Setting Every Community Up for Retirement Enhancement (SECURE) Act

Detailed Summary

As Enacted on December 20, 2019 · Prepared for LPL by Davis & Harman LLP

Provision	Current Law	Summary of Secure Act Provision
Open Multiple Employer Plans/ Pooled Employer Plans **§ 101**	**ERISA:** A multiple employer plan (MEP) is a plan (other than a Taft-Hartley plan) maintained by two or more unrelated employers. MEPs are treated as a "single plan" for ERISA purposes. If an arrangement involves different employers, but is not a MEP, each employer is treated as operating a separate plan for ERISA purposes. Under ERISA, an employee pension benefit plan must be established or maintained by an employer, an employee organization, or both. An "employer" means "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity." ERISA §§ 3(2) and 3(5). Under prior Department of Labor (DOL) guidance, MEPs were allowed to be established or maintained by a cognizable, bona fide group or association of employers, acting in the interests of its employer members to provide benefits to their employees. However, DOL guidance required the employer members to share a common economic or representational interest or genuine organizational relationship unrelated to the provision of benefits. This is known as the "common interest" requirement, and it is not satisfied by "unrelated employers merely execut[ing] identically worded trust agreements or similar documents as a means to fund or provide	**Open MEPs:** Unrelated employers will be allowed to participate in a MEP, called a "pooled employer plan," that will be treated as a single plan for ERISA purposes. A pooled employer plan must be a defined contribution plan qualified under Code § 401(a) or a plan that consists of individual retirement accounts. Treatment as a pooled employer plan will be conditioned on the plan using a "pooled plan provider" (PPP). PPPs will be responsible for performing all administrative duties necessary to ensure that the plan complies with ERISA and the Code. PPPs will be a named fiduciary, plan administrator, and subject to registration, audit, examination, and investigation by Treasury and DOL. A pooled employer plan must have terms that: ▪ Designate a PPP and provide that the PPP is a named fiduciary of the plan; ▪ Designate one or more trustees to be responsible for collecting contributions to, and holding assets of, the plan, and require such trustees to implement written contribution collection procedures; ▪ Provide that each participating employer retains fiduciary responsibility for (1) the selection and monitoring of the PPP and any other named fiduciary, and (2) to the extent not otherwise delegated to another fiduciary by the PPP, the investment and management of those plan assets that are attributable to employees of that participating employer; ▪ Provide that a participating employer, participant, or beneficiary is not subject to unreasonable restrictions, fees, or penalties with regard to (1) ceasing participation, (2) receipt of distributions, or (3) otherwise transferring assets of the plan in accordance with applicable rules for plan mergers and transfers;

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Open Multiple Employer Plans/ Pooled Employer Plans **§ 101 (Continued)**	benefits." The common interest requirement, as well as a related control requirement, present significant obstacles for unrelated employers that wish to join a MEP. On July 29, 2019, DOL finalized new regulations that expand the types of employer associations that may sponsor a retirement plan on behalf of multiple employers. The regulations continue to require a certain "commonality of interest" among participating employers and prohibit the sponsoring association from being a financial services firm. Working owners of a trade or business without employees (e.g., "gig" workers) may qualify as both an employer and an employee for purposes of participating in a MEP if certain conditions are met. In addition, the rule clarifies the circumstances under which professional employer organizations (PEOs) may sponsor a MEP. DOL's new rule does not address the "one bad apple" rule discussed below. **Internal Revenue Code:** Under the Code, if just one employer participating in a MEP runs afoul of the plan qualification rules, the entire MEP may be disqualified. This is often referred to as the "one bad apple" rule. On July 3, 2019, Treasury and IRS proposed regulations that would provide relief from this rule if certain conditions are satisfied	▪ Require the PPP to provide to participating employers any disclosures or other information that DOL may require, including any such items to facilitate the selection or monitoring of the PPP by participating employers; ▪ Require each participating employer to take any actions that DOL or the PPP determines are necessary to administer the plan or for the plan to meet applicable ERISA and Code requirements, including providing any disclosures or other information that DOL requires or that the PPP determines is necessary to administer the plan; and ▪ Provide that any of the disclosures or other information required to be provided as described above may be provided in electronic form, and will be designed to ensure only reasonable costs are imposed on PPPs and participating employers. Except with respect to the administrative duties of the PPP, each employer in a pooled employer plan will be treated as the plan sponsor with respect to the portion of the plan attributable to the employees of such employer. There is a provision offering "good faith" relief to employers and PPPs for periods before guidance is issued. **One Bad Apple Relief:** The Act will generally eliminate the "one bad apple" rule for MEPs maintained by employers that either (1) have a "common interest other than having adopted the plan," or (2) use a PPP. As a condition for relief, assets attributable to "bad apple employers" would generally need to be "spun off" from the MEP to a separate plan or IRA. Additionally, the bad apple employer must be liable for any liabilities with respect to such plan attributable to the employees of such employer.

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Open Multiple Employer Plans/ Pooled Employer Plans **§ 101 (Continued)**		**Form 5500 Reporting:** MEPs, including pooled employer plans, will be required to include the following on Form 5500: ▪ A list of participating employers; ▪ A good faith estimate of the percentage of total contributions made by participating employers during the plan year; ▪ The aggregate account balances attributable to each employer in the plan; and ▪ Identifying information for the pooled plan provider, if the plan is a pooled employer plan. The DOL will have authority to provide for simplified Form 5500 reporting for MEPs that cover fewer than 1,000 participants, as long as each participating employer has fewer than 100 participants covered by the plan. The description included in the Ways and Means Committee's Report for the SECURE Act makes clear that, other than providing relief from the "one bad apple" rule and adding certain reporting requirements, the Act generally does not change present law and related guidance applicable under the Code or ERISA to MEPs maintained by employers with a common interest other than having adopted the plan. *These changes apply to plan years beginning after December 31, 2020.*

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Safe Harbor 401(k) Plans and Timing of Plan Amendments and Adoptions **§§ 103 AND 201**	**401(k) safe harbor** 401(k) plans have two main non-discrimination safe harbors, which allow the plan to avoid testing. Generally, the safe harbors are satisfied when an employer makes a specified level of matching contributions or, alternatively, a specified level of non-elective contributions. Both safe harbors require employees to receive a notice of their rights and obligations under the plan within a reasonable period prior to the beginning of the plan year. **Plan provisions** providing for either nonelective or matching safe harbor contributions must generally be adopted prior to the plan year and must remain in effect for the entire 12-month plan year. However, in the case of a non-elective 401(k) safe harbor plan, the plan may be amended after the first day of the plan year to provide for the 3% safe harbor non-elective contribution as long as the plan is amended no later than 30 days before the end of the plan year and certain other conditions are satisfied. **Plan adoption.** A plan must be adopted by the last day of the taxable year of the employer in order to be in effect for such year. Rev. Rul. 76-28, 1976-1 C.B. 106. Although the plan need not be funded by that date, the employer must formally adopt the plan and trust documents by the end of its taxable year. Thus, by the time a small employer files its tax return, it is too late to adopt a plan to provide additional deductions to the employer or its owner(s) in the case of a pass-through entity.	**401(k) safe harbor**. The safe harbor notice requirement is eliminated for plans seeking to satisfy the safe harbors by using nonelective contributions. The Act also permits a plan to be amended to become a nonelective safe harbor plan for a plan year (1) any time before the 30th day before the close of the plan year (without being required to satisfy the additional conditions as currently provided for under regulation) or (2) on or after the 30th day before the end of the year, as long as the amendment is made by the close of the following plan year, and the nonelective contribution is at least 4%. *These changes apply to plan years beginning after December 31, 2019.* **Plan adoption.** An employer is allowed to adopt a plan for a taxable year as long as the plan is adopted by the due date for the employer's tax return for that year (including extensions). *This change applies to plans adopted for taxable years beginning after December 31, 2019.*

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Startup Credit for Small Employer Plans and New Credit for Small Employer Plans Adopting Automatic Enrollment **§§ 104 AND 105**	Employers with generally up to 100 employees are eligible for an annual tax credit for three years equal to 50% of certain costs paid or incurred in connection with starting a retirement plan, up to a cap on the annual credit of $500.	The $500 annual cap is increased to the greater of (1) $500 or (2) the lesser of (a) $250 for each non-highly compensated employee who is eligible to participate in the plan or (b) $5,000. In addition, employers with generally up to 100 employees are eligible for a new credit of $500 per year for up to three years, beginning with the first taxable year for which the employer includes automatic enrollment in a qualified employer plan (even if the feature was added after the plan was adopted). The new credit for adding automatic enrollment is available in addition to the startup credit allowed under § 45E. *These changes apply to taxable years beginning after December 31, 2019.*
Post-70½ IRA Contributions **§ 107**	An individual who is 70½ by the end of the year may not make a non-rollover contribution to a traditional IRA. IRA owners who are 70½ may direct tax-free distributions of up to $100,000 per year from an IRA to a qualified charity or charities. These distributions are called "qualified charitable distributions."	The limit prohibiting individuals who are age 70½ from making non-rollover contributions to traditional IRAs is repealed. (The individual will otherwise need to be eligible to make IRA contributions, including having earned compensation.) The exclusion for qualified charitable distributions is reduced (but not below zero) by an amount equal to the excess of: (1) all IRA deductions allowed to a taxpayer for all taxable years ending on or after the date the taxpayer attains age 70½; over (2) all reductions to the exclusion based on post-70½ IRA deductions for all taxable years preceding the current taxable year. *This change applies to contributions (or distributions in the case of qualified charitable contributions) made for taxable years beginning after December 31, 2019.*

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Long-Term Part-Time Employees **§ 112**	Under ERISA and the Code, a retirement plan may require that an employee earn a year of service (and/or attain age 21) before becoming eligible for a plan. A plan (other than a 401(k) plan) may require two years of service, but only if employer contributions are immediately vested. A plan may not impose any service condition that is longer than these rules. A plan can provide that an employee is not credited with a year of service unless the employee completes 1,000 hours of service during a 12-month period. ERISA and the Code also impose requirements on vesting, generally requiring that employer contributions be vested after a certain number of years of service. In determining the participant's nonforfeitable right to employer contributions under the plan, a year of service is generally only required for periods during which the participant has completed 1,000 hours of service. For vesting purposes, a plan may disregard certain periods of service under the break-in-service rules. Under those rules, a one-year break in service is a year during which a participant has not completed more than 500 hours of service.	Except in the case of collectively bargained plans, the Act requires employers maintaining a 401(k) plan to have a dual eligibility requirement under which an employee must complete either: (a) one year of service (with the 1,000-hour rule); or (b) three consecutive years of service where the employee completes at least 500 hours of service. In the case of employees who are eligible solely by reason of the latter new rule, the employer may elect to exclude such employees from testing under the non-discrimination and coverage rules, and from the application of the top-heavy vesting and benefit rules. An employer is not required to make matching or non-elective contributions on behalf of such employees, and could continue to impose a requirement that the employee is 21 before participating in the plan. In the case of employees who are eligible solely by reason of the latter new rule, each 12-month period for which the employee has at least 500 hours of service shall be treated as a year of service for vesting purposes and shall not be treated as a one-year break in service. *These changes apply to plan years beginning after December 31, 2020, except that, for purposes of the new eligibility criteria, 12-month periods beginning before January 1, 2021 shall not be taken into account.*

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Plan Withdrawals for Birth or Adoption **§ 113**	Distributions from a qualified retirement plan, 403(b) plan, 457(b) plan, or IRA are generally included in income for the year in which the distribution is made. Unless an exception applies, taxable distributions taken from a qualified retirement plan, 403(b) plan, or IRA before age 59½ are subject to a 10% early distribution tax penalty. If eligible, a distribution from a qualified retirement plan, 403(b) plan, 457(b) plan, or IRA may be rolled over tax-free to another eligible retirement plan within 60 days. In-service distributions of elective deferrals from a qualified retirement plan, 403(b) plan, or 457(b) plan are generally not permitted, unless a specific exception applies. Qualified retirement plans and 403(b) plans may distribute elective deferrals upon hardship, and the regulations provide a safe harbor list of events that are treated as constituting a hardship. The birth or adoption of a child is not on the safe harbor list. Similarly, the regulations governing unforeseeable emergency withdrawals from 457(b) plans do not explicitly permit distributions in connection with a birth or adoption.	Under this provision, "qualified birth or adoption distributions" from a retirement plan or IRA: (a) can be distributed regardless of whether an in-service distribution is otherwise permitted; (b) will be exempt from the 10% early distribution tax penalty; (c) will be exempt from the mandatory 20% withholding, 402(f) notice, and direct rollover rules otherwise required when distributed from a retirement plan; and (d) can be repaid to certain retirement plans and IRAs without regard to the usual 60-day time limit for rollovers. Any distribution from an IRA, qualified defined contribution plan, 403(b) plan, 403(a) plan, or governmental 457(b) plan that is taken within one year of a birth or adoption will be treated as a "qualified birth or adoption distribution," subject to the following conditions: ▪ Qualified adoption distributions would be limited to $5,000 (not indexed) per birth or adoption; ▪ Qualified adoption distributions would not include the adoption of a child of the taxpayer's spouse; and ▪ Qualified birth or adoption distributions would be limited to the adoption of children who are either under age 18, or physically or mentally incapable of self-support. The $5,000 limit applies on an individual basis, meaning spouses could each receive a distribution of up to $5,000 per qualifying birth or adoption. The individual will need to provide certain information regarding the eligible child on the individual's tax return. An amount equal to the qualified birth or adoption distribution can be repaid, without regard to the usual 60-day time limit for rollovers, to an IRA, qualified defined contribution plan, 403(b) plan, 403(a) plan, or governmental 457(b). Any repayment of a qualified birth or adoption distribution will generally be treated as a direct trustee-to-trustee transfer within 60 days of the distribution. *This change applies to distributions made after December 31, 2019.*

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Increased Required Beginning Date **§ 114**	Required minimum distributions (RMDs) generally must begin by April 1 of the calendar year following the calendar year in which the individual (employee or IRA owner) reaches age 70½, subject to an exception for certain plan participants. This deadline is called the "required beginning date."	The Act increases the age triggering the required beginning date for plans and IRAs to 72. *This change applies to distributions required to be made after December 31, 2019, with respect to individuals who attain age 70½ after such date.*
Consolidated Form 5500 Reporting for Similar Plans **§ 202**	Administrators of pension benefit plans are generally required to file an annual return that contains information relating to the qualification, financial condition, and operation of the plan. ERISA § 104 and I.R.C. § 6058. This requirement is satisfied by filing Form 5500, which is used by DOL, the IRS, and PBGC. Plans that cover fewer than 100 participants and meet other conditions may file the simplified Form 5500-SF instead. A MEP files a single Form 5500, but employers that participate in plans that are virtually identical must file separate Forms 5500.	Under the Act, a group of similar plans will be permitted to file a single consolidated Form 5500 if all plans in the group: ▪ Are individual account plans or defined contribution plans; ▪ Have the same trustee, named fiduciary(ies), and administrator; ▪ Use the same plan year; and ▪ Provide the same investments or investment options. The DOL and Treasury will be authorized to require such consolidated Forms 5500 to include any information regarding each plan in the group that is necessary or appropriate for the enforcement and administration of the Code and ERISA. Also, DOL and Treasury shall require information that would enable participants in a plan to identify any consolidated Form 5500 filed with respect to their plan. Information regarding each plan for which information is provided on a consolidated Form 5500 will be treated as a separate return for purposes of determining whether the IRS may require electronic filing based on the number of returns a person files. I.R.C. § 6011(e)(2)(A). (This modification would apply to returns required to be filed with respect to plan years beginning after 2019.) *The ability to file consolidated Forms 5500 will be implemented no later than January 1, 2022, and will apply to returns for plan years beginning after December 31, 2021.*

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"Stretch" RMD **§ 401**	Required minimum distribution (RMD) rules generally require plan participants to begin taking distributions shortly after the participant reaches age 70½ (subject to certain exceptions). I.R.C. § 401(a)(9). Under current law, the after-death RMD rules permit a designated beneficiary to draw down the remaining plan benefits over the beneficiary's life expectancy. (The rules differ slightly based on whether the participant dies before or after the required beginning date, but very generally, in both cases if there is a designated beneficiary, current regulations allow distributions to be stretched over that designated beneficiary's life expectancy.) Similar rules apply to IRAs.	Upon the death of an IRA owner or defined contribution plan participant, the individual beneficiary will be required to draw down his or her entire inherited interest within 10 years. This rule applies regardless of whether RMDs had begun prior to the owner/participant's death. The new rules do not apply to defined benefit plans, but do apply to defined contribution plan and IRA annuities. Significantly, the 10-year rule does not apply to any portion payable to an "eligible designated beneficiary" if such portion will be (1) distributed over the beneficiary's life or a period not exceeding his or her life expectancy, and (2) such distributions begin within one year of the death. (If the eligible designated beneficiary is the surviving spouse, then such distributions would not be required to begin earlier than the date on which the participant/IRA owner would have attained age 70½, which is changed to 72 by another provision of the bill. Surviving spouses also have the option of converting the IRA to their own.) An eligible designated beneficiary is any designated beneficiary who is: ▪ The surviving spouse; ▪ A child under the age of majority; ▪ Disabled or chronically ill; or ▪ Any other person who is not more than 10 years younger than the participant/IRA owner. In the case of a child who has not attained the age of majority, the 10-year rule applies as of the date the child attains the age of majority. The 10-year rule will also apply upon the death of any eligible beneficiary. Finally, current law is retained for non-individual beneficiaries, such as estates and charities, which are subject to a five-year rule and cannot "stretch" the payouts over a longer period.

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"Stretch" RMD **§ 401 (Continued)**		*These changes apply generally with respect to deaths after 2019. There are delayed effective dates for collectively bargained plans and for governmental plans. The new rules do not apply to a qualified annuity, which is a binding contract as of the date of enactment of the bill, and for which payments have begun or the owner has made an irrevocable election as to the method and amount of annuity payments.* *Note: Unlike the version of the SECURE Act passed by the U.S. House of Representatives on May 23, 2019, this provision clarifies that the 10-year limitation would not apply to disabled or chronically ill beneficiaries of certain multi-beneficiary trusts.*

This information is not intended to be a substitute for specific individualized tax or legal advice. We suggest that you discuss your specific situation with a qualified tax or legal advisor.

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