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Many 2022 Year-End Plan Amendment Deadlines Extended

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On August 3, 2022, the IRS published Notice 2022-33, which announced an extension of the amendment deadlines applicable to retirement plans and individual retirement arrangements (IRAs) to comply with the requirements of the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), the Further Consolidated Appropriations Act, 2020[1] (known as the Bipartisan American Miners Act of 2019 (Miners Act)), and certain provisions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).[2] Barely eight weeks later, on September 26, 2022, the IRS published Notice 2022-45, which announced an extension to the amendment deadline to comply with certain other provisions under the CARES Act, and also announced an extension of the amendment deadline to comply with the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act).

Before the publication of Notice 2022-33 and Notice 2022-45, the original amendment deadline to comply with the SECURE Act, the Miners Act, and the CARES Act was the last day of the plan year beginning after January 1, 2022 (i.e., December 31, 2022, for calendar year plans). Notice 2022-33 extended this deadline for nongovernmental qualified retirement plans (e.g., 401(k), profit sharing, money purchase, defined benefit, cash balance, etc.), IRAs, and §403(b)[3] plans not maintained by public schools by three years (i.e., to December 31, 2025, for IRAs and calendar year plans), and generally extended the deadline for governmental plans (including governmental §457(b) plans) and §403(b) plans maintained by public schools to 90 days after the close of the third regular legislative session that begins after December 31, 2023, for the legislative body with the authority to amend the plan (or, if applicable in the case of a governmental §457(b) plan, the first day of the first plan year beginning more than 180 days after the date of notification by the Secretary that the plan was administered in a manner that is inconsistent with the requirements of §457(b).

The extension under Notice 2022-33 applies to certain provisions of the SECURE Act (including both required and optional changes), §104(a) of the Miners Act (lowering the minimum age for in-service distributions from a qualified pension plan (such as defined benefit plans and money purchase pension plans) from age 62 to age 59-1/2), §104(b) of the Miners Act (permitting amounts under a governmental §457(b) plan to be made available to a participant as early as the calendar year in which the participant attains age 59-1/2), and §2203(a) of the CARES Act (providing for the waiver of required minimum distributions (RMDs) in 2020 for defined contribution plans and IRAs). Significant changes are summarized below.

In addition, Notice 2022-33 provides relief from the anti-cutback requirements under §411(d)(6) with respect to amendments adopted to comply with the SECURE Act and §2203(a) of the CARES Act.

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[1] Pub. L. No. 116-94.

[2] Pub. L. No. 116-136.

[3] All section references herein are to the Internal Revenue Code of 1986, as amended (the Code), or the Treasury regulations promulgated thereunder, unless otherwise indicated.

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Notice 2022-45 similarly extends the amendment deadline to comply with §2202 of the CARES Act (providing for Covid-19-related distributions (CRDs) and loan relief to participants), as modified by §280 of the COVID-related Tax Relief Act of 2020 (enacted as Subtitle B, Title II, Division N, of the Consolidated Appropriations Act, 2021),[4] as well as §302 of Title III of the Relief Act (set forth in Division EE of the Consolidated Appropriations Act, 2021) (providing special disaster-related rules for the use of retirement funds). Specifically, the extended deadline for non-governmental qualified retirement plans, IRAs, and §403(b) plans not maintained by public schools is now December 31, 2025. The extended deadline for governmental plans (including governmental §457(b) plans) and §403(b) plans maintained by public schools is 90 days after the close of the third regular legislative session that begins after December 31, 2023, for the legislative body with the authority to amend the plan (or, if applicable in the case of a governmental §457(b) plan, the first day of the first plan year beginning more than 180 days after the date of notification by the Secretary that the plan was administered in a manner that is inconsistent with the requirements of §457(b)).

Notice 2022-45 also provides relief from the anti-cutback requirements under §411(d)(6) with respect to amendments adopted to comply with §2202 of the CARES Act.

AMEND LATER . . . OR NOW?

Despite the extensions of these amendment deadlines, however, plan sponsors may wish to consider amending their plans now to comply with current law — or, at least, sooner rather than later — for two reasons set forth below.

First, all plans are required to be operated in compliance with the requirements under current law, even where the plan terms have not yet been amended to reflect that operation and current law. From a purely practical perspective, it is generally simpler to administer a plan when its terms are already updated to reflect current law, and operational failures attributable to a mismatch between the plan terms and legal operational requirements are less likely to occur.

Second, some of the changes for which amendments are required address temporary circumstances that arose solely in 2020, and no longer applied after 2020. Waiting until the end of 2025 to amend plans to reflect their operation in 2020 may be problematic in scenarios where accurate records and/or the personnel, vendors, or service providers who administered the plans in 2020 are no longer available to verify how the plans were operated. This situation can potentially arise where employee turnover has occurred amongst the personnel tasked with administering the plan, or the plan sponsor has changed vendors or service providers, or the entity sponsoring the plan has been acquired (e.g., in a merger and acquisition transaction). In many cases, it may well be more desirable to keep plan documents updated for operational changes more frequently than required by the now extended deadlines.

Another consideration is that many employers sponsoring qualified defined contribution plans utilizing pre-approved plan documents were required to amend and restate the plan documents using the latest pre-approved plan document for the current six-year remedial amendment cycle by July 31, 2022 (Cycle 3 Deadline). Because the language included in the pre-approved plan documents generally was drafted long before the Cycle 3 Deadline (and before the statutes discussed above), however, the pre-approved plan documents adopted by the Cycle 3 Deadline did not include the changes required by the SECURE Act, CARES Act, etc. Some pre-approved plan document providers also provided employers with interim plan amendments to sign along with the restated pre-approved plan documents for the Cycle 3 Deadline; accordingly, plan sponsors with pre-approved plan documents may wish to coordinate with their pre-approved plan document provider to determine whether any provisions in those amendments require execution now.

On the other hand, multiple pieces of legislation are currently pending in the U.S. Senate and House of Representatives that, if passed and enacted into law in 2022, are likely to further change the rules for which plans must be amended. As a result, plan sponsors also may wish to consider, in the alternative, whether their circumstances are such that waiting to amend their plans would better suit their purposes. Plan sponsors who choose to do so, however, should bear in mind that it may take some time for regulators to issue guidance on any law after enactment, and the timeframe for doing so can be unpredictable.

Finally, with respect to any optional provisions now permitted by current law, plan sponsors may wish to consider any applicable advance timing requirements needed by their vendors and service providers to implement operational changes, and take this timing into account when determining whether and when to amend their plans.

CERTAIN CHANGES DUE TO THE SECURE ACT

Section 114 of the SECURE Act changed the age for RMDs from age 70-1/2 to age 72 effective Janu-

[4] Pub. L. No. 116-260.

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ary 1, 2020. In other words, the required beginning date (RBD) for anyone who attains age 70-1/2 after December 31, 2019 (i.e., was born after June 30, 1949), will be April 1 of the year after the year of attainment of age 72, while anyone who attained age 70-1/2 on or before December 31, 2019 (i.e., was born before July 1, 1949) continues to be subject to the age 70-1/2 RBD rules, even if they had not yet attained age 72. (But see the discussion below regarding the CARES Act changes with respect to the 2020 RMD.) Note that plan sponsors may still choose to require the commencement of distributions at an earlier age (such as normal retirement age).

The SECURE Act also changed the RMD timing rules to eliminate the ability of many beneficiaries under defined contribution plans to stretch out the distributions where a participant dies on or after January 1, 2020. Effective January 1, 2020, a deceased participant's entire interest generally must be fully distributed within 10 years after the participant's death, unless the participant's beneficiary is his or her surviving spouse or another eligible designated beneficiary, as defined under the law (i.e., children who have not reached majority, and designated beneficiaries who are disabled, chronically ill, or not more than 10 years younger than the employee). In addition, if an eligible designated beneficiary dies before receiving the deceased participant's entire benefit, the remaining benefit must be distributed within 10 years after the death of the eligible designated beneficiary.

In addition, under §112 the SECURE Act, long-term part-time employees (LTPT Employees) who attain age 21 and complete 500 hours of service during three consecutive 12-month periods beginning after 2020 must be allowed to make elective deferrals to their employer's 401(k) plan, and special vesting rules apply to LTPT Employees who become eligible to contribute under this rule. Although the 12-month periods beginning before 2021 can be disregarded for purposes of determining eligibility for making elective deferrals under a 401(k) plan (and therefore the eligibility by LTPT Employees to participate will be delayed until January 1, 2024, at the earliest), the periods cannot be disregarded for vesting purposes unless another otherwise permissible and applicable rule applies (such as disregarding service credited prior to age 18).

Section 113 of the SECURE Act amended §72(t)(2) to permit in-service distributions of up to $5,000 for a qualified birth or adoption (QBADs) that are not subject to the 10% penalty on early withdrawals. The change applies to any defined contribution plan (including §403(b) plans), governmental §457(b) plans, and IRAs (the change does not apply to defined benefit pension plans). A QBAD includes any participant distribution from a defined contribution plan during the one-year period that begins on the birth date of the participant's child or on the date the child's adoption is finalized. Participants may repay all or a portion of the QBAD by contributing to any plan that permits QBADs and is otherwise permitted to accept rollovers.

The SECURE Act also requires that certain qualified foster care payments known as ''difficulty of care payments'' made by a participant's employer be treated as compensation for purposes of determining the limit on annual additions to the participant's benefit under a qualified retirement plan.[5]

CERTAIN CHANGES DUE TO THE MINERS ACT

The Miners Act permits plan sponsors of defined benefit pension plans and money purchase pension plans to amend their plans to allow participants to take in-service distributions upon attainment of age 59-1/2, rather than age 62, effective for distributions made after December 31, 2019. This law also applies to governmental §457(b) plans (where participants may take in-service distributions upon attainment of age 59-1/2 rather than age 70-1/2), and profit sharing and 401(k) plans with transferred money purchase pension plan assets.

CERTAIN CHANGES DUE TO THE CARES ACT

Under the CARES Act, the RMDs were temporarily waived for the 2020 calendar year for §401(k) plans, §403(a) plans, §403(b) plans, government-sponsored §457(b) plans, and IRAs. This temporary RMD waiver applied to anyone who had an RMD due in 2020, including anyone who attained age 70-1/2 in 2019 with a required beginning date of April 1, 2020. This allowed plans to postpone by one year all RMDs that otherwise would have occurred in 2020, and likewise postponed all required beginning dates that would otherwise have occurred in 2020. Plans must be amended to reflect the temporary waiver of the 2020 RMDs by the deadline described above.

The CARES Act allowed for CRDs of up to $100,000 to be made to participants through December 31, 2020, from §401(k) plans, §403(a) plans, §403(b) plans, government-sponsored §457(b) plans, and IRAs. These CRDs were not subject to the 10% early distribution penalty applicable to distributions made before age 59-1/2, and could be repaid within

[5] If an employer does not make difficulty of care payments to its employees that are eligible to participate in the employer's plan, then the plan does not need to be amended to include difficulty of care payments in compensation.

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three years via one or more contributions. In addition, any income taxes incurred in connection with receipt of the CRDs could be paid ratably over three years. Although permitting CRDs under a plan was an optional, rather than mandatory change, any plan sponsor that permitted CRDs to be made from the plan in 2020 must amend the plan accordingly to include provisions for CRDs by the deadline described above.

The CARES Act also temporarily extended the repayment period for plan loans and temporarily increased the maximum loan limit under qualified retirement plans for participants who met the requirements to receive a CRD from the lesser of $50,000 or 50% of the vested account balance to the lesser of $100,000 or 100% of the vested account balance. In addition, individuals with outstanding participant loans due and payable in 2020 could suspend their loan repayments through December 31, 2020 (with subsequent repayments adjusted to reflect the delay). Again, permitting the extended repayment period and increased loan limits was optional and not mandatory; however, if a plan sponsor permitted the temporary loan repayment suspensions and allowed loans to be made to participants using the temporarily increased limits, then the plan must be amended to include these provisions by the deadline described above.

CERTAIN CHANGES DUE TO THE RELIEF ACT

The Relief Act included optional rules for qualified disaster-related distributions (QDDs) for Federal Emergency Management Agency (FEMA) declared disasters (other than Covid-19) from January 1, 2020, through the date 60 days after enactment of the Relief Act (i.e., through February 25, 2021). This relief applied to QDDs made from qualified defined contribution plans, §403(b) plans, and governmental §457(b) plans through the date that was the day before 180 days after enactment (i.e., June 24, 2021). If a plan sponsor allowed QDDs, then the plan must be amended to include these provisions by the deadline described above.

PLAN DESIGN CHANGES

Two deadlines that were *not* extended by Notice 2022-33 and Notice 2022-45 were (1) the generally applicable year-end deadline to amend plan documents to reflect any discretionary changes in plan design that were implemented during the plan year (other than any discretionary changes implemented in connection with the SECURE Act or the CARES Act that are subject to the extended amendment deadlines described above), and (2) the Cycle 3 Deadline.

With respect to the former, if any discretionary changes in plan design not subject to the extensions under Notice 2022-33 and Notice 2022-45 were made during the 2022 plan year, plan sponsors must execute plan amendments no later than the last day of the 2022 plan year (December 31, 2022, for calendar year plans) to reflect the discretionary changes. With respect to the latter, the failure to timely restate a pre-approved plan document results in the plan being treated as an individually designed plan rather than a pre-approved plan. Consequently, employers that sponsor qualified defined contribution plans utilizing pre-approved plan documents that did not execute restated plan documents using the latest pre-approved plan documents by the Cycle 3 Deadline will need to consult with counsel and their plan document providers to determine whether, as an individually designed plan, the plan document has any qualification failures that require correction under the Employee Plans Compliance Resolution System (EPCRS), as published in Rev. Proc. 2021-30.

Finally, note that in some cases plans must be amended by the last day of the plan year to adopt optional plan design changes that plan sponsors intend to implement effective as of the first day of the next plan year. Plan sponsors who wish to implement such changes should consult with their counsel and advisors to determine the applicable amendment execution deadlines for any optional plan design changes they want to make effective January 1, 2023.

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