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Exploring optional amendments under Secure 2.0 - Part 2 | VIEWPOINT

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The Secure 2.0 Act of 2022 (Secure 2.0) represented a major effort to change qualified retirement plans with new concepts and elimination of or edits to old concepts. Arguably the most significant modification to qualified retirement plans in a generation, Secure 2.0 impacts plan sponsors, participants, service providers and even the government.

In Part I of this series, we explored some of the more important mandatory amendments under Secure 2.0. In this Part II, we will discuss some of the more significant optional amendments under Secure 2.0. The amendments to comply with Secure 2.0 for most plans must be made by December 31, 2026 and by December 31, 2027, for Individual Retirement Accounts (IRAs), Roth IRAs, SIMPLE IRAs and Simplified Employee Pensions (SEPs). Collectively bargained plans must be in documentary compliance by December 31, 2028, and December 31, 2029, for governmental plans and public school-sponsored 403(b) plans. It is worth noting that many of the changes were required to be implemented at various points between 2023 and the present, resulting in a possible disconnect between plan operations and plan documents.

OPTIONAL AMENDMENTS

Increased cash-out limit

Plans can transfer small account balances to IRAs without the former participant's consent. For years, the upper limit on this practice was $5,000. Secure 2.0 allows plans to increase the upper limit to $7,000. This is a simple documentary amendment and relatively easy operational switch, but there are many plan sponsors who are perfectly happy keeping the upper limit at $5,000.

Super catch-up

Many (although not all) plans offer participants over the age of 50 the ability to contribute several thousand dollars more than the statutory limit that applies to participants under the age of 50. These contributions are known as "Catch-Up Contributions." Secure 2.0 allows plans to offer "Super Catch-Up Contributions" to participants aged 60, 61, 62 or 63. In 2026, the Super Catch-Up limit is $11,250 (indexed for inflation) – this is on top of the regular 401(k) limit of $24,500. As is the case for Catch-Up Contributions, high-earning (over $150,000 in FICA wages, indexed for inflation) participants must make Super Catch-Up Contributions as Roth contributions. The Super Catch-Up rules allow participants to boost retirement savings even more as they get closer to actual retirement.

Self-certification of hardship distributions

In plans that allow them, a participant may take a hardship distribution if there is an immediate and heavy financial need, the distribution is not in excess of the amount required to satisfy the need, and the distribution is being made on account of one of the seven safe harbor hardship distribution reasons. Under Secure 2.0, plans can now allow participants to self-certify that they

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meet the criteria. Put differently, participants do not have to provide proof other than their own words that they are eligible for a hardship distribution.

An open self-certification model has given pause to many plan sponsors. Without appropriate guardrails around amounts or frequency, plan sponsors are worried that some bad actors may try to fraudulently take distributions (hardship or otherwise).

Early distributions

Generally, absent a specific exception, in-service distributions before 59 ½ are subject to a 10% excise tax (in addition to any other taxes that may apply). Secure 2.0 added several types of in-service distributions that are not subject to the 10% excise tax, some of which are set forth below. In some cases, the distributions are new classes, and in other cases they are merely add-ons to existing distribution types.

Emergency withdrawals: Participants can self-certify (see above) to request distributions for unforeseeable or immediate financial needs for personal or family emergency expenses. This distribution can be taken once per year and is limited to $1,000 (or vested account balance over $1,000 if lower).

Qualified birth or adoption: Distribution of up to $5,000 per child must be taken within one year of the birth of a child or the finalization of an adoption. This can be repaid as a rollover contribution within three years.

Domestic abuse victims: Domestic abuse victims can self-certify as to their status and request a distribution of the lesser of $10,300 (indexed for inflation) or 50% of the participant's vested account. This can be repaid within three years.

Terminal illness: Participants with a terminal illness can, with documentation, request a distribution. Interestingly, this is not a new type of distribution – it must be tacked on to an existing distribution class. More interestingly, even if the plan is not amended, participants can request the waiver of the excise tax on their personal tax returns.

Practical implications

The above discussion represents a high-level overview of some of the more significant optional amendments to 401(k) and other plans. Of course, like any Internal Revenue Service (IRS) rule, these changes are laden with details and nuance.

What does this mean for plan sponsors? Operationally, sponsors will need to ensure that the relevant stakeholders—HR, payroll, recordkeepers and trustees—are trained and aligned with new policies and procedures. Sponsors will also need to decide from a business and human capital perspective whether these optional amendments should be added to plans or not. From a document standpoint, for sponsors who adopted a pre-approved/volume submitter plan, there are different options. Some document providers (Fidelity, Voya, Vanguard, Schwab, Empower, etc.) will send essentially an adoption agreement, some will automatically include these amendments, some documents will automatically exclude these amendments, and some document providers will require phone calls to approve the relevant documentation. It is worth noting that, depending on the document providers, some of these amendments are opt-in while others are opt-out, but this varies greatly among the different document providers. For sponsors using an individually designed plan, ERISA counsel (or, although less frequently, other third-party advisors) will need to draft amendments and related documents.

All in all, Secure 2.0 presents a brave new world for retirement plans, with increased opportunities for participants to save, grow accounts and be more in control of distributions, and with increased compliance challenges for plan fiduciaries and other service providers.

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