

# **The Patchwork of Retirement Changes under the SECURE Act**

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# Today's Presenters



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# Introduction

## SETTING EVERY COMMUNITY UP FOR RETIREMENT ENHANCEMENT ACT OF 2019

Passed on the coattails of the bipartisan spending bill signed by President Trump on December 20, 2019, the SECURE Act may be the most impactful retirement plan legislation since the Pension Protection Act of 2006. SECURE aims to increase access to defined contribution plans for businesses and participants, promote the inclusion and portability of lifetime income investment options, and facilitate retirement plan design and administration.

# Introduction

Today we will provide a high-level summary of the significant changes codified by SECURE, which generally impact the following categories:

- Access to Retirement Plans
- Retirement Plan Design
- Investment-Related Changes
- Plan Disclosure Obligations
- Other Changes/Enhancements

# ACCESS TO RETIREMENT PLANS

# Access to Retirement Plans

**Pooled Employer Plans (PEPs).** Perhaps the most anticipated change in the law is SECURE's loosening of certain rules of ERISA and the Internal Revenue Code to facilitate the creation of "open" multiple employer plans (open MEPs) or "pooled employer plans" (PEPs) as they are called in SECURE.

## What is a PEP?

- An individual account plan described in Section 401(a) of the Internal Revenue Code of 1986, as amended (the Code) or that consists of individual retirement accounts under Code Section 408
- established or maintained by a "Pooled Plan Provider"
- for the purpose of providing benefits to the employees of two or more employers
- includes certain specified terms in its plan document

# Access to Retirement Plans

## Who can participate in a PEP?

- SECURE amends ERISA's definition of "employer," eliminating the "nexus"/"commonality" requirement (e.g., a common industry or geographic proximity)
- The Department of Labor (DOL) issued a final rule in 2019 that clarified its position on open MEPs, but many practitioners felt that the rule did not go far enough to permit open MEPs
- SECURE permits entirely unrelated employers to join together to participate in a PEP
- As a result, employers can consider joining a PEP versus maintaining their own stand-alone plan(s)

# Access to Retirement Plans

## What if a participating employer fails to meet tax-qualification requirements?

- SECURE amends the Code to address what is known as the “one bad apple” rule—the situation where one participating employer fails to meet the requirements for tax qualification, and the tax qualification of the entire MEP is jeopardized
- Many believed this to be a primary deterrent for MEP participation
- Under the new law, if certain requirements are met, a PEP will not be treated as failing to meet the PEP requirements solely because a participating employer fails to meet its obligations to the PEP, and SECURE establishes a process to address the failure
- In the event of a failure, assets attributable to that employer are transferred out of the PEP to another retirement plan or account unless the Treasury and/or the DOL determines that it is in the “best interests” of the employees to retain the assets in the PEP
- The offending employer, and not the PEP or other participating employers, will be responsible for any associated liabilities resulting from the failure



# Access to Retirement Plans

## Why is this important?

- For years, industry professionals have critiqued existing law for placing restrictions on and/or being a roadblock to the formation of open MEPs for no apparent reason, and President Trump issued his Executive Order on Strengthening Retirement Security in America on August 31, 2018 calling for the DOL and the Internal Revenue Service (IRS) to address retirement plan access
- SECURE essentially created a new type of retirement plan that could be a step in the right direction in solving the retirement crisis for small- to midsize employers
- While there will continue to be benefits for larger employers to offer customized individual plans (for example, to offer unique features such as company stock, custom investment options, and open architecture platforms), PEPs should be a more accessible outlet for small businesses to offer plans to their employees

## What else to keep in mind?

- SECURE directs the DOL and IRS to issue additional guidance around PEPs – stay tuned!
- The SECURE provisions impacting PEPs become effective December 31, 2020

# Access to Retirement Plans

## Small Business (Up to 100 Employees) Startup Credit

- The SECURE Act increases the current \$500 tax credit cap (for the plan's first three years) to the greater of (1) \$500 or (2) the lesser of (a) \$5,000 or (b) \$250 multiplied by the number of nonhighly compensated employees eligible to participate in the plan. The increase is effective for plan years beginning after 2019

## Small Business (Up to 100 Employees) Automatic Enrollment Credit

- Small employers that adopt automatic enrollment provisions are eligible for an additional \$500 credit for three years regardless of when the automatic enrollment provisions are adopted. The new credit is effective for plan years beginning after 2019

# RETIREMENT PLAN DESIGN

# Retirement Plan Design

## Mandatory Plan Design Changes Under SECURE

### Part-time employee defined contribution plan eligibility

- Previously plans could exclude part-time employees if employees did not complete 1,000 hours of service
- SECURE requires plans to extend participation—solely for purposes of making elective deferrals—to any part-time employee who has worked at least 500 hours in each of the immediately preceding three consecutive 12-month periods
- Plans need not provide matching or other employer contributions to these newly eligible employees
- Special rules are provided to ensure that extending participation to these part-time employees does not adversely affect nondiscrimination testing
- Effective January 1, 2021, but plans will need to be amended prior to December 31, 2020

# Retirement Plan Design

## Post-death “Stretch” Distributions

- Previously, a plan could allow a designated beneficiary to “stretch” distributions from a plan over the beneficiary’s remaining life expectancy
- SECURE caps the time permitted to exhaust inherited plan or IRA assets at 10 years (for designated beneficiaries) and five years (for nondesignated beneficiaries)
- This new cap does not apply to certain “eligible designated beneficiaries,” including a surviving spouse, a minor child, a disabled person, a chronically ill person, or any person not more than 10 years younger than the employee
- These new rules are generally effective with respect to participants who die after December 31, 2019

# Retirement Plan Design

## Required beginning date increased to age 72

- Previously, qualified plan participants were generally required to begin receiving distributions by April 1 following the later of the year in which the participant attains age 70½ or terminates employment
- SECURE extends age 70½ to age 72
- If a plan currently requires distributions based on age 70½ and desires to change the age to 72, the plan would require an amendment
- Note that plans can require distributions to be made as early as age 65 (e.g., at normal retirement age)
- This new rule applies to defined contribution plans, defined benefit plans, and IRAs
- Effective for any participant reaching age 70½ after December 31, 2019

# Retirement Plan Design

## Optional Plan Design Changes Under SECURE

### Increased QACA Rate Cap

- Effective for plan years beginning after 2019, the max default automatic contribution rate remains at 10% for the first year and can be increased to up to 15% in later years (previously the cap was 10%)

### Change to Earliest Pension Plan In-Service Retirement

- Effective for plan years beginning after December 31, 2019, in-service retirement benefits from a pension plan may be changed from age 62 to as low as age 59½

### Child Birth or Adoption Distributions

- Effective for distributions after December 31, 2019, defined contribution plans can permit penalty-free distributions of up to \$5,000 for expenses related to the birth or adoption of a child
- These special distributions can later be repaid to a qualified retirement plan

# Retirement Plan Design

## Safe Harbor Plan Adoption

- If a plan intends to adopt a 401(k) safe harbor provision in a plan year after December 31, 2019, SECURE permits a plan to elect into the 3% nonelective safe harbor at any time up until 30 days before the close of the plan year
- Additionally, SECURE permits a 401(k) plan to elect into the nonelective safe harbor even *after* the 30th day before the close of the plan year so long as the amendment to adopt the nonelective safe harbor is made by the end of the following plan year, and the nonelective contribution is at least 4%

## Lifetime Income Investment Portability

- For defined contribution plans that intend to offer Lifetime Income Investments under the plan, SECURE expands portability for participants choosing the option if the plan later eliminates the option
- An amendment may be desired to permit in-service and in-kind distributions of lifetime income investments and to permit the acceptance of in-kind transfers of lifetime income investments, such as through a rollover from a previous employer-sponsored plan



# INVESTMENT-RELATED CHANGES

# Investment-Related Changes

## Lifetime Income Option Safe Harbor

- SECURE provides a new safe harbor that defined contribution plan fiduciaries can rely on in selecting lifetime income investment providers to make available as an investment option or a component of an investment option under the plan
- The safe harbor allows a fiduciary to satisfy its obligation to “consider the financial capability of such insurer to satisfy its obligations under the guaranteed retirement income contract,” and its obligation to conclude that “at the time of selection, the insurer is financially capable of satisfying its obligations under the guaranteed retirement income contract” by (1) obtaining specific representations from the insurer providing the lifetime income product and (2) considering whether the costs and fees associated with the lifetime income investment are reasonable
- Plan fiduciaries that satisfy these requirements and qualify for the safe harbor would be shielded from liability with respect to participant losses in the event of the annuity provider's inability to pay the full benefits when they are due
- SECURE offers no effective date, but most assume that this safe harbor is effective immediately

# PLAN DISCLOSURE OBLIGATIONS

# Plan Disclosure Obligations

## Safe Harbor Notices

- Defined contribution plans take advantage of safe harbor rules to avoid nondiscrimination testing using a nonelective contribution formula; the annual safe harbor notice requirement has been eliminated
- This new rule is effective for years beginning after December 31, 2019

## Lifetime Income

- Defined contribution plans, whether or not any lifetime income investment options are available under the plan, must include a lifetime income disclosure on benefit statements
- The lifetime income disclosure must illustrate monthly payments that the individual would receive if his or her entire account balance were used to purchase a joint and survivor or single life annuity
- SECURE directs the DOL to issue interim final rules, model disclosures, and assumptions that plans may use in developing their disclosures; this change applies to benefit statements furnished more than 12 months after the DOL issues such guidance

# OTHER CHANGES

# Other Changes/Enhancements

## Soft-Frozen Defined Benefit Plans

- SECURE provides nondiscrimination testing relief with respect to closed or “soft-frozen” defined benefit plans so as to permit existing participants to continue accruing benefits without running afoul of the testing requirements (covers plans that closed before April 5, 2017, or that have been in effect for at least five years without a substantial increase in coverage or benefits in the last five years)
- These changes are effective immediately, or if the plan sponsor so elects, for plan years beginning after 2013

## Consolidated Form 5500 Reporting for Defined Contribution Plans

- SECURE directs the IRS and the DOL to modify annual retirement plan reporting rules to permit certain common individual account plans or defined contribution plans (for example, multiple defined contribution plans sponsored by the same employer with the same trustee, fiduciary, and investment menu) to file a consolidated Form 5500
- The modified rules must be implemented by the end of 2021 and apply for plan years beginning after 2021

# Other Changes/Enhancements

## Increased Penalties for Failure to File Returns

- SECURE raises the late filing penalties for a number of required tax returns; for example, the late filing penalty for failing to file a Form 5500 is increased to \$250 per day, capped at \$150,000 effective for returns and filings due after December 31, 2019

## 403(b) Plan Terminations

- If an employer terminates a 403(b) custodial account, the distribution needed to complete the plan termination may be the distribution of an individual custodial account in kind to a participant or beneficiary
- The individual custodial account will be maintained as a 403(b) custodial account until paid out, subject to the 403(b) rules, and the Treasury is to issue guidance no later than six months after SECURE is enacted

## Church Plans

- SECURE clarifies which individuals may be eligible to participate in retirement plans maintained by church-controlled organizations, and this clarification is applicable to years beginning before, on, or after the enactment of SECURE

# Other Changes/Enhancements

## Qualified Disaster Distributions

- SECURE retroactively provides special rules for qualified disaster distributions and loans from retirement plans and IRAs
- Applies to individuals who suffered losses in a qualified disaster area beginning after 2017 and ending 60 days after the date of enactment

## Traditional IRA Contribution Rules

- SECURE removes the current traditional IRA contribution age limit
- However, contributions made after age 70½ are subject to an offset with qualified charitable distribution reductions
- SECURE expands the nondeductible contribution limit for foster parents
- SECURE expands the definition of “compensation” such that compensation earned by graduate and post-doc students be included for contribution calculation purposes



# Questions?

# Speaker Biography



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## **Amy Pocino Kelly**

Amy is the deputy practice leader for the employee benefits and executive compensation practice. Amy's practice focuses on providing strategic, day-to-day guidance on employee benefits plan matters to plan sponsors, including public and private companies, tax-exempt organizations, and governmental employers. She counsels these clients on the design, governance, operation, and compliance of qualified and nonqualified retirement plans, equity and executive compensation arrangements, and welfare benefit plans. Amy also represents plan sponsors in audit and correction matters before the DOL and the IRS.

# Speaker Biography



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## Vincent Smith

Vin is a partner and senior consultant at Fiduciary Investment Advisors, LLC (FIA). His focus is on providing services to defined contribution retirement plan clients. Vin has more than 14 years of experience providing a broad array of consulting services to plan sponsors including: comprehensive fiduciary governance and oversight, investment policy statement development and review, investment menu design, investment monitoring and selection, market reviews and request for proposals, fee analysis and benchmarking projects, and participant-level communication and education planning and delivery. He is a member of FIA's Defined Contribution Strategic Oversight Committee. Prior to joining FIA, Vin was a senior member of the consulting teams at Cammack LaRhette Consulting and Longfellow Advisors, where he was responsible for managing client relationships as well as teams of junior consultants.