U.S. CHAMBER OF COMMERCE

The SECURE Act
Summary & Applications

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) impacts nearly all types of employers and retirement plans. Below is a summary of the provisions with the titles color coded based on applicability.

Titles in **black bolded** font impact all plans, **orange bolded** font impact small plans, **green bolded** font impact limited types of plans, and **blue bolded** font do not impact retirement plans.

TITLE I—EXPANDING AND PRESERVING RETIREMENT SAVINGS

Sec. 101. Multiple employer plans; pooled employer plans.

This provision would allow for open multiple employer plans sponsored by pooled providers. The pooled provider would be the named fiduciary and plan administrator under the Employee Retirement Income Security Act of 1974 (ERISA). However, each employer under the plan would remain responsible for the selection and monitoring of the pooled provider. There is no limit to the size of an employer that could participate in a pooled provider plan.

The SECURE Act also eliminates the one bad apple rule, which provides that the actions of one participating employer could disqualify the entire plan.

Sec. 102. Increase in 10 percent cap for automatic enrollment safe harbor after first plan year.

Under current law, an employer may automatically enroll employees in a 401(k) plan. Under the Internal Revenue Code of 1986 (Code), the amount of elective deferrals for an automatic contribution arrangement cannot exceed 10 percent of compensation. The SECURE Act would increase the amount to 15 percent (but no more than 10 percent in the first year that the participant is enrolled).

Sec. 103. Rules relating to election of safe harbor 401(k) status.

Under current law, if an employer elects to use the safe harbor contribution method to meet the Actual Deferral Percentage (ADP) nondiscrimination testing, the plan sponsor must give an annual notice to the employee regardless of the safe harbor method elected (namely, either a matching contribution or a non-elective contribution).

Under the SECURE Act, a plan sponsor would not be required to give notice of the safe harbor election if the plan sponsor elects the non-elective contribution safe harbor. The notice would still be required if the matching contribution safe harbor is used.

Sec. 104. Increase in credit limitation for small employer pension plan startup costs.

The SECURE Act would increase the credit for plan start-up costs for small employers to the greater of: (1) $500; or (2) the lesser of (a) $250 multiplied by the number of non-highly compensated employees of the eligible employer who are eligible to participate in the plan or (b) $5,000. The credit would apply for up to three years. A small employer is an employer with no more than 100 employees.

Sec. 105. Small employer automatic enrollment credit.

The SECURE Act would create a new tax credit of up to $500 per year to employers to defray startup costs for new section 401(k) plans and SIMPLE IRA plans that include automatic enrollment. The credit is in addition to the plan start-up credit allowed under present law and would be available for three years. The credit also would be available to employers that convert an existing plan to an automatic enrollment design. A small employer is an employer with no more than 100 employees.

Sec. 106. Certain taxable non-tuition fellowship and stipend payments treated as compensation for IRA purposes.

N/A

Sec. 107. Repeal of maximum age for traditional IRA contributions.

N/A

Sec. 108. Qualified employer plans prohibited from making loans through credit cards and other similar arrangements.

The SECURE Act effectively prohibits loans through credit cards or other similar arrangements by providing that any loan made through a credit card or similar arrangement would be treated as a distribution subject to taxation.

Sec. 109. Portability of lifetime income options.

The SECURE Act would allow 401(k), governmental 457(b) and 403(b) plans to make a trustee-to-trustee distribution of a lifetime income investment in the form of a qualified plan distribution annuity contract 90 days or later after the investment is no longer authorized to be held as a plan investment. A “qualified plan distribution annuity contract” is an annuity contract that the plan purchases for a participant.

Sec. 110. Treatment of custodial accounts on termination of section 403(b) plans.

The SECURE Act mandates that the Secretary of Treasury provide regulations that where an employer terminates a 403(b) custodial account, it may be terminated by providing an in-kind distribution to an individual custodial account of a participant or beneficiary. The individual custodial account will be maintained on a tax-deferred basis as a 403(b) custodial account until paid out, subject to the 403(b) rules in effect at the time that the individual custodial account is distributed. The Treasury guidance must be retroactively effective for taxable years beginning after December 31, 2008.

Sec. 111. Clarification of retirement income account rules relating to church controlled organizations.

Certain rules do not apply to 403(b) account plans that are retirement income account plans established or maintained by a church or a convention or association of churches to provide benefits under the plan to employees of a religious, charitable or similar tax-exempt organization. The SECURE Act clarifies individuals that may be covered by plans maintained by church controlled organizations.

Sec. 112. Qualified cash or deferred arrangements must allow long-term employees working more than 500 but less than 1,000 hours per year to participate.

Under current law, a defined contribution plan may exclude an individual who does not have a year of service, which is defined as at least 1,000 hours within a 12-month period. The SECURE Act would require that a plan (except collectively bargained plans) allow an individual to participate the earlier of: (1) one year of service; or (2) three consecutive years during which the employee had at least 500 hours of service and the employee is at least 21 years old in the third year. Regardless of the nondiscrimination requirements, an employer is not required to make a matching or non-elective contribution on behalf of employees who are eligible to participate because of the 500-hour rule.

An employer also would be allowed to elect to exclude such employees from non-discrimination testing, including the coverage (410(b)), contribution (401(a)(4)), ADP and Actual Contribution Percentage (ACP), safe harbor plans, and automatic contribution plans. Such employees also may be excluded from top heavy testing. For vesting purposes, each 12-month period in which at least 500 hours of services are performed will be considered a year of service.

Sec. 113. Penalty-free withdrawals from retirement plans for individuals in case of birth of child or adoption.

Under current law, there is an additional 10 percent tax penalty on distributions that do not meet certain requirements. The SECURE Act provides that this penalty would not apply to distributions for a qualified birth or adoption, if that distribution does not exceed $5,000 for each birth or adoption. A qualified birth or adoption distribution is any distribution from a plan to an individual within one year of the date of the birth or date of the legal adoption. An eligible adoptee is defined as an individual (other than the child of the taxpayer's spouse) who is not yet 18 years old or is physically or mentally incapable of self-support.

The SECURE Act also would allow an individual to repay any qualified birth or adoption distribution. However, the details would need to be worked out in regulations.

Sec. 114. Increase in age for required beginning date for mandatory distributions.

Under current law, an individual must start required minimum distributions from a plan by April 1 of the year following the year the individual reaches age 70 ½. The SECURE Act would change the age to 72. Conforming amendments were made in the case of a spouse as beneficiary and for owners. This rule also will apply to IRAs and governmental 457(b) plans.

Sec. 115. Special rules for minimum funding standards for community newspaper plans.

The SECURE Act would allow certain community newspaper defined benefit plans to elect to use different interest rates for funding purposes. In addition, such entities would be allowed to amortize any shortfall over 30 years rather than the current 7 years. A community newspaper plan is a plan maintained by an employer that, as of December 31, 2017:

- Publishes and distributes (either electronically or in print) one or more community newspapers in a single state;
- Is not publicly traded or controlled by a publically traded company;
- Is controlled by:
    - one or more persons residing in the state where the community newspaper is published;
    - for not less than 30 years, individuals who are members of the same family;
    - a trust created or organized in the state in which the newspaper is published;
    - a 501(c)(3) entity and the primary purpose of the entity is to benefit communities in the state; or
    - a combination of the above; and
- Does not control any newspaper in any other state.

In addition, to be eligible no participant may have had the participant's accrued benefit increased (whether because of service or compensation) after December 31, 2017.

Sec. 116. Treating excluded difficulty of care payments as compensation for determining retirement contribution limitations.

Some home health care workers receive difficulty of care payments to care for certain foster children in their homes. These payments are not includible as income. Home health care workers receiving only these payments cannot participate in tax-qualified retirement plans or IRAs because "difficulty of care" payments are not considered compensation or earnings upon which contributions to such plans or IRAs may be made. The SECURE Act would amend the Code to consider such payments compensation for purposes of a qualified plan and an IRA.

TITLE II—ADMINISTRATIVE IMPROVEMENTS

Sec. 201. Plan adopted by filing due date for year may be treated as in effect as of close of year.

The SECURE ACT would allow businesses to treat qualified retirement plans adopted after the close of the taxable year, but before the due date (including extensions) of the tax return, as having been adopted as of the last day of the taxable year.

Sec. 202. Combined annual report for group of plans.

The SECURE Act would direct the Secretaries of Treasury and Labor to modify the Form 5500 to allow all members of a group of plans to file a single return. To be eligible, a group of plans must meet the following:

- Be an individual account plan or defined contribution plan;
- Have the same trustees;
- Have the same one or more named fiduciaries;
- Have the same administrator under ERISA and plan administrator under the Code;
- Have the same plan year; and
- Provide the same investments or investment options for participants and beneficiaries

Sec. 203. Disclosure regarding lifetime income.

Under current law, a plan administrator must provide both quarterly and annual notices to individuals in certain individual account plans. The SECURE Act adds a new requirement to the annual statement. The plan administrator would be required to include on the annual statement the "lifetime income stream equivalent" that is equal to the participant's or beneficiary's total accrued benefits. The "lifetime income stream equivalent" is defined as the monthly payments the participant or beneficiary would receive either as a single life annuity or a joint and survivor annuity. The Secretary of Labor would be directed to create a model disclosure within one year of enactment that:

- Explains that the lifetime income stream equivalent is only provided as an illustration;

- Explains that the actual payments under the lifetime income stream described in the illustration will depend on numerous factors and may vary substantially from the lifetime income stream equivalent in the disclosures;
- Provides the assumptions upon which the lifetime income stream equivalent was determined; and
- Provides such other, similar explanations as the Secretary of Labor considers appropriate.

Within a year of enactment, the Secretary of Labor also would be required to issue regulations with the assumptions that plan administrators must use to calculate the "lifetime income stream equivalent." The Secretary of Labor may issue either a single set of assumptions or a range of assumptions that may be used. If an accrued benefit is or may be invested in a lifetime income stream, the assumptions for that investment may be used.

The SECURE Act provides that "[n]o plan fiduciary, plan sponsor, or other person shall have any liability under this title solely by reason of the provision of lifetime income stream equivalents which are derived in accordance with the assumptions and rules" provided by the Secretary of Labor, which includes the explanation provided in the model disclosure notice.

The SECURE Act does not provide a minimum account balance threshold for which this disclosure would be required.

Sec. 204. Fiduciary safe harbor for selection of lifetime income provider.

Currently, ERISA does not have any specific fiduciary rules related to the purchase of annuities by plans. Instead, the general fiduciary rules apply, and standards have been developed through litigation, particularly with respect to the purchase of annuities in a terminated defined benefit plan. The SECURE Act would provide a specific safe harbor to the ERISA fiduciary rules with respect to the selection of annuity products within a defined contribution plan.

Under this safe harbor, a fiduciary will be deemed to have met the ERISA prudence standard in selecting an insurer for a guaranteed retirement contract, if the fiduciary:

(A) Engages in an objective, thorough, and analytical search for the purpose of identifying insurers from which to purchase such contracts;

(B) Considers, with respect to each insurer identified
   - (i) the financial capability of such insurer to satisfy its obligations under the guaranteed retirement income contract; and
   - (ii) the cost (including fees and commissions) of the guaranteed retirement income contract offered by the insurer in relation to the benefits and product features of the contract and administrative services to be provided under such contract; and

(C) Concludes, on the basis of such consideration, that
   - (i) at the time of the selection, the insurer is financially capable of satisfying its obligations under the guaranteed retirement income contract; and

(ii) the relative cost of the selected guaranteed retirement income contract is reasonable.

A fiduciary will meet the requirement of determining that at the time of the selection the insurer is capable of meeting its financial obligations if:

(A) The fiduciary obtains written representations from the insurer that:
- (i) it is licensed to offer guaranteed retirement income contracts;
- (ii) it, at the time of selection and for each of the immediately preceding 7 plan years:
  - a. operates under a certificate of authority from the insurance commissioner of its domiciliary state which has not been revoked or suspended;
  - b. has filed audited financial statements in accordance with the laws of its domiciliary state under applicable statutory accounting principles;
  - c. maintains (and has maintained) reserves which satisfies all the statutory requirements of all states where the insurer does business; and
  - d. is not operating under an order of supervision, rehabilitation, or liquidation;
- (iii) it undergoes, at least every 5 years, a financial examination by the insurance commissioner of the domiciliary state; and
- (iv) it will notify the fiduciary of any change in circumstances occurring after the provision of the representations in clauses (i), (ii), and (iii), which would preclude the insurer from making such representations at the time of issuance of the guaranteed retirement income contract; and
- (v) after receiving such representations and as of the time of selection, the fiduciary has not received any notice that the insurer is operating under an order of supervision, rehabilitation or liquidation and does not have any other information that would cause the fiduciary to question the representations provided.

The safe harbor does not require the fiduciary to select the lowest cost contract. In conjunction with considering the cost, the fiduciary may consider the value of the contract, including "features and benefits of the contract and attributes of the insurer." The fiduciary is not required to review the appropriateness of the insurer after the purchase of the contract for a participant or beneficiary.

If a fiduciary satisfies these requirements, it is not liable after the distribution of any benefit, or the investment by or on behalf of a participant or beneficiary, or for any losses because an insurer cannot satisfy its obligation under a contract.

Sec. 205. Modification of nondiscrimination rules to protect older, longer service participants.

Under current law, all retirement plans are required to pass nondiscrimination tests to maintain their tax qualification status. Some defined benefit plans that are frozen to new entrants may not be able to pass such tests as long term participants become older and earn higher salaries. The

SECURE Act would provide a safe harbor that would deem such plans to pass the benefits, rights and features nondiscrimination tests if the plan passed the test in the year the plan closed and the two succeeding years. A plan also could test the closed defined benefit plan with a defined contribution plan that includes a match or ESOP feature.

Sec. 206. Modification of PBGC premiums for CSEC plans.

Defined benefit plans are required to make premium payments to the Pension Benefit Guaranty Corporation (PBGC). There are flat rate premiums (which for 2019 are $80 per participant) and variable rate premiums (which for 2019 are $43 for every $1000 of unfunded vested benefits). Under the SECURE Act, the PBGC flat rate premium for CSEC (cooperative and small employer charity) plans would be $19 per participant and the variable rate premium would be $9.

In addition, for purposes of determining a CSEC plan's variable rate premium, unfunded vested benefits for a plan year would be the excess (if any) of: (1) the plan's funding liability (CSEC plans may use the third segment rate as the interest rate), determined by taking into account only vested benefits (as opposed to all accrued or earned benefits), over (2) the fair market value of plan assets.

TITLE III—OTHER BENEFITS

Sec. 301. Benefits provided to volunteer firefighters and emergency medical responders.

N/A

Sec. 302. Expansion of section 529 plans.

N/A

TITLE IV—REVENUE PROVISIONS

Sec. 401. Modification of required distribution rules for designated beneficiaries.

Under current law, if a participant dies before receiving the full distribution from a defined contribution plan, a plan may pay a designated beneficiary the amount over the designated beneficiary's life. Under the SECURE Act, payment would need to be made within 10 years of the employee's death, except for payment to a spouse, a minor child (until reaching majority), or an individual that is chronically ill, disabled, or who is not more than 10 years younger than the employee.

Sec. 402. Increase in penalty for failure to file.

Under current law, the penalty for a failure to file a return for taxes under Chapter 1 of the Code is the lesser of: (1) the dollar amount of the tax; or (2) a total of $205. The SECURE Act would increase the dollar threshold from $205 to $400.

Sec. 403. Increased penalties for failure to file retirement plan returns.

The SECURE Act would increase various pension and retirement related filings and notice penalties, including:

- Failure to submit the Form 5500 would result in a penalty of $105 (from $25) per day, but is not to exceed $50,000.
- Failure to file a registration statement of deferred vested participants would incur a penalty of $2 (from $1) per participant per day, not to exceed $10,000.
- Failure to file a required notification of a change in plan status would result in a penalty of $2 (from $1) per day, not to exceed $5,000 for any failure.
- Failure to provide a required withholding notice for periodic pension payments would results in a penalty of $100 (from $10) for each failure, not to exceed $50,000 for all failures during any calendar year.

Sec. 404. Increase information sharing to administer excise taxes.

N/A