ERIC | THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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Submitted Electronically

February 20, 2024

Internal Revenue Service
Attn: CC:PA:01:PR (REG-104194-23)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2024-2: Miscellaneous Changes Under the SECURE 2.0 Act of 2022

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC), thank you for the opportunity to comment on Notice 2024-2, entitled "Miscellaneous Changes Under the SECURE 2.0 Act of 2022," (Notice) issued by the Internal Revenue Service (IRS) on December 20, 2023. ERIC appreciates the guidance the IRS, the Department of the Treasury, and the Department of Labor have provided in connection with the *SECURE 2.0 Act of 2022* (SECURE 2.0), including this Notice.

By way of background, ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state, city, and Congressional district.

While ERIC strongly supported SECURE 2.0, we fully recognized that technical implementation would be challenging. The Notice issues important clarifications and states IRS' interpretation of some legislative sections that are vague or not reticulated. ERIC agrees with most of the guidance provided in the Notice, but we do provide comment on several of its sections.

Automatic Enrollment Mandate Grandfathering Should be Clarified Further

Section 101 of SECURE 2.0 generally creates a qualification requirement for cash or deferred arrangements (CODAs) to satisfy certain new automatic enrollment requirements housed in new Code section 414A. Among a variety of exceptions, a plan "established" before the date of

enactment of SECURE 2.0 is not subject to these requirements.[1] We appreciate that Q&A A-1 makes clear that a plan is "established" on the date plan terms providing for the CODA are adopted *initially* (emphasis added). Consistent with this, it would be helpful for IRS to further clarify that plan amendments or other plan changes, such as expanding plan eligibility (not involving mergers or spin-offs) do not affect the date the plan was "established" for purposes of section 414A. Additionally, ERIC has been concerned about pre-enactment plans that are spun-off or merged with other plans. We support the clarification in Q&A A-3, permitting ongoing plans to retain grandfathered status so long as a merger is accomplished within a transition period outlined in Code Section 410.

There is one issue involving multiple employer plans that should be clarified further. Under the Notice, if a post-enactment single employer plan is merged into a pre-enactment plan maintained by more than one employer, then the CODA included in the ongoing plan would not be treated as a pre-enactment qualified CODA with respect to that employer. However, the merger does not affect whether the qualified CODA is treated as a pre-enactment qualified CODA with respect to other participating employers. IRS should clarify that if a pre-enactment single employer plan is merged into a post-enactment plan maintained by more than one employer, the CODA should be treated as pre-enactment with respect to that single employer.

The Notice's guidance on Section 101 is particularly helpful for sponsors of pre-enactment qualified CODAs who are exempt from SECURE 2.0's automatic enrollment requirement. However, the Notice does not address other important aspects of this provision for post-enactment plans that must implement compliant automatic enrollment arrangements in less than a year's time.[2] We encourage IRS to provide guidance on the following components of Section 101—as well as relief for reasonable, good faith compliance—as soon as practicable to give these plans adequate time to prepare:

- Clarify that the automatic enrollment arrangement can exclude collectively bargained employees

- Clarify that a post-enactment plan need not auto-enroll employees who were already participating before the automatic enrollment requirement takes effect (e.g., participants in post-enactment plans established prior to January 1, 2025, and plans of small and new businesses when they are no longer exempt). If IRS determines that these employees must be automatically enrolled, then guidance is needed about how the employees' affirmative elections should be treated.

[1] Sec. 414A(c)(2)(A)(i).
[2] Even though post-enactment calendar-year plans wouldn't be required to automatically enroll employees until January 1, 2025, they would have to provide automatic enrollment notices to employees within a reasonable period before the arrangement is effective (i.e. between October 3 and December 2, 2024).

IRS Should Give Additional Flexibility for New De Minimis Cash Incentives

ERIC supported Section 113 of the SECURE 2.0 Act, amending Code Sec. 401(k)(4)(A). This provision permits an employee to receive a de minimis financial incentive to elect to have the employer make contributions to a defined contribution plan. The incentive is not permitted to be paid by plan assets. The relevant paragraph now reads:

> *(A)Benefits (other than matching contributions) must not be contingent on election to defer*
>
> > *A cash or deferred arrangement of any employer shall not be treated as a qualified cash or deferred arrangement if any other benefit (other than a de minimis financial incentive (not paid for with plan assets) provided to employees who elect to have the employer make contributions under the arrangement in lieu of receiving cash) is conditioned (directly or indirectly) on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving cash. The preceding sentence shall not apply to any matching contribution (as defined in section 401(m)) made by reason of such an election.*

ERIC appreciates the guidance provided in section D of the Notice. However, further clarification would be helpful. For example, Q&A D-1 of the Notice defines "de minimis" if "it does not exceed $250 in value." Additional clarification would be helpful for the case of an incentive consisting of a chance at a contingent or speculative award, such as a raffle or other game of chance. If the value of the contest prize exceeds $250, but the expected value of the contest entry is less than $250, is the incentive permissible? In this case, there is a strong case that it should be, as the economic value to the participant is less than $250, but further guidance would be helpful. Similarly, is an offer of vacation time or other non-monetary incentives permissible? What if the offer is universal but the value to some employees is higher than $250? Finally, if an employer provides a gift card and wants to gross it up to account for the employee's taxes, would that additional amount count toward the $250 limit? In our view, the section should be construed broadly to permit these incentives.

It is also not clear that the statute's scope limits these incentives to participants making an election for the first time. In Q&A D-2, IRS forecloses this possibility of an incentive for participants for whom an election is already in effect but who may elect higher contributions if offered the incentive. The basis for this restriction is not evident in the legislative text. Similarly, there is nothing in the statute prohibiting a third-party from incentivizing the election pursuant to this section. The IRS specifically requested comments on this issue; we see no reason to foreclose this possibility and we recommend IRS permit it in order to further encourage retirement savings.

IRS Should Not Require Extensive Documentation for Distributions to Terminally Ill Participants

Under Section 326 of SECURE 2.0, terminally ill individuals are permitted, subject to conditions, to receive an early withdrawal without incurring the 10 percent additional tax usually required of such withdrawals. Distributions made on or after the date that a participant is certified to have a terminal illness by a physician receive relief from this additional tax. The statute, incorporating and amending a definition from Code Section 101(g), further defines "terminally ill individual" as someone who has been certified by a physician as having an illness or physical condition which can reasonably be expected to result in death in 84 months or less after the date of the certification. Section 326 also permits the Secretary of the Treasury to require the participant to provide additional documentation to the plan administrator.

In Section F of the Notice, the IRS expands on the requirement to provide a physician certification. In particular, the IRS Notice would require the physician to provide:

> *"(1) A statement that the individual's illness or physical condition can be reasonably expected to result in death in 84 months or less after the date of certification;*
> *(2) A narrative description of the evidence that was used to support the statement of illness or physical condition (as described in this F-6 (1));*
> *(3) The name and contact information of the physician making the statement;*
> *(4) The date the physician examined the individual or reviewed the evidence provided by the individual, and the date that the certification is signed by the physician; and*
> *(5) The signature of the physician making the statement, and an attestation from the physician that, by signing the form, the physician confirms that the physician composed the narrative description based on the physician's examination of the individual or the physician's review of the evidence provided by the individual"*

We have some concerns about requirement (2), a narrative description. First, such a description is not required by the statute, which requires only a "certification." The statement contained in (1) would satisfy this requirement. Second, the purpose of the narrative description is unclear. So long as the statement in (1) is made, the physician's justification or analysis does not appear to be subject to second-guessing or appeal. Therefore, we recommend eliminating the second requirement, but permitting plans to ask for this additional information.[3]

IRS Should Permit "Partial Roth" Matching and Nonelective Contributions

ERIC thanks IRS for its clarifications with respect to Section 604 of SECURE 2.0, providing the option to allow employees to receive matching and nonelective contributions on a Roth basis. In particular, we appreciate the clarifications included in Section L of the Notice that a plan offering a Roth feature need not offer every possible type of designated Roth contribution. However, for

[3] A draft technical corrections bill released last December would amend Section 326 to provide an exception from the distribution restriction requirements for terminal illness distributions and allow participant self-certification. *See* https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=409833.

plans that do offer designated Roth matching or nonelective contributions, IRS should clarify that a "partial Roth" election is possible. In other words, a participant should be allowed to elect some, but not all, of the matching or nonelective contribution to be made on a Roth basis. Like designated Roth elective contributions, IRS should also clarify that plans can make Roth treatment the default for matching and nonelective contributions. The Notice—which states that "[r]ules similar to the rules for designated Roth elective contributions under § 1.401(k)-1(f)" apply to these contributions—does not appear to foreclose these options, but additional clarification would be helpful.

Additionally, IRS should not limit the opportunity to elect designated Roth matching and nonelective contributions to fully vested participants. Participants who are partially vested should be allowed to elect Roth treatment for the vested portion of any matching or nonelective contributions. Section 604's requirement that designated Roth matching and nonelective contributions be nonforfeitable is consistent with such an approach, and nothing in the plain language of that provision suggests that Congress intended Roth treatment to be limited to fully vested participants.

Conclusion

Thank you for the opportunity to submit comments on this Notice. We look forward to discussing these issues with you. We also note that other provisions included in SECURE 2.0, such as Section 110, relating to student loan matching programs, also require implementing guidance. Please let us know if we can assist as you consider those issues.

Sincerely,

Andy Banducci