

Insider

SECURE 2.0 signed into law as part of 2023 federal spending package

By Ann Marie Breheny and Bill Kalten

The SECURE 2.0 Act of 2022 was enacted as part of the Consolidated Appropriations Act, 2023 on December 29, 2022. SECURE 2.0 combines three related, but separate, bipartisan retirement security bills and includes more than 90 provisions, some of which took effect immediately.

Key provisions are aimed at expanding plan access and participation, increasing retirement savings, encouraging plan sponsorship, easing plan administration and compliance, and more. Provisions in the act address defined benefit (DB) and defined contribution (DC) plans as well as individual retirement accounts (IRAs). There are provisions aimed at both large and small plan sponsors, with changes that target multiple employer plans (MEPs) and pooled employer plans (PEPs).

This article provides a brief overview of some of the key provisions in SECURE 2.0. We will provide more detailed information on some of the more important provisions — and their implications for plan sponsors, participants and retirees — in future articles.

Encouraging plan participation and increased savings

Encouraging workers to participate in retirement plans, and encouraging participants to save more, are central goals of SECURE 2.0, so many of its provisions are intended to expand DC plan participation and increase contributions. For example:

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- Most new 401(k) and 403(b) plans will be required to use automatic enrollment and automatic escalation.
- Part-time employees will be eligible to contribute to a DC plan after completing at least 500 hours of service for two consecutive years (reduced from three years under current law).
- Employers will be permitted to make retirement plan contributions for employees based on their student loan payments.
- Workers ages 60 to 63 will be able to make higher catch-up contributions.
- Employers will be allowed to use small gift cards or other *de minimis* incentives to help encourage plan participation.
- Retirement service providers will be allowed to provide automatic portability services to help facilitate the rollover of default IRAs (established when a former employer automatically distributes an employee's account balance) to a plan sponsored by the individual's new employer.
- The Saver's tax credit will be enhanced and converted to a matching contribution.

Expanding plan sponsorship

SECURE 2.0 also aims to encourage plan sponsorship. A number of the provisions provide incentives and make other changes intended to encourage more employers, especially small employers, to sponsor their own plans or participate in MEPs or PEPs. Some provisions intended to encourage plan sponsorship include:

- Authorizing 403(b) plan MEPs and PEPs
- Allowing “starter 401(k) deferral-only plans” and “safe harbor 403(b) deferral-only plans,” under which employers will automatically enroll employees, only elective contributions are permitted, and contributions will be limited to the contribution and catch-up limits that apply to IRAs
- Enhancing the start-up tax credit for small employers by increasing the credit percentage from 50% to 100% of eligible expenses for employees with up to 50 employees and allowing an additional tax credit for small employers that make contributions on behalf of their employees
- Allowing eligible employers to claim the starter tax credit for joining an existing MEP or PEP, even if the MEP or PEP has been in existence for more than three years

MEPs and PEPs

Several provisions directly affect MEPs and PEPs. PEPs were authorized by the 2019 SECURE Act, and SECURE 2.0 provides important expansions and clarifications. As noted above, SECURE 2.0 allows for the formation of 403(b) MEPs and PEPs and allows eligible employers to claim a tax credit for joining one of those plans.

In addition, SECURE 2.0 clarifies that any named fiduciary (other than a participating employer) may collect

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contributions from the employers participating in the PEP. Before the change, a trustee needed to be responsible. Finally, the Department of Labor (DOL) is directed to study PEPs — including the number of PEPs and plan participants, the extent to which PEPs have improved coverage and other information — and report to Congress every five years.

New distribution options and other distribution changes

Many provisions in SECURE 2.0 address distributions from DB and DC plans. Some provisions are intended to help employees delay distribution or otherwise preserve their income during retirement. Other provisions will give employees access to penalty-free distributions in circumstances such as natural disasters, personal emergencies and domestic abuse.

The following are among the provisions addressing retirement-related distributions:

- The age for required minimum distributions (RMDs) will increase to 73 (generally beginning in 2023) and then increase to 75 (generally beginning in 2033).
- Penalties for failure to take RMDs will be reduced from 50% to 25%. If the failure is corrected in a timely manner, the penalty will be reduced to 10%.
- Certain RMD barriers to life annuities will be removed, such as by allowing small annual cost-of-living increases and return of premium death benefits.
- The Secretary of Treasury is directed to revise the rules for qualified longevity annuity contracts by repealing the current 25% limit, allowing spousal survivor rights in limited circumstances and allowing participants to have a 90-day “free look period.”
- Owners of accounts that hold annuities will be allowed to aggregate distributions from the annuity portion of the account and the non-annuity portion for purposes of RMDs, resulting in a potential reduction to their RMDs.
- The exemption from the early distribution penalty for substantially equal periodic payments will be extended so that it continues to apply if the account is rolled over,

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exchanged for an annuity that provides the payments or exchanged for an annuity that satisfies the minimum distribution rules.

Provisions addressing other distributions include:

- Emergency distributions, which generally will allow individuals to take one distribution per year of up to \$1,000 to meet unforeseeable or immediate personal or family emergency expenses, and repay the distribution over three years
- Terminal illness distributions, which will allow penalty-free distributions for individuals who have certification from a physician that they have an illness or condition likely to result in death within 84 months
- Domestic abuse distributions, which will allow individuals who are survivors of domestic abuse to take penalty-free distributions of up to \$10,000, include the distribution in income over a three-year period or repay the distribution within three years
- New disaster distribution rules, which will allow individuals to take up to \$22,000 in penalty-free distributions following a federally declared natural disaster, include the distribution in income over three years or repay the distribution within three years, plus special rules to govern repayment of distributions taken for home purchases and address plan loans, which will ensure that those affected by natural disasters do not have to wait for Congress to approve targeted relief
- Distributions for long-term care insurance premiums, under which individuals will be allowed to take up to \$2,500 in distributions annually to pay certain long-term care premiums

Defined benefit plans

Several provisions in SECURE 2.0 apply specifically to DB plans:

- For cash balance plans that use a variable interest crediting rate, the act provides that, for purposes of the accrual rules (i.e., backloading), the rate that is treated as in effect and as the projected interest crediting rate will be a reasonable projection of such variable rate (subject to a 6% cap).
- The annual indexing of the rate for variable rate premiums (VRPs) will be eliminated; the VRP will be permanently set at \$52 per \$1,000 in underfunding.
- The information that must be reported in the annual funding notice will be modified to “identify defined benefit plan funding issues more clearly.”
- Disclosure requirements for plans that offer lump sum windows will be enhanced, including additional disclosures to plan participants and beneficiaries related

to the windows, notice to the DOL and Pension Benefit Guaranty Corporation (PBGC) (which will be made publicly available) about the window, and “post offer reports” to the DOL and PBGC.

- The DOL is directed to review the fiduciary standards that apply when DB plans select an annuity provider to determine whether amendments to the standards are warranted and report findings to Congress.
- The mortality table regulations will be changed to provide that for purposes of the minimum funding rules (and presumably benefit restriction rules), pension plans are not required to assume future mortality improvements at any age that are greater than 0.78%. Further, regulatory amendments would be made as necessary to modify the 0.78% figure to reflect material changes in the overall rate of improvement projected by the Social Security Administration.
- The section 420 sunset date will be extended until December 31, 2032 (from December 31, 2025). Plans that are at least 110% funded will be allowed to make transfers of up to 1.75% of the plan’s assets to pay retiree medical or life insurance.

Plan compliance and administration

Many provisions in SECURE 2.0 address plan administration and compliance, generally with the goal of reducing some of the administrative burdens on plan sponsors and easing plan compliance. Some of provisions in the legislation will do the following:

- Allow plan fiduciaries to decide that the plan will not recover overpayments mistakenly made to participants and beneficiaries. For plans that choose to recoup overpayments, limitations and protections will apply for participants and beneficiaries who received the overpayments.
- Increase the limit for mandatory cash-out of benefits to \$7,000.
- Direct the Government Accountability Office to report to Congress on the effectiveness of section 402(f) notices.
- Direct the Department of Treasury to issue sample forms for direct rollovers and trustee-to-trustee transfers, to

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help simplify, standardize and facilitate such rollovers and transfers.

- Allow employees to self-certify that an event constitutes a hardship and codify the current rule permitting self-certification that the amount of a hardship distribution does not exceed the need.
- Conform the 403(b) hardship rules to the rules that apply to 401(k) plans.
- Allow plans covering employees who are otherwise excludable under the general age and service rules to exclude the employees from consideration in determining whether the plan (or any plan of the employer) satisfies the top-heavy rules.
- Allow self-correction of inadvertent plan violations, including certain loan failures, under the Employee Plans Compliance Resolution System unless the IRS discovers the violation before the employer can show that it has taken action that demonstrates a commitment to correction.
- Require that Treasury and DOL issue rules allowing plan sponsors to consolidate certain automatic enrollment related notices for DC plans.
- Direct Treasury, DOL and the PBGC to review current reporting and disclosure requirements for retirement plans and make recommendations to Congress to consolidate, simplify and improve the requirements.
- Establish a safe harbor to correct errors in administering automatic enrollment and escalation features without penalty if certain conditions are met.

Other provisions

To help raise revenue to offset some of the costs of other provisions in the act, SECURE 2.0 includes new expansions of Roth contributions. Employees who earn more than \$145,000 will be required to make all catch-up contributions as Roth contributions. In addition, plans will be allowed to offer Roth matching and non-elective contributions.

Employers will be authorized to establish “pension-linked emergency savings accounts” for non-highly compensated employees. The accounts will accept elective deferrals on a Roth basis and will be treated as elective deferrals for matching contributions. Employers may provide for automatic enrollment into the accounts. The maximum balance will be \$2,500. Once the limit is reached, additional contributions may be treated as Roth contributions to the employer’s retirement plan.

Some provisions of SECURE 2.0 took effect upon its December 29, 2022 enactment, while others will take effect over the next several years.

No expenses and fees may be charged on the first four withdrawals during a year. At separation, the account may be rolled over to a Roth plan or a Roth IRA.

A national Retirement Savings Lost and Found program will be established. It will provide a national database to help individuals find retirement savings from former employers.

The Internal Revenue Code is amended to permit 403(b) plans to invest in collective investment trusts, but additional changes are needed to corresponding securities laws.

Next steps

Some provisions of SECURE 2.0 took effect upon its December 29, 2022 enactment, while others will take effect over the next several years. Plan sponsors will want to review the provisions of the new law to determine actions needed to comply with the changes as well as actions to take advantage of provisions that provide strategic opportunities for their plans and their workforces. The DOL, Treasury and PBGC will issue implementing guidance and conduct other activities they are directed to complete under the provisions of the act.

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ACA FAQs provide relief for prescription drug data collection reporting requirements

By Maureen Gammon and Anu Gogna

On December 23, 2022, the departments of Labor, Health and Human Services, and the Treasury issued **Affordable Care Act FAQs Part 56**, which provide among other things, relief for employer plan sponsors working in good faith to comply with the prescription drug and healthcare spending reporting requirement added under the Consolidated Appropriations Act, 2021 (CAA).

Specifically, starting in 2020, group health plans and health insurance issuers must report to the departments certain information, including, among other things, general information regarding the plan or coverage; the 50 most frequently dispensed brand prescription drugs, the 50 most costly prescription drugs by total annual spending and the 50 prescription drugs with the greatest increase in plan expenditures over the preceding plan year; total spending by the plan or coverage broken down by the type of costs; and the average monthly premiums paid by participants, beneficiaries and enrollees and paid by employers.

Recognizing that plans and issuers have encountered operational challenges when attempting to comply with these reporting requirements, the departments extended reporting for the 2020 and 2021 reference years to December 27, 2022. The FAQs now provide additional relief and clarifications for employer plan sponsors:

- **Good faith relief.** For the 2020 and 2021 data submissions that are due by December 27, 2022, the departments will not take enforcement action against any plan or issuer that uses a good faith, reasonable interpretation of the regulations and the Prescription Drug Data Collection (RxDC) Reporting Instructions in making its submission.

- **Grace period.** A plan or issuer now has until January 31, 2023, to make a good faith submission of 2020 and 2021 data to remain in compliance with the RxDC requirements.
- **Email submission.** The FAQs provide that although plans and issuers were instructed to submit information using the HIOS RxDC module, those submitting only the plan list, premium and life-years data, and narrative response — and not submitting any other data — may submit the file instead by email to RxDCsubmissions@cms.hhs.gov. The emailed submission must include the plan list file, premium and life-years data (data file D1), and a narrative response. The submission may include optional supplemental documents. The name of each file should include the reference year of the submission, the plan list or data file type (e.g., P2, D1), and the name of the group health plan sponsor.

In addition, the FAQs also clarified the following:

- More than one reporting entity may submit the same data file type on behalf of the same plan.
- A reporting entity submitting the required data may, within each state and market segment, aggregate at a less granular level than that used by the reporting entity that is submitting the total annual spending data.
- Reporting on vaccines and on amounts not applied to the deductible or out-of-pocket maximum is optional.

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