Employee Benefits Report

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SECURE Act 401(k) Plan Changes Impact Employer Responsibilities

Employers who sponsor 401(k) plans must ensure they are in compliance

The SECURE Act changes some employer responsibilities, but unfortunately not all of the necessary guidelines have been released by the Department of Labor or Internal Revenue Service, so employers will have to remain vigilant. Still, there are several things employers must do now.

President Trump signed the SECURE Act into law Dec. 20, 2019, and Congress enacted it on Jan. 1, 2021. The goal of the act is to increase participation in employer-sponsored 401(k) plans.

According to the 2020 U.S. Bureau of Labor Statistics, only 55 percent of the civilian adult population participates in a workplace retirement plan and even many who do have not saved enough. For instance, Vanguard, a wealth management

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Unwelcome Surprises in Some 401(k) Plans

It pays to read the fine print on the fee disclosure documents of your company's 401(k) plan.

In 2021, the Department of Labor began requiring 401(k) providers to disclose their fees in documents called 408(b)(2) fee disclosures. The purpose was to provide transparency to plan fiduciaries and their participants.

Unfortunately, a recent study by Employee Fiduciary, LLC, a 401(k) plan provider for small businesses, revealed that three out of every four small business 401(k) plans have hidden fees. These fees cost 401(k)s an average of $228 annually. That might not sound like much, but when compound interest is considered, that's a loss of hundreds of

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group, reported in 2019 that the median 401(k) balance for those ages 65 and older is just $58,035

In addition, the SECURE Act makes it easier for small employers to band together to use their combined buying power.

The SECURE Act's eligibility and vesting rules for long-term and part-time employees are now in effect for plan years beginning after Dec. 31, 2020. The deadline for amending a 401(k) plan to reflect those rules is the last day of the first plan year beginning on or after January 1, 2022.

Here is an overview of measures the SECURE Act is requiring employers to implement. As always, check with a 401(k) expert for assistance in implementing the new 401(k) regulations.

New Eligibility Rule for Elective Deferrals

Plan years beginning after Dec. 31, 2020, must allow long-term, part-time employees who meet these conditions to make elective deferrals under a 401(k) plan. They must:

- Be non-union
- Have completed three consecutive 12-month periods of at least 500 hours of service. Note that 12-month periods beginning before Jan. 1, 2021, are not to be considered. Therefore, the earliest date a long-term, part-time employee could become eligible to make elective deferrals under the new eligibility rule is Jan. 1, 2024. The 500-hour provision does not apply to 403(b) plans. An employee also qualifies if they are working part-time for a minimum of 1,000 hours during the year.
- Have reached age 21 by the end of the three consecutive 12-month periods.

Even though long-term, part-time eligible employees must be provided the opportunity to make elective deferrals; they may continue to be excluded from eligibility for other types of employer contributions to their 401(k) plan.

The intention is to encourage more employees to sign up for 401(k)s by reducing the number of hours required to work.

Special Vesting Rules

For vesting purposes, an employee must be credited with a year of service for each 12-month period during which he or she completes at least 500 hours of service.

Internal Revenue Service Notice 2020-68 states that all years of service — even those beginning before Jan. 1, 2021 — count under the special vesting rules subject to certain exceptions (for example, a plan may exclude years of service before an employee turns 18).

The IRS acknowledges the potential administrative burdens related to counting years of service beginning before January 1, 2021, and is accepting comments on the rule until Nov. 2, 2021.

Nonelective Contribution

Nondiscrimination testing ensures that plans are fair to lower-level employees. However, plan administrators can bypass this stricter nondiscrimination testing by mandating a three percent nonelective contribution. Non-elective contributions represent three percent of an employee's salary and are fully paid by the employer. The contribution is not considered a matching contribution. Employers must implement the contribution at least 30 days prior to the close of the plan year.

Automatic Enrollment

The default contribution limit for a Qualified Automatic Contribution Arrangement safe harbor 401(k) plan is increased from 10 percent to 15 percent following a participant's first year of plan participation. However, for the first year of participation, the limit is 10 percent. Employees may opt out of the increase.

Usually, contributions are stepped up annually either at the beginning of the year or when annual raises are given out.

thousands of dollars in lost returns over several decades of retirement saving.

How could this happen? These multi-page disclosures are often difficult for someone to understand unless they have 401(k) expertise. Since hidden fees can be profitable for the providers, it's in their best interest for the disclosure documents to be confusing.

Work with a broker or a financial adviser if you have questions about your plan's disclosure documents. You can also evaluate your 401(k) fees by comparing them to industry averages and/or the fees charged by competing 401(k) providers.

How to Stay in Compliance with the Latest Immigration Laws

Even if you are fairly certain you hire only U.S. citizens, several new laws were added in 2021 that you will need to follow.

More than 40 million people not born in the United States are currently living here, according to the Pew Research Center. In addition, U.S. Customs and Border Protection reports that 100,000 to 200,000 illegal immigrants are crossing the southern border every month.

Employers are responsible for determining whether a potential employee can legally work in the United States. To verify and record the identity and employment authorization of individuals hired for employment, employers must complete Form I-9 for each employee. These forms should be retained for three years after the date of hire or one year after employment is terminated — whichever is later — and should be made available for inspection if requested by the Department of Labor, Department of Homeland Security (DHS) or U.S. Immigration and Customs Enforcement (ICE).

In addition, the Immigration and Nationality Act (INA); Title VII of the Civil Rights Act of 1964 (Title VII); and other federal laws require employers to refrain from:

- Requesting that employees produce documents that are different than those required by Form I-9 or rejecting a document that reasonably appears to be genuine.
- Treating employees differently based on their real or perceived citizenship or immigration status.
- Treating employees differently based on their place of birth, country of origin, ethnicity, ancestry, native language, accent, or the perception that they look or sound "foreign." The INA's national origin prohibition applies to employers who have 4 to 14 employees. The U.S. Equal Employment Opportunity Commission's (EEOC) rules apply to employers with 15 or more employees.

- Intimidating, threatening, coercing or retaliating against any employee because the employee filed an immigration-related employment discrimination charge or complaint, or participated in an investigation against the employer, or asserted his/her or another person's rights under the INA.

Rule Changes and Case Law Updates

Recent changes to immigration law in the U.S. that affect an individual's employment status mean that new DACA applications can be accepted: The Deferred Action for Childhood Arrivals (DACA) program allows people who entered the United States while they were minors to apply for a temporary reprieve from deportation. Under the Trump administration, only renewed applications were accepted. Due to a

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Dec. 7, 2020, Court order, U.S. Citizenship and Immigration Services (USCIS) must accept new DACA applications and DACA renewal applications.

If you have any individuals who have a work authorization/DACA that is expiring, they should re-apply for the program.

- **AEWR Frozen:** The Department of Labor froze AEWR (Adverse Effect Wage Rates) wages at the December 2020 level until 2023. It's expected that this will be a significant cost savings for farmers.
- **Visa Moratorium Cancelled:** President Donald Trump signed a moratorium on granting H1B visas for tech workers and H2B visas for temporary non-agricultural work in June of 2020. However, the moratorium was later halted. The Biden administration has lifted some of the Trump administration's changes to make the application process easier.
- **Wage Increase Frozen:** Although a wage increase for H1B workers was proposed, there was concern the increase would make them more difficult to hire. The U.S. Citizenship and Immigration Services did not publish its policy rationale into the rule making for the increase, so the increase was placed on hold.

New COVID-19 Obligations Added to Group Health Plans

Even as the country is regaining a sense of normalcy following the pandemic, the federal government has strengthened group health plans obligations for COVID-19 coverage.

The Departments of Labor (DOL), Health and Human Services (HHS) and the Treasury released guidance for health plans this year in the form of Frequently Asked Questions (FAQ). The FAQ focuses on the implementation of the Families First Coronavirus Response Act ("FFCRA"), the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), and other health coverage issues related to COVID-19. In addition, the Centers for Disease Control and Prevention (CDC) released FAQs addressing who is to pay for COVID-19 vaccines.

The FAQs clarify that the legislation applies to both self-funded and fully insured employer-sponsored group health plans, including governmental plans, church plans and grandfathered plans. Coverage must be provided from March 18, 2020, until the end of the public health emergency. The FAQs specify that group health plans must cover COVID-19-related items and services as of March 18, 2020 and maintain that coverage until the public health emergency is declared over.

COVID-19 Diagnostic Testing

Here are the highlights of the tri-agency FAQ:

Requirement: Group health plans and health insurance issuers offering group or individual health insurance coverage, including grandfathered health plans, must cover certain items and services related to the testing and diagnosis of COVID-19 without cost-sharing, prior authorization or other medical management requirements. *Requiring entity: FFCRA*

Requirement: Providers must offer an expanded range of COVID-19 related diagnostic items and services. *Requiring entity: CARES Act*

Requirement: Plans must reimburse any provider of COVID-19 diagnostic testing at an amount that equals the negotiated rate. However, if the plan does not have a negotiated rate with the provider, the plan should use the cash price listed by the provider on a public website. *Requiring entity: CARES Act*

Requirement: An individual does not need to show the presence of symptoms or proof of a recent known or suspected exposure to COVID-19 to get a test that is covered by the plan. The test must be covered without cost sharing,

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prior authorization or other medical management requirements. This includes tests obtained from a state- or locality-administered site, a "drive-through" site, and/or a site that does not require appointments. However, plans are not required to cover testing for public health surveillance or employment purposes. *Requiring entity: FFCRA*

COVID-19 Preventive Services Coverage

Requirement: Group health plans and health insurance issuers must cover, without cost-sharing requirements, any qualifying coronavirus preventive services for an individual who has received a recommendation. *Requiring entity: CARES Act*

COVID-19 Vaccines

Requirement: The COVID-19 vaccination must be provided free to everyone living in the United States regardless of their immigration or health insurance status. Therefore, any provider giving vaccinations can be reimbursed for vaccine administration fees by the patient's public or private insurance company. If someone is uninsured, the Health Resources and Services Administration's Provider Relief Fund will cover the costs. The CDC stresses that no one can be denied a vaccine – even if they are unable to pay a vaccine administration fee. However, providers can bill for additional health care services. *Requiring entity: CDC*

Remember that formal guidelines have not yet been released by the DOL, HHS or the Treasury Department, so these this information is subject to change.

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Unemployment Tax Rate Increases Expected

The Biden Administration's decision to extend unemployment benefits in response to the COVID-19 pandemic may significantly increase employers' unemployment benefit tax costs for years to come.

Employers fund unemployment benefits through federal and state taxes – except in three states – Alaska, New Jersey and Pennsylvania, which assess unemployment taxes on employees. The Federal Unemployment Tax Act (FUTA) tax is imposed on the first $7,000 paid to each employee. The State Unemployment Tax Act (SUTA) requires employers to pay a tax on the taxable earnings of employees. In most states, that ranges from the first $10,000 to $15,000 an employee earns in a calendar year. These funds go into a state unemployment insurance (UI) fund.

In the past, unemployment benefits in most states were paid for a maximum of 26 weeks, ranging from 12 weeks to 30 weeks. Responding to the forced economic shut down due to the pandemic, the administration extended unemployment benefits an additional 24 or more weeks. However, under the new American Rescue Plan, unemployment insurance will be extended through Labor Day 2021, a total of 53 weeks of additional benefits.

The result is that state UI benefits have been depleted. To replenish this fund, employers most likely will have to double the percentage of employees' wages they pay for UI programs for the next two to three years. While experts believe employers will feel some impact in 2021, they believe the real impact will be hit in 2022 and later as federal loans to the states must be repaid.

Employers who want to be proactive should take the following actions:

- Discuss the expected rate increases with their UI claims manager
- Conduct unemployment fraud exams to filter out fraudulent claims
- Review their tax rate for layoffs and correct errors to their rate.

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