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After a delay of several months, Congress passed the Setting Every Community Up for Retirement Enhancement (SECURE) Act, clearing the way for one of the most substantial pieces of retirement plan legislation in years to become law.

The House of Representatives initially passed the SECURE Act in May by an overwhelming 417–3 vote. Although the Act was set for easy bipartisan passage, it foundered in the Senate. The bill found new life at the eleventh hour of the 2019 legislative session as an attachment to the must-pass $1.4 trillion spending bill, which passed by significant margins.

The SECURE Act brings quite a few changes that will affect both plan sponsors and participants. It is intended to incentivize employers (particularly small businesses) to offer retirement plans, promote additional retirement savings, and enhance retiree financial security, including several provisions that will impact current plan administration. The changes brought by the Act are generally positive in our view, but certain ones will create some new administrative challenges and questions.

Key changes include:

Open Multiple Employer Plans (MEPs)

Among several other MEP-related provisions, the Act provides for the establishment of defined contribution Open MEPs – referred to as "Pooled Plans" – which will be treated as single ERISA plans. Under current law, where a plan is sponsored by a group of employers that are not under common control, the employers must have certain "commonality" of interests, or the arrangement may be treated as multiple component plans for ERISA purposes. Even though the recent Department of Labor regulation on "Association Retirement Plans" relaxed the commonality requirement significantly, a limited commonality requirement nonetheless remained. As a result, Open MEPs (which are generally offered by service providers and open to any employer who wishes to adopt them) remained subject to potential treatment as multiple ERISA plans. In a move largely cheered by the industry, the SECURE Act goes further by abolishing the commonality requirement entirely.

Part-Time Employee Eligibility for 401(k) Plans

Sponsors of 401(k) plans will be required to allow employees who work at least 500 hours during each of three consecutive 12-month periods to make deferral contributions — in addition to employees who have satisfied the general "one year of service" requirement by working at least 1,000 hours during one 12-month period. Long-term part-time employees eligible under this provision may be excluded from eligibility for employer contributions, and the Act provides very significant nondiscrimination testing relief with respect to this group. Nonetheless, this is an example of a provision that – while positive in the sense of encouraging additional retirement plan coverage – will nonetheless create new recordkeeping and administrative challenges.

Required Minimum Distributions (RMDs)

The age at which required minimum distributions must commence will be increased to 72 from 70 1/2. This is another example of a helpful change that will nonetheless lead to additional compliance questions.

Increased Tax Credits

The cap on start-up tax credits for establishing a retirement plan will increase to up to $5,000 (depending on certain factors) from $500. Small employers who add automatic enrollment to their plans also may be eligible for an additional $500 tax credit per year for up to three years.

Safe Harbor 401(k) Enhancements

Employers will have more flexibility to add non-elective safe harbor contributions mid-year. Additionally, the Act eliminates the notice requirement for safe harbor plans that make non-elective contributions to employees. The automatic deferral cap for plans that rely on the automatic enrollment safe harbor model (known as the "qualified automatic contribution arrangement" or "QACA" safe harbor) also will increase to 15% from 10%.

Other Retirement Plan Highlights

- Penalty-free (but of course, not tax-free) retirement plan withdrawals for a birth or adoption.
- An objective fiduciary safe harbor for the selection of a lifetime income provider is being added to encourage employers to offer in-plan annuity options. The Act also provides for tax-advantaged portability for a lifetime income product from one

plan to another or between plans and IRAs to help avoid surrender charges and penalties where the lifetime income product is removed from a particular plan.

- A separate provision also requires participant lifetime income disclosures illustrating the monthly payments if the participant's account balance was used to provide lifetime income in an annuity.
- Nondiscrimination testing relief for some closed defined benefit plans.
- Certain clarifications relating to the termination of 403(b) custodial accounts and 403(b) retirement income accounts within church-sponsored plans.
- Increase in penalties for failing to file plan returns on time.

While it is not related directly to employer-sponsored plans, readers may be interested to know that the Act also repeals the maximum age for IRA contributions and eliminates the stretch IRA. As to the latter, non-spouse beneficiaries of inherited IRAs will be required to take their benefits in income on an accelerated basis (as compared with current law) – this will have estate planning implications for individuals and families that should be understood and reviewed.

The SECURE Act is one of the most comprehensive retirement plan reforms in a decade and brings many changes for consideration. Plan sponsors should consider how the SECURE Act will impact the administration of their plans. Employers that do not currently sponsor retirement plans may wish to consider (or reconsider) doing so given the Act's additional incentives — or may consider joining a MEP.

Most provisions of the Act will go into effect on January 1, 2020. In the coming months, it will be necessary to consider its practical effects on plan design and administration, including the interplay between certain of the Act's provisions and existing regulatory guidance where there is subject-matter overlap.