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Workplace law trends for today and beyond.
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The SECURE Act

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Overview

- **SECURE Act**
 - **Required minimum distributions (RMDs)**
 - Post-death RMDs DC plans
 - IRAs
 - Age increased to age 72
 - **DC plans – lifetime income**
 - Disclosure
 - Fiduciary relief for selecting life insurance company provider
 - **DC plans – safe harbor 401(k) plans**
 - Increased QACA rate cap – 10% to 15%
 - Adoption and administration
 - **DC plans – other changes**
 - No credit card loans
 - Childbirth and adoption distributions
- **SECURE Act**
 - **DC plans – eligibility**
 - Certain part-time employees
 - **Open MEPs**
 - **DB plans – testing relief**
 - **DB plans – changes to earliest age for in-service retirement**
 - **DB plans – PBGC premium relief for limited plans (rural electrical coops)**
 - **403(b) plans – plan termination**
 - **Health and welfare**
 - Repeal of Cadillac tax
 - Repeal of medical device tax
 - Renewal of PCOR fee
 - **Penalties – increase for failure to file**



Required Minimum Distributions (RMDs) Post-Death Distribution Period

- **Post-death distribution period (FCAA, Division O, § 114)**
 - **Issue: Period of time over which a beneficiary has to take distributions**
 - **Previously**
 - An individual beneficiary who inherited qualified retirement plan or IRA was permitted to take out or “stretch” required minimum distributions over beneficiary’s entire lifetime
 - Naming a trust as beneficiary of qualified retirement plan or IRA required complete withdrawal by end of fifth year following year of plan participant or IRA owner’s death
 - Two exceptions
 - Conduit trust
 - See-through accumulations trust

Required Minimum Distributions (RMDs) Post-Death Distribution Period


- **Post-death distribution period (continued)**
 - **SECURE Act**
 - **Ten-year rule**
 - Now, in most cases, individual beneficiaries must completely withdraw all retirement benefits by end of tenth year following year of plan participant or IRA owner’s death
 - **Five exceptions:**
 - Surviving spouse
 - Minor children of participant
 - Disabled individuals
 - Chronically ill individuals
 - Individuals not more than 10 years younger than plan participant

IRA Contributions Post Age 70½

- **IRA pre-tax contributions (FCAA, Division O, §107)**
 - **Previously**
 - Contributions (including non-deductible contributions) to traditional IRAs were prohibited after age 70½
 - SECURE Act removes age limitation for 2020 and later contributions
 - **SECURE Act**
 - Removes age limitation for 2020 and later contributions
 - Note: Contributions for 2019 can be made up until April 15, 2020, but limited to taxpayers who are under age 70½
 - Note: Roth IRAs were never subject to same age limitation

Required Minimum Distributions (RMDs) Commencement Age Change to 72

- **Change in RMD age (FCAA, Division O, § 114)**
 - **Previously**
 - Distributions required to start no later than April 1 of calendar year following attainment of age 70½ (or for qualified plans, severance from employment by participants who work past age 70½)
 - **SECURE Act**
 - Changes age 70½ to age 72 for plan participants and IRA owners who turn 70½ after December 31, 2019
 - Law change did not affect actuarial increase requirements applicable to participants in pension plans who continue working past age 70½



Distributions in General Impact of Changes

- **Impact of changes on your distributions**
 - Individuals should consult their estate planning attorney
 - Coordination of beneficiary designations with your estate plan is critical
 - Encourage employees with questions regarding beneficiary designations to consult their estate planning attorneys!



DC Plans – Safe Harbor Plans Increased QACA Rate Cap

- **New safe harbor rate cap for qualified automatic contribution arrangements (QACAs) (FCAA, Division O, § 102) – Optional**
 - **Previously:**
 - Safe harbor arrangements designed to satisfy Code § 401(k)(13) capped automatic contribution rate at 10%
 - Applies to both automatic contribution and auto-escalation limits
 - **SECURE Act:**
 - Retains 10% cap for first year of participation, but permits rate to be increased to 15% for subsequent plan years
 - Increases potential retirement savings for participants who have not made elective deferral election
 - Potential issue if plan document references Code § 401(k)(13) but does not include specific percentage – how is change implemented?
 - Does plan sponsor want it to be implemented?
 - Effective for plan years starting after December 31, 2019



DC Plans – Safe Harbor Plans Notice Requirements

- **Notice requirements (FCAA, Division O, § 103) – Optional**
 - **Generally reduces certain administrative costs and burdens for nonelective safe harbor plans**
 - **Previously:**
 - Safe harbor matching contribution and nonelective contribution must provide initial and annual safe harbor notices to participants before start of plan year
 - Notice to explain: safe harbor contribution formulas, how to make elective deferrals, vesting and distribution rules, contact information, automatic contributions and auto-escalation (if applicable)
 - **SECURE Act:**
 - Safe harbor notices no longer required for nonelective safe harbor plans where safe harbor is only for elective contributions
 - Safe harbor notices still apply to safe harbor matching contributions
 - Effective for plan years beginning after December 31, 2019



DC Plans – Safe Harbor Plans Adoption and Administration

- **Plan adoption (FCAA, Division O, § 103) – Optional**
 - **Previously:**
 - Generally, amendment adopting safe harbor plan must be executed before beginning of plan year in which safe harbor applies
 - Possible to adopt safe harbor nonelective plan at 3% contribution rate no later than 30 days before end of plan year provided several conditions are met
 - **SECURE Act:**
 - Possible to adopt safe harbor nonelective plan at 3% contribution rate no later than 30 days before end of plan year without current conditions
 - Possible to adopt safe harbor nonelective plan at 4% contribution rate through end of following plan year (need to provide 4% nonelective contribution for both years)
 - Note: safe harbor matching contribution plan amendments are still required to be adopted *before* plan year in which safe harbor applies
 - Effective for plan years beginning after December 31, 2019

DC Plans – Lifetime Income Provisions

- **SECURE Act**

- Adds 3 lifetime income provisions
- Lifetime income disclosure (FCAA, Division O, § 203)
- Fiduciary safe harbor – guaranteed retirement income contract selection (FCAA, Division O, § 204)
- Lifetime income options (FCAA, Division O, § 109)

DC Plans – Lifetime Income Disclosure

- **Lifetime income disclosure (FCAA, Division O, § 203)**

- **SECURE Act**

- Requires individual account plans (e.g. 401(k) plans) to include a lifetime income disclosure at least once during 12-month period
- Disclosure required to be included in benefit statements 12 months after later of DOL's issuance of latest of following:
 - Interim final rules
 - Model lifetime income disclosure
 - Assumptions used to convert total accrued benefits to lifetime income streams
- DOL to issue final interim rules, model disclosure, and conversion assumptions by December 20, 2020
- Liability relief under Title I of ERISA if disclosures comply with interim rules, model disclosure, and assumptions
- Content requirements include: (i) express total accrued benefits as a lifetime income stream, (ii) life annuity amount, and (iii) joint and survivor annuity amount assuming spouse is same age

DC Plans – Lifetime Income Fiduciary Relief

- **Fiduciary relief (FCAA, Division O, § 204)**
 - **SECURE Act**
 - Creates new optional safe harbor (ERISA § 404(e))
 - Prudent selection of Guaranteed Retirement Income Contract (“GRIC”)
 - “[A]nnuity contract for a fixed term or a contract (or provision or feature thereof) which provides guaranteed benefits annually (or more frequently) for at least the remainder of the life of the participant or the joint lives of the participant’s designated beneficiary as part of an individual account plan”

DC Plans – Lifetime Income Fiduciary Relief

- **Fiduciary relief (continued)**
 - **SECURE Act (continued)**
 - **Insurer representations:**
 - Insurer licensed to offer GRICs
 - Insurer at selection and for 7 prior years:
 - State insurance commissioner certificate not revoked or suspended
 - Filed audited financial statements in accordance with domiciliary state laws
 - Maintained reserves satisfying statutory requirements in each state it does business
 - Is not under order of suspension, rehabilitation, or liquidation
 - Insurer undergoes a financial examination by state insurance commissioner every 5 years
 - Insurer must notify plan fiduciary of any change in representations that would preclude it from making representations at time of contract issuance

DC Plans – Lifetime Income Fiduciary Relief

- **Fiduciary relief (continued)**
 - **SECURE Act (continued)**
 - **Time of selection and periodic reviews**
 - Time provider is selected for distribution of benefits or to provide benefits for future dates
 - Requires periodic review of continuing appropriateness of fiduciary's conclusions
 - Annual representation of insurer is deemed to satisfy periodic review unless notice of change is provided or fiduciary becomes aware of facts that would cause it to question insurer's representation
 - **Costs are factor but not required to select lowest cost contract**

DC Plans – Lifetime Income Portability

- **Portability (FCAA, Division O, § 109)**
 - **SECURE Act**
 - Added Code § 401(a)(38)
 - Allows plans to include distribution provision allowing for more portability of lifetime income products where there is a change of record keepers

DC Plan – Other Changes No Credit Card Loans

- **Loans (FCAA, Division O, § 108) – Mandatory**
 - **Background:**
 - Retirement plans may make loans
 - Internal Revenue Code does not limit number of loans, so may make multiple small loans in manner similar to credit card or through credit card
 - **Previously:**
 - DOL guidance allowed loans through credit card (ERISA Advisory Opinion 1995-17A)
 - **SECURE Act:**
 - Prohibits loans through credit cards and similar arrangements
 - Effective December 20, 2019

DC Plans – Other Changes Child Birth and Adoption Assistance


- **Distributions to assist parents (FCAA, Division O, § 113) – Optional**
 - **Previously:**
 - No specific provision for distribution upon child birth or adoption
 - May qualify for hardship distribution, but such distributions before age 59½ are subject to 10% early distribution penalty
 - **SECURE Act:**
 - Plan may offer distribution of up to \$5,000 within one year of birth or adoption
 - Does not cover adoption of spouse's child
 - Limited to children under age 18 or physically or mentally incapable of self-support
 - Limit of \$5,000 is on an individual basis, so each spouse could receive distribution of up to \$5,000
 - If plan offers, plan also needs to offer repayment opportunity
 - Effective for plan years starting after December 31, 2019

DC Plans – Other Changes 415 Compensation

- **Distributions to assist parents (FCAA, Division O, § 116) – Mandatory**
 - **Previously:**
 - If employer provided difficulty of care payments under Code § 131 for foster care, amount was excluded from income and from compensation for retirement plan purposes
 - **SECURE Act:**
 - Inclusion in compensation for retirement plan purposes for difficulty of care payments for foster care
 - Effective for plan years starting after December 31, 2015


DC Plans – Eligibility Part-Time Employees

- **Expanded eligibility for part-time employees (FCAA, Division O, § 112) – Mandatory**
 - **Previously:**
 - Defined contribution plans (other than 403(b) plans) may exclude employee who has not complete one year of eligibility service (1,000 hours in 12-month period)
 - **SECURE Act:**
 - **Dual eligibility:**
 - One year of eligibility service (1,000 hours in 12-month period)
 - Three consecutive years in which an employee completes at least 500 hours of service
 - Not required to make matching or nonelective contributions to those who qualify under new provision
 - Need to treat employees who are eligible solely based on new provision as accruing year of vesting service for each year in which employee completes 500 hours in 12-month period
 - This new requirement does not apply to collectively bargained plans



DC Plans – Eligibility Part-Time Employees

- **Expanded eligibility for part-time employees (continued)**
 - **SECURE Act (continued):**
 - Service before January 1, 2021 does not need to be taken into account
 - Effective for plan years starting after December 31, 2015



Open MEPs

- **Open MEPs and pooled employer plans (PEPs) (FCAA, Division O, § 101) – Optional**
 - **SECURE Act**
 - Eases path for small employers to offer tax-favored retirement plans
 - Multiple, unrelated employers can now participate in a centrally administered retirement plan sponsored by financial services firm

Open MEPs

- **Open MEPs and pooled employer plans (continued)**

- **Previously**

- Before SECURE Act, in 2018 DOL issued regulations in response to an executive order, but regulations did not allow financial services firms to sponsor MEPs – thus true “open MEPs” were not yet allowed
 - IRS also issued proposed regulations in 2019 designed to mitigate “one bad apple” rule

Open MEPs

- **Open MEPs and pooled employer plans (continued)**

- **SECURE Act**

- Provides for new type of MEP called “pooled employer plan” (PEP)
 - Unlike traditional MEPs, which can be sponsored by PEOs and trade associations, PEPs are truly open
 - Financial services firms (banks, trust companies, TPAs) may sponsor
 - Employers need not have anything in common

Open MEPs PEPs

- **Open MEPs and pooled employer plans (continued)**

- **SECURE Act**

- PEPs are effective for plan years beginning after December 31, 2020
 - May be organized as a 401(a) plan or as a plan of individual retirement account (IRAs)
 - Plan document must designate a “pooled plan provider” (PPP) who is a named fiduciary
 - Employers remain responsible for monitoring the PPP and investment of assets attributable to that employer’s employees unless PPP has delegated 3(38) responsibility to another fiduciary

DB Plans Testing Relief

- **DB testing relief (FCAA, Division O, § 205)**

- **Previously:**

- IRS has provided guidance providing certain relief for closed DB plans (plans with no new participants)

- **SECURE Act:**

- Makes “closed” DB plan testing relief permanent (previously provided on a year-by-year basis)
 - Expands eligibility to aggregate DB plan with a DC plan to take into account benefits provided under DC plan (cross-testing) eliminating “gateway test” and allows matching contributions and employer ESOP or 403(b) contributions to be taken into account
 - Provides relief from “benefits, rights, and features” testing – automatic pass for closed plans
 - Provides relief from “minimum participation requirement” – 50 employees or 40% of all employees covered – eliminated for closed plans
 - Effective for plan years beginning after December 31, 2013

DB Plans Testing Relief

- **DB testing relief (continued)**
 - **SECURE Act (continued)**
 - **Eligible closed DB plans:**
 - Closed before April 5, 2017 or satisfy “five-year rule”
 - Five-year rule – existed for at least five years before closure without a “substantial increase” in coverage or value of benefits, rights, and features during that five-year period
 - Must pass testing for first three years without SECURE Act relief (year of plan closure plus next three years)
 - Subsequent plan amendments must not discriminate significantly in favor of highly compensated employees

DB Plans PBGC Premium Relief for Certain Plans

- **DB plan premium relief (FCAA, Division O, § 206)**
 - **Previously:**
 - Pension Protection Act in 2006 raised PBGC premiums
 - Per capita (per participant premium) – Variable rate premium (underfunded plans)
 - 1990 – \$19 per participant
 - 2005 – \$19 per participant
 - 2006 – \$30 per participant
 - 2018 – \$74 per participant
 - 2019 – \$80 per participant
 - 2020 – \$83 per participant
 - 1990 – \$9 per \$1000 (\$34 per p cap)
 - 2005 – \$9 per \$1000 (no cap)
 - 2006 – \$9 per \$1000 (no cap)
 - 2018 – \$38 per \$1000 (\$523 per p cap)
 - 2019 – \$43 per \$1000 (\$541 per p cap)
 - 2020 – \$45 per \$1000 (\$561 per p cap)
 - **SECURE Act:**
 - Provides PBGC premiums for cooperative and small employer charity (CSEC) are reduced to pre-2006 rules (\$19 per participant and variable rate of \$9 per \$1,000 of unfunded vested benefits) and alternate definition of unfunded vested benefits
 - Effective for plan years after December 31, 2018

DB Plans and Other Plans In-Service Distributions

- **DB plans, money purchase pension plans, and governmental 457(b) plans (FCAA, Division M, § 104)**
 - **Previously**
 - Age 59½ in-service distribution available under 401(k) plans (and 403(b) plans)
 - **SECURE Act:**
 - Provides for age 59½ in-service distribution option for these plans
 - Effective for plan years beginning after December 31, 2019

403(b) Plans Plan Terminations

- **403(b)(7) custodial accounts (FCAA, Division O, § 110)**
 - **Background:**
 - Several types of 403(b) arrangements
 - 403(b)(1) – invested in annuity contract
 - 403(b)(7) – invested in custodial contract
 - IRS has given guidance on termination and distribution of 403(b)(1) investments in annuities (Revenue Ruling 2011-7)
 - **Previously:**
 - IRS position was that 403(b)(7) custodial accounts could not be distributed to an individual, making it difficult to terminate plan with such investments
 - **SECURE Act:**
 - IRS to provide guidance not later than six months after enactment of SECURE Act for distribution of 403(b)(7) custodial accounts in kind to participant to allow plan termination
 - Will facilitate plan termination
 - Guidance effective retroactively to December 31, 2008

Health Plans Repeal of Cadillac Tax

- **Cadillac tax (FCAA, Division N, § 503)**
 - **Previously:**
 - ACA created 40% excise tax on high-cost health coverage
 - Code § 49801 imposed excise tax on employer-sponsored health coverage exceeding annual limitation
 - Originally effective for tax years beginning after 2017
 - Delayed twice by legislation – first to 2020 then to 2022
 - **Concerns from industry regarding cost and application of tax**
 - Estimated tax would have affected 1 in 5 employers' plans in 2022 unless significantly recalculated
 - One of several issues: affordability requirements under Code § 4980H and annual limitation under Code § 49801 were indexed differently
 - **HHS Extenders:**
 - Code § 49801 repealed
 - Estimated to reduce revenues by \$196.966 billion
 - Effective for taxable years after December 31, 2019

Health Plans Repeal of Health Provider Tax

- **Health provider tax (FCAA, Division N, § 502)**
 - **Previously:**
 - ACA § 9010 imposed fee on each covered entity engaged in business of providing health insurance
 - First filings were due from covered entities by April 15, 2014 and first fees were due September 30, 2014
 - There was moratorium on fee for 2017
 - There was suspension on fee for 2019
 - **HHS Extenders:**
 - ACA § 9010 repealed for calendar years after 2020
 - IRS emphasizes that fees are due for 2020 calendar year
 - Effective for calendar years after December 31, 2020

Health Plans Repeal of Medical Device Tax

- **Medical device tax (FCAA, Division N, § 501)**
 - **Previously:**
 - Code § 4221(a) imposed 2.3% excise tax on sales of medical devices manufactured in and imported to United States
 - Effective for sales on or after January 1, 2013
 - Medical devices included MRI machines, defibrillators, pacemakers, surgical equipment, hospital beds, infusion pumps, etc.
 - Generally excise tax did not apply to devices sold at retail by individuals
 - **HHS Extenders:**
 - Code § 4221(a) and Code § 6416(b) relevant portions repealed
 - Estimated to reduce revenues by \$25.529 billion
 - Effective for sales after December 31, 2019

Health Plans Renewal of PCOR Fee

- **Patient centered outcomes research fee (FCAA, Division N, § 104)**
 - **Previously:**
 - Code § 4375 and Code § 4376 enacted
 - PCOR fees applied through calendar year plan years from 2012-2018 (plan years ending on or before September 30, 2019)
 - **HHS Extenders Changes:**
 - PCOR fees extended for plan years ending before October 1, 2029
 - Code § 4375 and Code § 4376 revised to reflect new timeframe
 - Applies to health insurers and self-insured health plan sponsors
 - Calculated based on average number of lives covered during policy year or plan year multiplied by applicable dollar amount for year
 - Applicable dollar amount for plan years ending on or after October 1, 2018 through September 30, 2019 was \$2.45; IRS to issue applicable dollar amounts for subsequent years
 - Take away: self-insured plan sponsors and insurers will need to file Form 720 (Quarterly Federal Excise Tax Return) and make PCOR payment by July 31, 2020 for 2019 plan year

Penalties Updated Penalty Amounts

- **Increased filing penalty (FCAA, Division O, § 402)**
 - **Previously:**
 - Section 6651 imposes penalties
 - generally apply to income, estate, gift, employment and self-employment, and certain excise tax returns
 - **SECURE Act:**
 - Increases penalties for failure to file a return within 60 days of the due date to the lesser of \$435 (adjusted for inflation; previously \$330) or 100% of the amount of tax due
 - Effective for returns with filing due dates (including extensions) after December 31, 2019

Penalties Updated Penalty Amounts

- **Form 5500 (FCAA, Division O, § 403)**
 - **Previously:**
 - Code § 6652(e) imposes penalty of \$25 per day with maximum of \$15,000 per year
 - **SECURE Act:**
 - Penalty increased to \$250 per day with maximum of \$150,000 per year
 - Effective for returns required to be filed after December 31, 2019
 - **Note: IRS will generally waive late Form 5500 filing penalties for filers who satisfy DOL's DFVC program requirements**
 - To qualify employer must not only satisfy DFVC program but also
 - File any missing Forms 8955-SSA with IRS for separated deferred vested participants for tax year of delinquent filings
 - Meet requirements of IRS Notice 2014-35
 - Not clear if IRS will be revising this guidance

Penalties Updated Penalty Amounts

- **Annual registration statement (FCAA, Division O, § 403)**
 - **Previously:**
 - Code § 6652(d)(1) imposes penalty of \$1 per day per participant for registration statement regarding separated, deferred vested participants with maximum penalty of \$5,000 per year
 - **SECURE Act:**
 - Penalty increased to \$10 per day with maximum penalty of \$50,000 per year
 - Effective for statements required to be filed after December 31, 2019
- **Change in status notice (FCAA, Division O, § 403)**
 - **Previously:**
 - Code § 6652(d)(2) imposes penalty of \$1 per day for failing to update plan registration with maximum penalty of \$1,000
 - **SECURE Act:**
 - Penalty increased to \$10 per day with maximum penalty of \$10,000
 - Effective for statements required to be filed after December 31, 2019

Penalties Updated Penalty Amounts

- **Withholding notice (FCAA, Division O, § 403)**
 - **Previously:**
 - Code § 6652(h) imposes penalty of \$10 for failure to provide required withholding notice with maximum penalty of \$5,000 for all failures per year
 - **SECURE Act:**
 - Penalty increased to \$100 per day with maximum penalty of \$50,000 per year
 - Effective for statements required to be filed after December 31, 2019



Other

- **Church plans (FCAA, Division O, § 111)**
 - Clarifies (expands) who may participate in section 403(b)(9) retirement income accounts
- **Governmental plans**
 - Not all changes are applicable to governmental plans



Other

- **Qualified disaster distributions (FCAA, Division Q, § 202)**
 - Provides for disaster relief for presidentially declared disasters for period beginning on January 1, 2018 through date 60 days after enactment (enactment on December 20, 2019)
 - Does not cover disasters for which relief was provided under Bipartisan Budget Act of 2018
- **Retirement plan loan relief for victims of natural disaster (FCAA, Division Q, § 202)**
 - Provides for disaster relief for presidentially declared disasters for period beginning on January
- **Filing extension (FCAA, Division Q, § 205)**
 - Provides automatic extension of 60 days for filing Form 5500 and certain events for employers (and individuals) affected by certain natural disasters
- **Repeals UBTI expansion covering expenses related to qualified transportation fringe benefits (FCAA, Division Q, § 302)**
 - Repeals change made by TCJA in late 2017 back to TCJA

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