

## Steve Leimberg's Employee Benefits and Retirement Planning Email Newsletter Archive Message #707

**Date:**28-May-19

**Subject:** Mary E. Vandenack & the SECURE Act

*“The House of Representatives passed legislation on May 23, 2019, making significant changes to the rules governing retirement plans. The goal of the legislation is to make it easier to save for retirement. Although the bill is bipartisan and is expected to pass the Senate, Texas Republican Ted Cruz has objected to the removal of a provision regarding home schooling that would have expanded tax advantaged savings accounts to cover K-12 expenses.”*

**Mary Vandenack** provides members with important and timely commentary on the progress and impact of the SECURE Act.

**Mary E. Vandenack** is founding and managing member of **Vandenack Weaver LLC** in Omaha, Nebraska. Mary is a highly regarded practitioner in the areas of tax, benefits, private wealth planning, asset protection planning, executive compensation, equity fund development, business and business succession planning, tax dispute resolution, and tax-exempt entities. Mary’s practice serves businesses and business owners, executives, real estate developers and investors, health care providers, companies in the financial industry, and tax exempt organizations. Mary is a member of the American Bar Association Real Property Trust and Estate Section where she serves as Co-Chair of the Law Practice Group and on the Planning Committee. Mary is the Editor-in-Chief of the American Bar Association Law Practice Magazine. Mary was named to ABA LTRC 2018 Distinguished Women of Legal Tech. Mary is a frequent writer and speaker on tax, benefits, asset protection planning, and estate planning topics as well as on practice management topics including improving the delivery of legal services, technology in the practice of law, building sustainable law firms, and alternative fees for process-oriented law firms.

Here is her commentary:

### **EXECUTIVE SUMMARY:**

The House of Representatives passed legislation on May 23, 2019, making significant changes to the rules governing retirement plans. The goal of the legislation is to make it easier to save for retirement. Although the bill is bipartisan and is expected to pass the Senate, Texas Republican Ted Cruz has objected to the removal of a provision regarding home schooling that would have expanded tax advantaged savings accounts to cover K-12 expenses.

## **FACTS:**

On May 23, 2019, the House of Representatives passed an act titled “Setting Every Community Up for Retirement Enhancement Bill of 2019” (HR 1994). The act is known as the SECURE Act. This legislation will result in significant changes to retirement planning vehicles. Assuming passage by the Senate and approval from the executive branch, the changes that will result are summarized below.

## **COMMENT:**

### **Cap on Escalation of Automatic Deferrals Increased**

Automatic enrollment is a retirement plan feature that allows an employer to automatically deduct deferrals from employee wages unless the employee makes an election otherwise. Plans with automatic enrollment specify the percentage of wages that will automatically be deducted if the employee does not elect otherwise. The default deferral percentage starts at 3% and gradually increases. Under current law, the default deferral percentage cannot exceed 10%. Under the SECURE Act, the default deferral percentage maximum will be increased to 15%.

### **Safe Harbor Rules Are Simplified**

Safe harbor retirement plans are retirement plans under IRC Section 401(k) that include an arrangement whereby employers either make a qualifying non-elective contribution or a qualifying matching contribution for employees. A plan qualifying as a safe harbor plan will be deemed to satisfy the ADP (actual deferral percentage) test for elective contributions

and/or the ACP (actual contribution percentage) test for matching contributions.

Employers sponsoring safe harbor plans must satisfy various requirements to achieve the benefits of such plans. One such requirement is that of providing annual notice to employees. The SECURE Act eliminates the requirement of the annual safe harbor notice; however, employees still have the right to make or change their deferral elections at least annually.

Under current law, an employer must elect prior to the beginning of the plan year whether the plan will be a safe harbor plan satisfying the non-elective contribution rules or the matching contribution rules. The SECURE Act allows an employer to amend to non-elective status with a three percent non-elective employer contribution at any time before the 30<sup>th</sup> day prior to the close of the plan year. Amendments closer to the end of the plan year will be permitted if they provide a nonelective contribution of at least four percent of compensation for all eligible employees and are made no later than the last date for distributing excess contributions for the plan year for which amended.

### **Increase in Credit for Small Employer Pension Plan Startup Costs**

Current law provides a tax credit for expenses related to starting a SEP, SIMPLE-IRA or qualified plan for eligible employers. Eligible employers are those with 100 or fewer employees who received \$5,000 or more in compensation in the prior year, had at least one participant who was a non-highly compensated employee; and the employees in the plan were not previously participants in another plan sponsored by the employer through a controlled group or predecessor employer. The current credit is 50% of start-up costs up to \$500 per year. The SECURE Act increases the credit to the greater of (1) \$500; or (2) the lesser of (a) \$250 multiplied by the number of non-highly compensated eligible employees or (b) \$5,000.

### **Small Employer Automatic Enrollment Credit**

The SECURE Act provides a new tax credit for plans that include automatic enrollment. A credit of \$500 per year, in addition to the current startup cost credit, is created to further defray start up costs for 401(k) plans and SIMPLE IRAs that include automatic enrollment.

## **Definition of Compensation Expanded to Include Fellowship and Stipend Payments for Graduate Students**

The amount that can be contributed to an IRA is based on the definition of compensation that can be considered for such purposes. Current law excludes fellowship and stipend payments received by graduate students from the definition of compensation that can be considered for making IRA contributions. The SECURE Act provides that such amounts can be included in income for purposes of calculating the amount that can be contributed to an IRA.

## **Maximum Age for Making IRA Contributions**

Under current law, an individual can no longer make a contribution to a traditional IRA upon reaching the year in which the individual turns age 70 ½. The SECURE Act repeals the maximum age for making IRA contributions.

## **Loans Through Credit Cards Prohibited**

401(k) plans can allow for loans to be made to plan participants. A plan loan to a participant is limited to \$50,000 or 50% of vested balance, whichever is less. The SECURE Act prohibits such loans from being made by the plan through a credit card or similar arrangement.

## **Portability of Lifetime Income Investment Options and Annuities**

Some retirement plans offer an annuity or lifetime income option to retiring participants. Such options typically provide a participant a guaranteed payment for life or some specific period. Retirement plan sponsors sometimes discontinue lifetime income plans. That action can result in surrender fees or early distribution fees to participants who elected a lifetime income option. The SECURE Act provides that a lifetime income investment or annuity can be transferred to another plan via a trustee to trustee transfer in the event that such an investment option is discontinued under the plan in which it was originally offered.

## **Long Term Part-time Workers permitted to participate in 401(k) plans**

Current law allows employer sponsored retirement plans to exclude employees who work less than 1,000 per hours per year. The SECURE Act will require employers to offer a dual eligibility requirement whereby employees must be eligible to participate in the plan if they (1) work at least 1,000 hours in a year; or (2) work at least 500 hours per year in three consecutive years. For purposes of non-discrimination and coverage rules, an employer may elect to exclude employees eligible based on the 500 hour/3 year rule.

### **Increase in Age for Required Minimum Distributions**

Under current law, participants must commence taking distributions in the year in which the participant turns 70 ½ (although the first distribution can be deferred until April 1 following the year in which the participant turns 70 ½). The SECURE Act increases the age for commencing minimum required distributions to age 72.

### **Changes to Required Minimum Distribution Rules**

When the owner of a defined contribution plan account dies prior to distribution of the entirety of the plan balance, specific rules apply to force distribution of the remaining amounts. Current rules allow certain beneficiaries to “stretch” the distributions over their own life expectancy. The SECURE Act requires that distributions other than to a spouse, disabled individual or beneficiary not more than ten years younger than the account owner, or minor beneficiary must be made by the end of the tenth calendar year following the year of the account owner’s death. This rule will substantially eliminate the “stretch”.

### **Penalty Free Withdrawals Permitted in Case of Birth of Child or Adoption**

Generally, distributions prior to reaching age 59 ½ are subject to early withdrawal penalties. Certain exceptions are specified. The SECURE Act adds a new exception to the withdrawals subject to penalties. A penalty free withdrawal of up to \$5,000 may be taken with respect to a “qualified birth or adoption” distribution. Such a withdrawal must be taken during the 1-year period beginning on the date on which a child of the individual was born or on which the adoption was finalized.

## **Plans May be Adopted for prior year If Adopted by Filing Date for Year**

The SECURE Act provides that an employer may adopt a qualified retirement plan effective as of the last day of the taxable year prior to the filing date for such taxable year.

**HOPE THIS HELPS YOU HELP OTHERS MAKE A *POSITIVE* DIFFERENCE!**

*Mary Vandenack*

### **CITE AS:**

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