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SECURE 2.0: What Plan Sponsors Need to Know Now

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Employee Benefits Academy
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Presentation by:
Jessica Agostinho, Partner, Hunton Andrews Kurth
Scott Austin, Partner, Hunton Andrews Kurth
Michelle Lewis, Counsel, Hunton Andrews Kurth

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Jessica Agostinho

Partner
Email: jagostinho@HuntonAK.com
Phone: 202-419-2110

2200 Pennsylvania Avenue NW
Washington, DC 20037

Jessica helps clients navigate the complex and evolving area of employee benefits law, including health care reform, tax-qualified retirement plans and executive compensation. She also frequently handles employee benefits issues arising in corporate transactions, employment agreements, and vendor contract negotiations.

Jessica works with clients on a broad array of employee benefits matters, advising on compliance with ERISA, the Internal Revenue Code, the Affordable Care Act, HIPAA and COBRA. She regularly advises on compensation and benefits aspects of employment agreements and severance arrangements. She also frequently works with clients on negotiating employee benefit vendor contracts and HIPAA business associate agreements for employee benefit plans.

In corporate transactions, Jessica negotiates employee benefits representations and covenants, conducts due diligence review of employee benefit plan documentation, and advises clients on executive compensation issues arising under Section 409A and Section 280G.

Scott Austin

HUNTON
ANDREWS KURTH

Partner
Email: saustin@HuntonAK.com
Phone: 214-979-3002

1445 Ross Avenue, Suite 3700
Dallas, TX 75202

600 Peachtree Street, NE
Atlanta, GA 30308

Scott works on all legal aspects of executive compensation and employee benefits, as well as ERISA litigation matters. His practice includes working with businesses to put in place and maintain executive employment agreements and deferred compensation arrangements, qualified retirement plans and health and welfare plans.

He helps lead the firm's Health Care Reform initiative. Scott regularly advises clients on issues involving deferred compensation (including Internal Revenue Code Sections 409A, 162(m) and 280G). He has also worked with a number of companies in designing and implementing cash balance plans and other qualified retirement plans, including 401(k) plans.

Scott works closely with the fiduciary administrative committees of clients' benefit plans and helps them through the murky waters of ERISA's fiduciary requirements. He also advises on the employee benefit aspects of corporate transactions and financings.

Michelle Lewis

Counsel
Email: mlewis@HuntonAK.com
Phone: 202-955-1859

2200 Pennsylvania Avenue NW
Washington, DC 20037

Michelle concentrates her practice in the areas of health and welfare plans, qualified retirement plans, and executive deferred compensation plans.

She delivers insightful and practical advice to clients in addressing a broad spectrum of employee benefit issues, including drafting plan documents, preparing IRS submissions, resolving ERISA and Internal Revenue Code compliance issues, advising on benefit claims and appeals, addressing various litigation issues, and negotiating employee benefit vendor contracts and HIPAA business associate agreements.

Topics Covered

- Contributions
- Distributions
- Plan Administration Provisions
- Defined Benefit Plan Provisions

Contributions

Mandatory Automatic Enrollment

- Effective for plan years beginning on or after January 1, 2025, new 401(k) and 403(b) plans established on or after ***December 29, 2022*** are required to include the following:
  - Automatic enrollment at a contribution rate of at least 3% (and no more than 10%) of eligible compensation
  - Automatic increases each year of 1%, up to a maximum of at least 10% (but no more than 15%) of eligible compensation
- Governmental plans, church plans, and SIMPLE plans are exempt
- New employers and small employers have special rules allowing them to delay application of the rules

Contributions

Changes Affecting Catch-Up Contributions

- Starting ***January 1, 2025***, the catch-up contribution limit for participants who will turn ages 60-63 during the plan year is increased to the greater of the following (indexed for inflation):
    - $10,000; or
    - 150% of the regular catch-up amount for 2024.
- Effective ***January 1, 2024***, catch-up contributions made by employees whose prior year wages exceed $145,000 (as indexed) must be made as Roth contributions
- Plan amendments will be needed to reflect both changes

Contributions

Option to Treat Employer Contributions as Roth

- Effective immediately, plan sponsors have the option to allow participants the ability to elect some or all of the plan's matching contributions or nonelective employer contributions on a Roth basis
  - The contributions must be fully vested at the time they are made
  - Rule applies to 401(k), 403(b), and governmental 457(b) plans
  - Student loan matching contributions (see next slide) can also be designated as Roth contributions
- This is an optional change, but likely will require a plan amendment if adopted
  - Plan sponsors making this change likely will need to coordinate closely with payroll in order to ensure that imputed income is properly calculated

Contributions

Matching Contributions for Student Loan Repayment

- For plan years beginning on or after ***January 1, 2024,*** employers are permitted to amend their plans to add matching for "qualified student loan payments" as if the student loan repayments were elective deferrals.
  - Vesting and matching schedules must be the same as if the loan payments had been salary deferrals
  - Matching contributions can only be made for employees who would otherwise be eligible to make deferrals into the plan, and must be made available for all match-eligible participants

Contributions

Matching Contributions for Student Loan Repayment (cont.)

- Can be used in safe harbor plans
- Treated as regular matching contributions for nondiscrimination testing
- For purposes of ADP testing, plans may test the employees who are receiving matching contribution separately
- Employers can rely on employee certification regarding payment of student loans
- Applies to 401(k), 403(b), governmental 457(b), and SIMPLE plans

Contributions

Long-Term Part-Time Employees - Eligibility

- Existing IRS rules require that a part-time or temporary employee be allowed to participate in a plan if the individual reaches 1,000 hours of service in a year
- SECURE 1.0 (passed in late 2019) requires plan sponsors to allow long-term, part-time workers to participate in a 401(k) plan if they complete 3 consecutive years of service, with at least 500 hours of service, and are at least age 21 at the end of the three years
  - Service crediting was required starting in 2021; the earliest plan entry would be in 2024
  - Elective deferrals only; matching and non-elective employer contributions not required
  - Pre-2021 service is excluded for purposes of eligibility, but not vesting
  - Employees eligible under this provision could be excluded for nondiscrimination testing

Contributions

Long-Term Part-Time Employees - Eligibility (cont.)

- Effective ***January 1, 2025***, SECURE 2.0 reduces the measuring period for long-term, part-time employees' eligibility from 3 years to 2 years
  - Pre-2021 service can be disregarded for both eligibility and vesting purposes
  - Also extends this provision to ERISA-covered 403(b) plans
- Plans that currently have different eligibility provisions for full-time and part-time employees likely will need to be amended to comply

Contributions

DeMinimis Incentives to Encourage Participation

- Effective for plan years beginning after enactment, employers are allowed to provide “de minimis financial incentives” to boost participation in retirement plans
- No clear definition of “de minimis”
  - The Act uses low-dollar gift cards as an example
- The financial incentives cannot be paid for with plan assets

Contributions

“First Day of the Month” Rule Eliminated for Governmental 457(b) Plans

- Effective ***January 1, 2023***, participants in a governmental 457(b) plan may request changes to elections any time prior to the date that the compensation being deferred is available
  - Prior rule required that the election be made before the first day of the month in which the compensation is paid or made available
- Does not apply to 457(b) plans of tax-exempt entities

Contributions

Pension-Linked Emergency Savings Accounts

- Effective ***January 1, 2024***, employers can offer emergency savings accounts within a retirement plan
  - Available for non-highly compensated plan participants who otherwise meet plan eligibility requirements
  - Can also have automatic enrollment
  - Eligible employees can defer up to 3% of compensation, up to a total contribution of $2,500 (adjusted for inflation after 2024).
    - Employers may impose a lower maximum limit at their discretion.
  - Once contributions reach the limit, the additional contributions can be directed to the employee’s plan Roth account (if applicable) or stopped until the balance attributable to contributions falls below the cap.

Contributions

Pension-Linked Emergency Savings Accounts (cont.)

- Contributions to the emergency savings account must be eligible for matching contributions at the same matching rate as under the plan
  - Matching contributions are made to the plan, not the emergency savings account
- Employees may take at least one tax-free, penalty-free distribution from the savings account per calendar month.
  - Employers may not impose any fees for distributions on at least the first four distributions each year.
- At separation from service, employees may take their emergency savings accounts as cash or roll it into their Roth defined contribution plan (if they have one) or IRA

Required Minimum Distributions

- RMD age is further increased as follows:
  - RMDs must be taken at age 72 for participants who turn 72 ***between January 1, 2020 and December 31, 2022*** (i.e., who were born in 1950 or earlier).
  - The RMD age increases to 73 beginning January 1, 2023, for participants who reach age 73 ***before January 1, 2033*** (i.e., who were born 1951-1959).
  - The RMD age increases to 75 effective ***January 1, 2033***.
- Required change. Plan amendment may be needed.

Required Minimum Distributions

- Effective for tax years beginning ***after December 29, 2022***, the excise tax imposed on participants for failing to take an RMD will decrease from 50% to 25%, with a further reduction to 10% if corrected within a two-year correction window.
- Effective for plan years beginning on or after ***January 1, 2024***, Roth accounts held in an employer retirement plan are not subject to RMD requirements while the participant is alive.
  - Required change

Required Minimum Distributions

- Effective for calendar years beginning ***after December 31, 2023***, a surviving spouse that is designated as the beneficiary of an employer-provided plan benefit may elect to be treated as the deceased employee for purposes of the RMD rules.
- Extends the current IRA rule that permits sole designated beneficiary spouses to elect to be treated as participant for RMD purposes to qualified plans, if distributions have not yet begun when the employee dies, thus delaying when RMDs must be paid from retirement plans.
- Required change. Plan amendment may be needed.

Required Minimum Distributions

- Effective for calendar years beginning ***after December 29, 2022***, RMD rules applicable to annuity payments are relaxed to permit commercial annuities to provide additional types of payment such as annual payment increases up to 5% and certain lump sums.
- Under the prior RMD rules, distributions in the form of an annuity were unattractive to participants in individual account plans because of the requirement that payments must (generally) be in the form of non-increasing annuities.
- Optional change

Involuntary Cashout Distributions

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- Effective ***January 1, 2024***, the involuntary cashout limit will increase from $5,000 to $7,000.
- Optional change

Emergency Distributions

- **Penalty-free emergency withdrawals**
  - Beginning ***January 1, 2024***, employers have the option to offer an emergency savings distribution provision for "unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses."
  - Plan administrator can rely on self-certification for eligibility
  - Not subject to the 10% early withdrawal penalty.
  - Maximum distribution allowed is $1,000 with the option to repay the distribution within three years.
  - Only one distribution may be made every three years or one per year if the prior distribution is fully repaid.
  - Optional change

Emergency Distributions

- **Penalty-free withdrawals for cases of domestic abuse**
  - Beginning ***January 1, 2024***, plans can permit participants to withdraw up to the lesser of $10,000 or 50% of the participant’s account balance, if the participant self-certifies that he or she has experienced domestic abuse within the past year
  - The amount withdrawn will not be subject to the 10% early withdrawal penalty
  - The individual has the opportunity to repay the withdrawn amount over a three-year period.
  - Optional change

Emergency Distributions

- **New rules for qualified federally declared disasters**
  - For qualified federally declared disasters occurring ***on or after January 26, 2021***, participants are allowed to make a withdrawal of up to $22,000 within 180 days after the disaster.
    - Not subject to the 10% early withdrawal penalty.
    - Amounts can be taken into income over three years, unless repaid to the plan within three years.
  - Maximum loan amount may be increased (i.e., up to $100,000 or 100% of the account balance) and the repayment period extended up to one year.
  - If a participant took a distribution within 180 days prior to a disaster to buy or build a home, but can't do so due to the disaster, the distribution can be repaid within 180 days
  - Optional change for plans that provide distributions and loans in cases of qualified federally declared disasters.

Emergency Distributions

- **Penalty-free withdrawals for individuals with terminal illnesses**
  - Effective for distributions made ***after December 29, 2022***, distributions made to a participant *who is otherwise eligible for a distribution* and is determined by a physician to be terminally ill (i.e., expected to die within 7 years)
  - “Sufficient” evidence required
  - Not be subject to the 10% early withdrawal penalty.
  - Amounts can be repaid over a three-year period.

Hardship Distributions

- **Expanded hardship sources for 403(b) plans**
  - Effective for plan years beginning ***after December 31, 2023***, contribution sources that can be used for a 403(b) hardship withdrawal are expanded to match those available to a 401(k) plan.
  - Optional change

Plan Administration Provisions

- Expansion of EPCRS
  - Effective immediately, all “eligible inadvertent failures” may be self-corrected under EPCRS, unless identified by the IRS prior to any actions demonstrating a commitment to implement a self-correction
  - Eligible inadvertent failure – failure that occurs despite the existence of practices and procedures in place to ensure compliance with applicable requirements
  - Exception – Failures which are egregious, relate to the diversion or misuse of plan assets, or directly or indirectly relate to an abusive tax avoidance transaction

Plan Administration Provisions

- Expansion of EPCRS
  - All plan loan failures (which are eligible inadvertent failures) may now be self-corrected, following the principles of Section 6.07 of EPCRS, and any such self-correction shall be treated by the DOL as meeting the requirements of VFCP
  - Self-corrections for eligible inadvertent failures for IRAs
    - Waiver of excise tax for MRD failures
    - Waiver of 60-day rollover period under certain circumstances
    - Allowing non-spouse beneficiary to return distributions to an inherited IRA where beneficiary believed the distribution could be rolled over without tax
  - IRS directed to expand EPCRS to provide additional safe harbors, including safe harbors means of calculating earnings

Plan Administration Provisions

- Expansion of EPCRS
  - Employee Elective Deferral Failures – Safe Harbor Correction:
    - Corrected within 9 ½ months after the end of the plan year during which the error occurred
    - Corrected in a manner that is favorable to the participant
    - Correction is of a type used to correct for all similarly situated participants in a non-discriminatory manner
    - IRS to specify permissible correction methodologies

Correction may occur regardless of whether the participant is still employed and without regard to whether the error had been identified by the IRS

Plan Administration Provisions

- Recoupment of Benefit Overpayments
  - Effective immediately, plan sponsors/fiduciaries are not required to recoup inadvertent overpayments to participants or beneficiaries, or to repay the plan (with certain limitations)
  - The plan may be amended to increase benefits to adjust for prior inadvertent benefit overpayments
  - If inadvertent benefit overpayment is rolled over, and the overpayment is not recouped, the overpayment portion is considered to be an eligible rollover distribution for rollover purposes

Plan Administration Provisions

- Recoupment of Benefit Overpayments
  - If recoupment is sought from a participant or beneficiary, numerous limitations apply, including:
    - No interest or other additional amounts (costs of collection) can be sought
    - Limitations on future reductions in benefit payments to recoup the overpayment (generally, no more than 10% per year)
    - Overpayments to a participant cannot be sought from a surviving spouse or other beneficiary
    - No recoupment if the first overpayment occurred more than 3 years before the participant or beneficiary is notified of the overpayment
    - Participant or beneficiary must be entitled to contest the recoupment under the plan's claims review procedures

Plan Administration Provisions

- Reporting and Disclosure
  - Effectiveness Report by Agencies - DOL, IRS and PBGC to review the effectiveness of the various reporting and disclosure requirements under ERISA and the IRC and prepare a report to Congress relating to ways to consolidate, simplify, standardize and improve such requirements
  - Unenrolled participants - 401(k) and other individual account plans are not required to send disclosures, notices or plan documentation to unenrolled participants as long as the individual has received the plan’s SPD, and the plan sends the individual an annual reminder notice of the individual’s eligibility for the plan, and any document requested by the individual that would be required to be provided

Plan Administration Provisions

- Reporting and Disclosure
  - Required Paper Annual Statements - Effective for plan years beginning **after December 31, 2025**, pension benefit statements must be provided in writing at least annually for individual account plans, and at least once every three years for defined benefit plans
    - Exception for electronic delivery if DOL's electronic delivery requirements are met, or if the participant elects to have documents sent electronically
    - Electronic delivery requirements under ERISA to be modified to ensure
      - Participants are afforded an opportunity to elect electronic delivery
      - Participants are notified of how to request paper disclosures
      - Participants are notified of how to access underlying plan documentation
      - No fees may be charged for paper disclosures

Plan Administration Provisions

- Reporting and Disclosure
  - Pension Plan Lump Sum Window – Notice must be provided to each participant who is eligible for a one-time lump sum window opportunity under a pension plan
    - Provided at least 90 days before the effective date of the lump sum window
    - DOL to develop a model notice
    - Notice of the lump sum window to be provided to PBGC
    - Effective upon issuance of final DOL regulations

Plan Administration Provisions

- Retirement Savings Lost and Found
  - DOL, in consultation with IRS, to develop an online searchable database, to be administered by the DOL to allow:
    - Individuals to search for information to enable the individual to locate the plan administrator of a plan in which the individual participated
    - DOL to assist the individual in locating such plan administrator
    - DOL to make changes in any contact information of the plan or plan administrator

Plan Administration Provisions

- Retirement Savings Lost and Found
  - Effective for plan years beginning after the second December 31 following enactment, plan administrators will be required to provide to the DOL (format and timing to be determined under final DOL regulations) information relating to:
  - Contact information of the plan and plan administrator
  - Changes in such contact information or changes in the plan (e.g., plan termination)
  - Name and taxpayer identification number of participants or former participants who were previously reported as having a deferred vested benefit and whose benefits were fully paid during the plan year, or who received a rollover or a deferred annuity contract during the plan year
  - Contact information of the IRA custodian or annuity contract issuer

Plan Administration Provisions

- Retroactive Plan Amendments to Increase Benefits
  - Stock bonus, pension, profit sharing or annuity plans may be amended retroactively to increase benefits for the prior plan year (does not include matching contributions)
  - Amendment must be executed by the deadline to file the plan sponsor's tax return (including extensions) for the applicable year
  - The amendment must comply with the general rules relating to qualified retirement plans (e.g., may not be discriminatory)
  - The amendment may be treated as being effective as of the last day of the preceding plan year

Plan Administration Provisions

- Hardship Withdrawal Certifications
  - Effective immediately, 401(k), 403(b) and 457(b) plans may, absent actual knowledge to the contrary, rely on participants' self-certification of the occurrence of a hardship event for purposes of approving hardship distributions
  - Under prior rules, technically, self-certification was available for the amount of the financial hardship, but not the actual occurrence of the event

Defined Benefit Plan Provisions

- Cash Balance Plan Interest Crediting Rate – Effective for plan years beginning **after December 29, 2022**, a fixed interest crediting rate under a cash balance plan of not more than 6% will be deemed to be reasonable
- Transfer of Overfunded Pension Plan Assets to Cover Retiree Health and/or Life Insurance Benefits – The ability to use overfunded pension plan assets to cover retiree health and/or life insurance benefits is extended to the end of 2032.
    - Pension Plan must be at least 110% funded
    - Amount transferred cannot exceed 1.75% of plan assets

Defined Benefit Plan Provisions

- Elimination of PBGC Variable Rate Premium Indexing – Effective **December 29, 2022**, the current methodology for determining variable rate PBGC premiums is replaced with a flat rate of $52 for each $1,000 of unfunded vested benefits
- Mortality Table Changes – For purposes of the minimum funding rules, pension plans are not required to make assumptions beyond the valuation date for future mortality improvements at any age greater than 0.78%; the IRS is required to update mortality tables used for funding purposes by 2024

Upcoming Webinars

Executive Compensation Academy

- Title: Start-Up Compensation Designs: Focus on Founders (Part 1 of 2)
- When: February 9, 2023
- Time: 10:00 am – 11:00 am CT
  11:00 am – 12:00 pm ET

Employee Benefits Academy

- Title: Welfare Plan Check-Up: Assessing Your Welfare Plan's Compliance
- When: March 23, 2023
- Time: 10:00 am – 11:00 am CT
  11:00 am – 12:00 pm ET

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