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January 3, 2024

IRS Notice 2024-2 Provides Guidance for Multiple SECURE 2.0 Provisions

On December 20, 2023, the Internal Revenue Service (IRS) released guidance with respect to certain provisions of the SECURE 2.0 Act of 2022 (SECURE 2.0). Notice 2024-2 (Notice), which is in a Q&A format, is not intended to be comprehensive guidance but rather to offer assistance in commencing implementation of these provisions. The Treasury Department and IRS invite comments on the matters discussed in the Notice. Comments should be submitted by **February 20, 2024**. Additional guidance is anticipated.

Eligible Automatic Contribution Arrangement Required for Newly Established 401(k) and Certain 403(b) Plans

Newly formed 401(k) and 403(b) plans must automatically enroll eligible participants (who do not opt out) using a 3% minimum and 10% maximum contribution rate. Such plans must also provide for an automatic escalation feature that increases employee contributions by 1% per year up to at least 10% (capped at 15% of compensation). The plan must permit a participant to make withdrawals no later than 90 days after the date of the first contribution. For safe harbor plans, the cap on permissible auto escalation is 15%; for non-safe harbor plans, the cap on permissible auto-escalation is 10% prior to 2025; for 2025 and later years, the cap is increased to 15%.

Exclusions: This provision does not apply to: (1) 401(k) and 403(b) plans that were adopted prior to December 29, 2022; (2) governmental or church plans; (3) SIMPLE 401(k) plans; (4) new businesses (in existence for less than three years); and small employers (normally employs 10 or fewer employees).
Effective date: The Act requires new plans established after December 29, 2022, to implement the automatic enrollment mandates in plan years after December 31, 2024, unless otherwise exempt.

Updated Guidance: The IRS confirmed that for purposes of application of this provision, a 401(k) plan is considered to be established on the date it is first adopted, not the date the plan is first effective. Alternately, a 403(b) plan is considered to be subject to the provision if established after the date of enactment, without regard to the date of adoption of the plan's terms. The IRS also provided various scenarios of plan merger and spin-off transactions and the application of the provision related to pre-enactment plans after such transactions.

Credit for Small Employer Startup Costs

Start-up credit – Increases the startup cost credit for employers with between 1 and 50 employees from fifty percent (50%) percent to one hundred percent (100%) up to $5,000. The increase does not apply to plans of employers with between 51 and 100 employees and that credit remains at fifty percent (50%).

Employer Contribution Credit – An additional credit is provided for employer contributions (except in the case of defined benefit plans) equal to 100% in the year in which the plan is established. This credit excludes contributions made for employees earning $100,000 or more in wages.

- **Credit for employers with 50 or fewer employees**
  The amount of the additional credit generally will be a percentage of the amount contributed by the employer on behalf of employees, up to a per-employee cap of $1,000.

Taxable year beginning after the taxable year during which plan is established	Applicable Percentage
Year 1	100%
Year 2	75%
Year 3	50%
Year 4	25%
Year 5	0%

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- **Credit Phase-in for employers with between 51 and 100 employees**
  The credit is reduced by an amount equal to the product of (i) the amount otherwise so determined under paragraph (2), multiplied by (ii) a percentage equal to 2 percentage points for each employee of the employer for the preceding taxable year in excess of 50 employees.

The startup cost tax credit is available to employers starting a new plan by joining a MEP or PEP. The credit will be available for the first three years an employer starts a plan under a MEP or PEP regardless of how long the MEP or PEP has been in existence.

Effective date: Taxable years beginning after December 31, 2022.
Applicable plans: Section 401 defined contribution plans, SEPs, and SIMPLE IRAs.

Updated Guidance: The employer contribution credit is treated as a separate credit from the startup costs credit; an employer could be eligible for both credits. An eligible employer plan is considered established for purposes of determining the first (and subsequent) employer contribution credit taxable years on the date the plan becomes effective with respect to the eligible employer. The IRS also addressed various scenarios for when an employer's eligibility changes and its effect on claiming the credits as well as applicability of the credit to plans established prior to 2023.

Small Financial Incentives for Contributing to the Plan

Employers sponsoring 401(k) and 403(b) plans are able to provide de minimis financial incentives, not paid for with plan assets, such as small gift cards. This incentive can be provided to employees who elect to make contributions to the plan in question via a cash or deferred arrangement or a salary reduction agreement.

Effective date: Plan years beginning after December 31, 2022.
Applicable plans: 401(k) and 403(b) plans.

Updated Guidance: A financial incentive is a de minimis financial incentive only if it does not exceed $250 in value. It may only be offered to employees for whom no election to defer under the plan is already in effect. The Notice clarifies that the payment of the de minimis incentive may be made in installments, including over more than one plan year, in order to incentivize continued deferrals. A de minimis incentive does not include a matching contribution and is not subject to the rules governing contributions, including qualification requirements and deductibility timing.

De minimis incentives constitute remuneration that is includible in the employee's gross income and wages. The incentive is subject to applicable withholding and reporting requirements for employment tax purposes, unless the provision of the de minimis financial incentive satisfies an exception under the Code.

Exception to the 10% Premature Distribution Penalty Tax for Terminally Ill Individuals

SECURE 2.0 created a new exception to the 10 percent additional tax for any distribution made to a terminally ill individual. An individual who has been certified by a physician as having a terminal illness may receive a distribution on or after the date of the certification. A terminally ill individual means an individual who has an illness or physical condition that can reasonably be expected to result in death in 84 months or less after the date of the certification. The employee must furnish sufficient evidence to the plan administrator in the form and manner as the Secretary of the Treasury (Secretary) may require. A terminally ill individual distribution is includible in gross income but is not subject to the 10 percent premature distribution penalty tax. Such distributions may be repaid following rules similar to repayment of qualified birth or adoption distributions.

Effective date: Distributions made after December 31, 2022.
Applicable plans: 401(a) (including a defined benefit plan), 401(k), 403(b), and traditional and Roth IRAs.

Updated Guidance: The Notice provides that certification of terminal illness from a physician to the plan administrator must include the following:

(1) A statement that the individual's illness or physical condition can be reasonably expected to result in death in 84 months or less after the date of certification,
(2) A narrative description of the evidence that was used to support the statement of illness or physical condition,

(3) The name and contact information of the physician making the statement,
(4) The date the physician examined the individual or reviewed the evidence provided by the individual, and the date that the certification is signed by the physician, and
(5) The signature of the physician making the statement, and an attestation from the physician that, by signing the form, the physician confirms that the physician composed the narrative description based on the physician's examination of the individual or the physician's review of the evidence provided by the individual.

The certification as provided to the plan administrator does not need to include the underlying documentation upon which the certification is based. However, the participant or account owner should retain both the underlying documentation and a copy of the certification for the employee's tax records. Self-certification for a terminally ill individual distribution is not allowed.

The distribution must be made on or after the date a physician makes the certification that the employee has a terminal illness.

The provision for a terminally ill individual distribution is optional for a qualified retirement plan, including an IRA. However, the participant must be eligible for a permissible in-service distribution. In general, there is no limit on the amount that an employee is permitted to receive as a terminally ill individual distribution.

If a qualified retirement plan does not permit terminally ill individual distributions and a participant receives an otherwise permissible in-service distribution that meets the requirements of both the permissible in-service distribution and a terminally ill individual distribution, the participant may treat the distribution as a terminally ill individual distribution on their federal income tax return.

Safe Harbor for Corrections of Employee Elective Deferral Failures

Currently there is safe harbor guidance for correction of elective deferral issues, but it is slated to expire in 2023. The Act addresses the issue by providing a statutory safe harbor for the correction of a reasonable administrative error involving automatic contribution or automatic escalation. To meet the safe harbor, errors must be corrected prior to 9½ months after the end of the plan year in which the error occurred and is corrected in a manner that is favorable to the participant and consistently applied to similarly situated participants.

Effective date: Errors falling within the 9½ month correction period after the end of that plan year after December 31, 2023.
Applicable plans: 401(k), 403(b), and 457(b) plans and traditional IRAs.

Updated Guidance: The Notice clarifies that the safe harbor correction method under EPCRS is available for both active and terminated employees provided the notice requirements, including content requirements, are met. The Notice for terminated employees can exclude the following statements which are required for active employees:

(1) The statement that the appropriate amounts have begun to be deducted from compensation and contributed to the plan, and
(2) An explanation that the affected terminated employee may elect an increased deferral percentage to make up for the missed deferral opportunity.

The guidance provides a safe harbor for allocating any missed matching contributions. A corrective allocation of matching contributions (adjusted for earnings) is treated as having been made within a reasonable period if it is made by the last day of the 6th month following the month in which correct deferrals begin (or with respect to a terminated employee, would have begun but for the termination of employment). For automatic contribution errors that began on or before December 31, 2023, a corrective allocation of matching contributions (adjusted for earnings) is considered reasonable if made by the end of the third plan year following year in which the error occurred.

Optional Treatment of Employer Matching or Nonelective Contributions as Roth Contributions

An employer may designate matching contributions or nonelective contributions as Roth contributions, provided that the participant is fully vested in such Roth employer contributions.

Effective date: Contributions made after the effective date of the Act.
Applicable plans: 401(k), 403(b) or governmental 457(b) plans.

Updated Guidance: If this option is provided by the employer, a designation of a matching contribution or nonelective contribution as a Roth contribution must be made by the employee no later than the time that the contribution is allocated to the employee's account and must be irrevocable. Additionally, an employee must be given an effective opportunity to make or change that designation at least once a year.

An employee may only make a Roth designation of matching and/or nonelective contributions if 100% vested at the time of allocation. A plan will not be treated as failing to satisfy section 401(a)(4) merely because the plan provides that an employee may designate a matching contribution or nonelective contribution as a Roth contribution only if the employee is fully vested in that type of contribution at the time the contribution is allocated to the employee's account.

Designated Roth matching contribution or designated Roth nonelective contribution amounts are to be reported on IRS Form 1099-R as an in-plan Roth conversion and includible in the employee's gross income in the taxable year in which the amounts were allocated to the participants account.

Designated Roth matching contributions or designated Roth nonelective contributions are not considered wages for purposes of income tax withholding. Roth matching and/or nonelective contributions to a 401(a)/(k) or 403(b) are not subject to Federal Insurance Contributions Act ("FICA") or Federal Unemployment Tax Act ("FUTA"). However, such contributions to a governmental 457(b) plan may be subject to FICA, but not FUTA.

If a plan defines compensation under the IRC 415(c) safe harbor, designated Roth matching and/or Roth nonelective contributions are not included in the definition. Such amounts are subject to similar tax treatment and separate accounting requirements as Roth elective deferrals.

Plan Amendment Deadlines Updated

Notice 2024-2 extends the plan amendment deadline for required and discretionary amendments as a result of the SECURE Act, section 104 of the Miners Act, sections 2202 or 2203 of the CARES Act relating to Coronavirus-related distributions, section 302 of the Relief Act and the SECURE 2.0 Act as follows:

- Non-governmental 401(a), 401(k) and 403(b) plans – no later than December 31, 2026
- Collectively Bargained 401(a), 401(k) and 403(b) plans – no later than December 31, 2028
- Governmental 401(a) and 403(b) plans – no later than December 31, 2029
- Governmental 457(b) plans – the later of:
    - December 31, 2029, or
    - If applicable, the first day of the first plan year beginning more than 180 days after the date of notification by the Secretary that the plan was administered in a manner that is inconsistent with the requirements of Section 457.
- IRAs – December 31, 2026

The Notice did not extend the amendment deadlines for 457(b) plans sponsored by a non-governmental employer. Absent IRS guidance, the deadline for amending such a plan remains the last day of the 2025 plan year.

IRS Circular 230 Disclosure
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