The SECURE Act Cheat Sheet For Plan Providers

By Ary Rosenbaum, Esq.

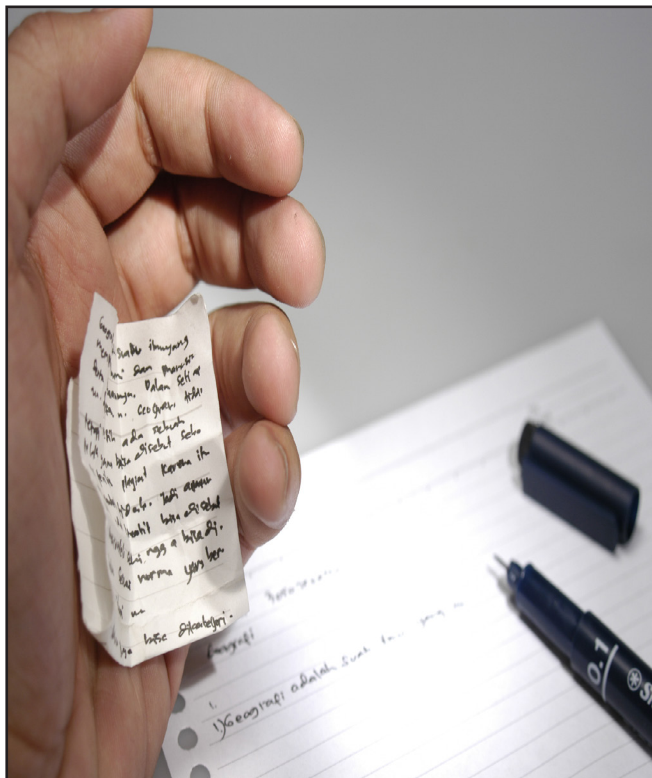
The beauty of the retirement plan business is that it isn't static, it's constantly changing. One of the reasons that it constantly changes is changes in the Internal Revenue Code, ERISA, and regulations. The SECURE Act is the most profound change in retirement plan laws since the Pension Protection Act of 2006. With any change, there is opportunity and challenges. This is all about how you can deal with the SECURE Act in your role as a plan provider.

The nature of change in the retirement plan business

When I started as an ERISA attorney over 20 years ago, I worked for a small law firm associated with a third-party administrator (TPA). My mentor was a paralegal named Marge and she taught me many lessons that I still remember to this day. Marge worked in the retirement plan industry in the days of the industry's Wild West, the days before ERISA. One lesson that Marge taught me is that when the Tax Reform Act of 1986, many TPAs and other providers went out of business because they simply couldn't deal with the changing times. We saw how many plan providers including many well-known insurance companies that simply exited the retirement plan business because of the anticipated change that fee disclosure regulations would have when they were implemented in 2012. The fact is that we will certainly see plan providers that will thrive because of the SECURE Act, but we will certainly see plan providers that will fail because they couldn't adapt to a changing environment brought forth by this new law.

The biggest change and pitfall is the long term, part-time employee change

While everyone is focused on the multiple employer plan (MEP) changes through the new pooled employer plan (PEP) (more on that later), that isn't the biggest change introduced through the SECURE Act. The biggest change is the change to the eligibility provisions of a 401(k) plan. While plan sponsors could limit participation in the 401(k) plan to full-time employees who must complete 1,000 hours of service to be eligible, that will no longer be the case. The law changed and long time part-

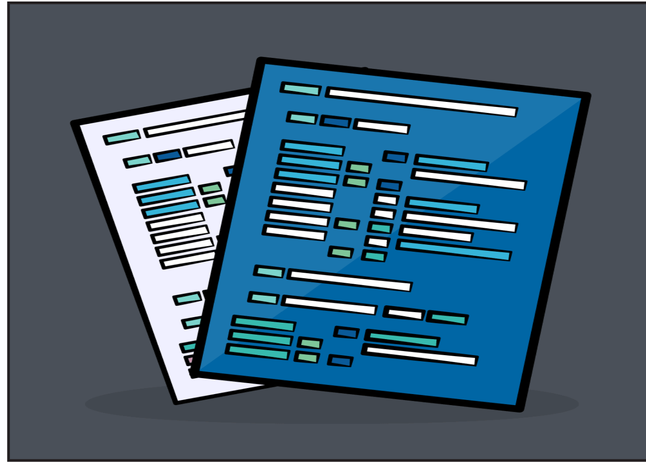


time employees who complete 500 hours of service in 3 consecutive years will be eligible to defer in a 401(k) plan. This is a substantive change since plans could always require 1000 hours of service for eligibility. While this doesn't mean that these part-time employees have to be eligible to get a profit-sharing contribution or affect testing (still can use the one-year eligibility exclusion for both purposes), it's going to certainly affect the 401(k) plan in terms of cost and compliance. Luckily, the law gives us a head start since we don't have to look at plan years before 2021 to determine eligibility for these part-timers. So that means that the earliest that these part-time employees could be eligible is January 1, 2024. While this allows plan providers to get ready, history has shown that many plan providers just like to procrastinate. The problem with procrastination is that this will lead to plan providers and plan sponsors forgetting to include these part-timers as part of the deferral component of the plan when it's required. This will lead to forgetting to include these part-timers in the plan that might require the plan sponsor to make corrective qualified non-elective contributions to these part-timers for missed deferral opportunities. As a plan provider, you need to make sure that plan sponsor clients understand the new rule and the need to track the hours of these part-timers to ensure compliance. As a plan provider, you also need to make sure the rules are followed. If you're a TPA, it's your job. While people may scoff at the suggestion that plan providers should deal with this new rule now, I still recall a TPA administrator I worked with that was telling me in 2007 that a plan he worked had a 7-year graded schedule for matching contributions, even though that schedule was eliminated in 2002.

MEPs, PEPs, and the issues they bring

In 2012, the Department of Labor (DOL) opined that multiple employer plans where there was no commonality between adopting employers were not considered a single plan for ERISA purposes. That advisory opinion was a dagger to what we called Open MEPs (where there was no commonality) because it required them to file a Form 5500 for each adopting employer. For

over 7 years, we waited for regulations from the DOL that would further explain their decision in that advisory opinion on what would constitute commonality or in which scenario they would allow Open MEPs to be considered a single plan. When President Trump in 2019 issued an executive order for the DOL to promulgate regulations that would allow greater access to MEPs, there was hope that the DOL would allow Open MEPs to be considered a single plan again. However, the DOL's proposed regulations affirmed their view from 2012 that a MEP requires commonality among adopting employers to be considered a single plan. It took the SECURE Act to be signed into law for Open MEPs to be treated as a single plan for purposes of the Internal Revenue Code (IRC) and ERISA. What the SECURE Act did was to amend the IRC and ERISA to allow for two types of MEPs: a closed MEP where there is commonality among adopting employers and a Pooled Employer Plan (PEP), where there is no commonality among adopting employers. Also, the SECURE Act eliminates the most overrated marketing tool against MEPs, the one bad apple rule (where theoretically one non-compliant adopting employer could disqualify the entire plan). As a plan provider, MEPs and PEPs can be great opportunities. The PEP is a nice tool because it could allow you to create a plan for the benefit of your smaller clients and offer them a full fiduciary solution through using a pool plan provider (that offers ERISA §3(16) services) and an ERISA §3(38) fiduciary. The PEP can be created with your branding and offer a cost one-stop fiduciary solution. The problem is whether you want to serve as a PEP (and the liability that goes with it) and the new rules don't change the biggest problem that I see that affects MEPs, which is whether they achieve the size to get the cost savings promised. Growing any type of MEP takes a lot of time and patience and you need to keep your expectations low. Often, a plan provider will tell me they have access to thousands of potential clients through some relationship (an association or alliance with a payroll provider), but the conversion rate of these opportunities to actual MEP adopting employers is quite low. With the PEPs being effective in 2021, expect many different providers to offer PEPs and most will fail in achieving the critical mass of plan



assets they need to achieve any meaningful cost savings. There is nothing more humiliating than not having enough plan assets to efficiently pay for the 401(k) audit. Whether you want to offer a PEP as a pooled plan provider or whether you want someone like me to fill that role, feel free to contact me.

Push Those Tax Credits

When prospecting potential clients that are considering a new 401(k) plan, you need to push those tax credits if they qualify. The SECURE Act made some significant changes and upgrades, that they should be considered and discussed. I'm sure many potential clients can be swayed towards adopting a 401(k) plan, rather than a free SEP or SIMPLE Plan because of these increased tax credits. For 2020, the credit is now equal to 50% of eligible expenses, subject to a minimum credit of $500 and a maximum credit of $250 per eligible non-highly compensated employee (capped at $5,000) over three years. To claim the credit, the potential plan sponsor must meet the following requirements: the expenses must be related to the plan's establishment, administration, and/or participant education; the client can't have sponsored a plan at any time in the immediately preceding three years; at least one plan participant must be a non-highly compensated employee, and the employer must have 100 or fewer employees with at least $5,000 in compensation in the preceding year. Also, there is a new $500 per year tax credit for up to three years for small employers that adopt new plans that include automatic enrollment. Change is opportunity and I believe that this is an underrated change.

Safe Harbor Non-Elective changes

Safe harbor plans were one of the greatest additions to 401(k) plans in the late 1990s. Allowing employers to automatically satisfy discrimination testing by offering fully vested contributions to plan participants was huge. The only problem is that plans had to add safe harbor before the plan year in which it would be effective and there was a notice requirement to participants. The SECURE Act made a substantial change to the safe harbor non-elective contribution (otherwise known as the safe harbor 3% profit sharing contribution). First off, the notice requirement for the safe harbor non-elective contribution is eliminated (but remains for the match). A huge change is that a plan sponsor may amend a plan to provide for a safe harbor nonelective contribution at any time before the 30th day before the close of the plan year. This means that a calendar year plan will have until December 1st to elect to make a 3% nonelective safe harbor contribution for the current year. A bigger change is that a plan sponsor may amend a plan to provide for a safe harbor nonelective contribution of at least 4% of compensation (note the increase from 3%) at any time before the last day by which the employer could distribute any excess contributions for the plan year, which is generally the last day of the plan year following the plan year for which the contribution applies. That means a 2020 calendar year plan may be amended as late as December 31, 2021, to make a safe harbor nonelective contribution for the 2020 plan year. Push safe harbor non-elective contributions in conjunction with new comparability/cross-tested to those plan sponsors where it makes sense.

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