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LEGAL DEVELOPMENTS

Another Year-End Tax Act Brings Changes for Plan Sponsors (and Their Service Providers)

This column includes a summary of the key provisions for defined benefit and defined contribution plans from the Further Consolidated Appropriations Act of 2020. Notably, a number of the provisions are effective January 1, 2020, providing an opportunity to take advantage of these provisions in the near term, or otherwise require system changes to be made to comply with any mandatory changes.

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The Further Consolidated Appropriations Act of 2020 (FCAA), which was signed into law on December 20, 2019, contains a number of pension provisions from the *Setting Every Community Up for Retirement Enhancement Act of 2019* (SECURE Act). {H.R. 1994} The SECURE Act has a 10-year history, and is intended to expand coverage for plan participants, facilitating lifetime savings and access to retirement funds. Of course, changes take time to implement properly, and some provisions of SECURE may provide opportunities and some may bring on additional challenges and expenses in maintaining a qualified plan.

A summary of the key provisions for defined benefit and defined contribution plans is set forth at the end of this column, via a side-by-side chart of the initial provisions, starting at page 41, and the changes. Notably, a number of the provisions are effective January 1, 2020, providing an opportunity to take advantage of these provisions in the near term, or otherwise require system changes to be made to comply with any mandatory changes.

Further Guidance Eagerly Awaited

Many of the fine points of the changes made by the FCAA are left to the Department of Labor (DOL) and the Internal Revenue Service (IRS) to determine through regulation or other such guidance. Many of these open questions are outlined in the chart below. While some of the provisions have delayed effective dates (such as the rules for long-term part-time employees, which do not need to take practical effect until 2024), many of the changes are effective in 2020 (or even retroactively). Therefore, guidance is anxiously awaited, and the pressure is on the regulatory agencies to be prompt in issuing the needed information (and, ideally, transition relief).

The FCAA also takes significant forward steps in encouraging the use of multiple employer plans, which have long been seen by those in government as a viable way to expand access to retirement plans, particularly to employees of small business (now that the lack of nexus hurdle has been overcome). Whether this turns out to be the case is yet to be seen. While economies of scale sound like a marvelous way to reduce costs for smaller plans, it is not entirely clear whether the complexities of administering plans with so many moving parts will cause these programs to be as successful as Congress anticipates. Nonetheless, many plan sponsors, as well as many in the industry, look with some level of excitement and trepidation to the changes that these structures may bring with them.

Action Steps

As we await IRS and DOL guidance on these various provisions, plan sponsors and recordkeepers should review these provisions and consider design changes to implement the optional provisions, and to take steps as soon as possible to be in operational compliance with the mandatory required minimum distribution (RMD) provisions (both lifetime and death changes).

For the RMD changes, which are already effective, this requires updating distribution packages, distribution forms, reviewing beneficiary designations, updating RMD policies and procedures, and potential corrective action if the RMD rules are violated. (Note that this may require two sets of procedures, as some participants/beneficiaries may be grandfathered under the old rules.) For example, if amounts are distributed during the participant's lifetime that are not RMD amounts under the new rules, then the amount may be eligible for rollover treatment, subject to 20 percent mandatory withholding and Section 402(f) notice obligations. If those rules are violated, it is possible that Revenue Procedure 2019-19 (the Employee Plans Compliance Resolution System (EPCRS) procedure) would need to be considered to correct potential plan overpayments (although, ideally, transition relief will be provided).

While the FCAA gives anti-cutback relief and an extended time for amendment, there may be situations where earlier amendments are desirable to clarify the operational aspects of a provision. It will be interesting to see how attorneys and document providers react to these needs, particularly where we anticipate additional IRS guidance (including model/sample amendments). And, it is reassuring to know that the remedial amendment period generally provides an opportunity to repair problems without creating qualification failures that require EPCRS remediation.

Conclusion

Those of us who have been in the benefits industry for a long time have seen new legislation come and go and have experienced the periods of chaos that generally follow as we try to synthesize, plan, and accommodate the new rules for our clients' plans. The FCAA is no different (although the lead time of less than two weeks over the holidays makes this one particularly challenging). As always, we live in interesting times. ■

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
Pooled Employer Plans (PEPs)	DC	MEPs (multiple employer plans) under Code Section 413 are limited to plans sponsored by employers with common interest.	Unrelated employers can participate in a single plan, and the plan may be sponsored by a non-PEO service provider.	This may provide cost-savings for plan sponsors and participants, with a single form 5500 filed for the plan and commingled investments, giving access to economies of scale.	Plan years beginning after December 31, 2020.	Optional
Plan Adoption Date	DB/DC	A qualified plan must be established/adopted by the end of the plan year for which it is effective.	A new qualified plan can be established/adopted by the deadline for filing the employer's tax return for the taxable year.	This provides more time for employer to offer qualified plans. This should also apply to MEPs. 401(k) salary deferral provisions, however, must be adopted before deferrals begin. Therefore, these plans are generally put into effect at the beginning of a year.	Plans adopted for taxable years beginning after December 31, 2019.	Optional

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
Small Employer Plan Start-Up Tax Credit and EACA Credit	DB/DC	An eligible employer with 100 or fewer employees may receive a nonrefundable income tax credit of up to \$500 (for three years) for qualified start-up costs of adopting a new qualified retirement plan. Eligibility for the credits track the rules for plan sponsors eligible for Simple plans/IRAs.	The start-up credit is increased (up to \$5,000 per year for three years). The credit is equal to 50 percent of start-up and administration expenses, up to a maximum of \$250 times number of participating NHCEs (but not more than \$5,000). Also, there is a new additional nonrefundable credit for small employers (up to \$500 per year for three years) that establish plans that include eligible automatic contribution enrollment (EACA) or add an EACA as a feature to an existing plan. Eligibility still tracks the rules for Simple plans/IRAs.	This is helpful incentive for small plan sponsors to offer plans or add automatic enrollment. As in the past, the start-up credit cannot be used if there has been another qualified plan, SEP, or SIMPLE in the prior 3 years.	Effective for taxable years beginning after December 31, 2019.	Optional
Nondiscrimination Relief for Certain Frozen Plans	DB	Closed/Frozen DB plans generally remain subject to Code Sections 401(a)(4), 401(a)(26), minimum coverage, and benefits, rights, and features testing.	Act provides nondiscrimination, minimum coverage, and Section 401(a)(26) relief with respect to benefit accruals and benefits, rights, and features for a closed class of participants under a defined benefit plan that has been closed for new hires, provided that the plan satisfies certain requirements.	This change is particularly important to "soft" frozen plans, with more mature, highly compensated participant populations.	On enactment.	Optional

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
Disaster Relief	DB/DC	Special disaster relief is limited to relief set forth in the statute or through other IRS guidance.	Following relief consistent with hurricanes Maria, Katrina, etc., the Act provides relief for post-2017 disasters (other than the California wildfires) through 60 days following enactment. The relief includes for individuals in areas affected by disasters to: (1) take temporary withdrawals or loans of as much as $100,000 from their retirement accounts without 10% penalty (with a three-year spread on taxation), and with withdrawals treated as tax-free rollovers if repaid within three years; (2) pay back loans that were outstanding over an extra year; (3) recontribute certain withdrawals taken for home purchases in the disaster area; (4) make it easier for those affected by disasters to obtain the earned income tax credit and refundable portion of the child tax credit by basing their eligibility on their income from the previous year; and (5) provide an automatic extension to certain retirement plan deadlines applicable to those affected by disasters.	This is special relief in addition to the new safe harbor hardship distribution provision. Participants generally have 180 days from enactment to take advantage of this relief (June 17, 2020). Special plan amendments must be adopted by the end of the 2020 plan year (2022 for governmental plans), unless otherwise extended.	Generally effective on date of enactment. For nationally declared disasters from 1/1/2018 to 60 days following enactment (*i.e.*, Feb. 18, 2020).	Optional

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
Lifetime Income Disclosure	DC	No required annuity payment disclosure.	Required participant disclosure on the participant's benefit statement at least annually of estimated monthly annuity payment (single life annuity and qualified joint and survivor annuity) generated by account balance. DOL to provide a model disclosure and set forth applicable assumptions.	Importantly, the Act provides fiduciary relief for plan sponsors when providing this information (which was a real concern where the actual payments fall short of the estimate). The intent is to provide sufficient information to ensure participants understand the sufficiency of their retirement savings, which may encourage lifetime income products. Notably, the Act does not mandate offering an annuity, only to provide disclosure information.	Benefit statements furnished more than 12 months after DOL's interim final rule or model disclosure/ assumptions issued. (Therefore, not effective for 2020.)	Mandatory
Lifetime Income Products	DC	DOL has a safe harbor for annuity selection from 2008.	New safe harbor fiduciary relief for selecting lifetime income products—which permits reliance on a certification from the insurer regarding compliance with state insurance laws.	This is intended to provide plan sponsors fiduciary relief protection for offering a lifetime income product to encourage the use of lifetime income products within DC plans.	Date of enactment.	Optional

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
Portability of Lifetime Income Products	DC (including 403(b) and gov't 457(b))	In-service distribution rules limit the ability to distribute a lifetime income product in the event the product is no longer offered by the plan sponsor or insurer.	Subject to IRS regulations, permits direct trustee-to-trustee transfers (or transfer annuity contracts) of lifetime income investments to another eligible employer plan or IRA that are no longer authorized to be held as investment option, under the plan.	This should help facilitate the use of these lifetime income products, as it will eliminate any concerns with having to maintain the product when a new recordkeeper, M&A transaction, or other event causes the plan sponsor to no longer offer the product. It is also helpful to note that there are no anti-cutback violations for eliminating these investment options. Notably, the IRS has authority to limit this relief through regulations.	Plan years beginning after December 31, 2019.	Optional

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
Post-death Required Minimum Distributions (RMDs)	DC	In general, payments can be paid over the beneficiary's life expectancy.	Distributions after death of the participant must be made by the end of the tenth calendar year following the year of death, except for lifetime distribution option if the beneficiary is (1) surviving spouse, (2) disabled or chronically ill individual (or certain trust for the same), (3) beneficiary no more than 10 years younger than the employee, or (4) minor child of the employee (generally until the child reaches majority).	This change impacts estate planning designs, and the ability to delay payments to subsequent generations. It will likely require a plan amendment and operational changes (*e.g.*, updates to beneficiary designation forms, distribution forms, SPD, and RMD processes). We anticipate IRS regulations will help clarify the scope of the changes made by the Act (*e.g.*, impact on look-through trusts, the existing rules remaining for non-designated beneficiaries, the extent that the "at least as rapidly" rule still applies, plan defaults, etc.).	Death after December 31, 2019 (December 31, 2021 for governmental plans and certain collectively bargained plans). Note that there is grandfathered relief for certain commercial annuities. There are special rules for beneficiaries where the employee died prior to January 1, 2020.	Required

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
Required Beginning Date (RBD)	DB/DC	Distributions must be made during the participant's lifetime beginning as of the required beginning date. RBD is April 1 of the calendar year following the year of the participant turns age 70½, or the year of retirement.	Age 70½ is replaced with age 72.	This change requires plan amendments and operational changes (*e.g.*, updates to Section 402(f), distribution forms, SPD, and RMD processes) to avoid making distributions of amounts that are no longer required minimum distributions. Notably, for employees working post age 70½, there was no change to the required actuarial adjustment for defined benefit plans (which was intentional), but, as a result, has raised some unwelcomed complexities to these adjustments.	Participant who turn age 70½ after December 31, 2019 (*e.g.*, participants who were born after June 30, 1949).	Required

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
Child Birth or Adoption In-Service Withdrawal	DC (including 403(b) and governmental 457(b) plans)	Plans have in-service distribution restrictions (*e.g.*, age 59½ or hardship) and, in general, there is an additional 10 percent tax for distribution prior to age 59½.	Penalty-free withdrawals up to $5,000 from DC plans (and IRAs), on a controlled group basis, for expense related to birth or adoption of a child for up to one year following birth or legal adoption. These distributions are not treated as eligible rollover distributions (*e.g.*, 10 percent optional withholding). There is also a special recontribution right to an eligible retirement plan/IRA that accepts rollover contributions.	This will require both a plan amendment and operational changes to implement. Additional guidance will be needed for this provision to confirm it is optional and the scope of the recontribution right. We anticipate special coding on Form 1099-R (and Section 402(f) notice will need to be updated).	Distributions after December 31, 2019.	Optional (We anticipate that the 10 percent penalty relief will be available even if the plan does not provide for a special distribution option via Form 5329.)
Plan Loans	DC/DB	Plan loans may be made through the use of credit cards.	Prohibits the use of credit cards for plan loans.	For plan sponsors using these arrangements, the activity should immediately cease for new loans.	Loans after the date of enactment.	Mandatory
In-Service Distributions for Pension Plans	DB, money purchase pension plans, and governmental 457(b) plans	Pension plans are permitted to make in-service distributions on or after reaching age 62. 457(b) plans permit in-service distribution at age 70½.	Age 62 is lowered to age 59½. Age 70½ for governmental 457(b) plans is lowered to age 59½.	This will facilitate access to pension funds, providing greater access to funds if the participant is in need. This will require a plan amendment and operational changes (*e.g.*, update distribution forms, SPD, in-service distribution policies and procedures). Note that a technical correction will be needed to mirror Code Section 401(a)(36) under ERISA.	Plan years beginning after December 31, 2019.	Optional

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
Part-Time Employees	401(k) plan	Part-time employees must be covered (for employee and employer contributions) if the employee has 1,000 hours in a 12-month eligibility computation period.	Part-time employees must be covered for elective deferrals if they work 500+ hours in 3 consecutive 12-month periods (and have reached age 21). For vesting purposes, a year of service is a 12-month period that the employee worked 500 hours. There is nondiscrimination and top-heavy plan relief as only elective deferrals are required, not employer contributions.	This will require a plan amendment and operational changes to provide 401(k) deferrals for these long-term part-time employees (*e.g.*, expand enrollment, update SPD, review vesting provisions if eligible for employer contributions). Many questions remain about these provisions, particularly in relation to employees who go back to being part-time after having achieved 1,000 hours in a year. This does not apply to collective bargained employees.	Plan years beginning after December 31, 2020, but no service prior to 1/1/2021 included for this eligibility requirement. Therefore, first entry of long-term part-time employees may be delayed until 1/1/2024.	Mandatory

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
QACA	401(k) plan	QACA—qualified automatic contribution arrangement—caps the deferral rate to 10 percent of pay.	The 10-percent limit will increase to 15 percent (10 percent for the first year of participation).	This will permit increased savings via negative election (and related employer matching contributions, if any at these high deferral rates). This will require a plan amendment and operational changes (*e.g.*, enrollment changes, deferral election change process, SPD).	Plan years beginning after December 31, 2019. Additional IRS guidance is anticipated, as Notice 2016-16 does not anticipate this mid-year change, nor is there guidance on the impact on the uniformity requirement.	Optional

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
QACA and Traditional 401(k)/(m) Safe Harbor Plans	401(k) plan	Safe harbor plan via traditional or QACAs provide for a pass in nondiscrimination testing if certain matching contributions are made, similar to plans that rather provide nonelective employer contributions.	Safe harbor plans using nonelective employer contributions: (1) no longer require a safe harbor notice requirement, (2) a plan can be amended to become a safe harbor nonelective contribution plan at any date before the 30th day before the close of the plan year, and (3) a plan can be amended to become a safe harbor plan after such period if the plan is amended to provide for a nonelective contribution of at least 4 percent of compensation for all eligible employees and the amendment is made by the last day for distributing excess contributions for the plan year (*i.e.*, generally by the close of the following plan year).	This simplifies the compliance for safe harbor plans and provides more flexibility to add mid-year in the event nondiscrimination testing is causing difficulties. Beware: notice is still required if a plan provides for a safe harbor matching contribution, even if that is not used to waive the ADP testing requirement. Additional IRS guidance is needed to determine the impact on a discretionary match if no notice is provided because the plan is a nonelective employer contribution plan. This will require a plan amendment and operational changes (*e.g.*, changes in employer contributions, notice requirements).	Plan years beginning after December 31, 2019.	Optional

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
Consolidated Form 5500 Reporting	DC	Separate 5500 reporting for each plan within the controlled group.	Directs the DOL and IRS to develop rules for consolidated Form 5500 reporting for plans if all the plans in the group (1) are defined contribution plans (or individual accounts), (2) have the same trustee, named fiduciary(ies) and administrator, (3) use the same plan year, and (4) provide the same investments or investment options to participants and beneficiaries.	This is intended to facilitate reporting compliance and save on plan sponsor resources. Presumably, this guidance is not needed for PEPs. May permit use of one Form 5500 for: (a) plan exchanges; and (b) open MEPs. Awaiting guidance for clarification.	Plan years beginning after December 31, 2021.	Optional
Form 5500 Reporting Penalties	DB/DC	The Internal Revenue Code imposes reporting penalties for failure to properly and timely file a Form 5500.	Increases the penalty to $250 per day, with a maximum annual penalty of $150,000.	This puts more emphasis on properly filing Forms 5500, as well as prompt use of DFVC and Rev. Proc. 2015-32 late filing corrective programs.	Returns due after December 31, 2019.	Mandatory
Annual Withholding Notice	DB/DC	Pension distributions are subject to withholding notice under Code Section 3405, and a penalty for failure to comply of $10 per failure (maximum $5,000 per year).	Increases the penalty to $100 per failure, with a maximum annual penalty of $50,000.	This puts more focus on properly providing the pension withholding notice.	Withholding notices required to be provided after December 31, 2019.	Mandatory

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
Form 8955-SSA (and notification of change on Form 5500)	DB/DC	The Internal Revenue Code imposes reporting penalties for failure to properly and timely file a registration statement for deferred vested participants (Form 8955-SSA), and for failure to file a notification of certain changes on Form 5500 (name of plan change, change in plan administrator, termination of the plan, or merger or consolidation of plans). The penalties are \$1 for each participant not reported multiplied by the number of days the failure continues (\$5,000 maximum for any failure (\$1,000 cap for any notice failure)).	Increases the penalty to \$10 per day, with a maximum annual penalty of \$50,000 (\$10,000 for change notification).	This puts more focus on ensuring that Form 8955-SSA and Form 5500 is properly and timely filed. Note: There is no remedial program for late filing relief outside DFVC, so if Form 5500 was timely filed, only alternative is reasonable cause waiver or seeking a voluntary closing agreement with the IRS.	Returns due after December 31, 2019.	Mandatory

	DB/DC Plans	Current Law	New Law	Comments	Effective Date	Optional or Mandatory
Plan Amendments to Comply with SECURE Act	DB/DC	Legally required amendments for FCAA are generally required for individually designed plans by December 31 of the second year following the issuance of the Required Amendment List for which the amendments are listed; otherwise, discretionary design changes must be adopted by the end of the plan year in which the change is effective. Pre-approved plans are subject to interim amendments, which timing varies depending on the plan year, employer fiscal year, and tax filing deadline.	Anti-cutback relief is provided for SECURE Act changes provided that the plan is amended by no earlier than the end of the 2022 plan year (2024 for governmental and collective bargained plans).	This provides much needed relief for more time for any required plan amendments. Notably, this relief technically does not extend to the in-service distribution change for pension plans, which is not part of SECURE, but another part of FCAA.	Date of enactment.	Optional
Difficulty of Care Payments	DC	Foster care payments that are excludible from income under Code Section 131, the "difficulty of care" exemption, were not counted as 415 compensation.	These foster care payments qualify as 415 compensation, which will permit these home workers to participate in a defined contribution plan.	This facilitates retirement savings for foster care providers. These contributions will be treated as after-tax contributions.	Plan years beginning after December 31, 2015.	Mandatory
403(b) Plan Termination*	403(b) Plan	It was unclear how to terminate a custodial account 403(b) plan.	IRS will issue guidance that permits that as part of a plan termination, a 403(b) custodial account can be distributed in-kind and be subject to 403(b) rules until paid out.	This will facilitate 403(b) plan terminations.	Plan years beginning after December 31, 2008.	Optional

* There is a special clarification of church plan rules, explaining that nonqualified church-controlled organizations may be covered under a 403(b) plan that consists of a retirement income account.