

## SECURE 2.0 Act: Focus on 401(k) and 403(b) Plans – Changes to Plan Corrections Guidance

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This article is the fourth in a series in which we focus on how the SECURE 2.0 Act will impact specific types of plans. The items listed below are provisions that plan sponsors of 401(k) and 403(b) plans should consider and discuss with their third party administrators and outside counsel. Please note that some of these provisions will also apply to other types of retirement plans. For a full list of our articles concerning the SECURE 2.0 Act, including additional detail regarding the provisions summarized below, please refer to the links below.

### **New Self-Correction for Eligible Inadvertent Failures**

The SECURE 2.0 Act updated the Employee Plans Compliance Resolution System (“**EPCRS**”) to allow for the self-correction of any “eligible inadvertent failures” for retirement plans. An “eligible inadvertent failure” means a failure that occurs despite the existence of practices and procedures that satisfy EPCRS standards 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. Informally, the IRS has indicated that it does not expect the new self-correction options available under the SECURE 2.0 Act to replace its voluntary correction program (“**VCP**”) currently available under EPCRS. Accordingly, plan sponsors who wish to obtain IRS approval of a correction in the form of a compliance statement should continue to file under VCP. Further, plan sponsors should still consider filing under VCP to correct complicated plan errors and errors for which specific corrections are not currently described in EPCRS. Additionally, VCP will continue to be an attractive option if a plan sponsor wishes to correct a plan error using a correction method that is different from the one described in EPCRS.

### **Permanent Safe Harbor for Automatic Deferral Failures**

Congress made permanent a temporary safe harbor for corrections of elective deferral failures relating to automatic deferral and automatic escalation features, 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 now have clear guidance that provides them the flexibility to decide to not recoup overpayments that were mistakenly made to participants in certain circumstances depending on the type of plan. If a plan fiduciary does decide to recoup an overpayment, the SECURE 2.0 Act places limitations on what actions the fiduciary can take,

including a prohibition on recouping overpayments if the first overpayment occurred more than three years before the participant is notified in writing of the failure. In addition, certain overpayments for which recoupment is not sought may be considered eligible rollover distribution if the payment would have otherwise been an eligible rollover distribution but for being an overpayment.

For further information on the above provisions and the SECURE 2.0 Act generally, please refer to our previous articles provided below.

- [SECURE 2.0 Act: Focus on 401\(k\) and 403\(b\) Plans – Plan Design Changes](#)
- [SECURE 2.0 Act: Focus on 401\(k\) and 403\(b\) Plans Distribution and Withdrawal Changes](#)
- [SECURE 2.0 Act: Focus on Pension Plans](#)
- [SECURE 2.0 Act: Permissive Plan Design Changes](#)
- [SECURE 2.0 Act Increases Age for Required Minimum Distributions](#)
- [SECURE 2.0 Act: Changes to Plan Corrections Guidance](#)
- [SECURE 2.0 is Here! What's Next for Plan Sponsors?](#)
- [Major Retirement Legislation Passed by Congress: SECURE 2.0 Act](#)