TRANSAMERICA®

IRS NOTICE 2024-2: "GRAB BAG" GUIDANCE ON VARIOUS SECURE 2.0 PROVISIONS

On December 20, 2023, the Internal Revenue Service ("IRS") released Notice 2024-2 (the "Notice"), providing guidance on a number of the SECURE 2.0 Act of 2022 ("SECURE 2.0") provisions. Of note, the IRS extended the deadline for plan document amendments required for SECURE 2.0 (and the other laws addressed in Section 501 of SECURE 2.0) from December 31, 2025, to December 31, 2026, for most plans (later dates apply to certain plans). Below is an overview of the SECURE 2.0 provisions discussed in the Notice.

<u>Automatic Enrollment Requirement for New Plans</u>

Under Section 101 of SECURE 2.0, plans initially established on or after December 29, 2022, are required to include or add, no later than January 1, 2025, an eligible automatic contribution arrangement ("EACA") that includes a 90 day withdrawal provision, unless the plan meets an exception to this requirement. The Notice provides the following guidance with respect to this provision.

- *Date a plan is "established."* For the purpose of Section 101 of SECURE 2.0, 401(k) plans are established on the date the plan (or the plan's Code Section 401(k) contribution feature) is adopted, regardless of the effective date of the feature. For example, if an employer adopts a new 401(k) plan on October 3, 2022, with an effective date of January 1, 2023, the plan is established prior to December 29, 2022. However, if a profit sharing plan that was initially adopted on January 1, 2010, adopts an amendment to add a Code Section 401(k) contribution feature on July 1, 2023, the deferral feature was established after December 29, 2022, and the EACA requirement will apply. Code Section 403(b) plans are deemed to be established on the date of the Code Section 403(b) plan's adoption, regardless of the date on which a salary deferral feature is adopted.

- *Effect of mergers, spin-offs, and acquisitions on grandfathered plans.* Plans established prior to December 29, 2022 ("pre-enactment plans") are not required to add an EACA, but plans established on or after December 29, 2022 ("post-enactment plans") must comply with this mandatory provision (assuming they do not meet an applicable exception). In the context of mergers, spin-offs, and acquisitions, the Notice provides the following guidance.

  - The surviving plan in a merger of two pre-enactment single employer plans retains its grandfathered/pre-enactment status.
  - In general, if a post-enactment plan is merged with a pre-enactment plan, the ongoing plan will be treated as a post-enactment plan and the requirement to add an EACA will apply to the ongoing plan.
  - As an exception to the above, if a post-enactment plan merges into a pre-enactment plan in connection with a transaction described in Code Section 410(b)(6)(C), the surviving plan will retain its grandfathered/pre-enactment status provided that the merger occurs before the end of the Code Section 410(b)(6)(C) coverage testing transition period.
  - A plan that is spun-off from a pre-enactment plan continues to be a grandfathered/pre-enactment plan.
  - A pre-enactment single employer plan that merges into a MEP that was established prior to December 29,

2022 (a "pre-enactment MEP") will retain its grandfathered/pre-enactment status following the merger into the pre-enactment MEP.

- A post-enactment single employer plan that merges into a pre-enactment MEP will continue to be a post-enactment plan, but it will not affect the status of any other pre-enactment plans in the MEP.
- A pre-enactment single employer plan that merges into a MEP established on or after December 29, 2022 (a "post-enactment MEP") will lose its pre-enactment/grandfathered status. Note that this interpretation by the IRS is inconsistent with industry expectation; however, it is currently unclear as to whether the IRS will provide any further clarification or adjustment in this regard.
- A single employer plan that is spun-off from a pre-enactment MEP will have the same status as it had when it was part of the pre-enactment MEP (i.e., it will be treated as a pre-enactment single employer plan only if the plan was a pre-enactment plan while it was in the MEP).

Distributions Due to Terminal Illness

Section 326 of SECURE 2.0 created an exemption from the 10% excise tax normally applicable to early withdrawals from qualified retirement plans if the distribution is made to a participant who is a terminally ill individual, as that term is defined in Section 326. In creating a new exemption from the excise tax, SECURE 2.0 amended only Code Section 72(t); it did not amend Code Section 401(k) to create a new exception to the restrictions from withdrawing elective deferrals prior to death, disability, attainment of age 59-1/2, termination of employment, or an enumerated in-service withdrawal. Consequently, it was unclear as to whether this provision gave rise to a new distribution right or merely created favorable tax treatment with respect to distributions a terminally ill participant was already eligible to take. The Notice provides the following guidance with respect to this provision.

- Plan sponsors may, but are not required to, amend their plans to provide for terminal illness distributions, with no dollar limitation, but the distribution must comply with the existing restrictions on in-service withdrawals of Code Section 401(k) or 403(b) salary deferrals. A plan could therefore allow participants to receive a terminal illness distribution from employer contributions, after-tax contributions, and rollover contributions without restriction; however, a terminal illness distribution could only be made available from a participant's salary deferral contributions if the terminally ill participant was otherwise eligible to withdraw his or her deferrals (e.g., was age 59½, disabled, terminated, or met the requirement for a different available in-service withdrawal, such as a hardship distribution).
- Only distributions from "qualified" retirement plans (which include 401(a), 401(k), 403(a), and 403(b) plans, and IRAs) may be terminal illness distributions; this expressly precludes distributions from 457(b) governmental plans from being terminal illness distributions.
- If a plan does not permit a terminal illness distribution, a terminally ill individual may treat any permissible distribution or in-service withdrawal as a terminal illness distribution on his or her individual tax return using IRS Form 5329 (and retaining a copy of the physician's certification).
- For a distribution to qualify as a terminal illness distribution, the required physician's certification must be issued prior to the distribution, and it must include certain specific information (as enumerated in the Notice), but it does not need to include any underlying medical documentation.
- A participant may not self-certify as to his or her terminal illness and a physician who is a terminally ill participant may not prepare his or her own certification.
- Terminal illness distributions may be recontributed to a qualified retirement plan (including an IRA) at any time during the 3-year period beginning on the day after the distribution was received under rules similar to the recontribution of a qualified birth or adoption distribution (QBAD).

Employer Contributions as Roth

Under Section 604 of SECURE 2.0, retirement plans that are permitted to offer a Roth deferral program may permit a participant to designate his or her vested employer matching and/or nonelective contributions as Roth contributions ("Designated Employer Contributions"). The Notice provides the following guidance with respect to this provision.

- Generally, the rules applicable to Roth salary deferrals will apply to Designated Employer Contributions. For example, the Roth designation must be made prior to the employer contribution being allocated to the participant's account and is irrevocable after such allocation, Designated Employer Contributions must be separately accounted for, and participants must be able to make, and change, designations at least once during each plan year.
- A participant may make a Roth designation of employer contributions only with respect to contributions in which the participant is 100% vested under the applicable vesting schedule. For example, if a participant is 60% vested in his or her matching contribution account under the plan, the participant may not elect to have any of the matching contributions made as designated Roth contributions.
- A plan may permit Designated Employer Contributions even if it does not permit employees to designate elective contributions as Roth, and vice versa. Although the right to designate elective contributions as Roth and the right to designate employer contributions as Roth are "rights or features" that must be nondiscriminatory, a plan will not fail the applicable nondiscrimination test merely because it requires that a participant be fully vested in his or her employer contributions in order to designate them as Roth.
- Designated Employer Contributions are included in the participant's taxable income in the year the contributions are made to the plan, not the year to which they are allocated (if different), and reported to the participant and Internal Revenue Service (IRS) by the plan using Form 1099-R.
- Designated Employer Contributions are not subject to federal income tax withholding; are not considered Section 415 compensation; and are generally not included in wages for purposes of FICA or FUTA (although special rules apply to state or local government plans if their participants are subject to social security or Medicare taxes).

<u>Additional Provisions Covered by the Notice</u>

SIMPLE IRA Provisions

The Notice addresses the SECURE 2.0 changes to SIMPLE IRAs and SEP IRAs, including 1) the increased limits applicable to contributions to SIMPLE IRAs; 2) the steps required for a plan sponsor to terminate a SIMPLE IRA mid-year and replace it with a safe harbor 401(k) without violating existing rules prohibiting sponsoring both a SIMPLE IRA and Section 401(k) plan at the same time; and 3) the new rules allowing SIMPLE IRAs to permit Roth contributions.

Start-Up Credits

Section 102 of SECURE 2.0 increased the small employer plan startup credit for certain employers from 50% to 100% of incurred start-up costs, and it added a new tax credit for employer contributions made to these plans. The Notice provides additional information for claiming these credits.

Military Spouse Credit

Section 112 of the SECURE Act created a new tax credit for small employers who permit non-highly compensated military spouses to join their plans two months after they are hired, make employer contributions at the rate a participant who is not a military spouse would receive after two years of employment, and fully vest those contributions. The Notice provides further details regarding the new tax credit, including timing requirements for the three-year credit period.

EPCRS Corrections – Safe Harbor for Missed Deferrals

Section 350 of SECURE 2.0 made permanent a correction method, previously scheduled to sunset at the end of 2023, for failure to properly implement an automatic enrollment or automatic escalation feature, and extended availability of this correction method to plans established under Code Sections 408 and 457(b) and to corrections for terminated participants. The Notice clarifies that the safe harbor correction method under Appendix A.05(8) of Revenue Procedure 2021-30 may be used if the SECURE 2.0 correction deadlines are met and discusses the errors to which the new safe harbor may be applied.

Small Immediate Financial Incentives

Section 113 of SECURE 2.0 permits plan sponsors to provide de minimis financial incentives to employees who elect to make deferrals to a 401(k) or 403(b) plan without violating the contingent benefit rule. The Notice defines de minimis as a financial incentive that does not exceed $250 in value. The financial incentive may be paid in installments over a multiple year period and subsequent installments may be made contingent on continued participation. The incentives may not be provided to participants already making contributions to the plan. Additionally, these incentives are includible in the employee's gross income and subject to withholding and reporting requirements for employment tax purposes.

Cash Balance Plan Anti-Cutback Relief

Section 348 of SECURE 2.0 revised how a cash balance plan is tested for compliance with Code section 411 accrual rule. Cash balance plans that have age or service based credits and variable interest crediting rates no longer need to have a fixed annual minimum interest crediting rate to comply with the accrual rule. The Notice addresses how a cash balance plan can be amended to reflect SECURE 2.0 without running afoul of anti-cutback rules.

Plan Amendments

The Notice extends the amendment deadlines for SECURE 2.0, the Setting Every Community Up for Retirement Act of 2019, the Bipartisan American Miners Act of 2019, the Coronavirus Aid, Relief and Economic Security Act, and the Taxpayer Certainty and Disaster Tax Relief Act of 2020, as follows:

- Qualified plans that are not governmental plans, 403(b) plans that are not maintained by public schools, and IRAs must be amended by December 31, 2026;
- Collectively bargained qualified and 403(b) plans must be amended by December 31, 2028;
- Qualified governmental plans and 403(b) plans maintained by public schools must be amended by December 31, 2029; and
- 457(b) governmental plans must be amended by the later of December 31, 2029, or, if applicable, the first day of the first plan year beginning more than 180 days after the date of notification by the Secretary that the plan was administered in a manner inconsistent with the requirements of Section 457(b).

The extension applies to both mandatory and discretionary provisions. For plans using one of Transamerica's pre-approved documents, clients will receive information as amendments become available for adoption. Individually designed plans should reach out to their document provider for information regarding the timing of amendments.

Please contact your Transamerica representative if you have any questions.

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