



February 7, 2023

Delivered via email

Lisa Gomez, Assistant Secretary
Employee Benefits Security Administration
Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Immediate Guidance Needs Under SECURE 2.0

Dear Assistant Secretary Gomez:

The enactment of the SECURE 2.0 Act of 2022 ("SECURE 2.0") on December 29, 2022, was a significant achievement for retirement security and all who worked tirelessly to see that the bill's 92 provisions to improve our retirement system became law. As employers, plan and IRA providers, workers, and retirees now turn to implementing and utilizing the changes made by the new law, guidance will be needed very quickly from the Department of Labor (DOL), the Treasury Department, and the Internal Revenue Service with respect to many of SECURE 2.0's provisions.

The American Benefits Council ("the Council") is writing to identify what we believe are *the most important, time-sensitive issues with respect to which DOL guidance is needed as soon as possible*. The provisions discussed below have either an immediate effective date or have immediate implications for which guidance is needed. We hope this letter is helpful as DOL identifies and prioritizes its SECURE 2.0 guidance projects. The Council will follow up with a separate letter identifying additional SECURE 2.0 items for which guidance will be needed but where such need is not immediate.

GROUP OF PLANS REPORTING (SECTION 345)

Summary: The SECURE Act of 2019 provides that a group of structurally similar plans (a "Group of Plans") may file a single, consolidated Form 5500 for plan years beginning after December 31, 2021. SECURE 2.0 provides that any audits with respect to

the group may relate only to each individual plan that would otherwise be subject to an audit were it not participating in the group (i.e., generally plans with 100 or more participants).

Time-sensitive issue: Although DOL issued proposed regulations and reporting requirements with respect to Groups of Plans in 2021, those requirements have not been finalized. Final revisions to Form 5500 are needed in order for Groups of Plans to utilize the option to file a single, consolidated Form 5500. This provision was effective for 2022.

Guidance requested: We urge DOL to finalize the reporting requirements for Groups of Plans (or “Defined Contribution Groups”) as soon as possible, taking into account, of course, the clarification regarding Group of Plan audits that was made in SECURE 2.0. This new reporting alternative as provided for in the SECURE Act of 2019 is a very important option for expanding plan coverage by small employers in particular and should be a very high guidance priority for DOL.

RECOVERY OF RETIREMENT PLAN OVERPAYMENTS (SECTION 301)

Summary: SECURE 2.0 generally allows plan fiduciaries to decide not to recoup overpayments that were mistakenly made to participants. If plan fiduciaries choose to recoup overpayments, then limitations and protections on the amount and manner of the recoupment apply to protect participants. This provision is effective as of the date of enactment.

Time-sensitive issue: The provision raises a number of questions with respect to the new limitations and protections for participants.

Guidance requested:

- Please confirm that a plan fiduciary that previously sought (or is seeking) to recoup a prior overpayment that occurred before the date of enactment but who, following SECURE 2.0, would prefer to no longer seek recoupment, may revise the plan’s treatment of the overpayment in accordance with the new provision.
- Please confirm that the limitations that apply with respect to fiduciaries who choose to seek recoupment only apply to overpayments made on or after the date of enactment. Overpayments made prior to the date of enactment should not be subject to new requirements. In other words, the new requirements should not be applied retroactively.
- Please confirm that a participant may elect a faster repayment schedule than what is set forth under SECURE 2.0. Correspondingly, please confirm that the limitations on recoupment are part of a fiduciary safe harbor (like the safe

harbor established under new ERISA section 206(h)(1)) and are not mandatory in all cases.

- It is common for plan administrators to receive late notices of a participant's death so that benefit payments may have been incorrectly paid after death, such as in the case of a life annuity. Regardless of whether the limitations on recoupment are mandatory or part of a fiduciary safe harbor, we ask for confirmation that recoupment of payments made erroneously to the participant after the participant's death may be recouped without any limitation including through stop payment orders or reversals of direct deposits.
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REASONABLE GOOD FAITH COMPLIANCE STANDARD

Pending the issuance of guidance on SECURE 2.0, we ask for confirmation that reasonable good faith compliance constitutes compliance with the new rules.

Sincerely,

A handwritten signature in cursive script that reads "Lynn D. Dudley".

Lynn D. Dudley

Senior Vice President, Global Retirement and Compensation Policy

cc:

Ali Khawar

Tim Hauser

Amy Turner

Joe Canary

Christopher Cosby

Michael Auerbach

Jeff Turner

Karen Lloyd

Mary Beech