10 Most Significant Employee Benefits Law Changes in 2023's Federal Spending Bill

Insights
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Besides ensuring the federal government remains fully funded, President Biden's signature yesterday on the Continuing Appropriations Act, 2023 (CAA 23) contains several provisions that will directly impact health and retirement benefit plans. First, CAA 23 enacts the Setting Every Community Up for Retirement Enhancement 2.0 Act (SECURE 2.0) to provide flexibility to employer-sponsored qualified retirement plans. Second, CAA 23 will extend recent guidance that permits certain telehealth benefits to be provided on a first-dollar basis under a high-deductible health plan (HDHP) without disqualifying the recipient from being eligible to contribute to a health savings account (HSA). Here are the 10 most significant items that employer plan sponsors need to know about CAA 23.

1. Telehealth Coverage and HSAs

General rules that govern HSAs disqualify anyone who has group health coverage other than under an HDHP which would require someone to first meet the applicable deductible before receiving health services. So, an individual who receives telehealth and similar remote services before meeting a deductible under an HDHP would be ineligible to contribute to an HSA.

Relief has been in place under the CARES Act and CAA, 2021 that prevents first-dollar telehealth coverage under an HDHP from being deemed disqualifying, but it was set to expire after December 31, 2022. CAA 23 extends relief through plan years starting after December 31, 2022, but before January 1, 2025.

Plan sponsors who wish to offer such benefits will need to check their plan documents to ensure they appropriately address the issue. Additionally, non-calendar year plans will need to be cautious about months starting January 1, 2023, until the start of the next plan year, as it appears the CAA 23 relief would not apply to those months absent further guidance.

2. Expanded Automatic Enrollment in Certain Retirement Plans

Under existing IRS rules, certain qualified retirement plans (e.g., 401(k) and 403(b) plans) may be designed to automatically enroll employees with a preset contribution percentage unless the employee opts out or chooses another percentage. Plans including these automatic contributions currently must satisfy certain rules to qualify as an automatic contribution arrangement under

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currently must satisfy certain rules to qualify as an automatic contribution arrangement under ERISA Sec. 514(e), eligible automatic contribution arrangement (EACA) under Code Sec. 414(w), or qualified automatic contribution arrangement (QACA) under Code Sec. 401(k)(13).

Effective for plan years starting after December 31, 2024, SECURE 2.0 adds new Code Sec. 414A which will require a plan that includes automatic enrollment to qualify under Code Sec. 414(w) and also:

- Allow permissible withdrawals within 90 days after the first elective contribution;
- Provide for automatic contributions of at least 3% and no more than 10% during the first year of participation, unless the participant elects otherwise. As of the first day of each plan year after a completed year of participation, the contribution percentage must automatically increase (unless the participant elects otherwise) by 1 percent, to at least 10% but no more than 15%. However, for plan years ending before January 1, 2025, the maximum percentage is 10% for any arrangement that is not a safe harbor plan under Code Sec. 401(k)(12) or Code Sec. 401(k)(13); and
- If a participant makes no investment election, automatically contributed amounts must be invested according to general DOL rules for qualified default investment alternatives.

3. Higher Beginning Age for Required Distributions

Certain qualified retirement plans (e.g., Code Sec. 401(k), Code Sec. 403(b), or Code Sec. 457(b) plans) must adhere to IRS required minimum distribution rules, which dictate that benefits be distributed or commence being distributed (for non-5% company owners) by April 1 following the later of the calendar year in which the employee attains age 72 or retires (Required Beginning Date or RBD). For an employee who is a 5% owner, the RBD is April 1 following the calendar year in which the IRA owner attains age 72, even if the employee works beyond that age.

For required distributions occurring after December 31, 2022, to individuals who reach age 72 thereafter, SECURE 2.0 provides that the age used to determine RBDs will increase from age 72 to:

- Age 73 starting on January 1, 2023 (for individuals who attain age 72 after December 31, 2022, and age 73 before January 1, 2033); and
- Age 75 starting on January 1, 2033 (for individuals who attain age 74 after December 31, 2032).

This provision applies to distributions required to be made after December 31, 2022, with respect to individuals who attain age 72 after such date.

4. Higher Permitted Catch-up Contributions

Certain qualified retirement plans may, but do not have to, allow participants who are age 50 or older to make so-called "catch-up" contributions. The permissible catch-up contribution limit is generally $7,500 for 2023 (SIMPLE plans are limited to catch-up contributions of $3,500 for 2023).

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Effective January 1, 2025, SECURE 2.0 will allow plans to permit the greater of $10,000 ($5,000 for SIMPLE plans) or 50% more than the regular catch-up amount in 2024 (2025 for SIMPLE plans) for individuals who turn 60, 61, 62 and 63. The higher amounts will be indexed for inflation beginning in 2026.

5. New Permitted Emergency Distributions

Starting with tax years beginning on or after January 1, 2024, SECURE 2.0 creates a new exception to the rule requiring a penalty for early qualified plan withdrawals. Penalties will not apply to distributions used for unforeseeable or immediate financial needs relating to personal or family emergency expenses. Plans may permit only one distribution per year of up to $1,000, and the participant has the option to repay the distribution within three years. No further emergency distributions may be made for that individual during the three-year repayment period absent full repayment.

6. Non-Highly Compensated Employees

Additionally, SECURE 2.0 will allows employers to offer non-highly compensated employees emergency savings accounts linked to individual account plans. Employers may automatically opt employees into these accounts at no more than 3% of their salary, and the portion of an account attributable to the employee's contribution is capped at no more than $2,500.

Contributions are post-tax, and withdrawals (in whole or in part) are permitted at least once per calendar month. The accounts are portable upon termination of employment and can be rolled into a Roth defined contribution plan or IRA.

7. New Starter 401(k) Plan Design

Starting with plan years that begin on or after January 1, 2024, SECURE 2.0 will allow certain employers to establish what will be known as a “starter 401(k) deferral-only arrangement” (Starter 401(k)).

A Starter 401(k) is a plan sponsored by an eligible employer under which each eligible employee must be treated, absent a different employee election, as having elected to have the employer make elective contributions in an amount equal to an applicable qualified percentage of compensation. All employees must be eligible to participate in the arrangement other than those that do not meet age and service limits.

The plan can define the qualified percentage, but it must be at least 3% and no more than 15%, and must be applied uniformly. An employee may affirmatively elect to not contribute or to defer at a different level. Matching or nonelective contributions are not allowed, and employee contributions are capped at $6,000 per calendar year (plus a $1,000 catch-up for employees 50 and up).

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Generally, other than in certain collectively bargained contexts, an employer may offer a Starter 401(k) only if neither the employer nor a predecessor employer maintains another qualified plan for the year. An exception could apply where, due to a business transaction and only during a specified transition period, an employer would otherwise violate this rule.

8. New Safe Harbor 403(b) Plan Design

Starting with plan years that begin on or after January 1, 2024, SECURE 2.0 will allow certain employers to establish what will be known as a "safe harbor 403(b) plan") (Safe Harbor 403(b)). Safe Harbor 403(b) plans will be subject to rules that will largely mirror the foregoing Starter 401(k) rules. All employees of the employer must be eligible to participate in a Safe Harbor 403(b) with limited exceptions.

9. Reduced Service Requirement for Part-Time Employees

SECURE Act 2019 added a new provision that called for certain qualified retirement plans to allow long-term part-time employees to participate. One of the requirements was that employees had to have worked at least 500 hours for the employer for three consecutive years.

Starting with Plan years that begin on or after January 1, 2025, SECURE 2.0 reduces the service requirement for those employees from three years to two years. So, a 401(k) plan generally must permit an employee to make elective deferrals if they have worked at least 500 hours per year for at least two consecutive years and has met the minimum age requirement (age 21) by the end of that period.

SECURE 2.0 also clarifies that 12-month periods beginning before January 1, 2021, do not count in defining a year of service for purposes of vesting of employer contributions. Therefore, an employer may disregard 12-month periods of service beginning before January 1, 2021, for vesting purposes.

Finally, the Act clarifies that a 401(k) safe harbor plan that is eligible for an exemption from the top-heavy rules will not fail to be exempt just because the plan does not provide safe harbor matching contributions to long-term part-time employees. It also extends the long-term part-time rules to 403(b) plan covered under ERISA.

10. Reduced Excise Tax on Noncompliant Required Minimum Distributions

Starting with plan years that begin after SECURE 2.0 is enacted, the current 50% excise tax that applies on the difference between the annual required minimum distribution and the amount actually distributed will reduce to 25%. Moreover, the excise tax will drop to just 10% if an affected taxpayer remedies the error within a limited correction window.

Conclusion

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There are numerous additional employee benefit provisions in CAA 23. For example, the new law includes certain administrative provisions relating to relaxed requirements for notices to no-participating employees under certain retirement plans, expands available IRS correction programs, and provides for plan amendments that become necessary due to SECURE 2.0 provisions to be made no later than the first day of the plan year beginning on or after January 1, 2025.

Stay tuned for updates as we monitor regulatory and departmental guidance regarding administration and implementation of CAA 23 benefits provisions. Fisher Phillips will provide updates as warranted, so make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information directly to your inbox.

In the meantime, if you have questions, feel free to reach out to your Fisher Phillips attorney, the author of this Insight, or any attorney in our Employee Benefits and Tax Practice Group.

Service Focus

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