Highlights

- 2023 Appropriations Act Includes Long-Awaited SECURE Act Follow-Up
- Changes Meant to Boost Plan Participation
- Gradual Increase in RMD Age
- Increased Flexibility for RMDs
- Plan Administration Changes Improve Efficiency

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President Signs Omnibus Bill; Including Secure 2.0 Act of 2022

On December 29, 2022, President Biden signed the Consolidated Appropriations Act, 2023 into law. It reached the President's desk upon passage in the House by a vote of 225 to 201 on December 23. This followed passage in the Senate on December 22 by a vote of 68 to 29. The heavily negotiated omnibus legislative package includes all appropriations for the federal 2023 fiscal year. The Act does not include any major tax provisions or tax extenders. However, the omnibus bill does include the long-awaited SECURE 2.0 Act of 2022.

The SECURE 2.0 Act of 2022 builds upon the provisions of the original SECURE Act from 2019 and further ensures that more Americans can save for retirement and increase the amount they are able to save. The Act does this by expanding upon automatic enrollment programs, helping to ensure that small employers can easily and efficiently sponsor plans for employees, and enhancing various credits to make saving for retirement beneficial to both plan participants and plan sponsors. The Act also improves various investment options for plan participants, streamlines plan administration for plan fiduciaries, and makes important changes to required minimum distributions that will help retirees with plan selections and decisions that will enhance their ability to make better use of their retirement savings.

A follow-up to the original SECURE Act has long enjoyed broad bipartisan support in Congress, and was expected to be attached to any legislation that has been proposed for the entirety of the 117th Congress. In March the House passed a version of it, colloquially known as the SECURE Act 2.0 but officially known as the Securing a Strong Retirement Act of 2022. The Senate Finance Committee proposed an even larger version later in 2022, known as The Enhancing American Retirement Now (EARN) Act. This final version, which officially adopts the SECURE 2.0 Act moniker, closely aligns with that broader Senate version.

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"The SECURE 2.0 Act of 2022 builds upon the provisions of the original SECURE Act from 2019."

COMMENT. *Much of the SECURE 2.0 Act is related to plan administration. This Briefing is meant to focus on the tax-related provisions of the massive Act.*

INCREASING PLAN PARTICIPATION AND SAVINGS

Automatic enrollment

One of the most broadly applicable provisions of the SECURE 2.0 Act of 2022 requires that, effective for plan years beginning after 2023, 401(k) and 403(b) sponsors automatically enroll employees in plans once they become eligible to participate in the plan. Under the requirement, the amount at which employees are automatically enrolled cannot be any less than three percent of salary, and no more than ten percent. The amount of employee contributions is increased by one percent every year after automatic enrollment, up to a maximum contribution of ten percent. Employees can opt out of automatic enrollment if they choose.

COMMENT. *Many employers have taken it upon themselves to automatically enroll employees in 401(k) and 403(b) plans since first allowed to do so more than 20 years ago, and this has, unsurprisingly, led to an increase in plan participation and retirement savings. However, under this provision, automatic enrollment would be required.*

Exceptions to the automatic enrollment requirement are provided to businesses with ten or fewer employees, businesses that have been in existence for less than three years, church plans, and government plans.

Saver's credit

For tax years beginning after 2026, the saver's credit is simplified from its current three-tier structure based upon income amounts to a unified 50 percent credit amount, with a phaseout for higher incomes. Just as with the current version of the credit, the phaseout amounts are adjusted annually for inflation, beginning in 2028. Additionally, the Treasury is directed to take steps to increase public awareness of the credit.

Small incentives

Under the new law, effective after the date of enactment, employers are no longer prohibited from offering small immediate incentives, such as gift cards, in exchange for employees making elective deferrals.

Catch-up limits

The annual amount that can be contributed to a retirement plan is limited, and this limitation amount is generally subject to annual adjustments for inflation. For plan participants aged 50 or older, the contribution limitation is increased ("catch-up contributions"). For 2023, the amount of the catch-up contribution is limited to $7,500 for most retirement plans, and $3,500 for SIMPLE plans, and are subject to inflation increases. Under the SECURE 2.0 Act of 2022, a second increase in the contribution amount will be available for participants aged 60, 61, 62, or 63, effective for tax years after 2024. For most plans, this "second" catch-up limitation would be $10,000, and $5,000 for SIMPLE plans. Like the "standard" catch-up amounts, these limitations will also be subject to inflation adjustment.

The annual limit on contributions to individual retirement accounts (IRAs) is also increased for participants aged 50 and older. The "catch-up" limit for IRAs is $1,000. Unlike the catch-up amount for other plans, this amount is not subject to increases for inflation under current law. The Act makes the IRA catch-up amount adjusted annually for inflation for tax years beginning after 2023.

Finally, the Act requires, effective for tax years beginning after 2023, that all catch-up contributions are subject to Roth (i.e. after-tax) rules, rather than only where allowed by the plan.

SIMPLE plans

The SECURE 2.0 Act of 2022 allows employers to make nonelective contributions of a uniform percentage to a SIMPLE IRA or SIMPLE 401(k) plan up to 10 percent of compensation, with an inflation-adjusted cap of

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$5,000. Contribution amounts to SIMPLE IRA and 401(k) plans are also increased in the case of certain smaller employers.

Matching student loan payments

For plan years beginning after 2023, the new law provides that employers may make payments to qualified plans that match qualified student loan payments by employees. In order to qualify to the matching contributions, the employees must be otherwise eligible for matching contributions by an employer, and the employer must make matching contributions for student loan payments at the same rate as those for elective deferrals.

SMALL EMPLOYERS

Currently, as established by the original SECURE Act, for the first three years an eligible small employer establishes an eligible plan, it can claim a credit of 50 percent of start-up costs with the credit not to exceed the greater of (1) $500 or (2) the lesser of $250 for each employee eligible to participate in the plan who is not highly compensated or $5,000.

Under the SECURE 2.0 Act of 2022, effective for tax years beginning after 2022, the length of time for which the credit can be claimed is extended to five years for employers with 50 or fewer employees. Additionally, the amount of the credit is increased to 100 percent of startup costs for employers with 50 or fewer employees, with a cap of $1,000 per employee. The 100 percent credit amount is phased out for employers with 51 to 100 employees, and also drops incrementally to 25 percent in the fifth year.

The Act also retroactively makes the startup credit (as expanded by the original SECURE Act) available to small employers that join a multiple employer plan (MEP) that was already in existence. Without this fix, the small employer would not have been eligible for the credit if the MEP had been in existence for three years. The fix is effective for tax years beginning after 2019.

The Act provides a credit for small employers who make military spouses immediately available to participate in the employer's retirement plan. The credit is effective for tax years beginning after the date of enactment of the Act.

> **COMMENT.** *The military spouse retirement plan eligibility credit is meant to ensure that military spouses can save for retirement. These spouses are often not located in one area long enough for them to meet length-of-service requirements for plan participation.*

The Act also allows employers sponsoring 403(b) plans, which are typically charitable organizations and other non-profits, to participate in MEPs just like sponsors of 401(k) plans. This expansion is effective for plan years beginning after 2022.

DISTRIBUTIONS AND WITHDRAWALS

Required minimum distributions

Under current law, as enacted as part of the original SECURE Act, plan participants are required to begin taking distributions ("required minimum distributions" or "RMDs") at age 72. Under the SECURE 2.0 Act of 2022, the age at which participants must begin taking RMDs is increased over a period of ten years. Starting in 2023, the age is increased to 73 for individuals who turn 72 after 2022 and age 73 before 2033. For individuals who turn 74 after 2032, RMDs must begin at age 75.

> **COMMENT.** *This provision may require a technical correction. An individual born in 1959 would turn 72 in 2031 (after 2022), 73 in 2032 (before 2033), and 74 in 2033 (after 2032), thus satisfying both age categories.*

Withdrawals

The SECURE 2.0 Act makes permanent the ability of a taxpayer to make an early withdrawal without incurring a 10-percent penalty as result of a federally declared disaster. Such a withdrawal will be allowed if made within 180 days of the disaster if the taxpayer's principal place of abode is

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within the declared disaster area and if the taxpayer has sustained an economic loss as a result of the disaster.

> **COMMENT.** *Historically, the allowance of making such withdrawals was subject to Congress passing specific disaster relief bills. This would be a blanket allowance in the case of any declared disaster.*

The Act also allows for penalty-free early withdrawals, after 2023, by a victim of domestic abuse, up to the lesser of $10,000 or 50 percent of the present value of the accounts. After the date of enactment, a penalty-free early withdrawal may also be made by an individual diagnosed with a terminal illness, within a period of 84 months after a physician certifies the diagnosis. After 2023, a penalty-free withdrawal of up to $1,000 is also allowed due to a personal financial emergency.

Under current law, an individual who is a public safety officer is allowed to make an early withdrawal after age 50 (as compared to others, who must wait for age 55). The new law expands this exception to public safety officers who attain age 50 or who have 25 years of service. The new law also treats private sector firefighters and certain corrections officers as public safety officers for purposes of this exception.

The SECURE 2.0 Act of 2022 also limits the amount of time during which a penalty-free distribution to a participant in the event of a birth or adoption may be repaid. Under current law, there is no limit. Under the new law, the amount must be repaid within three years, generally effective for distributions after the date of enactment.

ADDITIONAL RETIREMENT PROVISIONS

Annuities

The SECURE 2.0 Act of 2022 eliminates an actuarial test in the regulations relating to required minimum distributions that limits the use of certain annuities in defined contribution plans and individual retirement accounts. The modification makes it possible for participants to make elections to use annuities that provide only a small financial benefit but important guarantees. The change is effective for calendar years after the date of enactment.

The Act also removes statutory barriers to the adoption and growth of qualifying longevity annuity contracts that caused regulations relating to required minimum distributions to limit their adoption. The provision is effective on the date of enactment.

Miscellaneous improvements

The SECURE 2.0 Act of 2022 includes several other provisions meant to expand participation and boost retirement savings. Still other changes are intended to streamline plan administration. These additional improvements include (effective date noted in parentheses):

- Conforming 403(b) hardship rules to 401(k) hardship rules (plan years after 2022);
- Allowing plans to provide participants with the option of receiving matching contributions to a defined contribution plan on a Roth (i.e. after-tax) basis (after date of enactment);
- Allowing employers a grace period to correct mistakes without penalty when establishing automatic enrollment and contribution escalation plans (after 2023);
- Reducing SECURE Act length-of-service requirements for part-time participants in sponsored plans from three years to two years (plan years beginning after 2024);
- Allowing plan fiduciaries to decide not to recoup overpayments from retirees in the case of mistaken overpayment of benefits, and limits on fiduciaries that do decide to recoup (after date of enactment);
- Eliminating notification requirements to unenrolled plan participants, but requiring an annual notification to these participants of plan requirements and deadlines to encourage participation (plan years beginning after 2022);
- Eliminating the "first day of the month" requirement for requesting changes to governmental 457(b) plans (tax years beginning after date of enactment) and;

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- Requiring the IRS to update regulations to allow insurance-dedicated exchange-traded funds;

OTHER TAX PROVISIONS

The vast majority of the tax-related provisions of the Consolidated Appropriations Act, 2023 relate to retirement and income deferral. However, two unrelated provisions were included in the omnibus package.

Conservation easements

The SECURE 2.0 Act includes a prohibition on partnerships treating a contribution as a charitable conservation easement if the value of the easement exceeds 250 percent of the sum of each partner's basis in the partnership allocable to the property upon which the easement is placed. The prohibition applies to contributions made after the date of enactment.

> **COMMENT.** *The charitable deduction for qualified conservation easements can be used as an abusive tax shelter, thus the new limitation.*

Telehealth

The Consolidated Appropriations Act, 2023 includes the Health Extenders, Improving Access to Medicare, Medicaid, and CHIP, and Strengthening Public Health Act of 2022. The Act includes a one-year extension, through 2023, of the COVID-era safe harbor applicable to HSAs to retain treatment as a high deductible health plan despite the lack of a deductible imposed on the provision of telehealth services.

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