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# Participation of Long-Term, Part-Time Employees in 401(k) Plans

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One of the goals of the Setting Every Community Up for Retirement Enhancement Act (the "SECURE Act"), which was passed in late 2019, was to increase participation in 401(k) plans. In this regard, Section 112 of the SECURE Act requires certain long-term, part-time employees to be given the opportunity to make salary deferrals to a 401(k) plan. The clock started on January 1, 2021 for tracking hours to determine eligibility under a 401(k) plan as a long-term, part-time employee. As we are nearing the close of the first 12-month period since the effective date, employers that exclude part-time employees from 401(k) plan participation should ensure that they are on track for compliance with the new rules.

**Background**. The minimum age and service conditions of ERISA allow employees to be excluded prior to attaining age 21 or performing one year of service. For plans that credit service based on hours worked as opposed to the basis of elapsed time, part-time or seasonal employees could be excluded as a class unless and until they earn at least 1,000 hours of service during a 12-month period (or in a subsequent plan year after the initial computation period), even if the plan generally provides for immediate participation of full-time employees. As a result, long-term, part-time employees could potentially be excluded from participating in the plan indefinitely.

The SECURE Act modifies the minimum age and service conditions to mandate that part-time employees who earn at least 500 hours of service in each of three consecutive 12-month periods be offered the opportunity to enroll in a 401(k) plan and to make salary deferrals.

**Eligibility to Defer**. Effective for plan years beginning on or after January 1, 2021, long-term, part-time employees who complete three consecutive 12-month periods, each with at least 500 hours of service, must be given the opportunity to participate in the employee deferral component of a 401(k) plan. The initial computation period begins on January 1, 2021. Accordingly, part-time employees may first become eligible to defer under a 401(k) plan as a long-term, part-time employee after earning at least 500 hours of service in each of 2021, 2022 and 2023.

A long-term, part-time employee who has completed the statutory age and service requirement must become a participant no later than the earlier of (i) the first day of the plan year after meeting such requirements or (ii) six months following the date the employee satisfies the requirements.

These rules do not apply to employees covered by collective bargaining agreements if their retirement benefits were the subject of good faith bargaining. The new rules also do not apply to employees who have not attained age 21 by the close of the three consecutive 12-month periods.

**Nondiscrimination Testing.** Employers may elect to exclude the long-term, part-time employees from their nondiscrimination (ADP/ACP, 410(b) and top-heavy) testing.

**Eligibility for Employer Contributions**. Employers are not required to make employer matching and profit sharing contributions on behalf of long-term, part-time employees. Long-term, part-time

employees may also be excluded from safe harbor profit sharing or nonelective contributions under a safe harbor 401(k) plan.

However, if a long-term, part-time employee subsequently satisfies the general minimum age and service requirements by completing at least 1,000 hours of service, the employee becomes eligible to participate in any employer contributions and must be included in the nondiscrimination tests. This is a result of the general minimum age and service rules rather than the changes under the SECURE Act.

**Vesting**. If an employer voluntarily chooses to provide employer matching or profit sharing contributions that are subject to a vesting schedule to long-term, part-time employees, then years of service for vesting purposes must include each 12-month period during which the employee earns at least 500 hours of service. This rule generally requires crediting of vesting service for all years in which the employee performed at least 500 hours of service, including 12-month periods before January 1, 2021. The IRS recognizes the administrative burdens related to counting years of service beginning before 2021 for vesting purposes and has requested comments to simplify the process.

Employers may still disregard years of service before an employee reaches age 18 or prior to the establishment of the plan for purposes of determining eligibility.

**Effective Date.** Section 112 of the SECURE Act became effective January 1, 2021. This generally means that 2021 is the first period in which part-time employees' hours must be tracked to determine their eligibility, although they would not satisfy the eligibility conditions of Section 112 until their third consecutive 12-month period of earning at least 500 hours of service, which would be no earlier than 2023. As noted above, earlier periods may be required to be taken into account for vesting purposes if employer contributions are made on a long-term, part-time employee's behalf.

In general, employers must amend their plans to comply with the new long-term, part-time employee rules by the last day of the plan year beginning on or after January 1, 2022 (by December 31, 2022 for calendar year plans), with later deadlines for certain collectively bargained plans and governmental plans.