



Employee Benefits & Executive Compensation ADVISORY ■

NOVEMBER 3, 2023

Retirement Plan Amendments and 2023 Year-End Action Items

This advisory reminds qualified retirement plan sponsors of upcoming deadlines for amending qualified retirement plans and highlights other action items for plan sponsors to consider.

Qualified Plan Amendments and Other Changes

Amendments for Changes in Law

In some years, plans are required to be amended to reflect certain changes in law. This year does not appear to be such a year for most retirement plans. However, plan sponsors who made discretionary changes to their plans during the 2023 plan year should ensure that these amendments are documented in a formal plan amendment before the end of the year.

Implementation Steps Related to Recent Legislation

December 31, 2023 deadline to adopt changes under other recent legislation

Long-term part-time employees must be able to participate in their employer's 401(k) plan beginning January 1, 2024.

The SECURE Act was passed in late 2019 (SECURE 1.0). While the Act made several changes, it generally does not require plans to be amended until December 31, 2025 to reflect these changes. However, the changes must still be implemented operationally in the meantime. One such change requires 401(k) plan sponsors to amend any hours-based exclusions to allow long-term part-time employees (i.e., employees who complete at least 500 hours of service in the years 2021, 2022, and 2023) to make employee deferrals starting in 2024. Note that this is different from the requirement under SECURE 2.0 (passed in late 2022), which shortens the requirement to two consecutive years and counts years beginning January 1, 2023 or later. Plan sponsors of 401(k) plans that have hours-based exclusions should consider discussing with their recordkeeper how they are tracking these long-term part-time employees and ensure the requirements are implemented properly.

Other Action Items

IRS Relief for Roth Mandatory Catch-Up Contributions for Certain Employees

SECURE 2.0 requires that any catch-up contributions from employees who earned more than \$145,000 in the prior calendar year be made on a Roth basis. While this requirement is technically effective January 1, 2024, the IRS released Notice 2023-62 implementing an administrative transition period until 2026. Under this relief, the IRS will not consider

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plans to be out of compliance until 2026, though plan sponsors can decide to implement the requirement sooner if desired. Plan sponsors may wish to begin discussions of these requirements with their advisers, recordkeepers, and payroll providers to determine the best time to implement these new requirements, particularly for plans that do not already permit Roth contributions.

IRS Guidance on RMDs After Death

If a participant dies before taking a full distribution from a retirement plan such as certain IRAs or a qualified plan, the Code previously required that the beneficiary receive the entire balance of the account at the end of a five-year period unless an exception applied. SECURE 1.0 changed this to require distribution of the participant's entire balance over a 10-year period for deaths occurring January 1, 2020 or later. Many practitioners interpreted this requirement to mean that the entire distribution must take place by the end of the 10-year period. However, the Treasury published proposed regulations stating that in some cases, the 10-year distribution requirement also required a distribution in each year of the 10-year period. The Treasury proposal came as a surprise to some practitioners and beneficiaries who had not taken annual distributions in 2021, 2022, and 2023. In Notice 2023-5, the IRS provided relief for anyone in this situation who failed to take distributions in years before the effective date of the regulations. While a proposed regulation is not law, we believe many sponsors will find the risk/reward calculation favors treating the Treasury proposal as correct. Plan sponsors should consider discussing these new proposed requirements with their recordkeepers and begin to implement appropriate measures to ensure minimum distributions are processed correctly.

Optional Increased Mandatory Distribution Limit Under SECURE 2.0

SECURE 2.0 increased the limit for mandatory cash-outs under retirement plans from \$5,000 to \$7,000, effective January 1, 2024. While this is an optional change, some recordkeepers have begun steps to implement the change unless the plan sponsor takes action to inform them otherwise. Plan sponsors should consider reviewing their plan documents to determine how the mandatory distribution threshold is described and consider whether any amendments or action are necessary.

Proposed IRS Regulations on the Use of Forfeitures

On February 27, 2023, the IRS published proposed regulations on forfeiture accounts in defined contribution plans. The proposed regulations require that forfeitures resulting from unvested benefits be spent no later than 12 months after the close of the plan year in which the forfeitures were incurred. The IRS indicated that failure to observe these spending regulations may be considered an operational failure requiring correction under the Employee Plans Compliance Resolution System. The proposed regulations also provide for transition relief for forfeitures accrued during plan years beginning before January 1, 2024 – these can be treated as occurring in the first plan year beginning on or after January 1, 2024 and would need to be used within 12 months of the end of that first plan year.

This new guidance presents an opportunity for plan sponsors and fiduciaries to review their plans' forfeiture provisions and procedures. It may be appropriate to discuss this with recordkeepers to ensure forfeitures are being properly tracked, reported on, and used within the applicable time limit.

Plan rules for use of forfeitures are typically specified in the plan document, so plan sponsors will want to review these provisions of their plan documents to verify that forfeitures are being used correctly. Recently, some plans have been subject to litigation over the use of forfeitures, so plan sponsors may wish to review their forfeiture use provisions with their legal adviser as well. If plan sponsors determine that their forfeiture use provisions need to be updated to reflect the new proposed regulation or amended for any other reason, the end of the year presents an excellent opportunity to formally amend the plan to update these provisions.

Other Items to Consider

As you review your plan document, you may consider whether adding or reviewing any of the following provisions under your retirement plan is appropriate:

- Class action waiver provision
- Nonseverability/severability provision
- Mandatory arbitration provision
- Internal time limitations and forum selection provisions

We observe that arbitration and class action waiver provisions have been the subject of recent litigation, so plan sponsors with such provisions (or wishing to consider adding such provisions) may wish to reach out to their legal counsel to discuss these provisions. In some cases, it may be appropriate to modify these provisions to enhance the case for enforceability. However, these features are not legally required and might not be appropriate for every qualified retirement plan or for every plan sponsor.

Conclusion

The end of the year presents an opportunity for plan sponsors to review their qualified retirement plans and consider whether their retirement plans have any legally required amendments and whether they want to add any of the features discussed above even before a legally required deadline. Please do not hesitate to contact your Alston & Bird attorney to discuss any of the plan amendments or other action items.

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