and DOL are directed to modify the applicable forms so that all members of a group of plans may file a single aggregated annual return. This change is to be implemented no later than January 1, 2022, and will apply to returns and reports for plan years beginning after December 31, 2021.

Increased Penalties for Failure to File or Issue Retirement Plan Returns, Statements and Notices: The SECURE Act increases certain penalties for failure to file or issue retirement plan-related returns, statements and notices due after December 31, 2019 as follows:

- The penalty under Section 6652(e) of the Internal Revenue Code of 1986 (the "**Code**") for failure to file Form 5500 is increased to $250 per day, up to a maximum of $150,000 (previously, $25 per day, up to $15,000).
- The penalty under Section 6652(d)(1) of the Code for failure to file a registration statement for deferred vested benefits on Form 8955-SSA is increased to $10 per day per participant, up to a maximum of $50,000 (previously, $1 per day per participant, up to $5,000).
- The penalty under Section 6652(d)(2) of the Code for failure to provide a required notification of change of status is increased to $10 per day, up to a maximum of $10,000 (previously, $1 per day, up to $1,000).
- The penalty under Section 6652(h) of the Code for failure to provide a required tax withholding notice to certain recipients of plan distributions is increased to $1,000 per failure, up to a maximum of $50,000 for all such failures during the calendar year (previously, $10 per failure, up to $5,000).

IRA Contributions

Maximum Age for IRA Contributions: The SECURE Act removes the prohibition on contributions to an IRA by individuals who have attained age 70½. The change applies to IRA contributions made for taxable years beginning after December 31, 2019.

Contributions by Graduate Students: Taxable income relating to amounts paid to individuals for graduate and post-doctoral study can be treated as compensation for purposes of making IRA contributions. This change applies to IRA contributions made for taxable years beginning after December 31, 2019.

Plan Amendments

Deadline to Adopt SECURE Act Changes: Although some of the changes that are being made by the SECURE Act are optional amendments, other changes (such as the rules for required minimum distributions to plan beneficiaries) will require appropriate amendments to the governing plan documents. To the extent that any plan document must be amended to incorporate a required change, the change must be reflected in the plan document by the last day of the plan year that commences on or after January 1, 2022, or such later date as the IRS may prescribe. The delayed amendment date is conditioned on the plan having been maintained and administered as if any required change were included in the document as of the applicable effective date. Any such required change may be made without regard to the anti-cutback rules of ERISA and the Code.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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