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# INSIGHT

## IN THIS ISSUE

1 Impact of SECURE 2.0 on Governmental Plans

4 IRS Ruling on Retiree Medical Benefits to Active Employees

4 End of the COVID-19 Public Health Emergency and National Emergency

5 Implications of *Braidwood*: The ACA Preventive Care Decision

# Impact of SECURE 2.0 on Governmental Plans

As discussed briefly in the January 2023 issue of *GRS Insight*, the *SECURE 2.0 Act of 2022* (SECURE 2.0) was passed in late 2022 as part of the *Consolidated Appropriations Act, 2023* (CAA). A number of the SECURE 2.0 provisions have an impact on governmental plans, including:

## Required Minimum Distribution (RMD) Changes (SECURE 2.0: Sections 107, 302, 325 and 327)

Following the lead of the *2019 SECURE Act,* SECURE 2.0 further increases the age to determine a member's required beginning date (RMD age) under Section 401(a)(9) of the Internal Revenue Code (the Code). Specifically, after SECURE 2.0, the following RMD ages apply:

- For members born before July 1, 1949, the RMD age is 70½;
- For members born after June 30, 1949 who attain age 72 before January 1, 2023, the RMD age is 72;
- For members who attain age 72 after December 31, 2022 and age 73 before January 1, 2033, the RMD age is 73; and
- For members who attain age 74 after December 31, 2032, the RMD age is 75.

As written, the Act specifies that the RMD age for people born in years 1951 through 1958 is age 73, while the RMD age for people born in years 1960 and later is age 75. However, in light of the seeming overlap between the age 73 and age 75 groups, additional guidance will be necessary in order to determine the RMD age for those born in 1959. This provision is effective for distributions required to be made after December 31, 2022, for individuals that attain age 72 after that date.

In addition, the Code imposes an excise tax on an individual if the amount distributed to that individual during a taxable year is less than the Required Minimum Distribution (RMD) for that year. Prior to SECURE 2.0, that tax was equal to 50% of the amount by which the RMD exceeds the actual distributions for the year. SECURE 2.0 reduces this excise tax, generally to 25%, for taxable years beginning after December 29, 2022. However, if the individual corrects the deficiency during an approved correction window (generally, the earliest of the mailing of a notice of deficiency, the assessment of the tax, or two years after the year of the deficiency), the excise tax is reduced further, to 10% of the deficiency.

SECURE 2.0 also expands the spousal exception to the RMD beneficiary rules (where the member dies prior to the applicable required beginning date). A spouse that is the sole beneficiary of such member and elects to delay commencement of RMDs after the

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member's death until the member's RMD age will be treated as the employee for RMD purposes, and the applicable distribution period after the member's year of death is determined under the Uniform Lifetime Table (rather than the Single Life Expectancy Table). This provision is effective for calendar years beginning after December 31, 2023.

For defined contribution plans that contain Roth amounts, SECURE 2.0 exempts such amounts from the RMD rules, such that no RMDs are required from Roth amounts prior to a member's death. This provision is effective for RMDs required for taxable years beginning after December 31, 2023.

## Plan Correction Changes (SECURE 2.0: Sections 301 and 305)

SECURE 2.0 changes give plans more flexibility where there is a plan overpayment, in that an eligible plan (not including governmental 457(b) plans) is not required to recover (or attempt to recover) an "inadvertent benefit overpayment." In addition, certain overpayments may be treated as an eligible rollover distribution. However, even if this exception applies for purposes of the Code, plans should consider whether state fiduciary standards may require additional action. This provision is generally effective as of December 29, 2022.

SECURE 2.0 also expanded the self-correction program under the Employee Plans Compliance Resolution System (EPCRS) of Revenue Procedure 2021-30[1]. Prior to SECURE 2.0, plan sponsors had limited opportunities to self-correct plan errors, generally relating to operational failures that were insignificant or corrected within a three-year period. Under SECURE 2.0, any eligible inadvertent failure under a Section 401(a) or 403(b) plan may be self-corrected under EPCRS at any time (regardless of whether the error is insignificant or significant), unless:

- The IRS identified the failure before self-corrective measures commenced; or
- The self-correction was not completed in a reasonable period after the failure was identified.

To qualify, the failure must occur despite established practices and procedures that satisfy EPCRS requirements, meaning they are generally designed to promote and facilitate compliance with the Code. This provision is effective as of December 29, 2022, but future guidance will provide guidelines on corrections.

## Hardship Changes (SECURE 2.0: Sections 312 and 602)

Under SECURE 2.0, a plan administrator may rely on an employee's self-certification that:

- The employee had a safe harbor hardship event for purposes of taking a hardship distribution from a 401(k) or 403(b) plan;
- The distribution is not in excess of the amount required to satisfy the financial need; and
- The employee has no alternative means reasonably available to satisfy the financial need.

A similar rule applies for purposes of unforeseeable emergency distributions from a governmental 457(b) plan. This provision is effective for plan years beginning after December 29, 2022.

SECURE 2.0 also conforms the rules for Section 403(b) plans to those for Section 401(k) plans, permitting a 403(b) plan to distribute Qualified Nonelective Contributions (QNECs), Qualified Matching Contributions (QMACs), and earnings on all eligible contributions, and eliminates the requirement to take a loan prior to a hardship. This provision is effective for plan years beginning after December 31, 2023.

## Code Section 72(t) Changes (SECURE 2.0: Sections 115, 314, 323, 326, 329 and 330)

SECURE 2.0 made a number of changes that impact the 10% early withdrawal tax under Code Section 72(t):

- Adds an exception for qualified public safety employees who have separated from service and have attained 25 years of service (regardless of age). This provision is effective for distributions made after December 29, 2022.
- Expands the definition of a qualified public safety employee to include certain corrections officers and forensic security employees, thus making them eligible for the age 50 and 25 years of service

[1] https://www.irs.gov/pub/irs-drop/rp-21-30.pdf

exception. This provision is effective for distributions made after December 29, 2022.

- Creates an exception for withdrawals from a defined contribution plan (and an in-service distribution right) for “unforeseeable or immediate financial needs relating to personal or family emergency expenses” (generally up to $1,000 and limited in frequency). This provision is effective for distributions made after December 31, 2023, and the withdrawal may be repaid within three years from the day after the date of the distribution.
- Creates an exception for withdrawals from a defined contribution plan (and an in-service distribution right) in the case of domestic abuse (generally capped at $10,000). This provision is effective for distributions made after December 31, 2023, and the withdrawal may be repaid within three years from the day after the date of the distribution.
- Creates an exception for distributions from a defined contribution plan to individuals whose physician certifies that they have an illness or condition that is reasonably expected to result in death in 84 months or less. This provision is effective for distributions after December 29, 2022, and the withdrawal may be repaid within three years from the day after the date of the distribution.
- Clarifies that the exception for substantially equal periodic payments continues to apply after certain rollovers and for certain annuities. This provision is effective for transfers, rollovers, and exchanges after December 31, 2023, and for annuity distributions on or after December 29, 2022.

## Contribution Changes — Defined Contribution Plans (SECURE 2.0: Sections 109, 306, 603 and 604)

SECURE 2.0 made a number of contribution changes that solely impact defined contribution plans, including:

- Increasing the catch-up limit for 401(k), 403(b), and 457(b) plans under Code Section 414(v) for individuals age 60-63 from $7,500 (for 2023) to the greater of $10,000 or 150% of the regular catch-up amount for 2024 (indexed), effective for taxable years beginning after December 31, 2024.
- Eliminating the first day of the month requirement and allows members in governmental 457(b) plans to change their deferral rate at any time before the compensation is available, effective for taxable years beginning after December 29, 2022.
- Limiting catch-up contributions to Roth amounts for members receiving compensation in excess of $145,000 (indexed), effective for taxable years beginning after December 31, 2023.
- Allowing a plan to permit employees to designate employer matching or nonelective contributions as Roth contributions, effective for contributions made after December 29, 2022.

## Miscellaneous Changes (SECURE 2.0: Sections 309, 328 and 331)

In addition, SECURE 2.0 made some other changes that are likely to have a relatively narrow impact:

- For first responders, service-connected disability pension payments received after reaching retirement age are excluded from income up to an annualized excludable amount, which is tied to service-connected excludable disability payments received by the employee during the 12-month period immediately preceding attainment of retirement age. This provision is effective for amounts received with respect to taxable years beginning after December 31, 2026.
- The current exclusion from income for up to $3,000 for distributions made by governmental retirement plans to pay for health insurance premiums of eligible retired public safety officers is expanded to allow the plan to distribute funds directly to the member (and the member must include with their tax return a self-certification that such funds did not exceed the amount paid for premiums in that year). This provision is effective for distributions made after December 29, 2022.
- Provides permanent special rules governing distributions and loans in cases of federally declared disasters. This provision is effective for disasters occurring on or after January 26, 2021, and the withdrawal may be repaid within three years from the day after the date of the distribution.

## Amendments (SECURE 2.0: Section 501)

SECURE 2.0 provides an extended remedial amendment

period, in that any amendments made to governmental plans pursuant to the Act are not required until the end of the 2027 plan year. This extended deadline is available only if the plan is operated in accordance with the amendments as of the applicable effective date and the amendment applies retroactively.

SECURE 2.0 also extends the plan amendment deadlines under the *SECURE Act*, the *Coronavirus Aid, Relief, and Economic Security Act*, and the *Taxpayer Certainty and Disaster Relief Act of 2020* to the same deadline.

## IRS Ruling on Retiree Medical Benefits to Active Employees

Although Section 401(h) was added to the Internal Revenue Code (the Code) in 1962, beyond the publication of underlying regulations, the Internal Revenue Service (IRS) has provided limited guidance on the design and administration of section 401(h) accounts. This lack of guidance has led to uncertainty. For example, guidance has been lacking regarding the interaction of rules allowing in-service pension distributions under Code section 401(a)(36), where such distributions are permitted under plan terms, and the requirement that section 401(h) accounts provide only retiree medical benefits. However, a recent IRS private letter ruling provides some helpful insight.

### Background

A Section 401(h) account allows an employer to fund certain retiree medical expenses, generally through a separate account under a defined benefit plan. An eligible medical expense is defined under the regulations as a payment made for "sickness, accident, hospitalization, and medical expenses of retired employees, their spouses and their dependents." While qualified pension plans are also generally required to pay pension benefits primarily to retired employees, Code Section 401(a)(36) permits distributions to an employee who has reached age 59½, even if such employee is still working. Therefore, the question is raised whether a separation of service is required for an individual to qualify as a retiree eligible to receive benefits under a Section 401(h) account.

### Private Letter Ruling

On February 3, 2023, the IRS released Private Letter Ruling (PLR) 202305001[2] that specifically addresses whether retiree medical distributions from a Section 401(h) account to an individual who is still working, but eligible to receive an in-service pension benefit, would cause the pension plan to lose its qualified status.

In the PLR, the IRS held that where the plan permits members to receive in-service pension benefits under Code section 401(a)(36), such employees meet the definition of "retired employees" under the terms of the plan. Therefore, the payment of retiree medical benefits to such individuals would not impact the plan's qualified status.

However, if separation from service is a condition for receiving pension benefits under the plan, an individual who is still working would not be "retired" for Section 401(h) account purposes, and the Section 401(h) account could not pay the medical expenses of such individual. Consequently, whether a Section 401(h) account can pay medical expenses for a particular individual relies, in part, on a plan's provisions.

While many governmental defined benefit plans do not permit in-service distributions, often due to actuarial implications, this ruling raises an interesting consideration when contemplating such a provision.

## End of the COVID-19 Public Health Emergency and National Emergency

Since early 2020, the COVID-19 Public Health Emergency (PHE) and National Emergency (NE) have been in effect and renewed several times. In January 2023, President Biden stated his intention for the PHE and NE to terminate on May 11, 2023. To address stakeholders' confusion over their obligations after the end of the NE and PHE, the Departments of Treasury, Labor, and Health and Human Services (the Departments) issued FAQs (2023 FAQs)[3] on March 29, 2023. On April 10, 2023, President Biden signed a bipartisan congressional resolution, effective on that date, that terminated the NE early.

[2] https://www.irs.gov/pub/irs-wd/202305001.pdf
[3] https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-58

## End of PHE

- *COVID-19 Testing* – During the PHE, plans and health insurers were required to cover COVID-19 tests without cost-sharing or prior authorization or other medical management techniques, in- and out-of-network. The 2023 FAQs clarify that a COVID-19 test is considered furnished on the date it was rendered or purchased rather than the date the claim is submitted or paid.

  If plans and health insurers choose to change their COVID-19 test coverage after May 11, 2023, and this changes information on the Summary of Benefits and Coverage (SBC), plans and health insurers must provide 60-day advance notice. Notably, the 2023 FAQs state that the prior relief from this requirement only applies if the plan/ health insurer gave notice of the duration of the coverage with respect to the current plan year.

  In addition, the 2023 FAQs specified that the relief provided in Internal Revenue Service (IRS) Notice 2020-15[4], which permits high deductible health plans to cover COVID-19 testing and treatment pre-deductible without affecting HSA eligibility, will continue to apply indefinitely until the IRS issues guidance. Future guidance will apply on a plan year basis, meaning plans and health insurers will not be required to make changes until the next plan year.

- *COVID-19 Vaccines* – During the PHE, plans and health insurers must offer COVID-19 vaccines without cost-sharing, both in- and out-of-network. This requirement will generally continue to apply in-network, but not out-of-network, after May 11, 2023.

- *Employee Assistance Programs* – The Departments issued relief under which employee assistance programs could offer COVID-19 diagnosis, testing, and/or vaccination services without impacting their excepted benefits status. This relief ended on May 11, 2023.

- *MHPAEA* – During the PHE, plans could disregard COVID-19 benefits that were required to be covered without cost-sharing for purposes of the financial requirements and quantitative treatment limitations testing under the Mental Health Parity and Addiction Equity Act (MHPAEA). This relief ended on May 11, 2023.

- *Telehealth* – During the PHE, employers were permitted to offer stand-alone telehealth or remote care benefits to employees that are ineligible for major medical care coverage. This relief ends at the end of the plan year that begins on or before May 11, 2023.

## End of NE

- *Deadline Tolling* – During the NE, certain deadlines were tolled so that they did not run until the earlier of: 1) one year from the date on which they otherwise would have started to run; or 2) the end of the "outbreak period" (60 days after the end of the NE). However, the 2023 FAQs provided that relief would continue either 60 days after "the announced end of the [NE] or another date announced by [the Departments]." The Departments have informally stated that, despite the NE ending on April 10, 2023, the outbreak period will still end 60 days after May 11, 2023, rather than after the end date of the NE. Therefore, the 60-day period will run from May 11, 2023 to July 10, 2023, and deadlines will begin to run again on July 11, 2023. These deadlines are related to COBRA elections, payments, and second qualifying event notices; claims and appeals; external review; and HIPAA special enrollment. To provide clarity, the 2023 FAQs provided examples for stakeholders to understand how the deadlines will begin to run when the outbreak period ends.

- *Qualified Disaster Relief Payments* – Employers' and health insurers' ability to make COVID-19 related tax-free qualified disaster relief payments ended on April 10, 2023.

# Implications of *Braidwood*: The ACA Preventive Care Decision

On March 30, 2023, the District Court for the Northern District of Texas issued an opinion and order in *Braidwood Management Inc. v. Becerra*[5] that vacated

[4] https://www.irs.gov/pub/irs-drop/n-20-15.pdf
[5] https://storage.courtlistener.com/recap/gov.uscourts.txnd.330381/gov.uscourts.txnd.330381.113.0_5.pdf

the implementation and enforcement of key preventive service provisions in the Affordable Care Act (ACA). Most notably, this order enjoined the Departments of Health and Human Services, Labor, and Treasury (the Departments) from implementing and enforcing the ACA's requirement to cover without cost-sharing the United States Preventive Services Task Force (USPSTF) recommended preventive services rated at an "A" or "B" level on or after March 23, 2010. The preventive services recommended by the USPSTF prior to March 23, 2010 are unaffected by the order.

## Background

Six individuals and two businesses challenged the ACA's requirement for non-grandfathered group plans and health insurers to provide certain preventive services without cost-sharing. They challenged this requirement under several constitutional theories and the Religious Freedom Restoration Act (RFRA).

## Court Decision

On September 7, 2022, the District Court ruled partially in favor of the plaintiffs and partially in favor of the government. The District Court dismissed all constitutional claims except that the court held that the USPSTF experts' appointments were unconstitutional under the U.S. Constitution's Appointments Clause since the USPSTF experts were officers of the United States, but were not properly appointed as such. The court also found that the mandate to cover a specialized medication, (pre-exposure prophylaxis (PrEP), which is a preventive medication for HIV contraction) violated the plaintiffs' rights under the RFRA. The court requested supplemental briefings and did not rule on the appropriate remedy.

On March 30, 2023, the court vacated all of the Departments' actions implementing and enforcing the requirement to cover without cost-sharing USPSTF preventive services with "A" or "B" ratings and enjoined enforcement of those requirements in the future. However, the USPSTF recommendations in effect when the ACA was passed on March 23, 2010 were not impacted by the court's ruling because the court found Congress essentially incorporated those recommendations into the ACA. The court also enjoined the Departments from enforcing the mandate to cover PrEP against the plaintiffs.

Other ACA preventive services (such as immunizations recommended by the Advisory Committee on Immunization Practices and screenings and care for women, adolescents, children, and infants recommended by the Health Resources and Services Administration) are not affected by the ruling.

The federal government has appealed this decision to the Fifth Circuit Court of Appeals and requested a stay from both the district court and circuit court. On May 15, 2023, the Fifth Circuit issued an administrative stay that permits the Departments to continue enforcing the ACA's USPSTF preventive services mandate while the court considers the Departments' motion for stay pending appeal. If the government or plaintiffs request an oral argument, the argument might not be scheduled until fall of 2023, unless the parties request expedited consideration.

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