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IRS Issues Proposed Regulations Regarding Mandatory Auto-Enrollment Under SECURE 2.0

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The IRS and Treasury Department recently issued proposed regulations addressing the mandatory automatic enrollment provisions under the SECURE 2.0 Act of 2022 (SECURE 2.0). The proposed regulations generally adopt the previous interim guidance that was issued by the IRS in Notice 2024-02, with additional clarifications and some important new guidance.

By way of background, SECURE 2.0 requires a new 401(k) plan or 403(b) plan established on or after December 29, 2022 to include an eligible automatic enrollment arrangement (EACA) starting with plan years beginning after December 31, 2024. Plans established prior to December 29, 2022, church plans, governmental plans, or plans maintained by certain small or new businesses are not subject to this requirement. Previously, the IRS released Notice 2024-02 (discussed further in our prior blog post), which provided guidance on the mandatory automatic enrollment requirements, along with other provisions under SECURE 2.0. Notice 2024-02 clarified that a plan is considered to be established as of the date the plan was adopted, even if the plan was initially effective after December 29, 2022. Notice 2024-02 also provided clarifications on how this new requirement would impact plan mergers and spin-offs.

We have addressed the key provisions of the recent proposed regulations below.

Plan Mergers and Spin-Offs

The proposed regulations generally adopt the prior guidance in Notice 2024-02 regarding plan mergers and spin-offs. When two or more plans that were adopted before December 29, 2022 (i.e., "grandfathered" plans) are merged, the resulting plan will also be grandfathered. However, if a grandfathered plan is merged with a non-grandfathered plan, the resulting plan will not be grandfathered unless (i) the plan merger occurs during the coverage testing transition period, which is the plan year following the plan year in which a corporate M&A transaction occurs that changed the controlled group, and (ii) the grandfathered plan is treated as the surviving plan. With respect to plan spin-offs, a plan that is spun-off from a grandfathered plan will also be treated as a grandfathered plan.

Impact of Plan Amendments on Grandfathered Plans

The proposed regulations clarify that a grandfathered plan will not lose its status as exempt from the mandatory automatic enrollment requirements simply because the plan is amended outside of the plan merger and spinoff context addressed above. For example, amending a plan to cover additional groups

of employees would not result in the loss of grandfathered status.

Exceptions for Small Employers and New Businesses

SECURE 2.0 provides that the mandatory automatic enrollment requirements do not apply to employers with 10 or less employees. The proposed regulations clarify that an employer should use the same methodology for counting employees that is used for purposes of COBRA coverage requirements (i.e., the employer had less than 11 employees on at least 50% of its typical business days during a particular calendar year) when determining if they meet this exception. In addition, the proposed regulations provide that the mandatory automatic enrollment requirements do not apply to a plan for a particular plan year if the employer maintaining the plan (including any predecessor employer) has been in existence for less than three years.

Multiple Employer Plan (MEP) Considerations

As discussed further in our prior blog post, Notice 2024-02 confirmed that the determination of whether a multiple employer plan (MEP), including a pooled employer plan (PEP), is exempt from the mandatory automatic enrollment requirements (i.e., "grandfathered") is determined on an employer-by-employer basis. If a grandfathered plan is merged into a MEP, then the employer's portion of the MEP will continued to be treated as grandfathered. If a non-grandfathered plan is merged into a MEP, the employer's portion of the MEP will not be treated as grandfathered. Although Notice 2024-02 did not address the merger of a grandfathered plan into a MEP that was established after December 29, 2022, the proposed regulations clarify that if an employer maintains a grandfathered plan and the plan then mergers into a non-grandfathered MEP, the plan will retain its grandfathered status with respect to that employer. As a result, under the proposed regulations, a grandfathered plan would be permitted to join a MEP or PEP in the future and retain its grandfathered status regardless of when the MEP or PEP was established.

Mandatory Automatic Enrollment Requirements

For a 401(k) plan or 403(b) plan subject to the new mandatory automatic enrollment provisions, the following requirements must be met:

- EACA Structure: The proposed regulations confirm that the required EACA must provide for enrollment at a uniform deferral percentage of between 3% and 10%, with annual 1% increases up to a maximum deferral percentage of between 10% and 15%. Further, a participant must be allowed to make a permissible withdrawal within 90 days of the first automatic contribution.
- EACA Must Cover All Employees: The proposed regulations clarify that the requirement to include an EACA in the plan means that all employees, including long-term, part-time employees, who are eligible for elective deferral contributions must be covered by the EACA.
- Exception for Employees with Affirmative Elections: The proposed regulations clarify that a plan

may exclude from the EACA any employees who already had an affirmative election in place on the day the plan first became subject to the automatic enrollment requirements (i.e., the first day of the 2025 plan year).

Participant Notices

SECURE 2.0 includes a provision allowing plans to provide certain unenrolled participants with a simplified annual reminder notice in lieu of the standard suite of annual notices required to be provided to participants. This annual reminder notice may only be sent to participants after their initial year of eligibility. During the initial year of eligibility, all participants must receive all required notices. The proposed regulations confirm that for plans subject to the mandatory automatic enrollment requirements, the annual EACA required notice does not need to be provided to eligible unenrolled participants who receive the annual reminder notice. The proposed regulations also provide that the required EACA annual notices for all participants may be combined with certain other required participants notices, such QDIA notices, safe harbor plan notices, QACA notices, and notices for Pension-Linked Emergency Savings Accounts (PLESAs).

Effective Date

The new mandatory automatic enrollment requirements under SECURE 2.0 went into effect for plan years beginning after December 31, 2024. However, the proposed regulations will not go into effect until the first plan year that begins six months after final regulations are issued. For any plan years prior to final regulations being issued, the IRS will treat a plan as having complied with the mandatory automatic enrollment requirements if the plan follows a reasonable, good faith interpretation of the law.

The IRS is currently accepting written comments on the proposed regulations through March 17, 2025. A public hearing on the proposed regulations is scheduled for April 8, 2025.