# IRS Grab Bag Brings Clarity to Certain SECURE Act 2.0 Provisions: 6 Biggest Points for Employers

Insights
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Employers that sponsor retirement plans continue to have a lot on their plate. With SECURE Act 2.0 requirements now in play, this legislation continues to add more and more to your (already) overflowing plate. However, as is common with most pieces of large legislation, the law often provides little guidance and leaves employers and industry professionals confused. Although some guidance had been published last year, employers were patiently waiting for additional direction since the end of 2022, when Congress passed the act. Thankfully, at the end of 2023, the IRS issued a notice outlining much-anticipated guidance on SECURE Act 2.0 provisions that are currently (or soon-to-be) effective. We've highlighted the six pieces of IRS guidance that apply to most employers that sponsor retirement plans and how they impact your compliance efforts.

**1. Mandatory Automatic Enrollment**

Under SECURE Act 2.0, a new 401(k) or 403(b) plan with a qualified cash or deferred arrangement (CODA) added after December 29, 2022, must auto-enroll participants at an initial contribution amount between three and 10% beginning in the 2025 plan year. This initial contribution amount will increase by one percentage point each year until it reaches 10% to 15%. This provision does not impact plans established before December 29, 2022, and new companies in business for less than three years with 10 or fewer employees.

In its recent guidance, the IRS clarified the following:

**401(k) vs. 403(b) Plans**. When determining when the plan's CODA is "established," the rules differ for 401(k) and 403(b) plans. For example, if a profit-sharing plan was amended to add a CODA on November 1, 2022, with an effective date of January 1, 2023, the IRS views the CODA as established before December 29, 2022, thus exempt from these mandatory automatic enrollment requirements. However, for 403(b) plans, the original adoption date of the plan applies, even if the plan is later amended to add a CODA.

**Plan Mergers.** If two retirement plans merge — both with pre-enactment CODAs — then the qualified CODA in the merged plan is generally treated as a pre-enactment CODA, exempting this plan from the mandatory automatic enrollment requirements unless an exception applies.

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However, if two retirement plans merge with one plan having a pre-enactment qualified CODA and the other having a post-enactment qualified CODA, then the CODA post-merger will be treated as a post-enactment CODA. In this example, the mandatory automatic enrollment requirements will generally apply unless an exception applies.

**Spin-offs.** If a retirement plan is spun-off from another plan containing a pre-enactment qualified CODA, then the spun-off retirement plan with the CODA would generally continue to be treated as a pre-enactment CODA. In this example, the mandatory automatic enrollment requirements do not apply unless an exception applies.

**Starter 401(k) or 403(b) Plans.** These two new types of deferral-only plans (created by SECURE Act 2.0 for plan years beginning in 2024) are subject to these mandatory automatic enrollment requirements unless an exception applies.

## 2. Financial Incentives for Plan Participation

Under the SECURE Act 2.0, 401(k) and 403(b) plans may offer a "de minimis" financial incentive to employees for their participation in the plan for plan years beginning after December 29, 2022. As to these incentives, the IRS Notice clarified:

- "De minimis" means a value of $250 or less (think of a gift card).
- This incentive is only available to those employees who do not currently participate in the plan through an elected employee deferral.
- A de minimis incentive is not treated as a retirement plan contribution but as taxable wages.
- An employer matching contribution is not a de minimis incentive.

## 3. Roth Employer Contributions

SECURE Act 2.0 expanded Roth retirement plan options by permitting employees to elect that employer matching and non-elective contributions be deposited as Roth contributions, effective after December 29, 2022. The IRS Notice clarified that:

- Roth employer contributions are treated similarly to designated Roth elective contributions, such as requiring separate accounting and permitting employees to change designations at least once annually.
- To be eligible to designate these contributions as Roth, the employee must be 100% vested in their matching or non-elective contributions when allocated to their account.
- Roth employer contributions are excluded from wages for federal income and employment tax withholding. For governmental 457(b) plans, these contributions may be subject to FICA withholding (Social Security and Medicare employment taxes), unless a social security replacement plan covers the employees.

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- These Roth employer contributions are included in a participant's gross income for the taxable year in which they are allocated.
- These contributions do not count against Internal Revenue Code Section 415, which is the safe harbor definition of compensation.
- Roth employer contributions are reported on Form 1099-R (instead of W-2) since they are reported in the same manner as if the contribution was directly rolled over to a Roth account.
- These Roth employer contributions can be added to a retirement plan even if the plan does not permit Roth elective deferrals.

**4. Self-Correction for Automatic Enrollment Employee Deferrals**

SECURE Act 2.0 provided that 401(k), 403(b), and governmental 457(b) plans would not lose their qualified statuses under the Internal Revenue Code solely because of a reasonable administrative error made when implementing an automatic enrollment or escalation feature. Additionally, this applies to any failures made when allowing eligible employees to elect a salary deferral (if that employee was improperly excluded from the plan).

This IRS Notice provides insight into self-correction of automatic enrollment or escalation administrative errors, providing permanent relief for employers in most cases.

For example, corrected deferrals must be made by the earlier of:

- The nine-and-one-half-month period following the plan year when the error occurred; or
- The second month after the month the employee reports the error.

Any corrective matching contributions (adjusted for earnings) must be made within a reasonable time after the corrected deferrals begin. For example, if corrective matching contributions are made within six months following the corrected deferrals, then that is considered a "reasonable time." For any automatic contribution errors occurring before December 31, 2023, the correction must be made by the end of the third plan year after the error occurred.

Other implementation errors can be fixed by using the safe harbor methodologies for automatic contribution failures, described more fully in the IRS Employee Plans Compliance Resolution System (EPCRS). The IRS also confirmed that implementation corrections can apply, in most cases, to active or terminated employees.

**5. Terminal Illness Distributions**

SECURE Act 2.0 permits a terminally ill employee to take penalty-free distributions from their retirement plans on or after December 29, 2022.  The IRS Notice provides clarity on this distribution option:

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- **Although the current law provides relief from the 10% early penalty tax, it does not create a new distributable event.** The participant must be otherwise eligible for a plan distribution, such as a disability or hardship distribution. *NOTE: Congress intends to make this a separate distributable event through a technical corrections bill yet to be passed.*
- **The participant cannot self-certify their terminal illness.** The employee must provide the plan administrator with a physician's certification that meets certain requirements to qualify for this penalty-free distribution. Any distribution must be made after the physician's certification date.
- **Depending on plan design, the employee may recontribute any portion of the terminal illness distribution,** like qualified birth or adoption distributions.
- **This is not a required provision that retirement plans must adopt** – it's completely optional. However, if the employer chooses to offer this type of distribution, the plan must be amended to provide it.

### 6. Plan Amendment Deadlines

Graciously, the IRS extended the plan amendment deadlines as they relate to not only SECURE Act 2.0 changes but also to any amendments related to the CARES Act and SECURE Act 1.0.

This notice essentially provides for a one-year extension until December 31, 2026, for mandatory and discretionary plan amendments related to these various legislative changes. The extended deadline is December 31, 2028, for collectively bargained plans and December 31, 2029, for most governmental plans.

*It's important to note that this IRS Notice does not clarify student loan matching, emergency savings accounts, or mandatory Roth catch-up contributions for highly compensated employees.*

### Conclusion

If you have questions about how SECURE Act 2.0 may impact your retirement plan, 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. We will continue to provide tips, guidance, and updates on employee benefits and other workplace law topics, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information directly to your inbox.

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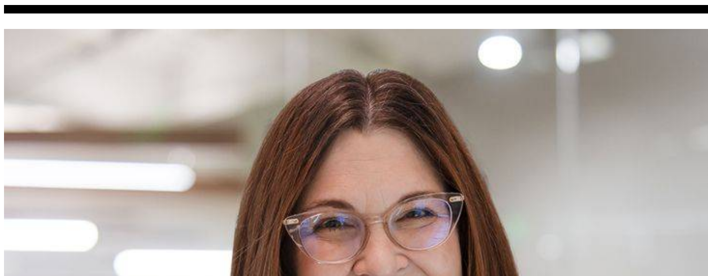

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