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RetireWell Administrators, Inc.

Third-party Pension Administration and Consulting Services

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RetireWell Administrators, Inc. provides total retirement plan solutions by combining TPA services with the employee benefits practice at The Law Firm of Anthony L. Scialabba, LLC.

Important SECURE 2.0 Act Modifications to Retirement Plans

By Anthony L. Scialabba IV, Esq., QKA

On December 29, 2022, the Consolidated Appropriations Act, 2023 was signed into law by President Joseph R. Biden Jr. This piece of legislation includes the SECURE 2.0 Act of 2022 ("Act"), which expands upon the retirement reforms provided by the Setting Every Community Up for Retirement Enhancement Act of 2019 ("SECURE 1.0 Act"). A few of the significant provisions in the Act are discussed as follows:

- **Treating catch-up contributions as Roth contributions. Effective for plan years beginning after December 31, 2023.**

  - The Act requires all catch-up contributions to retirement plans to be subject to Roth contributions tax treatment. An exception is granted for employees with compensation of $145,000 or less (indexed). If your plan document permits catch-up contributions but does not permit Roth contributions, a plan amendment must be adopted to either remove catch-up contributions or limit catch-up contributions to Roth contributions for employees with compensation greater than $145,000. If your plan document permits catch-up contributions from both pre-tax and Roth contributions, a plan amendment must be adopted to limit catch-up contributions to Roth contributions for employees with compensation greater than $145,000.

  - Prior to the effective date of the new rule, it is likely that recordkeepers, payroll companies, and document and testing software companies of retirement plans will have to update their systems to accommodate treatment of catch-up contributions as Roth contributions.

  - With regard to a Roth contribution feature, the contributions are taxed while they are withheld from pay, and when the contributions (including earnings) are distributed, they are not taxed. This taxation methodology favors younger, higher compensated employees who have longer time

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Tel: (856) 396-0499 Fax: (856) 985-6817
www.retirewelltpa.com

1002 Lincoln Drive West, Suite E
Marlton, New Jersey 08053

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Modifications to the Form 5500 Series

By Anthony L. Scialabba IV, Esq., QKA

On February 23, 2023, the Department of Labor's ("DOL") and the Internal Revenue Service released guidance concerning modifications to the 2023 Form 5500, Annual Return/Report of Employee Benefit Plan ("Form 5500"), and Form 5500-SF, Short Form Annual Return/Report of Small Employee Benefit Plan. The Form 5500 Series is part of a framework which aims to ensure that retirement plans are operated and managed according to standards and that participants and beneficiaries are given or have access to adequate information to defend the benefits and rights of participants and beneficiaries in retirement plans.

The Employee Retirement Income Security Act of 1974, as amended ("ERISA") provides that certain filed Form 5500's must also contain a report provided by an independent auditor ("ERISA audit requirement"). In this regard, the ERISA audit requirement stipulates that an independent auditor perform a review of plan documents and financial statements, along with the Form 5500. "Large plans", which are generally plans with more than 100 participants, are subject to this requirement.

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horizons rather than older workers who are age 50 or more and who can qualify to make a catch-up contribution. Thus, the new rule may hurt older participants who would otherwise receive a tax deduction for their pre-tax contributions that are made on a "catch-up" basis.

- **Expanding automatic enrollment. Effective for plan years beginning after December 31, 2024.**
  - The Act directs all "new" 401(k) and 403 (b) plans to automatically enroll participants upon becoming eligible (and the employees may opt out of coverage). The amount of the initial automatic enrollment must be at least three percent, but not more than ten percent. Each subsequent year, the deferral percentage is raised by one percent until it reaches at least ten percent, but not more than 15 percent. All 401(k) and 403(b) plans "in existence" before December 29, 2022 do not have to comply with the new rule.
  - An exception is provided to church plans, governmental plans, and SIMPLE 401(k)

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Modifications to the Voluntary Fiduciary Correction Program

By Anthony L. Scialabba IV, Esq., QKA

On November 21, 2022, the Department of Labor's ("DOL") Employee Benefits Security Administration ("EBSA") provided a proposed amendment and restatement of the Voluntary Fiduciary Correction Program ("VFCP"). The VFCP assists retirement plans, their fiduciaries, and service providers to avoid civil penalties and enforcement actions set forth under the Employee Retirement Income Security Act of 1974, as amended, and its associated regulations generally in connection with late remittances of elective deferral contributions and loan repayments provided that certain "corrective" actions are taken. In general, the corrective action requires that a contribution be made to the plan for the "defect" and associated "lost earnings". Finally, excise taxes must be paid to the Internal Revenue Service in connection with plans that have such late remittances.

The most noteworthy change affecting plan sponsors under the proposed changes to the VFCP is the incorporation of a new "self-correction" method for particular failures to timely transmit participant contributions and loan repayments to retirement plans. The self-correction methodology is meant to render a more streamlined correction procedure that incentivizes the correction of late remittances of participant

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plans. An exception is also provided to small businesses until one year after the end of the first taxable year in which the employer normally employs more than ten employees. Another exception is provided to a plan created during the first three years of an employer's existence. If your plan document is not subject to these exceptions, a plan amendment must be adopted to add automatic enrollment and automatic escalation.

- An expansion of automatic enrollment may increase the amount of employer matching contributions that participants receive. Thus, an employer may have to budget for this extra cost.

- **Improving coverage for part-time workers. Effective for plan years beginning after December 31, 2024.**

    - With regard to eligibility, the SECURE 1.0 Act, which became law on December 20, 2019, required employers to permit "long-term, part-time workers" to participate in the employers' 401(k) plans. In this regard, a 401(k) plan (except a collectively bargained plan) must include a dual eligibility requirement under which an employee must complete either one year of service (with the "1,000-hour" rule) or "three" consecutive years of service with at least 500 hours of service. The Act reduces three consecutive years of service to two.

        - Example: ABC Company sponsors the ABC Company 401(k) Plan ("Plan"). The Plan utilizes the "dual eligibility" requirement discussed above. Mark was hired by ABC Company on January 1, 2025, and works 500 hours in 2025. If Mark works 500 hours in 2026, he will become eligible to participant in the Plan on January 1, 2027.

    - The new rules concerning long-term, part-time workers also apply to vesting. In this regard, under both the SECURE 1.0 Act and the Act, employers are required to credit long-term, part-time workers with vesting service for 12-month periods in which they work a minimum of 500 hours. The Internal Revenue Service interpreted that the SECURE 1.0 Act required employers to credit all of a long-term, part-time worker's service (including pre-2021 service) for vesting purposes. This interpretation created a quirk because pre-2021 service was disregarded for eligibility purposes. The Act corrects the quirk by stipulating that pre-2021 service is also disregarded for vesting purposes, effective as if included in the SECURE 1.0 Act to which the amendment relates.

    - The Act extends the coverage rules of long-term, part-time workers to 403(b) plans that are subject to ERISA. However, employees who become eligible for the elective deferral part of their employer's retirement plan solely under this new rule may still be excluded from receiving other types of contributions made (e.g., employer matching contributions, employer non-elective contributions, and top-heavy minimum contributions) until they meet the eligibility requirements for such contributions.

    - Similar to the treatment of catch-up contributions as Roth contributions for certain employees, the new rule affecting long-term, part-time workers will make administration of a retirement plan more complex because of the hours of service worked over a two-year period that will need to be tracked.

If you have any questions or comments with regard to the Act or other retirement plan matters, please contact RetireWell Administrators, Inc. at 856-396-0499 or ClientServices@RetireWellTPA.com.

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"Small plans", which are generally plans with less than 100 participants, are exempt from this requirement. In addition, the DOL has a rule called "80-120", which provides that if the number of eligible participants at the opening of the year is between 80 and 120, and a Form 5500 was filed for the previous plan year, the plan may file a Form 5500 in the same classification (small or large plan) as the prior year.

In general, beginning in mid-2024, the filing of the 2023 plan year reports will occur. The following change is included with respect to those reports. Specifically, a change in the methodology for counting participants in connection with the determination of eligibility for simplified reporting alternatives available to plans. In this regard, plans are now required to count only the number of participants/ beneficiaries with account balances as of the beginning of the plan year. Prior to this modification, plans were required to count the number of all employees who were eligible to participate in a plan and any former employees with an account balance.

An ERISA audit may be costly and burdensome to comply with from the viewpoint of a plan sponsor. The new rule will reduce the amount of ERISA audits that must be performed each year. Thus, plan sponsors of small plans may be "saved" from an additional expense in connection with the Form 5500.

If you have any questions or comments with regard to the modifications to the Form 5500 Series or other retirement plan matters, please contact RetireWell Administrators, Inc. at 856-396-0499 or ClientServices@RetireWellTPA.com.

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contributions and loan payments. To use the self-correction methodology, certain conditions must be met, including each of the following:

- The amount of lost earnings (as determined through the use of the "VFCP Online Calculator") must be less than or equal to $1,000. Earnings for "large plans" (i.e., generally, plans with more than 100 participants) will likely have higher lost earnings amounts (Thus, the $1,000 threshold could restrict the self-correction method to "small plans" (i.e., generally, plans with less than 100 participants).).

- The delinquent participant contributions or loan repayments are remitted to the plan within 180 calendar days after they were received or withheld by the employer.

- The "self-corrector" must submit an electronic notice form on the EBSA website. Subsequently, the self-corrector would receive an emailed acknowledgment. The self-corrector must complete a retention record checklist, including signing a penalty of perjury statement, preparing or collecting particular documents, and delivering copies of the completed checklist and required documentation to the plan administrator.

- The plan, applicant, self-corrector, or plan sponsor must not be "under investigation" as defined in the VFCP.

Although self-correctors will not acquire a "no action" letter from the EBSA, the proposed amendment clarifies that self-correction through the self-correction method will exempt the plan and its fiduciaries from civil penalties and enforcement actions. Thus, it is incumbent on the plan fiduciaries to retain the "correction" records.

If you have any questions or comments with regard to the proposed amendment and restatement of the VFCP or other retirement plan matters, please contact RetireWell Administrators, Inc. at 856-396-0499 or ClientServices@RetireWellTPA.com.

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