AMERICAN RETIREMENT ASSOCIATION

Working for America's Retirement

Q&As From SECURE 2.0 ARA Webcasts

This document includes answers to questions we received during ARA webcasts. In some cases, we have reworded questions for clarity and/or consolidation of repetitive questions.

Many of the answers are subject to interpretation of the law and as of the date of the preparation of these answers, there has been no regulatory guidance. The answers do not, and are not intended, to constitute legal advice.

We expect that this document will be **updated** later in the year and provided to current subscribers to the ERISA Outline Book (EOB) online product and to purchasers of the 2023 EOB print edition. You may purchase, or subscribe to the EOB **here**.

SECURE 2.0

February 2023

LINKS TO COVERED TOPICS

Mandatory Eligible Automatic Contribution Arrangement (EACA) (Section 101)

Long-Term, Part-Time Employees (LTPT EEs) (Section 125)

Top Heavy Rules (Section 310)

Option to Treat Employer Contributions as Roth (Section 604)

Catch-up Contributions - Roth (Section 603)

Qualified Disaster Distributions (Section 331)

Hardship Distribution Certification (Section 312)

Family Attribution Rules (Section 315)

RMDs (Sections 107, 201, 207, 302 325, 327, 333 and 337)

Domestic Abuse Victims (Penalty-Free Withdrawals) (Section 314)

Distributions for Terminal Illness (Section 326)

Emergency Distributions up to $1,000 (Section 115)

Emergency Savings Account (ESA) (aka, side-car account) (Section 127)

EPCRS (Sections 305 and 350)

Discretionary Plan Amendments to Increase Benefits (Section 316)

Forced Cash-out Limit (Section 304)

Small Financial Incentives (Section 113)

Student Loan Repayment Matching Program (Section 110)

Start-Up Credit (Sections 102 and 111)

Retroactive First-Year Deferrals (Section 317)

403(b) Specific Provisions (Sections 106, 128 and 602)

Starter 401(k)/403(b) (Section 121)

SIMPLE Plans - Increased Limits and Roth (Sections 116 and 601)

SIMPLE IRAs - Mid-Year Replacement (Section 332)

Participant Disclosures (Unenrolled Participants) (Section 320)

Group of Plans Annual Audit (Section 345)

Increase in Catch-Up Limits (Section 109)

Distributions for Long-Term Care (Section 334)

Paper Statements (Section 338)

Saver’s Match (Section 103)

529 distributions to Roth IRA (Section 126)

Automatic Portability (Section 120)

Lost and Found Database (Section 303)

Other Questions

MANDATORY ELIGIBLE AUTOMATIC CONTRIBUTION ARRANGEMENT (EACA) (SECTION 101)

THE EACA FEATURE/REQUIREMENTS

I always think of EACAs as having 2 "flavors." For example - only auto enroll new employees versus everyone (which gets you the 6 month extension for testing). Is that still applicable?
Answer: Here is one other way to describe the two flavors. The first flavor is that if the EACA covers all participants for the entire period they are able to defer, then you have 6-months (instead of 2 ½ months) to make corrective distributions for a failed ADP test without being subject to the 10% excise tax. If the EACA doesn't cover all participants, such as when you only cover new employees, then you don't get the 6-month correction period.

The second flavor is that the employer can include a permissible withdrawal provision for those who are covered by the EACA (it's not contingent on whether all participants are covered by the EACA).

We do not have IRS guidance yet on whether the EACA mandate (which is effective for plan years beginning in or after 2025) must cover all participants. If it is a new plan, then presumably it must cover all participants. It is not clear whether it must cover all participants in subsequent plan years.

The main consequence is that participants who are covered by the EACA must receive an annual notice that's similar to a safe harbor notice. If a plan doesn't want to provide this notice annually (particularly to those participants who have opted out of the automatic enrollment feature), then the EACA is not covering all participants (and the 6 month corrective distribution period would not apply).

Similarly, there is a need for guidance on what happens where a 401(k) or 403(b) plan is established after December 28, 2022, and then adds the EACA effective on January 1, 2025 (as mandated by the law). Are existing participants subject to the EACA in 2025? The conservative interpretation is "yes," although it's possible the IRS would allow a plan to exclude from the EACA all existing participants (those who entered prior to the 2025 plan year) who have made an affirmative election (to either make deferrals or not make deferrals).

Can you confirm that the 6-month period for ADP/ACP testing is effective 1/1/25?
Answer: Not exactly. The 6-month period to make corrective distributions without subjecting the employer to the 10% excise tax is not new. It was effective for plan years beginning on or after January 1, 2010. See the prior question for an explanation of how a plan with a EACA feature is entitled to the 6-month corrective distribution period.

Does the EACA component apply to Long-Term, Part-Time Employees (LTPT EEs)? What about other part-time employees who are participants?
Answer: The law does not include any exceptions. We believe the EACA feature would apply to LTPT EEs when they first become eligible to participate in the plan. It is not

clear whether they must be covered by the EACA in subsequent years (if they make an affirmative election).

Is it correct that if a plan is effective mid-year, all participants must be subject to the EACA under the new rules, as opposed to current rules where only newly eligible participants are eligible? We typically write our ACA plans to cover new employees, but not existing participants. Will the new features need to apply to ALL participants, including existing participants in an ACA?
Answer: The question raises some key points. First, if the CODA feature is added mid-year, then all participants are "newly eligible" and must be covered by the EACA, at least when they first become eligible.

If an existing 401(k) plan and 403(b) plan isn't exempt, then the EACA mandate would apply as of the first day of the plan year beginning in 2025 so you wouldn't be dealing with mid-year entrants (other than new participants). One possible exception where we need guidance is on the exception for businesses that cross the threshold of being in existence for 3 years. Unlike the exception for normally employing 10 or more employees, the law does not specify when a plan must comply with the EACA mandate once the 3 years is met.

Can a different type of auto-enrollment be used to meet the requirement?
Answer: No, it must meet the EACA requirements. Note that the deferral feature of a qualified automatic contribution arrangement (QACA) would satisfy the EACA requirements (with the exception of which participants are covered).

When we set up a new plan now, should we be putting in automatic enrollment from the beginning?
Answer: If the employer and service providers are able to implement the provisions, then it might make practical sense to include the EACA when the plan is established. That would make it easier than dealing with transition issues once the mandate becomes effective.

Are there any rules stating when the escalation has to occur? For example, Jan 1st of each year or the anniversary date of hire. Or is that up to the employer?
Answer: The law states that the escalation must be effective for the first day of each plan year starting after each completed year of participation. We expect there to be some flexibility for an employer as long as the default percentage are at least equivalent to the minimum for the applicable period (i.e., similar to the QACA requirements where it's OK if you increase it earlier but you can't increase it later).

Is there a minimum amount of time that a plan must maintain the EACA feature? For instance can the plan add a EACA to comply with the requirements and then amend to eliminate the EACA feature in future years if they decide to do so?
Answer: Nice try - but no. It's a condition of meeting the requirements of IRC §§ 401(k) and 403(b) and must be maintained on an ongoing basis.

Is there any conflict between the new EACA mandate for a 403(b) plan where all participants would be subject to the EACA vs the current exclusion for employees expected to work less than 20 hours/week?
Answer: The EACA only applies to participants. It does not impact which employees are eligible to participate in the plan. Once an employee does not qualify for the 20 hours/week exclusion, then then he or she would then be subject to the EACA provision.

If you simply set up a profit sharing plan, are you exempt from the EACA mandate? Or do all new DC plans need to be automatic enrollment 401k plans?
Answer: The EACA mandate only applies to 401(k) and 403(b) plans that include a cash or deferred arrangement (other than SIMPLE IRA and SIMPLE 401(k) plans). It does not apply to a stand-alone profit sharing plan.

THE EXCEPTIONS TO THE EACA MANDATE

If a Plan is established in 2023, will it have to move to a EACA in 2025? Other documents say if the Plan was enacted before Dec. 31, 2024, they are exempt.
Answer: The law is clear: The exemption for existing plans only applies to cash or deferred arrangements (401(k) and 403(b) plans) that were established prior to the date of enactment (i.e., prior to 12/29/2022).

Suppose an employer established a 401(k) plan prior to 12/29/2022 by joining a MEP or a PEP. Suppose after that date, there is spinoff from the MEP or PEP (a new plan is setup, but its assets move over as well). Is that now going to be subject to the EACA mandate?
Answer: We think it's a reasonable interpretation that the plan would still be exempt because a spin-off generally is treated as a continuation of the same plan. We think the same is true in the reverse situation where there is a merger of a grandfathered 401(k) plan into a MEP or PEP.

Suppose a plan document was signed on November 11, 2022, with a deferral and match effective date of January 1, 2023. Assume the employer has more than 10 employees and has been in existence for at least 3 years. Is the plan grandfathered?
Answer: We believe it would be an aggressive position to take, but also acknowledge that it's not clear. One could look to the IRS guidance on which governmental plans were grandfathered for 401(k) purposes (which was based on when action was taken, even if the plan wasn't effective by the deadline) for a potential interpretation that the plan is grandfathered in this situation. However, that language is slightly different, so caution should be exercised in drawing parallels until the IRS issues guidance on this provision. If you take the position that it is grandfathered, then absent IRS guidance on the issue, it might be prudent to get an affirmative deferral election from all participants (even if the election is to defer $0) and an acknowledgement that they received the SPD. That way, even if the IRS were to say the plan isn't grandfathered, you may not have any retroactive consequences.

Suppose a 403(b) plan document was signed in September 2022. No employees elected to participate in the plan. Therefore no "product paperwork" was established. Assuming 10+ employees and 3 years existence, is this plan grandfathered?
Answer: If you have adequate records to show that the plan was communicated and offered (and declined) by participants, then a plausible argument could be made that the plan is grandfathered and exempt from the EACA mandate.

If a new company has 50 EEs but has been around less than 3 years are they excluded from the EACA requirement?
Answer: The plan would be excluded. You only need to fall within one of the exclusions.

One of the exemptions is for employers who "normally employ" 10 or fewer employees. Any guesses on what "normally employs" 10 or fewer employees means?
Answer: We will need guidance on this provision. The rule is that the employer loses the exemption 1 year after the close of the first taxable year during which the employer normally employed more than 10 employees. It is reasonable to say that if there were 11 employees on every day in a year, the exemption will be lost and if they employ 10 or fewer employees on every day, the exemption will apply. It is not clear what happens if the employer had 13 employees for 5 months and 9 employees for 7 months. It may be based on an average of the employees or some other standard announced by the IRS. However, regardless of the rule, the employer will have one year to evaluate its employment against the IRS standard before losing the exemption.

For purposes of the small employer exception (10 or fewer employees), is the term "employee" eligible employees are all employees?
Answer: Unless the IRS provides otherwise, we interpret this to mean all employees (even part-time employees).

Are you subject to the EACA mandate the minute you hire the 11th employee?
Answer: No. You are subject to the requirement no earlier than the first day of the first taxable year that is one year after the close of the taxable year in which you exceed 10 employees. For a calendar year plan year and taxable year, this means the plan would need to comply as of the first day of the plan year that is one year after the plan year in which the threshold is exceeded. It is not clear how this will be applied where the employer's taxable year differs from the plan year (which isn't very common).

Does the less than 3-year business exemption mean that once 3 years has passed, you are subject to the EACA mandate? Or are you grandfathered in because you set up a plan in your first 3 years as a business?
Answer: You are subject to the requirements once 3 years has passed. See the questions in the prior section regarding how and when that transition applies.

Does the mandatory EACA provision apply to non-ERISA 403b plans, specifically for K-12 school districts?
Answer: No. There is an exception for governmental plans and church plans.

Will the EACA requirement for new 403(b) plans make the "limited employer involvement" ERISA exemption obsolete (except for new ERs or 10 or less (exemptions))?
Answer: Probably so, unless the DOL issues new guidance. The law gives the employer discretion on the default percentage and escalation. Because of this flexibility there is more than limited involvement. Some earlier proposals would have removed the flexibility to address the ERISA coverage issue, but those weren't enacted.

Does restating a plan constitute a new plan for purpose of the EACA mandate?
Answer: No.

LONG-TERM, PART-TIME EMPLOYEES (LTPT EES) (SECTION 125)

Regarding LTPT, how will vesting work if an LTPT employee later becomes eligible to receive a match under regular plan provisions?
Answer: This is an issue from SECURE 1.0 and we don't have guidance yet. We believe the normal vesting rules (1,000 hours) would apply as long as the LTPT EEs didn't receive a contribution as a LTPT EE. The statute, however, is open to interpretation and some practitioners think the special vesting rule (500 hours) applies once a LTPT EE become eligible to receive employer contributions (i.e., after becoming a full-time employee). What is clear is that if LTPT EEs receive a match sooner than the regular plan provisions (i.e., so that the special vesting rule applies), then the special vesting continues to apply even if they later become a full-time employee. Also note that a technical error has been identified in the new ERISA LTPT EE provisions. If the special vesting rule does apply, the IRC allows you to use the normal "vesting" computation periods. The corresponding ERISA provision refers to the normal "eligibility" computation periods (which begin on the date of hire).

If LTPT EEs elect to not make deferrals, are they considered participants for purposes of determining whether the plan is a large plan (i.e., has over 100 participants)?
Answer: Yes, they count and could subject the plan to file as a large plan (generally over 100 eligible participants). The DOL has proposed regulations that would allow you to exclude from the count those participants who have no benefits under the plan. We do not know, however, if or when the DOL will finalize these regulations.

Will LTPT EEs need to receive Safe Harbor (SH) contributions or top heavy minimums?
Answer: LTPT EEs are not required to receive SH contributions. It is also clear that where the only EEs not receiving SH contributions are LTPT EEs, the plan will not lose the top heavy exemption merely because those LTPT EEs can defer to the plan. It's less clear where a plan decides to include all employees on the date of hire in order to avoid dealing with LTPT EEs. Existing IRS guidance provides that if a plan permits employees to defer before they are eligible to receive the safe harbor contributions, the plan loses the top heavy exemption. The expansion of the law to require the inclusion of LTPT EEs and clarify that the top heavy exemption is not lost in that case is a significant policy directive from Congress and we believe the IRS could (and hopefully will) specifically change the existing rule to address this issue.

If a plan has exclusions (e.g., excludes HCEs), do the excluded employees come back in as an LTPT EEs?
Answer: This is an issue from SECURE 1.0 which the IRS is aware of. We are therefore expecting IRS guidance on this issue.

Does the LTPT 500 hours of service for a year of vesting change the original 1,000 hour vesting rules, or is the 500 hours only for this class of employee?
Answer: The special vesting rule is only for this class of employees. If the IRS takes a broad interpretation of this rule (see the first question in this section), then some plans might opt to lower the threshold to 500 hours for all participants.

Can you clarify the LTPT example that was asked in the session where someone has 550 hours in 2022 and 650 in 2023 and 300 in 2024? When would the employee enter the plan assuming a calendar year plan?
Answer: The employee would enter the plan on 1/1/25. The employee would have 2 consecutive years of more than 500 hours at the end of 2023. But, under SECURE 2.0, the 3-year requirement is reduced to 2 years as of the first plan year beginning in 2025. Thus, the individual would enter the plan on 1/1/2025.

If an EE worked 600 hours in 2021 and 2022, and 400 hours in 2023, are they in in 2025 due to the new rules?
Answer: Yes. The employee has 2 consecutive years with more than 500 hours and the reduction from 3 years to 2 years is effective in 2025. So the employee would need to be eligible to make elective deferrals as of the first day of the 2025 plan year. See the next two questions for additional clarification of this example.

For the LTPT EEs scenario, what if they work 550, then 300, then 600 so the years are not consecutive?
Answer: They would need meet the definition of a LTPT EE and would not be required to enter the plan for deferral purposes. And that definition says that they must have two consecutive years over 500 hours of service.

For LTPT EEs, aren't pre-2023 hours excluded? So for your example, employee #2 was not eligible to enter on 1/1/25.
Answer: The example should have stated that it's for a 401(k) plan. For 401(k) plans, only years prior to 2021 are excluded. If the plan was a 403(b) plan, then you would be correct that years prior to 2023 are excluded. The reason for the 2 different rules is because SECURE 1.0 did not apply the provision to 403(b) plans. SECURE 2.0 expanded it to 403(b) plans and therefore it makes sense that there be a delayed effective date.

Once a LTPT EE enters the plan does the employee continue to be eligible if the hours drop in future years?
Answer: Yes. It's no different than the rules that apply under the 1-year of service requirement. If the hours drop, the employee is still a participant (at least for deferral purposes).

Just to confirm for LTPT EEs, plans that use elapsed time vesting cannot disregard service prior to 2021 for vesting purposes. Is this correct?
Answer: No. You can disregard service prior to 2021 (or 2023 for 403(b) plans) regardless of the method used to calculate service.

A plan has immediate entry upon meeting eligibility requirements. When would a LTPT EE enter? After the completion of 2 years and 500 hours or after meeting the 500 hours in the second year?
Answer: Since it's based on a calendar year, we think the answer is after the completion of 2 years and 500 hours - no different than how you apply the 1-year of service requirement. It's a computation period during which you satisfy the requisite hours. You aren't required to count the hours prior to the last day of the computation period, although a plan could be designed to give the person credit once the requisite hours are actually met (but that would be administratively difficult to apply for deferral purposes).

Do the individuals who enter as LTPT EEs get included in the ADP test like other participants?
Answer: Based on SECURE 1.0, the answer is no. They can be excluded from the ADP test as long as they are in the plan solely because of the change in the law. We have no guidance on how to interpret "solely." For example, if an employer decides to use immediate eligibility to avoid tracking these employees, then are they in the plan "solely" because of the law? If the IRS were to take a restrictive view, then you would be able to apply the ADP (and ACP tests) using the otherwise excludible rule (separate testing for those with less than 1 YOS/age 21) or the early participation rule (exclusion of NHCEs with less than 1 YOS/age 21).

If a plan goes to immediate eligibility to deal with LTPT EEs, how do you handle notices, including safe harbor & automatic-enrollment notices?
Answer: Existing rules already address immediate eligibility and permit the notices to be provided after becoming eligible for the plan. The following is from the **IRS web site**:

> In some cases, it may not be practicable for the notice to be provided on or before an employee's eligibility date. This is likely to be the case for a plan that allows an employee to participate on his or her date of hire. The regulations state that, in this situation, the notice will nonetheless be treated as provided timely if it is provided as soon as practicable after that date and the employee is permitted to elect to defer from all types of compensation that may be deferred under the plan earned beginning on the employee's eligibility date.

What impact do the LTPT EE rules have on the universal availability requirement that applies to 403(b) plans?
Answer: IRS guidance is needed on the LTPTE EE rules for both 401(k) and 403(b) plans. Based on what we have now (the law), here are some of the issues.

The new LTPT EE rules apply in addition to the existing universal availability rules (not in lieu of). This could impact plans using the universal availability exclusion for employees who normally work less than 20 hours per week. As explained below, we do not think it affects the student employee exclusion.

Here is the relevant portion of IRC 403(b)(12) (emphasis added and underlined text is the new SECURE 2.0 text):

> *Subject to the conditions applicable under section 410(b)(4) <u>and section 202(c) of ERISA</u> (these are the LTPT EE rules),* there may be excluded for purposes of this subparagraph employees who are students performing services described in section 3121(b)(10) and employees who normally work less than 20 hours per week.

The LTPT EE rule provides that a plan cannot, as a condition of participation, require a period of service that exceeds the new rules. Since the student employee exclusion isn't based on service, it's possible that this class is not impacted by the imposition of the LTPT EE rules. [Incidentally, this is the same reason we believe that class exclusions that are not based on service would still be allowed in 401(k) plans - again, we expect IRS guidance on this.]

With respect to the normally working less than 20 hours per week exclusion, this is clearly a service-based condition, so a 403(b) plan would need to apply both that rule and the LTPT EE rules. A question then arises as to what happens once an employee who is normally expected to work less than 20 hours per week meets the definition of a LTPT EE. Under universal availability, if any employee who normally works less than 20 hours is included in the plan, then all employees who normally work less than 20 hours per week must be included. See section 2.02(3) of Notice 2018-85. If that rule were to continue to apply, then the 403(b) plan would be required to make all employees who normally work less than 20 hours eligible for the plan as soon as one of them meets the LTPT EE requirements.

We expect and hope the IRS will interpret the new provision to avoid this result if an employee is only in the plan because of the LTPT EE rules. However, the IRS might conclude the statute as written doesn't give them flexibility in interpretation (regardless of what Congress may have intended).

If a large retail plan has always allowed part-time (P/T) EEs to participate, would it be worth considering instead to exclude P/T EEs knowing that LTPT EEs would still be able to voluntarily participate (without matching and counting towards testing via SECURE & SECURE 2.0)?

<u>Answer:</u> It would be best to wait for IRS guidance on LTPT EEs. We expect many plans are in the opposite situation and would be expanding the deferral provisions to all employees in order to avoid separately tracking LTPT EEs. If the IRS takes a more restrictive view of how the inclusion of all participants will affect the top-heavy and nondiscrimination test, then it would have the unintended consequence that this question presents.

TOP HEAVY RULES (SECTION 310)

For the new top heavy exclusion, what about plans that require 2 years of service for a profit sharing contribution? Does the top heavy minimum have to be provided for those who only have 1 year of service?

Answer: Yes, assuming lower eligibility applies for other types of contributions (e.g., if the plan is a 401(k) plan such that employees with 1 year of service are eligible to make deferrals).. The new top heavy exclusion applies when a plan uses eligibility requirements less than the statutory one year and age 21 provisions. If a plan had a two year eligibility requirement then those participants with more than one year of service would be required to receive the top heavy contribution.

OPTION TO TREAT EMPLOYER CONTRIBUTIONS AS ROTH (SECTION 604)

When do you expect the Roth employer contribution to be an option to use? It seems like document providers, recordkeepers, and payroll companies will all need to make adjustments for this to occur.

Answer: Companies will need time to update their administrative software and procedures. We recommend that you contact your service providers to see when each provision will be accommodated. As for document providers, plans do not need to be updated currently however, adjustments will need to be made to disclosure and administrative forms. And it is always a good idea to track how the plan is being operated under the new provisions so that when it comes time to update the document the information is readily available and does not have to be recreated.

For Employer Roth contributions, does the ER still get the deduction and the EE has to pay the additional taxes?

Answer: The employer still gets the deduction because the tax treatment to the employer is no different than any other contribution (i.e., it's still an ordinary and necessary business expense that is deductible to the employer subject to the limitations of IRC §404)). The participant will have current taxation on the contribution amount (of course, with pre-tax contributions the participant still had a tax due but only at the time of distribution, so there is no avoiding taxes)

Does electing a Roth employee contribution trigger FICA on the employer contribution too?

Answer: There is nothing in the law that subjects the amounts to FICA taxes. For participants, it's no different from than an in-plan Roth conversion or rollover. For the employer, it's no different than any other employer contribution (see the prior question).

Is the making employer contributions as Roth an employer election (blanket election for full contribution for the year) or on an individual participant basis? I thought each participant had to elect to allow it as Roth?
Answer: It is a per-participant election (if the plan permits Roth employer contributions). The plan cannot compel the participant to receive Roth employer contributions.

For employer Roth contributions, is Roth treatment applicable to Safe Harbor Match and Safe Harbor nonelective contributions (SHNEC) as well?
Answer: Yes.

Does the vesting requirement mean that the source is 100% vested for everyone, or just that the specific individual has achieved 100%?
Answer: It applies based on each specific participant and the particular contribution source. For example, if the matching account is 100% vested but the nonelective is not, then the participant could treat the match as Roth.

How is it reported? On Form W-2 and what code?
Answer: We do not have guidance on how the amounts are to be reported. It could be handled in a manner similar to in-plan Roth rollovers and in-plan Roth transfers, with reporting handled using Form 1099-R. However, because the amount is always Roth, rather than a conversion once it reaches the plan, it might need to be reported on the employees Form W-2. The IRS will have to update the applicable Form and/or instructions for this provision.

Does this also apply to PS only plans?
Answer: Yes, if the employer adopts this provision it may be applicable to any defined contribution plan.

To clarify, this allows employees to elect employer contributions to be made to a Roth account? Or does an in-plan Roth conversion request need to be made?
Answer: Each plan will have to develop procedures, but the provision allows employees to elect that the employer contributions be deposited as a Roth into a new Roth account for the participant. These amounts are NOT treated as Roth deferrals. Other than the tax treatment to the participant, they still retain their character based on the type of contribution (i.e., match or nonelective). No in-plan conversion is required.

Are the employer Roth contributions able to be split between participants? Where those that have a Roth Account get a Roth ER contribution and those that don't have a Roth Account get a pre-tax account?
Answer: It is the participant who has the election to treat the contribution as Roth. As to whether an employer could (or would want to) limit the ability of a participant to make the election based on whether the participant already has a Roth account, then the answer is probably "yes" (subject to potential nondiscrimination rules on benefits, rights and features).

For employer contributions, why wouldn't a plan want to treat these as Roth mandatorily?
Answer: The law states that it is an employee election. And you'd be causing taxation to participants without any additional income for them to pay the taxes.

Who pays the Roth employer contributions?
Answer: The participant pays the tax on Roth employer contributions. That is why this election is made by the participant, not the employer. We do not have guidance on how the contributions are reported by the employer or the plan.

Do we know if anyone is setup to manage the Roth matching contributions provision yet?
Answer: We aren't aware of any providers who are able to address this feature.

CATCH-UP CONTRIBUTIONS – ROTH (SECTION 603)

What about plans that do not offer Roth deferrals?
Answer: The law states (or will state after technical corrections are made) that employees with over $145,000 in wages in the prior year must have their catch-up contributions as Roth. If a plan does not offer Roth contributions, then catch-up contributions would be pre-tax but could only be made by those who earned $145,000 or less in the prior year.

In the event someone erroneously contributed a pre-tax catch-up contribution and was only eligible to make Roth catch-up contributions (i.e., earned over $145k in the prior year), would the correction have to be an in-plan Roth transfer?
Answer: We will need guidance on how to handle this situation. It may be optimistic, but we hope the plan would be able to give the participant a choice of a refund or Roth treatment.

Do you think mechanically, in the case of recharacterization, if the amounts were contributed originally pre-tax they will need to transfer within the plan to a Roth Source?
Answer: That is what we hope the IRS will permit.

Are you saying that all catch-ups could be required to be made as Roth? i.e., a plan is not required to use the $145k or less exemption.
Answer: Correct. There is nothing in the law prohibiting a plan from requiring all catch-ups to be Roth.

Would this also apply to 403(b) plan special organization catch-ups?
Answer: No. The special catch-up provisions for 403(b) and 457(b) plans (that aren't based on age) can still be made on a pre-tax basis.

If you don't have a Roth feature, when would it be required?
Answer: The provision is applicable for years that begin after December 31, 2023. If you don't have a Roth feature, then no participants earning over $145K would be able to make catch-up contributions.

Can a plan sponsor have a Roth contribution option for catch-up contributions only (i.e., nobody under 50 and/or nobody deferring less than 402(g) limit has a Roth Option)?
Answer: Possibly, but it would have to pass a benefits, rights and features nondiscrimination test (i.e., IRC §401(a)(4) test).

Per IRS: Elective deferrals are not treated as catch-up contributions until they exceed the limit of $22,500 in 2023. Will the IRS use this same "definition of catch-up contributions" in 2024 and later?
Answer: We don't know if the IRS will change the definition in light of the SECURE 2.0 changes. It's possible they will keep the definition the same and provide guidance on how pre-tax deferrals are recharacterized as Roth after the end of the year.

Can you address the following example: In 2024 (assume $23,000 IRC §402(g) limit and $7,500 catch-up) a participant whose salary is $200,000 elects an 11.5% pre-tax deferral and a 3.75% catch-up (required to be Roth). The participant only works 10 months so has only $19,167 of pre-tax deferrals and $6,250 of Roth contributions. The participant wanted maximum pre-tax deferrals but was almost $4,000 short; re-allocating Roth to pre-tax is not administratively feasible so what can be done?
Answer: We can't answer this until we know how the IRS interprets the provision. If the IRS permits pre-tax amounts to be recharacterized as Roth catch-ups, then having the participant elect that all amounts be pre-tax might be a good option.

In the prior example, if sponsors are allowed to offer Roth for catch-up contributions only and the IRS continues to only consider catch-up contributions as those elective deferrals that exceed the 402(g) limit, then under the scenario in first example, the plan would then be out of compliance (participant had almost $4,000 of Roth deferrals that IRS considers to be pre-tax because plan only allows catch-up contributions to be Roth.
Answer: Elective deferrals only become catch-up contributions after a limit is reached. So, if plan procedures allowed a participant to elect contribute pre-tax deferrals up to the IRC §402(g) limit and then excess amounts are Roth catch-ups, then this problem might be avoided. Getting IRS guidance on this provision is a top priority for ARA.

For the $145K catch-up exemption, does an employer just look at what the participant was paid from their company?
Answer: Yes. The employer does not need to determine whether an employee receive from other unrelated employers.

For the $145K catch-up exemption, is that base salary or does it include any bonus?
Answer: It's IRC §3121(a) wages, which would include bonuses.

The statute refers to IRC §3121(a) wages for the $145,000 exemption. How does that apply to self-employed individuals?
Answer: Self-employed individuals do not have IRC §3121(a) wages. Therefore, based on the statutory language, they would continue to be able to make pre-tax catch-up contributions (unless the law is changed).

Does a plan have to offer a Roth deferral option in their plan, even though catch-up contributions will be required to be Roth?
Answer: If a plan doesn't allow a Roth deferral option (catch-up or regular) then it would mean those who earn more than $145,000 would not be permitted to make catch-up contributions. Thus, excess contributions and excess deferrals for these participants would need to be refunded.

Is the $145K threshold going to be tied to the definition of highly compensated employees (HCEs) each year?
Answer: No. The $145,000 threshold is indexed for cost-of-living increases, but it is not tied to the definition of HCEs.

Why didn't they keep it in line with the HCE limits?
Answer: This was because the provision is driven by raising government revenue to offset the cost of other provisions in the law. Matching the HCE limits would have reduced revenue and caused the bill to not be budget neutral (absent revisions to reduce the cost of other provisions). Earlier versions of the bill either had no threshold - all catch-ups would have been required to be Roth - or a lower threshold ($100,000).

Does the catchup contribution for people age 60 or older also have to be ROTH?
Answer: Yes, if they have compensation in the prior year in excess of $145,000.

The $145,000 is based on 2023 income for 2024 consideration. My S-Corp owners want to reduce W-2 income and utilize draws to make up income. Do the draws count toward this rule?
Answer: No, they do not.

With a plan year starting October 1, 2023, would the implementation date for us be 10/1/24 or 1/1/24?
Answer: January 1, 2024. The law applies to taxable years beginning after December 31, 2023. It is referring to the individual's tax year, not employer's tax year or the plan year.

There are so many uncertainties around the new catch-up contribution rules - do you think it will be delayed beyond 12-31-23 so we can get guidance?
Answer: It's very unlikely. It would take Congressional action, and this provision was used to pay for other provisions in SECURE 2.0.

Are governmental plans required to follow the same implementation timeline?
Answer: Yes (although there is a delayed date by which conforming plan amendments are required for governmental plans).

We permit Roth deferrals in a plan but not a separate catch-up percentage election. We just determine the catch-up amount after the IRC §402(g) limit is reached. Should we have a separate catch-up election on our deferral forms, and if so, should it be deducted simultaneously with regular 401(k) deferrals? If so, what happens if the IRC §402(g) isn't reached in year?
Answer: Under current IRS rules, you can't determine if an amount is a catch-up until after a limit is exceeded, so you may not know if a deferral is a catch-up contribution until after the year is over. Unless those rules are changed, then a participant can't elect whether an amount is a catch-up or not. Because we expect the IRS to issue general guidance on Roth catch-ups, it would be best to see what develops before making decisions to alter your enrollment forms. One approach that may help is that if the plan permits an employee to split deferrals between Roth and pre-tax, that those employees who are likely to be impacted by the rule designate a portion of their regular deferrals as Roth.

Any update regarding the issue with the deletion of IRC §402(g)(1)(C) (i.e., that beginning in 2024, no catch-ups are permitted)? Any odds on the likelihood it will be addressed?
Answer: The odds are 100% that it will be fixed. What we don't know is when it will be fixed. It's a high priority within the government. We will be sending out communications when it is fixed.

If a participant earns over $145K, can the catch-up be pre-tax up to $145K then Roth for earnings more than $145k?
Answer: No. If the $145k threshold is met, all catch-up contributions must be Roth. In addition, the $145K is based on earnings from the prior year (i.e., not the year the deferrals are being made).

Our 403(b) contribution calculations are based on W-2 wages. What is the definition of the $145K salary in the prior year?
Answer: It is based on IRC §3121(a) wages, which are wages for FICA purposes.

Can a new hire make pre-tax catch-up contributions (earnings are $0 from prior year)?
Answer: Yes.

Is the Roth catch-up contribution applicable only to new plans?
Answer: No. It's applicable to all plans that permit catch-up contributions (effective in 2024)

Do you see a way a plan can exclude those making more than the $145K from making catch-up contributions?
Answer: The existing regulations generally require that if a plan permits catch-up contributions, that all participants have an effective opportunity to make catch-up contributions. We do not know if the Treasury will revise this provision in light of SECURE 2.0.

QUALIFIED DISASTER DISTRIBUTIONS (SECTION 331)

Is the provision optional?
Answer: Yes. A plan could add all or parts of the relief (i.e., it could permit distributions but not permit higher loan limits).

Is it possible to get more than on $22k for a Qualified Disaster Distribution?
No, the Qualified Disaster Distribution is limited to $22,000 per disaster. However, However, a FEMA event is also one of the events for hardships. If the participant needs additional amounts because of the event, then a hardship withdrawal might be available. A hardship withdrawal would not be eligible for repayment or waiver of the 10% additional tax.

Are repayments for Qualified Disaster Distributions considered Roth?
Answer: No.

Is the provision effective for disasters that occurred since 2021??
Answer: The provision is effective for FEMA declared disasters after January 26, 2021.

Can a participant choose to withdraw Roth vs regular 401(k) funds for a natural disaster or is pre-tax required to be withdrawn?
Answer: This depends on what the plan permits. It's not even limited to deferrals - a plan can permit any vested amounts to be withdrawn, even those from employer contributions.

HARDSHIP DISTRIBUTION CERTIFICATION (SECTION 312)

Is the self-certification optional for plan sponsors or mandatory?
Answer: It is optional.

To avoid the hardship distribution issue (concern that frequent hardship request via certification could be problematic) could you just limit hardships to one a year?
Answer: Yes.

What is the IRS position on participant self-certification versus employer certification?
Answer: We can only speculate that they'd prefer the employer certification.

FAMILY ATTRIBUTION RULES (SECTION 315)

Does the new spousal attribution rule apply if the companies are similar? Ex: Two married doctors each have their own practice.
Answer: The new rule could apply in this situation. First determine if the exception under IRC §1563(e)(5) applies. If so, then the new SECURE 2.0 provision would prevent aggregation solely because of a minor child or community property laws. The fact that businesses are similar doesn't affect the exception in IRC §1563(e)(5) (it's based on common ownership (direct or indirect), management, and whether the businesses have passive income).

RMDS (SECTIONS 107, 201, 207, 302 325, 327, 333 AND 337)

Are Roth accounts included in the balance to determine the RMD?
Answer: The account is not included. The law states that IRC §401(a)(9) (for distributions prior to death) doesn't apply to the "designated Roth account." This means the Roth account is disregarded when determining the amount of RMDs that must be made for the year (if a participant has not died).

If a plan allows in plan Roth transfers/rollovers and a participant rolls over or transfers the balance to Roth, would they be required to take RMDs from the Roth Rollover account?
Answer: No. That account would not be subject to IRC §401(a)(9) for distributions made prior to death (see the prior question).

Is there an expected release date of the 2023 RMD tables?
Answer: No.

Can you print the table with the RMD beginning ages?
Answer: Here is the corrected table:

Birth Date	Applicable RMD Age
Before July 1, 1949	70½
July 1, 1949 - 1950	72
1951 - 1959	73
1960 or later	75

Do you have a suggested communication template in the new RMD changes?
Answer: No, we do not.

DOMESTIC ABUSE VICTIMS (PENALTY-FREE WITHDRAWALS) (SECTION 314)

Are Domestic Abuse provisions a new distributable event, so just a new hardship reason? Does it override the minimum age for in-service?
Answer: This is a new type of distribution and may be taken before a participant is age 59 ½ (it is the terminal illness provision that is not a type of distribution).

Can you clarify whether these domestic abuse victim distributions are available for plans subject to the Joint and Survivor (J&S) requirements, or if consent rules would not apply for plans subject to these requirements.
Answer: They are not available to plans (or accounts) that are subject to the J&S rules. Congress could have taken a different approach and provided an exception to the spousal consent requirements, but it did not do so.

Is Domestic Abuse provision optional?
Answer: Yes.

Define Domestic Abuse: Does it include verbal, and emotional abuse (not just physical)? Does it only apply if reported to the police?
Answer: It is not limited to physical abuse. And it does not require that it be reported to the police. Here is the language from the law:

The term 'domestic abuse' means physical, psychological, sexual, emotional, or economic abuse, including efforts to control, isolate, humiliate, or intimidate the victim, or to undermine the victim's ability to reason independently, including by means of abuse of the victim's child or another family member living in the household.

It seems to me the Domestic Abuse Victim Distributions and the Distributions for Terminal Illness would lead to a violation of HIPAA because the separate distribution type will have to be established on the RK system and the employer would know. Or am I missing something?
Answer: The SECURE 2.0 specifically allows these two types of distributions. We recommend that an employer seek counsel on the HIPPA implications before permitting either of these distributions. However, we note that HIPAA generally only regulates "covered entities.". See this website for a description of covered entities.

A company, operating in its capacity as an employer or plan administrator generally is not a covered entity under HIPAA. In addition, even when HIPAA does apply, an employee's disclosure of his or her own protected health information is not a HIPAA violation. Therefore an employee providing his or her own information to the plan administrator generally would not cause HIPAA concerns. By contrast, however, the employer's health plan is a covered entity under HIPAA and could not disclose information to support a domestic abuse distribution absent participant consent.

If we have a 403(b) plan that elected J&S (Spousal Consent), can we remove that provision?
Answer: Maybe. For most 403(b) plans, the IRC doesn't mandate J&S provisions so they can be removed without violating the IRC. We have heard that there are some 403(b) plans that are money purchase type plans and those would not be able to remove the provision. And, for some plans there may be contractual (due to the investment product) and/or statutes (for governmental plans) limiting the ability to remove the provision.

DISTRIBUTIONS FOR TERMINAL ILLNESS (SECTION 326)

Why isn't terminal illness a distributable event for employer contributions under the 401 regulations that define a profit sharing plan and permit distribution for specified events ?
Answer: It could be a "stated event" for nonelective and regular matching contributions. It is not a new event that allows the withdrawal of restricted accounts (deferrals, QNECs, QMACs and SH contributions).

Regarding the terminal illness 10% additional tax waiver - what 1099-R code would be used for a participant to claim the terminal illness waiver? Does the participant need to submit documentation to the plan sponsor at the time of distribution to claim that?
Answer: The IRS will have to issue instructions for the 1099-R to know what code will be used. We will need guidance on the specifics as to the physician certification

Is the terminal illness just for participants or are beneficiary (spouse, child, etc.) included?
Answer: The law specifically says that this distribution is for the employee and does not reference any other family members.

Since this doesn't create a new distributable event for restricted accounts, does this provision have relevance to deferral only 403(b) and 403(b) plans (because distributions can't be made prior age 59 ½ and the excise tax doesn't apply at that point)?
Answer: For a deferral only plan (which only has restricted amounts), then this can't trigger a distribution. It's possible the participant may qualify for a distribution on account of disability (if unable to engage in any substantial activity). But that will not always be the case. Nevertheless, this provision could still be relevant for distributions on termination of employment. Suppose a participant terminates employment prior to age 55. Unless it qualifies for another exception (such as disability), the additional 10% tax would apply. This new exception to tax could then be used.

Can a participant use the exception even if a plan doesn't process the distribution as an exception to the additional tax?
Answer: Interestingly, and maybe not intentionally, the definition of a terminal illness distribution incorporates proof being provided to the plan administrator. Unlike many of the other exceptions to the additional tax, this appears to mean the exception is only available if the distribution is processed as a terminal illness distribution through a plan. A participant who receives a distribution and doesn't provide the proof of terminal illness to the distributing plan, then the participant would not be entitled to the relief. Again, it is not clear if this was intentional and perhaps the IRS can find a way to apply this differently without the need for a technical correction (depending on what was intended).

EMERGENCY DISTRIBUTIONS UP TO $1,000 (SECTION 115)

What constitutes an emergency distribution?
Answer: The description directly from the law is as follows:

> For purposes of this subparagraph, the term 'emergency personal expense distribution' means any distribution to an individual for purposes of meeting unforeseeable or immediate financial needs relating to necessary personal or family emergency expenses. The administrator of an applicable eligible retirement plan may rely on an employee's written certification that the employee satisfies the conditions of the preceding sentence in determining whether any distribution is an emergency personal expense distribution.

For emergency distributions, does the prohibition on distributions for three years (or until recontributed) mean no other form of distribution as well? Or only another emergency distribution?
Answer: It only refers to another emergency distribution.

Are these new distribution rules, Domestic Abuse, Terminal Illness, Emergency Distributions optional forms in the plan?
Answer: Yes, they are all optional.

Can you clarify the 'or elective deferrals or employee contributions equals contributions' as an alternative to repaying a previous emergency distribution?
Answer: In lieu of an actual repayment of the emergency distribution, if the participant's subsequent elective deferrals or after tax employee contributions are at least equal to the amount of the distribution, then this will satisfy the repayment criteria to be entitled to a second emergency distribution.

So, if I take $1k and do monthly contributions of $100, I will repay the amount in 10 months. Could I then take another emergency distribution?
Answer: Yes. Although, there is a limit of one withdrawal per calendar year.

Is an IRC §402(f) notice and 20% withholding required for an emergency distribution?
Answer: Yes. Unlike the side-car account (or qualifying disaster distributions), the distribution would be considered an eligible rollover distribution and therefore an IRC §402(f) notice and 20% withholding would apply (if the amount is not rolled over).

EMERGENCY SAVINGS ACCOUNT (ESA) (AKA, SIDE-CAR ACCOUNT) (SECTION 127)

Are contributions to a pension linked ESA included toward a participants deferral limit (IRC §402(g)) and are they included in nondiscrimination tests?
Answer: Yes. The contribution is a Roth contribution and is therefore included in testing just like any other deferral. One way to describe this is that it's a new type of Roth deferral account that is subject to separate accounting (from a regular Roth deferral account).

If you contribute $2,500 to an ESA and earnings bring the account to $3,000 and then you take a $500 distribution, can you contribute another $500?
Answer: No. If the account exceeds $2,500, then no more contributions may be made to the account.

I thought the $2,500 limit for the ESA was based on the account balance and not on contributions. Can you please confirm?
Answer: The wording of the law is unusual, but it is based on the account value, not the actual contributions.

Is there a limitation on what the ESA can be invested in?
Answer: Yes. The law provides that it must be invested with a goal of preserving principal and a reasonable rate of return, consistent with the need for liquidity.

Does any employer matching contribution that relates to an ESA contribution also need to be invested in a conservative investment option?
Answer: No. The employer matching contribution must be the match that would have been made on regular elective deferrals. The law is simply requiring a plan to treat ESA contributions as though they were deferrals (i.e., it is not creating a new type of matching contribution under the plan; nor does it require a plan to provide for matching contributions on deferrals).

Do ESAs within a plan count towards cash out limit?
Answer: Since this is a new type of Roth deferral account, it would seem that it is counted when determining the cash-out limit.

Do Emergency Savings contributions get counted in ACP test since made as after-tax contributions?
Answer: No. They are Roth contributions and are included in the ADP test.

If have an emergency savings account outside of the plan, is it still subject to match requirement?
Answer: No. It has no connection, nor impact, on the plan.

Would EEs who have not yet met eligibility for the plan be permitted to have an ESA?
Answer: An employee would have to be a participant to participate in the ESA.

Will 1099s need to be issued when distributions are made from an ESA?
Answer: Yes. The IRS will likely provide new instructions and/or codes for reporting these distributions.

How does the ESA compare to a loan? I have employees who take out loans for emergency situations now. Would there be an advantage?
Answer: It's a great question and requires too lengthy an answer to address in this document. In general, loans (and hardship distributions) are provisions that many employers include in plans to help with plan participation. Participants will be more likely to defer if they know their contributions are somewhat accessible. The ESA provision expands it even further by treating it as an actual emergency savings account (not only for branding but also withdrawals must be permitted at least once per month). One obvious advantage of the ESA compared to a loan is the lack of fees on the ESA (the first four distributions must be free to the participant)–whereas the loan and all the distribution options generally have transaction fees. On the other hand, distributions from the ESA cannot be repaid to the plan, thus cannot be restored as they could if a loan or personal emergency distribution were utilized. These issues, as well as the different access, taxation, and reporting will all factor into which feature is more advantageous.

Can the account be rolled into 401(k) each year if there was no emergency to use it on?
Answer: The law only addresses rollovers into a participant's regular Roth deferral account if the plan eliminates the feature or if the participant terminates employment. However, the law also does not preclude the distribution from being an eligible rollover distribution (withdrawal and then rolled over within 60 days or with a direct rollover). One reason a participant may want to do this is because of the investment restrictions on the emergency savings account.

If a plan implements an ESA provision, is it required to have automatic enrollment?
Answer: No. The law permits, but does not require, the feature to be subject to automatic enrollment.

Can ESAs be attached to 403(b) plans or is just for 401(k) plans?
Answer: The law doesn't restrict it to 401(k) plans. While it's primarily an ERISA provision, we see no reason it couldn't be used by non-ERISA plans.

Is an IRC §402(f) notice and 20% withholding required for an ESA distribution?
Answer: No. Distributions from an ESA may be eligible rollover distributions, but the law provides (similar to disaster relief) that a plan can process the distribution as an ineligible rollover distribution. Thus, no IRC §402(f) notice must be provided and there is no 20% withholding if the amount is not directly rolled over. Regardless of how the plan processes the distribution, a participant could technically still roll over the distribution (although it's an emergency distribution so it's not clear if the IRS could somehow prohibit a rollover).

EPCRS (SECTIONS 305 AND 350)

EPCRS loans…says…(1) such failure may be self-corrected under subsection (a) according to the rules of section 6.07 of Revenue Procedure 2021-30 (or any successor guidance), including the provisions related to whether a deemed distribution must be reported on Form 1099-R, 6.07 goes through which loans errors are eligible for SCP vs VCP/Audit CAP. But as an example- if a participant ends up with a $60k loan - you believe we can self-correct without taxation if they repay the excess - without going through VCP?
Answer: The intention of the new law is to expand the ability to self-correct loan failures. Having said that, this is one where it might be best to continue using VCP until the IRS issues guidance. Of course, it's ultimately the employer's decision on whether to take the risk and self-correct.

On EPCRS recovery of overpayments change, does this apply to DC plan that has deposit errors resulting in excess amounts in participant accounts that are subsequently distributed before correction can be made? Is the employer required to pursue the overpayment?
Answer: One of the primary purposes of the law is to clarify the fiduciary responsibilities and that in some cases it's not a fiduciary violation if a decision is made to not pursue the overpayment. It's hard to tell from the question what the exact circumstances are, but it appears that the plan isn't harmed due to the overpayment (whereas in a DB plan, an overpayment could affect all participants due to funding requirements).

Could you comment on whether correction of a failure to timely amend a plan could be an "eligible inadvertent failure"?
Answer: It's not prohibited in the law. But there is a risk in doing this type of self-correction prior to the IRS updating the EPCRS procedure to reflect the SECURE 2.0 provision.

This question relates to the missed deferral 9.5 month safe harbor. Are terminated employees eligible under this rule or would they need 50% of the missed deferral QNEC and full match for correction?
Answer: Terminated participants are eligible under this rule (it's specifically stated in Section 350 of the Act). If the requirements of the safe harbor are met (other than the requirement to start deferrals again), then there is no requirement to restore missed elective deferrals. The full match must be made (assuming the participant would have received a match had the deferrals been made).

DISCRETIONARY PLAN AMENDMENTS TO INCREASE BENEFITS (SECTION 316)

Will the discretionary amendment provision also apply to 403(b) plans?
Answer: No. It only applies to plans subject to IRC §401(a).

FORCED CASH-OUT LIMIT (SECTION 304)

Is the cash out limit increase to $7,000 required?
Answer: No. And care should be taken if a plan increases the threshold. That's because the plan must then be prepare to make the mandatory distributions to those participants who are affected by the change.

SMALL FINANCIAL INCENTIVES (SECTION 113)

Can providers provide these gift cards on behalf of the employer?
Answer: Yes, we think a provider, such as an advisor, could provide the incentive. However, it would be best to consult with tax and securities law advisors on the implications of doing so. For example, under FINRA, there are rules regarding the providing of gifts (generally under $100 is permitted). See their website. IRS Publication 15-B address the inclusion in income where fringe benefits, such as gifts, are provide by the employer. If gifts are provided to employees by a 3rd party, one should consult with a tax advisor as well as internal compliance restrictions.

Can employer merchandise be used to provide an incentive to defer?
Answer: Yes. While the law does not specify what the incentives are, it does use the term "financial incentives." We expect that this would be interpreted by the IRS broadly and that by "financial" it could be anything that has a de minimis value (even the logoed pen that skips when you're writing).

Can a small financial incentive include an employer contribution to the participant's account in the plan? Or does the incentive need to be separate from (outside) of the plan?
Answer: It must be outside the plan. If it were made to the plan, then it would be considered an employer matching contribution.

Can you require that a deferral election be in place for a certain amount of time before they earn the gift card?
Answer: There's nothing in the law addressing what conditions (other than that the employees make a deferral election) are permissible. IRS guidance would be helpful, but it would be a low priority.

Is there a dollar limit on the amount of small financial incentives that can be provided?
Answer: No. The law provides that it must be de minimis. What's considered de minimis is not defined, but see IRS Publication 15-B on what amounts may be taxable income to the participant.

STUDENT LOAN REPAYMENT MATCHING PROGRAM (SECTION 110)

Is the student loan repayment match mandatory?
Answer: No. This is an optional plan provision.

Is the student loan repayment matching contribution a separate formula or within an existing provision?
Answer: No. The matching formula is the same formula that is used elective deferrals. The law is simply allowing a plan to treat student loan repayments as though they were deferrals solely for purposes of applying the plan's matching contribution provisions (i.e., it is not creating a new type of matching contribution under the plan).

Does the student loan payment provision require an additional match on top of what is already being match?
Answer: No. See the prior question.

For student loan repayments being included as a matched contribution, you confirmed that these "contributions" count towards the 402(g) limit but are excluded from the ADP test. Do they count towards the IRC §415 limit? Are they included in the average benefit test?
Answer: These are not plan contributions so would not be included in the 415 limit or the average benefit test.

Can a 401(k) Safe Harbor plan implement a Student Loan Repayment Matching Program?
Answer: Yes. The student loan repayments are treated as deferrals as far as determining any matching contributions under the plan, including a safe harbor match.

Can an employer provide a 401(k) match for student loan repayments made by employees for student loans of their spouses or dependents?
Answer: No. The law applies to the student debt of the employee, not of family members.

The employer may still design a feature that matches those repayments (under existing laws treating it as a nonelective contribution, etc.), but the SECURE 2.0 changes will not apply to that feature.

Regarding matching student loan payments, if a participant both defers to the plan and makes student loan payments, is the participant disaggregated from ADP testing in total, or just the student loan payment amount?
Answer: While the IRS has not issued guidance on this point, it seems that only the student loan repayments would be disaggregated.

If a participants makes a student loan repayment and a deferral, is the match (if any) made on both?
Answer: No. Both amounts would be aggregated for purposes of determining the amount of the match. For example, if the plan provides a match on deferrals up to 3% of compensation, then only the regular deferrals and student loan payments would be aggregated to determine if the 3% amount has been reached.

The law says that the student loan repayment program is effective plan years starting after 12/31/23. Some plans have been offering student loan repayment programs for some time roughly based off the Abbott design. Could a plan offer a program this year? What is their risk?
Answer: The SECURE 2.0 provision allowing you to treat employer contributions that are based on student loan repayments as a matching contribution would not be available. This means the contributions would continue to be treated as nonelective contributions for purposes of nondiscrimination testing.

START-UP CREDIT (SECTIONS 102 AND 111)

Does the increase in the start-up credit from 50% to 100% of expenses for small employers build on the $250 per non-highly compensated participant (up to a maximum of $5,000)? Is that correct, or is there a $5,000 credit regardless of how many non-highly compensated employees participate in the plan?
Answer: The only change is that 50% is 100% for small employers. The maximum credit is still limited to the greater of $500 or the lesser of ($250 for each NHCE or $5,000). For example, if an employer employs no more than 50 employees (who earn at least $5,000 in the prior year) and has 21 NHCEs in the plan, then the credit would be 100% of qualifying expenses up to a maximum credit of $5,000. If the employer had more than 50 employees (and no more than 100), then the credit is not impacted by SECURE 2.0 (it would be 50% of qualifying expenses up to a maximum credit of $5,000).

Does the startup credit work the same as the old one just increasing to 100% instead of 50% so it's a dollar amount per NHCE up to $5000 or 100% of the cost?
Answer: Yes. The credit under Tax Code Section 45E is increased to 100% but only if there are not more than 50 employees. It is still 50% for those with more. The $5,000 cap or the methodology (which is tied to the number of NHCEs) was not changed.

Does the Start-up Tax Credit apply to an employer going from a Simple IRA to a 401k Plan?
Answer: It depends on how long ago the SIMPLE IRA plan was established. A SIMPLE IRA plan is eligible for the start-up credit. Thus, the 3-year clock on the availability of the credit started when the SIMPLE IRA plan was established. If there are still any available years left, then the expenses of the 401(k) plan would qualify for the credit. But there would not be a new 3-year period.

To get the $500 tax credit for auto enrollment, is it required the plan cover at least one non-HCE, or can a solo plan get that credit if they put an ACA in the plan?
Answer: No. Unlike the start-up credit, the automatic enrollment credit does not include the same provision requiring that the plan cover at least one NHCE.

Would the start-up credit be available to an employer with an existing plan looking to start an additional plan covering a different group of employees? For example, the existing plan excludes union employees and the new plan was started for union employees only?
Answer: Yes. The limitation on maintaining another plan during the prior 3 years only applies if the new covers "substantially the same employees" that were in the prior plan. In this example, they are covering different groups in each plan.

If an ER has little profit or a "paper" loss, does this still work?
Answer: An employer may claim the credit regardless of its earnings. How much it helps should be discussed with their tax advisor.

Can owner-only plans take the start-up credit?
Answer: No. There must be at least one NHCE for the credit to be taken.

If there is an Affiliated Service Group (ASG) (3 companies total) with 135 or so employees but only 75 or so are eligible for the Plan, does the start-up credit apply for each company that participates as each only has about 45 employees? Can they take advantage of the match credit or are they not allowed since they are an ASG and combined have over 100 employees?
Answer: They would not qualify for the credits. Eligibility for the credits is based on the number of employees (not participants) and is applied based on the entire ASG.

Does the additional credit for contributions apply if the employer has maintained a plan covering substantially the same participants in the prior 3 years?
Answer: Generally, yes. The regular start-up credit does not apply if the employer had another plan covering substantially the same participants in the 3 years preceding the first year for which the credit is claimed. That rule, for purposes of the additional credit for employer contributions, only applies to the year the plan is established. Thus, if an employer had a plan in the 3-years prior to establishing the plan for which the credit is being claimed, then the credit is not available in the first year, but is available for the next four years.

Does the additional tax credit for start-up plans (up to $1k per employee) apply to plans adopted in 2022?
Answer: It appears that the answer is "yes," but not the full credit. The new credit for

employer contributions is effective for taxable years beginning after December 31, 2022. The credit period (5 years) starts when the plan is established. This would leave 4 years for the credit to apply.

How does the tax credit work for tax-exempt entities starting up new plans?
Answer: Generally, it doesn't work (but see the next question). This is an item that is on our list of legislative initiatives.

Can the start-up credit be used to offset any Unrelated Business Taxable Income (UBTIA) that a non-profit may incur?
Answer: We don't see any reason why it couldn't be used.

Is the credit available if an employer terminates a SIMPLE to adopt a 401(k)?
Answer: Maybe. The credit period started when the SIMPLE plan was established. If it has been less than 3 years ago then the regular start-up credit is still available. Similarly, the new additional credit for the employer contributions may be available if the plan was established nor more than 5 years ago.

Many webinars and publications indicated (along with many others) that the $1,000 tax credit was 100% for the first 2 years and then it went down by 25% each year, lasting 5 years. But we've also heard some say this it's 100% in year and then decreased by 25% in each subsequent year. Which one is correct.
Answer: The credit for employer contributions is 100% for the first two years; then it decreases by 25% for the next 3 years. The law includes a table showing the applicable percentage. What may be confusing people is that the chart starts with the second year, not the first year. So, the first year of 100% is built into the text of the law: the table picks up after that (and it shows 100%, 75%, 50%, 25%, and then 0%. Is the start-up credit ONLY for start-up costs or does it also apply to the first (and later) year administrative costs?

Answer: It's based on both start-up and/or administrative costs for the applicable year.

Do the plan fees have to be paid by the plan sponsor in order to be eligible for the tax credit or can they be charged to plan assets?
Answer: The expenses must be paid by the employer, not the plan.

If a plan does not start until 1/01/25 or later, does it still qualify for the start-up credit or is that only for plans put in place effective in 2023?
Answer: It would apply. The increase in the credit percentage and the new credit for employer contributions are effective in 2023 or later (based on when the plan is established).

If a plan was established in 2022, would the employer (if it is a qualified small employer) be entitled to the increased 100% limit or would the 50% limit continue to apply?
Answer: The increase is based on taxable years so the 100% limit would apply.

Are there any new or increased incentives for plans we opened in the fourth quarter of 2022 or earlier?
Answer: The new and/or increased incentives do not apply prior to 2023, but those plans could take the tax credits beginning this year if they are eligible and within the applicable three or five-year period.

Can participating employers in a MEP/PEP retroactively amend tax returns to take advantage of tax credits?
Answer: Yes. Section 111 of the Act is retroactively effective as if it had been included in SECURE 1.0.

What is the maximum credit per year for the new employer contribution credit?
Answer: There is no stated maximum. But, the maximum per employee is $1,000 and the credit is phased out between 50 and 100 employees.

RETROACTIVE FIRST-YEAR DEFERRALS (SECTION 317)

For retroactive first year elective deferrals, what if the employer has no employee's for the first year but has an employee now in the current year. Does this now create a missed deferral for the employee in the current year?
Answer: The rule applies to the prior year, so if the employer had no employees for the prior year, then it would be eligible to utilize this provision regardless of whether they subsequently hired an employee after the tax year.

403(B) SPECIFIC PROVISIONS (SECTIONS 106, 128 AND 602)

Is it correct that 403(b) church plans are excluded from participating in a MEP/PEP?
Answer: No. The law doesn't include church plans, but it also states that it's not making any inferences on whether church plans can be part of a MEP/PEP. This was supposedly in the law because many practitioners felt that it has always been possible for a church plan to participate in a MEP, they weren't worried about the one bad apple spoiling the plan, and they did not want to be subject to the rules on getting rid of the bad apples.

Can 403(b)s join PEPs with 401(k)s plans? Or do they need their own PEP?
Answer: They would need their own PEP.

Why did they delay the hardship rule change for 403(b) plans until 2024?
Answer: It was probably because of budget scoring (although, this would increase revenue).

Do annuity (403(b)(1)) and custodial (403(b)(7)) 403(b) plans have the same hardship distribution rules? The legislative text seems to refer to annuities only.
Answer: They are now the same. The law amends the hardship distribution rules for both annuities and custodial accounts to be the same. Prior to this change, earnings on deferrals in a 403(b) annuity could not be distributed on account of a hardship (there was no

restriction on other contributions such as QNECs, QMACs and safe harbor contributions). For custodial 403(b)s, prior to this change in the law, hardship distributions could not be made with respect to earnings on deferrals, QNECs, QMACs and safe harbor contributions.

STARTER 401(K)/403(B) (SECTION 121)

Is the Starter K subject to annual disclosure requirements (and Form 5500 reporting)?
Answer: Yes, it is subject to the annual disclosure requirements that would apply to any 401(k) plan. Originally the bill would have had simplified reporting for plans with over 100 participants, but that provision was not included in the final law.

Is there a direction for how to go from the Starter 401(k) to a regular 401(k)?
Answer: The Starter(k) is merely a safe harbor design. Therefore, it would require only a plan amendment to go from the Starter 401(k) to a regular 401(k). There shouldn't be any issues if a Starter 401(k) is amended to a regular 401(k) as of the beginning of a plan year. We hope to get IRS guidance on whether an employer can amend a Starter 401(k) or 403(b) plan during the plan year.

Is the owner permitted to participate in the Starter 401(k) Plan?
Answer: Yes.

Do you know why an employer would want a Starter 403(b)? I can't see any advantage.
Answer: No. Originally the bill would have had simplified reporting for plans with over 100 participants, but that provision was not included in the final law. In addition, an earlier bill would have provided that the selection of a third party administrator would not be employer involvement that could subject a plan to ERISA (this also was not included in the final law).

Why would this be attractive to an employer when the limits are the same as IRA's?
Answer: Mainly because of state law requirements. Investment advisors will likely promote this plan as an alternative means of satisfying state law mandates that employers offer a workplace retirement savings plan. Notably, the Starter 401(k) will be eligible for the start-up plan tax credits, which make it more attractive than a deferral-only IRA–particularly for those employers that must offer a plan under applicable state law.

Does the Starter 401(k) require that amounts be invested in a QDIA?
Answer: No. The starter 401(k) provisions do not restrict how amounts in the plan must be invested.

How long can a company have a Starter 401(k)? Can they have that indefinitely or must they graduate to a real 401(k) after 3 or 5 years, etc.?
Answer: There is no limit on how long an employer can maintain a Starter 401(k).

How do we structure our salary reduction only 403(b) plans for non-profits to avoid them being treated as a "Safe Harbor" 403(b) plan?
Answer: If you don't limit deferrals to $6,000 then it doesn't meet the safe harbor requirements.

Will a TPA still be needed for the starter 401k?
Answer: Probably. Someone needs to do the work.

SIMPLE PLANS – INCREASED LIMITS AND ROTH (SECTIONS 116 AND 601)

What is required for a SIMPLE plan to add a ROTH provision?
Answer: The service provider would have to set up separate sources (if it's a SIMPLE 401(k) plan or a Roth IRA if it's a SIMPLE IRA plan) and communicate the change to plan participants. Absent an IRS extension, the plan document will need to be amended by the end of the 2025 plan year.

Is there talk of more oversight or reporting of SIMPLEs with all their new capabilities? People make mistakes.
Answer: Stay tuned. The section of the Act (117) that increases the limits also requires the Treasury to report to Congress on numerous items relating to SIMPLE plans. This may be the start of initiatives for more oversight.

SIMPLE IRAS – MID-YEAR REPLACEMENT (SECTION 332)

Can a SIMPLE 401(k) go to Safe Harbor 401(k) under the mid-year modification provision?
Answer: The provision generally only applies to SIMPLE IRAs. The IRS already has rules regarding mid-year amendments to safe harbor 401(k) plans. (IRS Notice 2016-16).

Does the waiver of the 25% penalty for a SIMPLE plan rollover apply to existing plans? E.g. SIMPLE ended 12/31/2022 and new 401(k) added 1/1/2023 - can the SIMPLE IRA accts rollover into the new 401(k) regardless of 2 year wait?

Answer: The change in the law is effective for plan years beginning after 2023. It is not tied to when the SIMPLE IRA was terminated nor when the 401(k) was added. This provision of the law also applies regardless of whether the rollover into the 401(k) plan takes place mid-year or on the first day of a plan year.

PARTICIPANT DISCLOSURES (UNENROLLED PARTICIPANTS) (SECTION 320)

Would non-enrolled participants still need to get an annual fee disclosure?
Answer: No.

Is there a list of notices that a plan does not need to provide to unenrolled participants?
Answer: We do not have a list. But, the law states that no ERISA disclosure, notice or other plan document must be provided as long as the plan complies with the notice requirements in this section of the Act (which requires an initial and annual reminder notices).

GROUP OF PLANS ANNUAL AUDIT (SECTION 345)

The same employer sponsors two DC plans (based on divisions). Each plan has fewer than 100 participants but combined would be over 120. Currently they file two 5500s with no audit for either. Under GoPs would the plan sponsor be available to file a single 5500 with no audit?

Answer: Assuming that the plans are not required to be audited, use of a GoP would not create a new plan-level audit requirement of either plan. Note, however, that proposed rules for GoPs would require a trust-level audit regardless of the whether the underlying plans require a plan audit. Final rules regarding GoP filings are expected in the near future. Note that the DOL has concerns on whether splitting a plan up to avoid an audit is acceptable. But we're also not aware of any enforcement on this.

INCREASE IN CATCH-UP LIMITS (SECTION 109)

For the Increased catch-up limits, is this something that will continue and always be 150% of the prior year catch-up amount (2026 catch-up for people in this age group would be 150% of 2025 regular catch-up amount)?

Answer: No, the amount is based on 150% of the 2024 (this is a technical error in the law and should be 2025). That amount will, however, then be indexed for cost of living. The adjustment is not made by multiplying the prior year adjusted catch-up limit by 150%. It will always be tied to 150% of the 2025 limit (assuming the technical error is fixed).

Are participants who are age 65 or older out of luck when it comes to applying the increased catch-up limits?

Answer: It applies to the ages as specified. So, it is not applicable for those age 65 or older.

Do the increased catch-ups up have to be Roth?

Answer: Yes, if the impacted participants did not earn less than the $145,000 in the prior year.

Is a plan that permits catch-up contributions required to allow the higher catch-up for those participants who are age 60 - 63?

Answer: We believe it is optional on whether to permit the increased amounts. We would, however, like to have the IRS confirm this interpretation.

We understand some practitioners are concerned that if a plan doesn't permit the additional catch-ups, that the plan would fail to satisfy Treas. Reg. §1.414(v)-1(e)(1). That regulation provides, in relevant part: "A plan fails to provide an effective opportunity to make catch-up contributions if it has an applicable limit (e.g., an employer-provided limit) that applies to a catch-up eligible participant and does not permit the participant to make elective deferrals in excess of that limit." That language, however, is in the context of a generally universal availability requirement for catch-up contributions (different than the universal availability requirement applicable to IRC §403(b) plans), and generally requires that all participants have the opportunity to make the same dollar amount of catch-up contributions. Therefore, we believe an employer could elect to offer the regular age-50 catch-up but not the 60-63 catch up as long as it does so for all participants.

DISTRIBUTIONS FOR LONG-TERM CARE (SECTION 334)

Would the distribution for purchasing long-term care contracts still be a taxable distribution even if the early distribution tax doesn't apply?
Answer: Yes, it is a distribution.

PAPER STATEMENTS (SECTION 338)

If a participant already elected electronic delivery, does he or she need to affirm that to avoid getting the paper statement once per year?
Answer: No. The new requirement only applies to participants who first become eligible to participate (or, for beneficiaries, who first become eligible for benefits) after December 31, 2025. The plan would not have to issue the paper statement for participants and beneficiaries in the plan prior to that date who have requested to receive their statements in electronic form.

Does the paper statement requirement apply to 403(b) and 457(b) plans?
Answer: It only applies to plans that are required to provide statements (ERISA covered plans). That means it would not apply to governmental 403(b) and 457(b) plans.

SAVER'S MATCH (SECTION 103)

Will they revisit the compensation limits for Savers' Match before this becomes effective? Or not likely?
Answer: Not likely.

How is the Savers Match going to work administratively? Sounds like a nightmare.
Answer: It will take quite a bit of time for plans to able to build a pipeline with the federal government. There will be some providers and plans that will not accept the saver's match - in which case the participants can direct the Treasury to deposit the match into their own IRA.

Is the Saver's Match subject to the plan's vesting schedule?

Answer: No. The match must be fully vested.

529 DISTRIBUTIONS TO ROTH IRA (SECTION 126)

Who can get the rollover from a 529 plan to a Roth IRA? The owner (parent) or the beneficiary (child)?
Answer: The beneficiary (child).

AUTOMATIC PORTABILITY (SECTION 120)

Will there be any option for getting amounts that were put into a Roth IRA (such as Roth money distributed as part of a mandatory cash-out distribution) back into a qualified plan? (Currently Roth IRAs can't be rolled into qualified plans)
Answer: SECURE 2.0 did not create an exception for rollovers of Roth IRAs into qualified plans. Maybe Congress will expand it once they have data on the utilization of the automatic portability provision. The DOL is required to provide a report to Congress every 3 years on the effectiveness of the feature.

LOST AND FOUND DATABASE (SECTION 303)

Will the DOL be able to use data we already submit with 8955-SSA for the lost and found database?
Answer: The DOL will need information that is not currently included on the Form 8955-SSA. For example, the name and address of the IRA or custodian where a participant's mandatory cash-out was sent. In addition, the 8955-SSA is an IRS form, which DOL does not have authority to control. It's too early to tell what information they want and how it is to be reported, but we expect it will be a new filing that will be made with DOL.

OTHER QUESTIONS

Any change to the mega back-door Roth conversion?
Answer: No. There was nothing in SECURE 2.0 addressing back-door Roth conversions.

Will ARA share "best practices" from Record Keepers on how they will support plan sponsors on implementing some of these required and optional provisions? Record Keepers and payroll may end up at odds.
Answer: We do not expect to be working on a best practices document.

Do the provision of SECURE 2.0 apply to Puerto Rican plans (i.e., section 1081.1 retirement plans in PR)?
Answer: The rules in SECURE 2.0 do not apply to Puerto Rican plans. Puerto Rico has its own tax code and any changes to the code must be made by the Puerto Rico Legislative Assembly.

Is the elimination of the "First Day of the Month" requirement for governmental 457(b) plans optional or mandatory (Section 306)?
Answer: We believe it is optional.

A lot of school districts do not offer Roth or offer Roth with a limited number of providers. Will ARA be doing anything with the K-12 TPAs to address the addition of Roth and making it universally available to all approved providers?
Answer: No. That is a business decision to be made by the providers.