

Now or Later: When Should You Update Your SPD for SECURE 2.0?

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PRACTICES ERISA and Other Benefits Litigation, Employee Benefits and Executive Compensation

As we previously reported [here](#), qualified non-governmental plans generally don't have to be amended for SECURE 2.0 changes until December 31, 2026. However, many of the changes permitted or required by SECURE 2.0 are currently effective, and plans must operate in accordance with such changes as of the effective date of the relevant statutory provisions. As a result, for several years, there may be a disconnect between the written terms of the plan and how the plan actually operates.

This disconnect raises the question as to what should be included in the plan's summary plan description ("**SPD**") – just the written terms of the plan, or how the plan is being operated and administered?

ERISA requires the SPD to explain the material contents of a plan in "plain English." Updated SPDs or summary of material modifications ("**SMMs**") must be provided no later than 210 days after the end of the plan year in which a material change to the plan was made.

It is clear that SPDs must be updated (or SMMs must be provided) after the plan is formally amended. However, if there are operational changes made to the plan without amendments (because the amendments are not yet due), then the plan sponsor may want to amend the plan prior to the date the amendments are adopted. For example:

In plan litigation, courts often give more weight to language in the SPD (or SMM) than the actual language in the plan, since plan participants and beneficiaries rely on language in the SPD. Judges may not be sympathetic to the argument that the SPD does not describe the material terms of the plan or the benefits available thereunder, because the plan has not been formally amended yet.

Plan sponsors and administrators may be exposed to breach of fiduciary duty claims if they fail to update the SPD to address legal changes that are currently effective, particularly if those changes impact the benefits available under the plan.

Questions may arise in other contexts as to whether the plan is being administered in accordance with the mandatory SECURE 2.0 provisions currently in effect and which permissive changes the plan has adopted. For example, in the context of a corporate transaction, the buyer should, as part of its due diligence review, confirm that mandatory SECURE 2.0 changes have been implemented as well as which permissive changes have been adopted by the selling employer. Updating the plan's SPD now could help answer those questions.

Plan service providers often prepare plan SPDs based on a form created for their pre-approved documents, and they are often reluctant to update their form SPDs before the underlying plans are formally amended. Nevertheless, the plan sponsor or a committee of the plan sponsor, not a third-party service provider, is generally the plan administrator responsible for ensuring the language in the SPD does not contain omissions or misrepresentations. Accordingly, plan sponsors should work

with their counsel to review the SPD and make sure they are properly updated for any legal changes currently effective.