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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.

Significant SECURE 2.0 Act Changes to Retirement Plans Which Were Signed Into Law

By Anthony L. Scialabba, Esq. and Anthony L. Scialabba IV, Esq., QKA

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

- **Heightening the catch-up contribution limit.** Currently, participants who have reached the age of 50 are allowed to make catch-up contributions over the otherwise applicable limits. In 2023, the catch-up contribution limit is $7,500 ($3,500 for SIMPLE plans). The Act provides that the catch-up contribution limit will be increased to the greater of $10,000 or 50 percent more than the normal catch-up contribution amount in 2025 (as indexed for inflation) for participants who are at the ages of 60 to 63. The rule is effective for taxable years beginning after December 31, 2024.

- **Increasing the age for required minimum distributions**. Participants generally had to take required minimum distributions ("RMDs") from a retirement plan at the age of 70 1/2. The SECURE 1.0 Act increased that age to 72. The Act raises that age to 73 starting on January 1, 2023 (and increases that age to 75 starting on January 1, 2033).

- **Reducing the excise tax on certain accumulations in plans.** A person who does not take a RMD from a plan is currently subject to an excise tax of 50 percent of the RMD amount that should have been distributed. Effective beginning in 2023, the excise tax is reduced to 25 percent, and is further reduced to

(Continued on page 2)

Inside

Significant SECURE 2.0 Act Changes to Retirement Plans Which Were Signed Into Law
(pg. 1)
By Anthony L. Scialabba, Esq. and Anthony L. Scialabba IV, Esq., QKA

The Department of Labor's Voluntary Fiduciary Correction Program
(pg. 2)
By Anthony Scialabba, Esq. and Anthony L. Scialabba IV, Esq., QKA

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(Continued from page 1)

ten percent if the person receives all of his or her past-due RMDs and files a tax return paying such tax before receiving notice of assessment of the RMD excise tax and in all events within two years after the year of the missed RMD.

- **Treating student loan payments as elective deferrals for purposes of employer matching contributions.** One of the aims of the Act is to assist participants who may not be able to save for retirement due to student debt (and thus, are missing out on available employer matching contributions). The Act enables such participants to receive those employer matching contributions by reason of repaying their student loans, regardless as to whether the loans emanate from government sources. The Act allows an employer to make employer matching contributions under a 401(k) or 403(b) plan, or a SIMPLE IRA in connection with "qualified student loan payments." The rule is effective for contributions made for plan years beginning after December 31, 2023.

- **Expanding automatic enrollment.** 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 is at least three percent, but not more than ten percent. Each subsequent year, that amount is raised by one percent until it comes to at least ten percent, but not more than 15 percent. All current 401(k) and 403(b) plans are "grandfathered" from having to comply with the rule. The Act is effective for plan years beginning after December 31, 2024.

(Continued on page 3)

The Department of Labor's Voluntary Fiduciary Correction Program

By Anthony L. Scialabba, Esq. and Anthony L. Scialabba IV, Esq., QKA

An employer with a 401(k) plan that has 100 or more participants must put the compensation that was removed from an employee's salary as an elective deferral contribution into the trust of the plan by the 15th day of the month that succeeds the month in which the compensation was removed from the employee's salary, or if it is reasonable to put the compensation in the trust of the plan earlier, then it must be put in the trust earlier. An employer with a 401(k) plan that has less than 100 participants can use a safe harbor rule which deems satisfaction of the "15-day/reasonable" requirement if contributions are deposited within seven business days of withholding or receipt by the employer.

A failure to timely deposit salary deferrals is a fiduciary violation and could subject a plan to the Department of Labor's ("DOL") civil penalties. In addition, the failure to segregate salary deferrals from an employer's general assets and timely forward them to the plan's trust allows the employer the prohibited use of plan assets. This can result in a plan fiduciary engaging in a prohibited transaction for which it can be assessed excise tax. However, a fiduciary can correct the fiduciary violation for failing to timely deposit salary deferrals, and possibly avoid paying the excise tax, by using the DOL's Voluntary Fiduciary Correction Program ("VFCP").

(Continued on page 5)

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(Continued from page 2)

- **Handling of employer matching contributions or employer non-elective contributions as Roth contributions.** Prior to the effective date of the Act, plan sponsors are not allowed to offer employer matching contributions or employer non-elective contributions in their 403(b), governmental 457(b), and 401(k) plans on a "Roth" basis. In this regard, employer matching contributions or employer non-elective contributions must be offered on solely a pre-tax basis. The Act permits defined contribution plans to give participants the option of receiving employer matching contributions or employer non-elective contributions on a Roth basis effective on the date of enactment of this Act. In doing so, this avoids a participant from having to elect an in-plan Roth conversion after such contributions have been made to a plan, and potentially have to pay tax on any earnings that have accumulated on such amounts prior to their in-plan conversion.

- **Savings "lost and found" for plans.** The Act requires the Department of Labor to establish and operate a national, online lost and found database. The database will allow those who perhaps lost track of their pension or 401(k) plan, to search for the contact information of their plan administrator. The Act calls for the establishment of the database no later than two years after the date of enactment of this Act.

- **Exempting for certain automatic portability transactions.** An employer may currently distribute the balance of a participant's account absent the consent of the participant if the balance is below $5,000 and immediately distributable. If the balance is at least $1,000 and the participant does not affirmatively elect otherwise, an employer may also roll over the balance into a default IRA. The Act allows a service provider to render automatic portability services to employer plans. These services include the automatic transfer of a participant's default IRA (created in connection with a distribution from a former employer's plan) into the participant's new employer's plan, unless the participant affirmatively elects otherwise. This rule is effective for transactions occurring on or after the date which is 12 months after the date of enactment of this Act.

- **Relying on participants' certification that they met hardship withdrawal conditions.** The Act sets forth that, under particular circumstances, participants may self-certify that they have had an event which constitutes a "hardship" for purposes of taking a hardship withdrawal. The rule is effective for plan years beginning after the date of enactment of this Act.

- **Withdrawing on account of a federal disaster.** If a participant lives in a federal disaster area and suffers an economic loss in connection with the disaster, he or she may make a withdrawal of up to $22,000 within 180 days after the disaster (without being subjected to the ten percent early withdrawal tax). The participant may repay such withdrawal to the plan within three years. The plan may be amended to permit an in-service withdrawal for this circumstance. The distribution limit applies toward all plans maintained within a single controlled group. This rule is effective for federal disasters occurring on or after January 26, 2021.

- **Withdrawing on account of domestic abuse.** Beginning in 2024, a participant who withdraws up to the lesser of $10,000 or 50 percent of their vested balance and certifies that he or she has been the victim of domestic abuse by a spouse or domestic partner within the prior one year, may avoid the ten percent early withdrawal tax on such amount and may repay such amount to the plan within three

(Continued on page 4)

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(Continued from page 3)

years. A plan may be amended to permit an in-service withdrawal for this circumstance. The distribution is not eligible for rollover and the distribution limit applies toward all plans maintained within a single controlled group.

- **Withdrawing on account of a hardship in 403(b) plans.** The withdrawal rules for 401(k) and 403(b) plans have been different in particular ways for various reasons. In this regard, all amounts are available for a hardship withdrawal in a 401(k) plan. In contrast, only employee contributions (without earnings) are available for a hardship withdrawal in a portion of cases in a 403(b) plan. The Act conforms the hardship criteria of a 403(b) plan to that of a 401(k) plan, effective for plan years beginning after December 31, 2023. Thus, all amounts will be available for a hardship withdrawal in a 403 (b) plan.

- **Withdrawing for certain emergencies.** In general, an additional ten percent tax applies to early distributions from tax-preferred retirement accounts. The Act provides an exception for certain distributions used for emergency expenses, which are unforeseeable or immediate financial needs relating to personal or family emergency expenses. One distribution is allowable each year in an amount of up to $1,000, and a participant has the option to repay the requested amount within three years. Unless repayment takes place, no subsequent emergency distributions are allowable during the three-year repayment period. An employer is also permitted to offer a retirement plan emergency savings account that would allow for penalty-free withdrawals per year. The new rules are effective for distributions made after December 31, 2023.

- **Improving coverage for part-time workers.** The SECURE 1.0 Act 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 <u>three</u> consecutive years of service to <u>two</u> consecutive years of service. This change is effective for plan years beginning after December 31, 2024. The Act also stipulates that service before 2021 is disregarded for vesting purposes, just as such service is disregarded for eligibility purposes under present law, 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.

- **Augmenting 403(b) plans.** Currently, investments of a 403(b) plan are primarily limited to publicly traded mutual funds and annuity contracts. The Act allows 403(b) custodial accounts to participate in group trusts ("Collective Investment Trusts" ("CITs")) and participate in multiple and pooled employer plans. These changes are effective after the date of enactment of this Act.

- **Qualified Longevity Annuity Contracts.** Currently, the lesser of 25 percent of a retirement account or $135,000 can be allocated to a Qualified Longevity Annuity Contract ("QLAC"). The Act requires that the "25 percent" consideration be repealed and that the cap be increased to $200,000. The Act also provides that QLACs with spousal survivor rights can still be paid in divorce. These changes are effective as of the date of enactment of this Act.

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

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(Continued from page 2)

The general premise of the DOL VFCP is to restore the plan to the position it would have been had the employer timely deposited the salary deferrals. Thus, under the VFCP, if an employer failed to deposit salary deferrals to the plan, then the employer must make corrective contributions in the amount of the salary deferrals the employer should have timely deposited adjusted for earnings.

The adjustment for earnings is measured from the earliest date the employer could have segregated the salary deferrals from its general assets to the date the employer actually makes the corrective contributions. An employer can use the DOL's online calculator when using VFCP to calculate earnings.

To utilize the VFCP to resolve the issue in connection with the Plan, a submission to the VFCP must be prepared. As a part of the submission, the submission would have to set forth the following information:

1) A discussion of the amount and timing concerning the elective deferrals that were not made to the Plan,
2) A demonstration that the contributions were made,
3) A determination that the earnings involved with respect to this matter (the online DOL calculator may be used to do this) and proof that the earnings are contributed to the Plan, and
4) A discussion that measures were implemented so that the failure does not occur again.

Finally, after the VFCP application is submitted, the resolution of the matter would need to be negotiated with a representative of the DOL.

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

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