SECURE 2.0 Act: Changes to Plan Corrections Guidance

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As we previously reported here, the SECURE 2.0 Act includes many provisions that have an immediate impact on retirement plan sponsors and participants, including the new retirement plan self-correction and overpayments guidance. Although plan correction guidelines are usually addressed by the IRS through its Employee Plans Compliance Resolution System ("***EPCRS***"), Congress included several related provisions to provide relief to plan sponsors and owners of Individual Retirement Accounts ("***IRAs***") due to the ever growing complexity of plan administration, as summarized below:

New Self-Correction for Eligible Inadvertent Failures:

The SECURE 2.0 Act updated EPCRS to allow for the self-correction of any "eligible inadvertent failures" for retirement plans as well as for IRAs through self-correction. An "eligible inadvertent failure" means a failure that occurs despite the existence of practices and procedures that satisfy EPCRS standards (*e.g.*, certain retirement plan loan errors) but does not include any failure that is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction. Based on the timing of past EPCRS updates, we expect EPCRS to be updated within two years to reflect this expansion and to provide additional guidance.

Permanent Safe Harbor for Automatic Deferral Failures:

Congress made permanent a temporary safe harbor for corrections of automatic deferral failures, which was set to expire at the end of this year. The current safe harbor permits self-correction if notice is given to affected employees, correct automatic deferrals commence within certain specified time periods, and the employer provides the employee with any matching contributions that would have been made if the failure had not occurred. For errors occurring after December 31, 2023, the safe harbor will now continue to allow for a grace period to correct reasonable automatic enrollment and escalation related errors up to 9½ months after the end of the plan year in which the error occurred, without penalty, including for terminated employees.

Clear Guidance Regarding Decisions Not to Recoup Overpayments:

ERISA retirement plan fiduciaries of individual account plans and defined benefit pension plans now have clear guidance that provides them the flexibility to decide to not recoup overpayments that were mistakenly made to retirees in certain circumstances depending on the type of plan, which was unclear under prior IRS guidance. Under the new guidance, fiduciaries of defined benefit plans could elect not to recoup overpayments in situations where (i) the plan satisfies minimum funding standards and (ii) the overpayment does not put other participant benefits at risk. As background, plan sponsors occasionally provide retirees with more money than they are owed under their retirement plans, and such overpayment, plus interest, can become substantial over multiple years. In the event a plan fiduciary chooses to recoup such overpayments, the following conditions would apply, provided that the first six

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conditions will not apply if the participant or beneficiary is "culpable" for the overpayment (*i.e.*, the overpayment is based on misrepresentations made by the participant or beneficiary or the participant or beneficiary knew the overpayments were materially in excess of the correct benefit amount):

- No interest or additional amounts can be sought on overpaid amounts;
- For non-decreasing annuities, the reduction shall cease after the plan has recovered the full amount, the amount recouped each calendar year cannot exceed 10% of the full dollar amount of the overpayment, and future benefit payments cannot be reduced to below 90% of the periodic amount otherwise payable under the terms of the plan;
- For recoupment of past overpayments of a benefit other than a non-decreasing annuity, the plan satisfies requirements developed by the DOL;
- Efforts to recoup overpayments cannot be accompanied by litigation threats, unless there is a reasonable likelihood of success as determined by the plan fiduciary, or through a collection agency or other third party, unless a final judgement or settlement is ignored or rejected;
- Recoupment for a past overpayment to a participant is not sought from a beneficiary of the participant;
- Recoupment for past overpayments may not be sought if the first overpayment occurred more than three years before the participant or beneficiary is first notified in writing of the error, except in the case of fraud or misrepresentation by the participant;
- A participant or beneficiary from whom recoupment is sought is entitled to contest all or part of the recoupment; and
- In determining the amount of recoupment to seek, the responsible plan fiduciary may take into account the hardship that the recoupment likely would impose on the participant or beneficiary.

With respect to overpayments made prior to enactment of this new guidance, plan sponsors are entitled to rely on a reasonable, good faith interpretation of then existing administrative guidance for inadvertent benefit overpayment recoupments and recoveries as well as determinations not to seek recoupment or recovery of all or part of an inadvertent benefit overpayment.

Retirement plan sponsors who believe they have identified a plan administrative, operational, or other error should first contact their benefits counsel to (i) discuss the potential error, (ii) preserve the attorney-client privilege as to such error, and (iii) determine if any self-correction procedures are available to correct the error, including the new self-correction procedures enacted as part of the SECURE 2.0 Act.

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