

RETIREMENT & PERSONAL WEALTH SOLUTIONS

# Legislative and regulatory brief

## As of February 2024

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# Legislative activity:

- SECURE 2.0 Act Technical Corrections
- Automatic IRA Act of 2024
- Retirement Savings for America Act
- Health Savings Accounts (HSAs) proposals



# SECURE 2.0 Act Technical Corrections

**STATUS:** As part of the larger Consolidate Appropriations Act of 2023, the SECURE 2.0 Act of 2022 was signed into law on December 29, 2022 by President Biden. Upon passage, certain technical errors in the legislative language have been identified that need attention.

## Status in Washington

### Committee status

In December, the House Committee on Education and the Workforce, the House Committee on Ways and Means, the Senate Finance Committee, and the Senate Committee on Health, Education, Labor and Pensions jointly released a discussion draft containing technical corrections and other clarifications regarding the SECURE 2.0 Act of 2022, including:

- *Updated required beginning date*
  - SECURE 2.0 increased the age at which the required minimum distributions must begin to age 73 in 2023 and then to age 75 after 2032.
  - Due to a glitch in the legislative language, it is unclear whether individuals born in 1959 would have a required minimum distribution at age 73 or at age 75.
  - The technical correction would clarify that the age triggering the required beginning date for an individual born in 1959 would be age 73.
- *Roth catch-up requirement*
  - SECURE 2.0 requires 401(k) plans that permit eligible participants to make catch-up contributions to require such contributions to be designated Roth contributions made pursuant to an employee election.
  - This requirement applies only to eligible participants with wages for the preceding calendar year that exceed \$145,000 (indexed).
  - An error in legislative language technically repealed *all pre-tax catch-up contributions* to 401(k) and 403(b) plans, regardless of whether an individual's wages did not exceed \$145,000 in the prior year.
  - The draft bill would correct this inadvertent error by adding back in to the Internal Revenue Code the language that was repealed.
- *Exception to additional tax for terminal illness*
  - SECURE 2.0 created a new exception to the 10% additional tax under Code section 72(t) for early distributions from qualified retirement plans for employees and IRA owners who are terminally ill.
  - The technical corrections draft would address two outstanding issues: 1) it would permit plans to allow individuals to certify that they are in fact terminally ill; and 2) would allow it to be treated as a permissive in-service distribution.

## Our Point of View

- As often happens with large pieces of legislation, technical errors in the legislative language are uncovered as the industry begins to apply the legislative changes to products and services.
- Congress was made aware very soon after the enactment of SECURE 2.0 that corrections were needed.
- In the interim, Congressional leaders have made clear to the various regulatory agencies their intent, particularly as it applied to the catch-up contribution provision.

### Potential for passage

- There is bi-partisan support for these changes and none appear to be controversial.
- Outlook for passage remains to be seen.
- Technical corrections legislation would not likely pass on its own as a standalone bill.
- We will continue to watch for larger legislation that may move at some point in 2024 and pick up the technical corrections language.



# Automatic IRA Act of 2024

STATUS: Reintroduced by Rep. Richard Neal (D-MA), would create a retirement savings coverage requirement at the federal level.

## Status in Washington

### House status

- Rep. Neal's proposal would create a national coverage requirement for most employers.
- This is similar to the state requirements we have seen over the past several years. However, the Neal proposal does not create a federal auto IRA program, only a coverage requirement.
- Employers with greater than 10 employees who have been in business more than two years would be required to maintain an ACPA (automatic contribution plan or arrangement) by offering one of the following:
  - Automatic IRA arrangement, 401(k), 403(b) or SIMPLE IRA plan that meets the ACPA requirements (see below), or
  - Maintain an existing, grandfathered qualified plan, 403(b) plan, SIMPLE or SEP in existence on the date of enactment. *Please note that in the future, adoption of a SEP will not satisfy the ACPA requirement.*
  - The requirement would be effective for 2027 if the proposal were to become law.
- The Act would include the following requirements to be an ACPA (other than for a grandfathered plan or auto IRA):
  - Employee notice requirements (similar to 401(k) safe harbor notice requirements)
  - All employees other than excludable employees must be eligible to participate
  - Auto enrollment and auto escalation
    - Auto enrollment default of least 6% (but no higher than 10%).
    - Automatic escalation of at least 1% per year, up to at least 7%, 8%, 9% and then 10%, subject to a 15% cap
  - No exemption for SIMPLE IRAs
  - Guaranteed income for life: At least 50% of every vested account in a 401(k) or 403(b) plan must be available for distribution in a form that provides guaranteed income for life, subject to an exception for vested accounts with \$200,000 or less

### Senate status

- There is no companion bill proposed in the Senate at this time.

## Our Point of View

- Ranking Member Neal has been the driving force behind the SECURE Act and SECURE 2.0 Act and as such, the bill represents important insight into his views on what additional reforms he believes should be considered.
- It is important to note that the federal coverage requirement in this proposal mirrors the coverage requirements that exist in several states already.
- Neal's proposal also appears to build on the requirement in SECURE 2.0 that newly established plans must have automatic enrollment and automatic increase features in their plan design.
- Proposals like this one leverage existing auto features and combine them with coverage mandates in an attempt to expand retirement savings coverage across the working population.
- Additionally, we continue to see more states consider state-run programs with coverage requirements that could become unwieldy for employers who work across several states.

### Potential for passage

- While the bill is not likely to advance in the current Congress, we will continue to watch as things develop in this election year.
- It remains to be seen what the bipartisan support for such a proposal would be like.
- If the 2024 election cycle were to result in a Democratic majority in Congress, it might create a more viable path forward for the proposed legislation or some of its components.



# Additional congressional activity

STATUS: We continue to see legislative proposals to expand access and coverage to retirement and health savings. This is just a sampling.

## ? Status in Washington

**Retirement Savings for America Act** Co-sponsors: Sen. Hickenlooper (D-CO), and Sen. Tillis (R-NC), Rep. Smucker (R-PA), Rep. Sewell (D-AL)

- This proposal is modeled on the retirement program for federal employees: the Federal Thrift Savings Plan (TSP).
- The legislation would establish a federally run “TSP for all.”
- Employers would be required to enroll all workers not currently saving in a workplace retirement plan or automatic IRA in the newly established government-run savings plan.
- The federal government would match contributions for low- and middle-income workers.

### HSA proposals

- *HSA Modernization Act* – House Ways and Means Committee
  - Increase HSA contribution limits by tying them to inflation adjusted out-of-pocket maximums for high deductible health plans (HDHP)
  - Eliminate barriers to individuals who are enrolled in Medicare Part A to continue to fund an HSA as long as they are otherwise eligible
  - Allow those receiving care from the Veteran’s Administration to continue to fund an HSA as long as they are otherwise eligible
  - Would permit payment of qualified long term care services with HSAs
- *Lowering Costs for Caregivers Act* – Sen. Rosen (D-NC) and Sen. Cassidy (R-LA)
  - Would permit individuals to use HSAs, health FSAs and HRAs to pay for medical expenses incurred by their parents or their spouse’s parents
- *WEAR Act (Wearable Equipment Adoption Act “WEAR IT”)* – Rep. Steele (R-CA) and Rep. Bera (D-CA)
  - Would permit up to \$375 per year in non-taxable distributions from HSAs to pay for “wearable devices” that are worn on the body and “...collects and analyzes physiological data for the diagnosis, cure, mitigation, treatment or prevention of disease.”

## 💡 Our Point of View

### Retirement Savings for America Act

- Creating a new federally run retirement savings program and providing for government-funded matching contributions would be costly. This could create difficulty as the sponsors try to advance the proposal.
- While there is bipartisan support and the bill is sponsored by both members of the Senate and the House, the price tag could be prohibitive and there are other proposals that would bring more workers access to retirement savings while leveraging existing retirement savings vehicles.
- The proposal from Rep. Neal (*Automatic IRA Act of 2024—see previous page*), which does not create a new federal program but rather builds on existing offerings in the private sector and at the state level, may garner more support.

### HSA proposals

- As HSA usage continues to grow, we will continue to see proposals to expand access to and use of HSAs going forward.
- Healthcare costs will be one of the largest expenses for most retirees. Providing expanded savings to help individuals plan and save accordingly for those expenses helps to ensure a secure retirement.
- Caregiving for spouses and other older family members has a financial impact to many Americans.
- Seven in 10 Americans age 65 and older may need care for prolonged periods in their lives.\*
- Proposals that leverage and expand existing savings vehicles to address these concerns will help individuals manage these expenses.

\**Caregiving in the Age of Longevity*, Bank of America, 2023.



# Regulatory Updates: Department of Labor



# Department of Labor (part 1)

STATUS: The DOL continues to work their annual regulatory agenda and ERISA Advisory Council study topics.

## Status in Washington

### **DOL Regulatory Agenda**

- The DOL 2023-2024 agenda includes a series of projects to develop guidance on the following:
  - Retirement Savings Lost and Found
  - Study on pooled employer plans
  - Prohibited transaction exemption for automatic portability providers
  - RFI on improving the effectiveness of participant disclosures
  - Improving and modernizing the Form 5500

### **ERISA Advisory Council (EAC) recommendations for topics to study**

- The EAC recommended that the DOL look at “recordkeeping in the electronic age” and provided several recommendations, including:
  - Guidance for plan sponsors on retention of plan documents
  - Maintaining a written records retention policy
  - Providing plan sponsors with a list of plan documents and their applicable retention periods
  - Guidance as to what should be included in contractual agreements between plans, recordkeepers and payroll providers
  - DOL-developed education for plan sponsors about System and Organization Controls (SOC)

## Our Point of View

### **DOL Regulatory Agenda**

- The DOL regulatory agenda is updated each year.
- Many projects remain on the plan for several years and sometimes get reprioritized or taken off the plan.
- There are no set deliverable dates for these projects; this is more of a gauge of the projects the DOL is focused on at the moment.
- We are hopeful that we may see more guidance released in 2024, but it might not be until 2025 or later that some of these items are addressed.

### **ERISA Advisory Council (EAC) recommendations for topics to study**

- The ERISA Advisory Council (EAC), as its name indicates, operates in an advisory capacity with no regulatory authority.
- Of two recommendations the EAC made, only the “recordkeeping in the electronic age” would be impactful in the retirement plan space.
- There is no set timeframe or extent to which the DOL is required to address these issues; we will continue to watch for any developments.



# Department of Labor (part 2)

STATUS: The DOL continues to work on SECURE 2.0 Act guidance projects.

## Status in Washington

### **DOL issues Request for Information (RFI) on SECURE 2.0 paper benefit statement provisions**

- SECURE 2.0 generally requires that beginning in 2026, retirement plans deliver certain pension benefit statements on paper, with two exceptions: DOL safe harbors for affirmative consent and “wired at work,” as well as an initial one-time paper notice in certain cases for the 2002 electronic delivery safe harbors. Additionally, there are several other provisions of SECURE 2.0 that impact plan reporting and disclosure.
- The DOL RFI asks for comments regarding this paper benefit statement requirement, as well as for several other disclosure items included in SECURE 2.0, including notices to unenrolled participants, consolidation of various participant notices, model notices for PLESA (pension-linked emergency savings accounts), participant fee disclosures, pooled employer plan (PEP) reporting, and certain defined benefit (DB) plan notices.
- The comment deadline to DOL was October 24, 2023.
- No further guidance has been released as of yet.

### **Joint Request for Information (RFI) on SECURE 2.0 reporting and disclosure provisions**

- The Employee Benefits Security Administration (EBSA), the Treasury/IRS and the Pension Benefit Guaranty Corporation (“Agencies”) issued a joint RFI asking for public input on the current reporting and disclosure requirements for retirement plans under ERISA and the Internal Revenue Code.
- The RFI is part of the Agencies’ compliance with Section 319 of the SECURE 2.0 Act, of which requires them to conduct a review of the current reporting and disclosure requirements and make recommendations regarding those requirements to Congress.
- The Agencies define the following terms for the purpose of the RFI as follows:
  - Disclosure includes notices, statements, and other documents, and the furnishing of information to retirement *plan participants and beneficiaries* as required by ERISA or the Code
  - Reporting refers to the furnishing of information or reports by plans to the *Agencies* as required by ERISA or the Code
- Public comments on the RFI are due by the end of April 2024, and a report to Congress is due by the end of December 2025.

## Our Point of View

### **DOL issues Request for Information (RFI) on SECURE 2.0 paper benefit statement provisions**

- The RFI was issued last fall and comments were due to the DOL in October.
- No further guidance has been released from the DOL at this time.

### **Joint Request for Information (RFI) on SECURE 2.0 reporting and disclosure provisions**

- This provision of SECURE 2.0 indicates its purpose is to reduce compliance burdens for plan sponsors while ensuring plan participants and beneficiaries receive plan information in a timely manner and have a better understanding of the information they need to monitor their plans, prepare for retirement and get the benefits they have earned.
- These two RFIs have some overlap, but the RFI from last fall is only from the DOL and focused on participant benefit statements, while the more recent RFI comes jointly from several agencies and says it is focused on the “effectiveness” of reporting and disclosure.
- There are some questions in the joint RFI about participant comprehension of plan disclosures and which delivery methods — paper or electronic — participants prefer.
- We will continue to track the public comments submitted, as well as any additional information issued by any of the Agencies involved as this project moves forward.



# Regulatory Updates: Treasury and Internal Revenue Service



# Treasury and Internal Revenue Service (part 1)

STATUS: Treasury and IRS continue to focus on their annual Priority Guidance Plan, additional guidance on SECURE Act and SECURE 2.0 Act provisions, as well as issuance of Notices and proposed regulations

## ? Status in Washington

### Treasury and IRS Priority Guidance Plan 2023-2024

- Each year the regulatory agencies issue an updated Priority Guidance Plan and list the various regulatory projects they are working on.
- Key projects listed on the plan include:
  - Long-term part-time rules for 401(k) plans under SECURE Act and SECURE 2.0 Act — proposed rules were issued in 2023, but issuance of the final rules remains on the guidance plan.
  - Required Minimum Distribution Rules (RMD) — rules need to be updated for changes under SECURE Act and SECURE 2.0 Act. Rules were issued in proposed form early in 2022 but need to be revised for subsequent legislation.
  - Final regulations on forfeitures and remote authorization remain pending.

### IRS issues two-year delay of Roth catch-up requirement Notice 2023-62

- SECURE 2.0 implemented a new requirement that age-based catch-up contributions made by employees with wages in excess of \$145,000 in the prior year must be made on a Roth basis.
- SECURE 2.0 made this effective in 2024, but it became apparent within a few months of 2023 that a 2024 effective date was going to be very difficult, and in some cases impossible, for plans to implement.
- In September 2023, the IRS released Notice 2023-62 which created a two-year “administrative transition period.”
- Absent further relief, plans will have to implement the rule beginning in 2026.
- The Notice also addresses a few technical issues in section 603 of SECURE 2.0. Briefly explained, those technical issues relate to conforming changes in SECURE 2.0 that could be read as prohibiting all catch-up contributions in 2024 or later for 401(k).
- Comments on the Notice were due to the IRS by October 24, 2023. No further guidance has been received on this topic.

## 💡 Our Point of View

### Treasury and IRS Priority Guidance Plan 2023-2024

- The Priority Guidance Plan is updated each year.
- Many projects remain on the plan for several years and sometimes get reprioritized or taken off the plan.
- There are no set deliverable dates for these projects; this is more of a gauge of the projects the IRS and Treasury are focused on at the moment.
- There are several items on the current guidance plan, such as the RMD regulations, that have been in process for some time.
- We are hopeful that the SECURE and SECURE 2.0 projects may see more guidance released in 2024 and that the final RMD regulations are finally released.

### IRS issues two-year delay of Roth catch-up requirement Notice 2023-62

- The SECURE 2.0 requirement that age-based catch-up contributions be made on a Roth basis created a very short timeframe for plan sponsors and recordkeepers as the legislation was passed in late 2023 with a 2024 effective date.
- The two-year administrative delay came as a relief for plans and service providers alike.
- It is important to note that plans that want to continue permitting catch-up contributions, but do not have a Roth provision in their plan design, will have to add that feature before 2026.



# Treasury and Internal Revenue Service (part 2)

STATUS: Treasury and IRS continue to focus on their annual Priority Guidance Plan, additional guidance on SECURE Act and SECURE 2.0 Act provisions, as well as issuance of Notices and proposed regulations

## ? Status in Washington

### IRS and Treasury release “grab bag” guidance on SECURE 2.0 provisions Notice 2024-2

- In December 2023, the IRS released Notice 2024-2, referred to as a “grab bag” of guidance as it addresses several open issues from SECURE 2.0.
  - The grab bag Notice is in a Q&A format and covers several provisions of interest, including the following:
    - Employer Roth Contributions*
      - Section 604 of SECURE 2.0 newly permits employees to designate employer matching contributions or employer nonelective contributions as Roth contributions. The changes made by section 604 technically apply to contributions made after December 29, 2022.
      - The Notice clarifies that this is an entirely optional provision that employers may choose to add to their plan design and addresses, vesting, wage withholding, FICA and FUTA and taxation year of the Roth amount.
    - Small Immediate Financial Incentives for Contributing to the Plan*
      - Section 113 of SECURE 2.0 exempts “de minimis” financial incentives from the contingent benefit rules applicable to 401(k) and 403(b) plans if certain conditions are met. Among other guidance, Notice 2024-2 provides that a de minimis financial incentive may not exceed \$250 in value, and that contingent installments of the incentive (up to a total of \$250) may be provided.
    - Exception to the additional tax for terminally ill individuals*
      - The Notice clarifies that there is no in-service relief in SECURE 2.0 for these distributions (*see SECURE 2.0 Technical Corrections proposal in Legislative section*).
      - Defines “terminal illness” as having an illness or physical condition that can reasonably be expected to result in death in 84 months or less.
      - Provides guidelines for certification of terminal illness status that must be provided to the plan administrator and requires it to be written by a physician.
- There are several other small business provisions addressed in the Notice.*

## 💡 Our Point of View

- Representatives from IRS and Treasury were saying in June of 2023 that this guidance would be coming “soon” and hopefully before Labor Day. However, the Notice was not released until the last week of 2023.
- There are some very helpful items in the Notice as listed here.
- There are several items discussed that were SECURE 2.0 provisions that apply to small employer plans, and as such are not listed here.
- The clarification on the “Small Immediate Financial Incentives” provision has had great interest, as it provides another creative way for employers to engage eligible but non-participating employees and encourage enrollment in the plan.
- The clarification for how to manage the new distribution option for employees who may meet the terminal illness definition is very helpful.
- The technical corrections legislation that is in draft (*see Legislative section for more detail*) will go a step further than the regulators can by expanding the law to provide that these distributions would be permissible in-service distributions and indicating that individuals may self certify that they meet the definition of terminally ill.
- Until we see a legislative change to that effect, these guidelines will help with any plans that choose to offer the optional distribution.



# Treasury and Internal Revenue Service (part 3)

STATUS: Treasury and IRS continue to focus on their annual Priority Guidance Plan, additional guidance on SECURE Act and SECURE 2.0 Act provisions, as well as issuance of Notices and proposed regulations

## ? Status in Washington

### Long-term part-time (LTPT) employee participation proposed regulations

- In November 2023, LTPT proposed regulations on the LTPT employee provisions from the first SECURE Act were issued.
- LTPT employees are defined as individuals who have three consecutive years of at least 500 hours of service each year for the 2024 plan year, and two consecutive years with at least 500 hours of service for the 2025 plan year and beyond.
- LTPT eligibility solely allows access to make elective deferrals into the plan; it does not otherwise entitle an employee to matching or employer contributions that are subject to eligibility requirements.
- The proposed regulations indicate that plan administrators must track LTPT status starting in 2021.
- Various issues are addressed in the proposal, including how to determine LTPT status, the impact on vesting and nondiscrimination testing, and several other issues.
- The LTPT requirement is in effect, so IRS has said that until a final rule is issued, plans “may rely” on the guidance on the proposal.
- The IRS is holding a public hearing on the proposed regulations in March 2024.
- We will continue to track any developments on this topic.

### 529 Roth Rollover 5498 Information Reporting

- The IRS Issued their Instructions for Filing Form 5498 for 2023, in which some clarity was provided on rollovers of unused 529 amounts to Roth IRA as provided for in the SECURE 2.0 Act.
- The information reporting indicates that eligible individuals can roll over from their 529 to a Roth IRA in 2024, but consider it a 2023 Roth contribution if it is made timely and subject to annual contribution limits.

## 💡 Our Point of View

### Long-term part-time (LTPT) employee participation proposed regulations

- The LTPT proposed regulations are complicated, but they answer many questions that needed clarification in addition to the statutory language.
- It is important to note that while plans must abide by the LTPT rules, they require plans to permit LTPT employees to make elective deferrals into the plan.
- Eligibility requirements for non-elective and/or matching employer contributions remain in place and applicable.

### 529 Roth Rollover 5498 Information Reporting

- This provision that permits limited rollovers from 529 accounts into Roth IRA accounts has garnered quite a bit of interest.
- Individuals need to be aware of the eligibility requirements:
  - 529 must have been open at least 15 years
  - The contribution cannot exceed Roth IRA contribution limits for the year
  - There is a maximum lifetime limit of \$35,000 that can be rolled from a 529 to a Roth IRA
- There are several outstanding questions that have arisen around this provision, including question about the 15-year clock on the account, which we hope the IRS will answer in additional guidance at a later date as it is included in the IRS Treasury Priority Guidance Plan.

