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Congress Passes Secure Act with Significant Changes to Retirement Plans

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The Setting Every Community Up for Retirement Act of 2019, or "Secure Act", has been passed by Congress as part of a large government funding bill. Upon being signed into law by the President, the Secure Act will be the most significant legislation affecting retirement plans since the Pension Protection Act of 2006. This is a high level summary of some key provisions of the Secure Act. Upcoming posts will focus on some of these provisions in greater detail.

- Increase in Age for Required Minimum Distributions. Participants currently must begin to receive their retirement benefits by April 1 of the year following the year in which they attain age 70-1/2 or, if later, retire, except for 5% owners. The Secure Act increases the age for minimum distributions to age 72 for distributions after December 31, 2019, but only for participants who attain age 70-1/2 after that date. Participants who attain age 70-1/2 before December 31, 2019, will not be affected by this change.

- Safe Harbor 401(k) Plans. The Secure Act provides significant changes to safe harbor 401(k) plans for plan years beginning after December 31, 2019.

    - *Nonelective safe harbor contributions.* Safe harbor plans that provide for safe harbor nonelective contributions of at least 3% of compensation will not be required to provide an annual notice in advance of each plan year. Further, a plan can be amended to provide for safe harbor nonelective contributions up until 30 days in advance of the plan year. The amendment can further be delayed until after the end of the year if safe harbor nonelective contributions of at least 4% of compensation are provided. The safe harbor notice and amendment requirements are not changed for plans that provide safe harbor matching contributions.

    - *Automatic contribution arrangements.* Currently, a safe harbor plans with auto-escalation features cannot result in a participant's automatic deferral percentage exceeding 10% of compensation. The Secure Act increases the maximum automatic

deferral to 15% of compensation after the first year of enrollment.

- Coverage of Long-Term Part-Time Employees in 401(k) Plans. Part-time employees can currently be excluded from 401(k) plan participation until they earn at least 1,000 hours of service in a year. The Secure Act requires that part-time employees who earn at least 500 hours of service for each of three consecutive 12-month periods be offered the opportunity to defer under a 401(k) plan. (Part-time employees who have not earned at least 1,000 hours in a year may still be excluded from eligibility for matching or nonelective contributions.) This requirement is generally effective for plan years beginning after December 31, 2020.

- Lifetime Income Disclosures. Benefit statements for 401(k) plans, 403(b) plans and other individual account plans will be required to show what the equivalent stream of payments would be under a single life annuity or qualified joint and survivor annuity. This is informational only; annuity options are not required to be offered to participants. The Secure Act directs the Department of Labor to develop a model disclosure form and actuarial assumptions to be used within 12 months of enactment. Plans will have at least 12 months after the issuance of the model notice and guidance on actuarial assumptions or, if later, interim final regulations, to comply with the lifetime income disclosure requirements.

- Lifetime Income Options. A "lifetime income investment" is a type of investment option that allows participants to lock in guaranteed annuity payments under a 401(k) plan, a 403(b) plan or a governmental 457(b) plan. The Secure Act provides that plans offering these options may permit participants to roll over their lifetime income investments or receive a distribution of an annuity contract up to 90 days before the lifetime income investment is eliminated as an investment option under the plan, regardless of whether the participant has otherwise incurred a distribution event. This provision is effective for plan years beginning after December 31, 2019. The Secure Act also provides for a fiduciary safe harbor for defined contribution plan fiduciaries in selecting and monitoring guaranteed retirement income contracts.

- Withdrawals for Birth or Adoption Expenses. Defined contribution plans, including 401(k) plans, 403(b) plans and governmental 457(b) plans, may provide for distributions of up to $5,000 on account of a birth or adoption of a child of the participant. These distributions may

be taken within one year of the birth or adoption and are not subject to the 10% additional tax on distributions before age 59-1/2. Further, participants can repay these distributions back to the plan, in which case the repayments will be treated as rollover contributions. These provisions apply to distributions made after December 31, 2019.

- Open Multiple Employer Plans (MEPs). The Secure Act expands the availability of "open MEPs" – retirement plans covering unrelated employers – by allowing for plans to be sponsored by vendors who acknowledge their fiduciary status, register with the Department of Labor and meet certain other requirements. Further, the Secure Act provides that a qualification failure involving one employer in a MEP generally will not result in the disqualification of the entire MEP (known as the "one bad apple" rule).

- Frozen Defined Benefit Plans. The Secure Act provides nondiscrimination testing relief for defined benefit pension plans that have been closed to new participants.

- Adoption of Plans after Close of Plan Year. The Secure Act allows plan sponsors to adopt new pension or profit sharing plans for a plan year after the end of the year up until the due date (with extensions) for the tax return for the year. This provision applies to plan years beginning after December 31, 2019.

- In-Service Pension Distributions. Defined benefit pension plans are currently able to offer in-service distributions to participants who have attained age 62. In-service distributions will be permissible for participants who have attained age 59-1/2 for plan years beginning after December 31, 2019.

- Combined Form 5500. The Department of Labor and IRS have been directed to modify the Form 5500 reporting requirements to allow defined contribution plans maintained by employers within the same controlled group that have common trustees, investment options and plan years to file a single Form 5500.