Insights: Alert

SECURE 2.0 Act of 2022, as enacted Summary of Key Provisions

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On December 29, 2022, President Biden signed the Secure 2.0 Act of 2022 (the "Secure 2.0 Act") into law. The Secure Act 2.0 builds off of the Secure Act, the last major retirement plan legislation enacted at the end of 2019, and brings important changes to retirement plans.

Most of the provisions in the final legislation are substantially similar to certain provisions in three prior bills that we summarized in our prior alert: (1) the Securing a Strong Retirement Act of 2022 (the "House Secure Act 2.0 Bill"), which the House passed on March 29, 2022, (2) the Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg Act ("RISE & SHINE Act"), which the Senate, Health, Education, Labor & Pensions Committee approved on June 14, 2022, and (3) Enhancing American Retirement Now ("EARN"), which the Senate Finance Committee released on June 22, 2022 (collectively, the "Prior Bills").

The following summary updates our prior alert to reflect the provisions of the final Secure 2.0 Act legislation.

I. New Provisions of SECURE 2.0 Act Not Included in Prior Bills

a. Saver's Match (§ 103):

- The Secure 2.0 Act provides a matching credit of up to 50% of a participant's IRA or retirement plan contributions, up to a limit of $2,000 per individual, effective for tax years beginning after December 31, 2026.This credit replaces the current refundable income tax credit and instead requires the refund from the Treasury Department to be deposited into a participant's IRA or retirement plan.
- Participants begin to phase out of this credit at incomes of $20,500 for single taxpayers and $41,000 for married taxpayers.

b. Starter 401(k) Plan (§ 121):

- The Secure 2.0 Act adds a starter 401(k) plan (or safe harbor 403(b)), which is set up as a deferral-only arrangement, effective for plan years after December 31, 2023.This starter plan would require employees to be automatically enrolled at a rate of 3 to 15 percent.
- Participants are generally limited to deferrals based on the IRA contribution limits ($6,500 in 2023), including catch-up contribution limits ($1,000 in 2023).

II. Secure 2.0 Act Provisions Substantially Similar to Prior Bills

a. Impacting Plan Design

i. Automatic Enrollment/Automatic Increase

- The House Secure Act 2.0 Bill would require new 40 1(k) and 403(b) plans (excluding plans that were in effect as of the date of enactment and plans of certain small or new businesses) to provide for an automatic enrollment/automatic increase arrangement, meeting the following requirements:
  - The automatic contribution rate must be between 3% and 10% of a participant's compensation.
  - Participants who are automatically enrolled must be able to withdraw their contributions within 90 days of their first contribution.
  - Participants who have not opted out or elected a specific percentage must have their contribution rate automatically increased by 1% as of the first day of each plan year, to at least 10% but not more than 15%.
  - Accounts must be invested by default in a qualified default investment alternative under ERISA Section 404(c)(5).
- *House Secure Act 2.0 Bill, § 101.,*
  - Effective for plan years beginning after 12/31/2024.
- *RISE & SHINE Act, § 401.*
  - The RISE & SHINE Act would require plans that offer an automatic enrollment arrangement to automatically enroll participants who have opted out at least once every 3 years, unless they make a new election to opt out.
  - Effective for arrangements taking effect after 12/31/2024.

Update: Secure 2.0 Act, § 101 includes a provision similar to what was included in the House Secure Act 2.0 Bill, effective for plan years after December 31, 2024.

ii. Required Minimum Distributions (RMDs)

- The required beginning date would be increased from age 72, as follows:
  - Age 73 for 2022-28 (House Secure Act 2.0 Bill);
  - Age 74 for 2029-31 (House Secure Act 2.0 Bill);
  - Age 75 for 2032 and later (House Secure Act 2.0 Bill and EARN Act).
- Note: The EARN Act Summary indicates that the required beginning date would increase to age 75, effective after 2031, but does not address whether there would be any increases in the interim as under the House Secure Act 2.0 Bill.
- *House Secure Act 2.0 Bill, § 106; EARN Act Summary.*
  - Effective for distributions required to be made after 12/31/2022 for individuals who attain age 72 after that date (House Secure Act 2.0 Bill).

Update: Secure 2.0 Act, § 107 increases the RMD age to 73 starting on January 1, 2023, and 75 starting on January 1, 2033. However, unlike the House Secure Act 2.0 Bill, there is no interim increase to the RMD age to 74.

- Excise taxes for RMD failures would be decreased from 50% to 25%, and to 10% if corrected promptly.
- *House Secure Act 2.0 Bill, § 302; EARN Act Summary.*
    - Effective for tax years beginning after 12/31/2022 or after date of enactment (EARN Act).

Update: Secure 2.0 Act, § 302 includes a similar provision, effective for tax years beginning after the date of enactment.

- Roth accounts in 401(k) plans would not be required to be distributed prior to death of the owner.
- *EARN Act Summary.*
    - Effective after 12/31/2023.

Update: Secure 2.0 Act, § 325 includes a similar provision, effective for distributions permitted to be paid on or after January 1, 2024.

- A surviving spouse of a deceased employee would be treated as the deceased employee for purposes of the RMD rules.
- *EARN Act Summary.*
    - Effective after 12/31/2023.

Update: Secure 2.0 Act, § 327 includes a similar provision, effective for calendar years beginning after December 31, 2023.

iii. <u>Roth Employer Contributions</u>

- Plans would be permitted to allow employees to elect to have employer matching contributions made on a Roth (after-tax) basis. The EARN Act would also allow other employer contributions to be made on a Roth (after-tax) basis.
- *House Secure Act 2.0 Bill, § 604; EARN Act Summary.*
    - Effective for contributions made after the date of enactment (House Secure Act 2.0 Bill) or after 12/31/2022 (EARN Act).

Update: Secure 2.0 Act, § 604 includes a similar provision, effective on the date of enactment.

iv. <u>Matching Contributions for Student Loan Payments.</u>

- 401(k) plans would be permitted to provide for matching contributions on an employee's student loan payments (up to the 401(k) contribution limit) based on the employee's certification that the loan payment has been made. The student loan repayments would not be taken into account as contributions under the plan. The plan would be permitted to perform ADP testing separately for participants who receive

matching contributions on student loan repayments, which would help to alleviate testing issues if these employees decide to forgo 401(k) contributions because their loan repayments are matched.

- *House Secure Act 2.0 Bill, § 111; EARN Act Summary.*
    - Effective for contributions for plan years beginning after 12/31/2022 (Secure Act) or 12/31/2023 (EARN Act).

Update: Secure 2.0 Act, § 110 includes a similar provision, effective for contributions made for plan years beginning after December 31, 2023.

v. <u>Catch-up Contributions.</u>

- Catch-up contributions for employees age 50 or older before the close of the year would be required to be made on a Roth basis.
- *House Secure Act 2.0 Bill, § 603; EARN Act Summary.*
    - Effective for plan years beginning after 12/31/2022 (House Secure Act 2.0 Bill) or after 12/31/2023 (EARN Act)

Update: Secure 2.0 Act, § 603 includes a similar provision for employees with prior year wages of $145,000 or more (adjusted for inflation) for tax years beginning after December 31, 2023.

- Employees ages 62 through 64 (House Secure Act 2.0 Bill) or 60 through 63 (EARN Act) before the close of a year would be permitted to make catch-up contributions of up to $10,000, as indexed for inflation in future years.
- *House Secure Act 2.0 Bill, § 108; EARN Act Summary.*
    - Effective for plan years beginning after 12/31/2022 (House Secure Act 2.0 Bill) or for taxable years beginning after 12/31/2024 (EARN Act)

Update: Secure 2.0 Act, § 109 includes a similar provision to permit catch-up contributions of up to $10,000 (indexed for inflation after 2025) for participants aged 60-63, beginning for taxable years after December 31, 2024.

vi. <u>Cashout Limit.</u>

- The cashout limit for involuntary distributions would be increased from $5,000 to $7,000.
- *House Secure Act 2.0 Bill, § 307; RISE & Shine Act § 101.*
    - Effective for distributions made after 12/31/2022 (House Secure Act 2.0 Bill) or 12/31/2023 (RISE & SHINE Act).

Update: Secure 2.0 Act, § 304 includes a similar provision, effective for distributions after December 31, 2023.

vii. Birth or Adoption Expense Withdrawal Repayment Deadline.

- The Secure Act (2019) provided that withdrawals for birth or adoption expenses could be repaid to the plan, without specifying a deadline for recontributions. This would impose a recontribution deadline of 3 years from the date of withdrawal.
- *House Secure Act 2.0 Bill, § 316; EARN Act Summary.*
  - Retroactively effective as if included in the Secure Act (House Secure Act 2.0 Bill). The effective date is not specified in the EARN Act summary.

Update: Secure 2.0 Act, § 311 includes a similar provision, effective for distributions made after the date of the bill and retroactively to the three-year period beginning on the day after the date on which such distribution was received.

viii. Domestic Abuse Withdrawals.

- Similar to the birth or adoption expense withdrawal provisions of the Secure Act, participants who have been victims of domestic abuse would be permitted to withdraw up to $10,000 or 50% of their account (if less) (exempt from the 10% additional tax on early distributions) and recontribute the withdrawn amount or a portion thereof to the plan up to three years later. Under the House Secure Act 2.0 Bill, plans would be permitted to rely upon employee certifications as being eligible for withdrawal.
- *House Secure Act 2.0 Bill, § 318; EARN Act Summary.*
  - Effective as of the date of enactment (House Secure Act 2.0 Bill and EARN Act).

Update: Secure 2.0 Act, § 314 includes a similar provision, effective for distributions made after December 31, 2023.

ix. Long-term Care Contract Withdrawals.

- Retirement plans would be permitted to distribute up to $2,500 per year for the payment of premiums for certain long-term care contracts, exempt from the 10% additional tax on early distributions.
- *EARN Act Summary.*
  - Effective 3 years after the date of enactment.

Update: Secure 2.0 Act, § 334 includes a similar provision, effective for distributions made after the date that is three years after the date of enactment.

x. Distributions to Terminally Ill Participants.

- The 10% additional tax for early distributions would not apply to distributions to a terminally ill individual.
- *EARN Act Summary.*
  - Effective after date of enactment.

Update: Secure 2.0 Act, § 326 includes a similar provision, effective for distributions made after the date of enactment.

xi. Ongoing Disaster Relief.

- Up to $22,000 would be permitted to be distributed from retirement plans or IRAs for individuals affected by a declared disaster. These withdrawals would not be subject to the 10% additional tax on early distributions and would be taken into account as income over 3 years, unless recontributed to the plan. Additionally, hardship withdrawals to purchase a principal residence before a disaster could be recontributed, and larger amounts and longer repayment terms would be permitted to be available for plan loans.
- *EARN Act Summary.*
    - Effective for disasters occurring on or after 1/26/2021.

Update: Secure 2.0 Act, § 331 includes a similar provision for disasters occurring on or after January 26, 2021.

xii. Coverage of Part-time Employees.

- The Secure Act included a requirement that part-time employees with at least three consecutive years of at least 500 hours of service be eligible to defer under a 401(k) plan. (See blog post.) This provision would reduce the service requirement for part-time workers to two years.
- *House Secure Act 2.0 Bill, § 116; RISE & SHINE Act, § 109; EARN Act Summary.*
    - Effective for plan years beginning after 12/31/2022 (House Secure Act 2.0 Bill and EARN Act) or one year after the date of final regulations implementing this provision (RISE & SHINE Act).

Update: Secure 2.0 Act, § 125 includes a similar provision, effective for plan years after December 31, 2024.

xiii. Emergency Savings.

- Defined contribution plans would be permitted to provide for an emergency savings account that would allow participants to save up to $2,500, which participants could withdraw from at least once per month. Contributions would be on an after-tax basis and if the employer contributes to the account, the contributions would be taxable to the participant.
- *RISE & SHINE Act, § 202.*
    - Effective date not specified.
- Participants would be permitted to withdraw up to $1,000 per year for personal or family emergency expenses. Withdrawals could be repaid in whole or in part up to 3 years later, and no further withdrawals would be permitted until repayment.
- *EARN Act Summary.*

- Effective for plan years after 12/31/2023.

Update: Secure 2.0 Act, § 127 includes a similar provision, effective after December 31, 2023. Contributions are generally treated as Roth contributions and distributions of earnings are nontaxable. HCEs are not permitted to contribute. At separation from service, employees may take their emergency savings accounts as cash or roll into their Roth defined contribution plan or IRA.

xiv. Automatic Portability of Rollovers.

- Service providers would be permitted to provide for the automatic rollover contribution of a participant's rollover IRA to a new employer plan unless the participant affirmatively elects otherwise.
- *EARN Act Summary.*
  - Effective for plan years after 12/31/2023.

Update: Secure 2.0 Act, § 120 includes a similar provision, effective for transactions occurring on or after the date which is 12 months after the date of enactment.

xv. Multiple Employer Plans for 403(b) Plans.

- Nonprofit employers would be eligible to participate in multiple employer 403(b) plan arrangements similar to the arrangements available for 401(k) plans under the Secure Act.
- *House Secure Act 2.0 Bill, § 110; RISE & SHINE Act, § 101; EARN Act Summary.*
  - Effective for plan years after 12/31/2022 (House Secure Act 2.0 Bill and RISE & SHINE Act) or the date of enactment (EARN Act).

Update: Secure 2.0 Act, § 106 includes a similar provision, effective for plan years beginning after December 31, 2022.

xvi. Health Benefits in Pension Plans.

- Overfunded pension plans (over 110% funded) would be permitted to transfer up to 1.75% of plan assets to a program used to pay for retiree health and life insurance benefits. This expands relief that is currently set to sunset at the end of 2025 through 2032.
- *RISE & SHINE Act, § 603; EARN Act Summary.*
  - Effective after date of enactment.

Update: Secure 2.0 Act, § 606 includes a similar provision, effective for transfers made on or after the date of enactment.

xvii. ESOP Provisions.

- Owners of S-Corporation stock would be able to defer 10% of the long-term capital gain from a sale to an ESOP.
- *House Secure Act 2.0 Bill, § 117; EARN Act Summary.*
    - Effective after 12/31/2027.

Update: Secure 2.0 Act, § 114 includes a similar provision, effective for sales made after December 31, 2027.

- The rules for determining what securities are considered publicly traded and subject to a diversification right would be expanded.
- *House Secure Act 2.0 Bill, § 118.*
    - Effective after 12/31/2027.

Update: Secure 2.0 Act, § 123 includes a similar provision, effective for plan years after December 31, 2027.

xviii. <u>Cash Balance Plans.</u>

- Cash balance plans with variable interest crediting rates would be allowed to use a reasonable projection of the interest crediting rate, not to exceed 6%, for purposes of backloading and applying 415 limits.
- *RISE & SHINE Act, § 601.*
    - Effective for years beginning after the date of enactment.

Update: Secure 2.0 Act, § 348 includes a similar provision, effective after the date of enactment.

xix. <u>Retroactive Amendments Increasing Benefits.</u>

- Employers would be permitted to adopt retroactive amendments to increase benefits or employer contributions (other than matching contributions) to 401(k) or pension plans up until due date of tax return for the year.
- *House Secure Act 2.0 Bill, § 320; EARN Act Summary.*
    - Effective for plan years beginning after 12/31/2023 (Secure Act 2.0); or after enactment (EARN Act).

Update: Secure 2.0 Act, § 316 includes a similar provision, beginning after December 31, 2023.

b. Provisions Impacting Participant Disclosures

i. <u>Unenrolled Participants.</u>

- Under the House Secure Act 2.0 Bill and RISE & SHINE Act, eligible employees under a 401(k) plan who are not contributing and who do not have account balances would not be required to be provided most participant disclosures as long as they have received an SPD and an annual reminder notice of their

eligibility to participate (with key features, like contribution and vesting terms), and, upon request, other documents they would otherwise be entitled to. The EARN Act contains a similar provision.

- *House Secure Act 2.0 Bill, § 305; RISE & SHINE Act, § 111; EARN Act Summary.*
    - Effective for plan years beginning after 12/31/2022 (House Secure Act 2.0 Bill and RISE & SHINE Act) or after enactment (EARN Act).

Update: Secure 2.0 Act, § 320 includes a similar provision, effective after for plan years after December 31, 2022.

ii. Paper Benefit Statements.

- Participants who are receiving disclosures under the DOL's new electronic disclosure rules (see blog post) would be required to receive a one-time initial paper notice of their right to request paper documents and at least one paper benefits statement annually for a defined contribution plan, or every three years for a defined benefit plan, unless they affirmatively elect to receive their statements electronically.
- *House Secure Act 2.0 Bill, § 314.*
    - Effective for Plan years beginning after 12/31/2023.

Update: Secure 2.0 Act, § 338 includes a similar provision, requiring the Labor Secretary to update relevant sections of the regulations and guidance by December 31, 2024, other provisions effective for plan years after December 31, 2025.

iii. Blended Fund Benchmarks.

- The DOL would be directed to amend its regulations to allow for blended benchmarks to be used for comparative investment returns for designated investment alternatives that contain mixes of asset classes, such as target date funds.
- *House Secure Act 2.0 Bill, § 303; RISE & SHINE Act, § 103.*
    - The DOL would be required to report to Congress on implementation within 3 years after enactment (House Secure Act 2.0 Bill) or 1 year after enactment (RISE & SHINE Act).

Update: Secure 2.0 Act, § 318 includes a similar provision, requiring the DOL to update its regulations no later than two years after the enactment of the date of enactment.

iv. Agency Review of Reporting and Disclosure Requirements.

- The IRS, DOL, and PBGC would be directed to review the effectiveness of their regulations and to make recommendations to Congress on consolidating, simplifying, standardizing and improving the requirements so that participants have better and more timely information on their retirement benefits.
- The RISE & SHINE Act separately directs the Department of Labor to (i) review fee and disclosure reporting for participant-directed defined contribution plans to explore how they could be improved so that participants understand the cumulative effect of fees and expenses on retirement savings over time, (ii)

report its findings to the HELP Committee, and (iii) update its regulations to address consolidation of safe harbor notices and qualified default investment alternative notices (which is already permitted under Field Assistance Bulletin 2008-03).

- *House Secure Act 2.0 Bill, § 304; RISE & SHINE Act, §§ 106, 301, 302.*
    - Agencies would be required to report to Congress within two years after enactment (House Secure Act 2.0 Bill) or three years after enactment (RISE & SHINE Act).

Update: Secure 2.0 Act, §§ 319, 340, and 341 include a similar provision, directing agencies to act within two or three years from the date of enactment.

v. <u>Lump Sum Windows.</u>

- A plan administrator of a pension plan offering a lump sum window would be required to:
    - Provide a notice to participants to help them evaluate the opportunity, including identification of their options, how their benefit was calculated and the risks and tax implications of electing a lump sum. The IRS is directed to issue a model notice for this purpose.
    - Report to the IRS and PBGC no later than 30 days prior to the first day on which participants can elect a lump sum, notifying the agencies of the number of eligible participants, the length of the window, and providing an explanation of how the benefit was calculated and a sample participant notice.
    - Plan sponsors would also be required to report to the IRS and the PBGC within 90 days of the conclusion of the election the number of participants electing the lump sum and any other information required by the IRS.
- *RISE & SHINE Act, § 303.*
    - Effective no earlier than one year after enactment, with good faith compliance required no later than one year after the issuance of final regulations for participant disclosures and 6 months after the issuance of final regulations for reporting to the IRS and PBGC.

Update: Secure 2.0 Act, § 342 includes a similar provision, requiring the DOL to issue regulation implementing the provision not earlier than one year after the enactment and applicable not earlier than issuance of a final rule and not later than one year after issuance of a final rule.

vi. <u>Annual Funding Notice.</u>

- The annual funding notices for defined benefit plans would be modified to provide participants additional information regarding the funding status of the plans and the PBGC's guarantee of benefits.
- *RISE & SHINE Act, § 304.*
    - Effective for plan years beginning after 12/31/2023.

Update: Secure 2.0 Act, § 343 includes a similar provision, effective for plan years beginning after December 31, 2023.

vii. Standardized Rollover Forms.

- The IRS would be required to issue sample forms for direct rollovers to or from a retirement plan or IRA.
- *EARN Act Summary.*
  - Standard forms to be issued by 1/1/2025.

Update: Secure 2.0 Act, § 324 includes a similar provision, requiring the Treasury Secretary to develop and release sample forms no later than January 1, 2025.

c. Provisions Impacting Plan Administration or Investment

i. Hardship Withdrawals.

- Plans would be permitted to rely on employee certifications that they have had an event that qualifies for a hardship withdrawal (with possible exceptions under applicable regulations, such as where Plan fiduciaries have actual knowledge that is inconsistent with the certification). This appears to end all substantiation requirements for hardship withdrawals.
- *House Secure Act 2.0 Bill, § 317; EARN Act Summary.*
  - Effective for plan years beginning after 12/31/2022 (House Secure Act 2.0 Bill) or after enactment (EARN Act).

- Hardship withdrawal rules for 403(b) plans would be conformed to the rules that apply to 401(k) plans.
- *EARN Act Summary.*
  - Effective after the date of enactment.

Update: Secure 2.0 Act, § 312 includes a similar provision, effective for plan years beginning after the date of enactment.

ii. Missing Participants.

- The DOL, in consultation with IRS, would be directed to create an online searchable database to be known as the “Retirement Savings Lost and Found” that would allow individuals to search for any retirement benefits that may be due to them and to locate the plan administrator. The EARN Act version of this provision would require the IRS to maintain the data base and to hold balances under $1,000.
- *House Secure Act 2.0 Bill, § 306; EARN Act Summary.*
  - The DOL would be required to establish this database within 2 years after enactment (Secure Act 2.0; unspecified in EARN Act).

Update: Secure 2.0 Act, § 303 includes a similar provision, directing the DOL to create a database no later than two years after the date of enactment.

iii. De Minimis Financial Incentives for 401(k) Plans.

- Employers would be permitted to provide de minimis financial incentives to encourage employees to make 401(k) contributions. Currently the only incentives that can be provided for 401(k) contributions are matching contributions. De minimis financial incentives are not defined for this purpose.
- *House Secure Act 2.0 Bill, § 114; EARN Act Summary.*
    - Effective for plan years beginning after the date of enactment.

Update: Secure 2.0 Act, § 113 includes a similar provision, effective for plan years beginning after the date of enactment.

iv. <u>Pension Risk Transfer Guidance.</u>

- The DOL would be directed to review its guidance on fiduciary considerations for purchasing an annuity under a defined benefit plan, such as in connection with a plan termination.
- *House Secure Act 2.0 Bill, § 323; RISE & SHINE Act, § 105 Summary.*
    - The DOL would be required to report to Congress within one year after the date of enactment (House Secure Act 2.0 Bill) or as soon as practicable after enactment (RISE & Shine Act).

Update: Secure 2.0 Act, § 321 includes a similar provision, requiring the DOL to report to Congress on its findings no later than one year after the date of enactment.

v. <u>403(b) Plan Participation in Collective Investment Trusts (CITs).</u>

- Section 403(b) custodial accounts would be permitted to invest in CITs, which are investment funds for retirement plan investors that may be similar to registered mutual funds, but often with lower expense ratios.
- *Secure Act, § 105; EARN Act Summary.*
    - Effective for amounts invested after 12/31/2022 (House Secure Act 2.0 Bill) or after the date of enactment (EARN Act).

Update: Secure 2.0 Act, § 128 includes a similar provision, effective after date of enactment.

vi. <u>Distribution of Life Annuities.</u>

- The House Secure Act 2.0 Bill would allow for distribution of a participant's benefit in the form of a commercial annuity issued to a tax-qualified retirement plan for which annuity payments increase up to 5% annually, or an annuity that allows for a lump sum in lieu of future annuity payments or certain other accelerations of payments, or a death benefit up to the consideration paid for the annuity (less annuity payments made). The EARN Act includes a similar provision.
- *House Secure Act 2.0 Bill, § 201; EARN Act Summary.*
    - Effective for calendar years beginning after the date of enactment.

Update: Secure 2.0 Act, § 201 includes a similar provision, effective for calendar years after the date of enactment.

vii. <u>Qualifying Longevity Annuity Contracts.</u>

- Annuity contracts purchased with retirement plan or IRA assets that begin at a specific age (up to age 85) and meet certain other requirements would not be taken into account for RMDs. This provision would increase the premium limitation from $135,000 for 2022 to $200,000 (indexed) and would eliminate a restriction on premiums to 25% of the individual's account.
- *Secure Act, § 202; EARN Act Summary.*
    - Effective after the date of enactment.

Update: Secure 2.0 Act, § 202 includes a similar provision, effective for contracts purchase or received in an exchange on or after the date of the enactment.

d. Provisions Impacting Plan Corrections Program

i. <u>Overpayments.</u>

- Under the House Secure Act 2.0 Bill and the RISE & SHINE Act, plans would generally not be required to seek to recover inadvertent overpayments either by asking the participant to return the overpayment or reducing future benefit payments to the correct amount under the plan. Plans could nevertheless seek the return of overpayments if (i) no interest or other costs apply to the overpayment; (ii) overpayments are recouped by offsetting annuity payments; (iii) no more than a 10% reduction applies; and (iv) no recovery from a surviving spouse or other beneficiary is permitted. Further, overpayments would be subject to a 3-year limitations period, so the return of an overpayment could not be sought if the participant or beneficiary is not notified in writing within 3 years after the overpayment initially occurred. The EARN Act contains a similar provision.
- *House Secure Act 2.0 Bill, § 301; RISE & SHINE Act, § 108; EARN Act Summary.*
    - Effective as of the date of enactment (House Secure Act 2.0 Bill, RISE & SHINE Act and EARN Act), but certain overpayment recovery arrangements in process are grandfathered (House Secure Act 2.0 Bill, RISE & SHINE Act).

Update: Secure 2.0 Act, § 301 includes a similar provision, effective after the date of enactment.

ii. <u>Auto-Enrollment/Increase Failures.</u>

- Plans are permitted to self-correct auto-enrollment or auto-increase failures within 91/2 months of the end of a plan year as long as the correction is favorable to the participant and corrected consistently for all similarly situated participants in a nondiscriminatory manner. Under the House Secure Act 2.0 Bill, the IRS would be directed to specify appropriate correction methods for these purposes. The EARN Act would make permanent an existing safe harbor permitting employers to correct auto-enrollment failures.

- *House Secure Act 2.0 Bill, § 115; EARN Act Summary.*
    - Effective as of the date of enactment (House Secure Act 2.0 Bill) or after 12/31/2023 (EARN Act).

Update: Secure 2.0 Act, § 350 includes a similar provision, effective for errors after December 31, 2023.

iii. <u>Expansion of Self-Correction under EPCRS.</u>

- Under the House Secure Act 2.0 Bill, the IRS correction program (EPCRS) would be modified to provide for self-correction of any inadvertent compliance failure regardless of when the failure occurred provided there were practices and procedures in place designed to prevent the error, unless otherwise provided by the Internal Revenue Code or IRS regulations. There would be exceptions for (i) failures that the IRS discovers before actions are taken to demonstrate a commitment to self-correcting, (ii) egregious failures, (iii) failures involving a misuse or diversion of plan assets, and (iv) abusive tax avoidance transactions. The IRS would also be directed to specify additional safe harbors for corrections, including earnings methods. The EARN Act includes a similar provision expanding access to self-correction options under EPCRS.
- *House Secure Act 2.0 Bill, § 308; EARN Act Summary.*
    - No effective date specified (Secure Act) or effective as of date of enactment (EARN Act).

Update: Secure 2.0 Act, § 305 includes a similar provision, requiring the IRS to update guidance no later than two years after the date of enactment.

e. Plan Amendments

i. <u>Plan Amendment Deadlines.</u>

- Plan amendments to implement provisions of the House Secure Act 2.0 Bill would generally be required to be adopted by the end of the first plan year beginning on or after 1/1/2024, unless the deadline is extended by the IRS.
- *House Secure Act 2.0 Bill, § 501.*
    - The amendment deadlines for the Secure Act (2019) and the CARES Act would be extended from the end of the first plan year beginning on or after 1/1/2022 to the end of the first plan year beginning on or after 1/1/2024.
- *House Secure Act 2.0 Bill, § 501; RISE & SHINE Act, § 701.*
    - Plan amendments to implement the RISE & SHINE Act would be due by the last day of the first plan year beginning on or after 1/1/2025.
- *RISE & SHINE Act, § 701.*
    - Plan amendments to implement the EARN Act would be due by 12/31/2024 for calendar year plans.

Update: Secure 2.0 Act, § 501 includes a similar provision, except that plan amendments will generally be required on or before the last day of the first plan year beginning on or after January 1, 2025 (or

2027 in the case of government plans), which is at least as favorable or more favorable than the extended deadlines announced by the IRS in Notice 2022-33 and Notice 2033-45.

III. Provisions of Prior Bills Not Included in SECURE 2.0 Act

a. New 401(k) Plan Safe Harbor.

- A new safe harbor 401(k) plan design would be available for plans that offer automatic enrollment with default contributions of at least 6% of compensation, with automatic increases of at least 1% per year up to at least 10%. Matching contributions would be required of 100% of the first 2% of compensation deferred, 50% of the next 4% of compensation deferred, and 20% of the next 4% of compensation deferred. For example, a participant contributing 10% of compensation would receive a matching contribution of 4.8% of compensation. This would require greater contributions than the existing safe harbor for automatic enrollment arrangements, but small employers offering this safe harbor design may be eligible for a tax credit.
- *EARN Act Summary.*
    - Effective for plan years beginning after 12/31/2023.

Update: Secure 2.0 Act does not include a similar provision.

b. Incidental Settlor Expenses.

- Expenses relating to the administration of a plan are payable from plan assets, but expenses relating to plan design must be paid by the employer. This provision would allow “incidental expenses solely for the benefit of participants and beneficiaries” to be paid from plan assets, such as costs incurred in considering automatic enrollment or automatic increases.
- *RISE & SHINE Act, § 402.*
    - Effective date not specified.

Update: Secure 2.0 Act does not include a similar provision.

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