

MEMO# 32118

December 20, 2019

Congress Approves Bipartisan Retirement Legislation

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December 20, 2019 TO: ICI Members
Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension RE: Congress Approves Bipartisan Retirement Legislation

On December 19, 2019, the US Senate approved the Fiscal Year 2020 Consolidated Domestic and International Assistance Package (H.R. 1865), which includes the Setting Every Community Up for Retirement Enhancement Act (the SECURE Act).[\[1\]](#) The US House of Representatives approved the year-end spending package on December 17, 2019 and the President is expected to sign the legislation on Friday, December 20, in order to keep the government funded. The SECURE Act includes several retirement savings provisions and expansion of section 529 savings opportunities, as described below.

As you may remember, the SECURE Act originally passed the House of Representatives in May 2019 as H.R. 1994[\[2\]](#) by an overwhelming majority of 417 to 3.[\[3\]](#) The SECURE Act provisions included in H.R. 1865 generally are the same as H.R. 1994, with the addition of a new section 601 (providing for a remedial plan amendment period) and certain other minor modifications.[\[4\]](#)

Member Input Needed: Several provisions of the legislation contain effective dates that are close at hand, with many requiring implementation as early as the 2020 plan year or taxable year. We are interested in hearing from ICI members about what implementation relief may be helpful for specific provisions, such as the increase to the age for required minimum distributions (section 114), which generally is effective for individuals who attain age 70 1/2 after December 31, 2019. Please contact us if you have input to share.

The SECURE Act does the following:

- Establish Open MEPs (§101). The bill will allow otherwise unrelated employers (of any size) to band together and participate in open multiple employer plan (MEP) arrangements (referred to in the bill as “pooled employer plans” or “PEPs”).[\[5\]](#) Only individual account plans that are qualified under section 401(a) of the Internal Revenue Code (“Code”) or IRA-based could qualify as a PEP. Under the bill, employers could transfer fiduciary responsibility for selecting and monitoring investment options made available through the PEP to another fiduciary. The bill includes important

safeguards for PEPs to ensure the legitimacy of the sponsoring entity and that ERISA fiduciary standards are met, including:

- Participating employers in the PEP would retain fiduciary responsibility for the selection and monitoring of the pooled plan provider, who would be the “named fiduciary.”
- The pooled plan provider would be required to acknowledge in writing that it is a fiduciary to the plan. The pooled plan provider, or its designee, would also be required to fulfill the role of the plan’s “administrator,” which means it ultimately would be responsible for all ERISA statutory disclosure responsibilities. The named fiduciary could delegate recordkeeping and other administrative functions to another entity.
- The pooled plan provider would be required to register with DOL and provide any information required by DOL, including submitting to audits, examinations or investigations by DOL to enforce compliance with legal requirements for pooled plan providers.
- The plan would be prohibited from subjecting participating employers to unreasonable restrictions or fees, or any penalties, that restrict participating employers’ ability to cease participation in, or transfer assets from, the plan. This requirement would not prohibit an investment fund from imposing fees or charges normally assessed to any shareholder or investor in the normal course of business, such as redemption fees.

The bill also eliminates the “one bad apple” rule under the Code, allowing PEPs (as well as other MEPs consisting of related employers) to continue to be treated as satisfying the tax qualification requirements despite the violation of those requirements with respect to one or more participating employers.[\[6\]](#) In the case of a violation of the tax qualification requirements by a participating employer, the bill allows the plan to spin off the portion of the plan’s assets attributable to that participating employer, into a separate plan maintained by that employer.

The provision applies to plan years beginning after December 31, 2020.

- Increase Auto-enrollment Safe Harbor Cap on Auto-escalation (§102). For plans using the automatic enrollment safe harbor, the bill raises from 10 percent to 15 percent the limit on automatic escalation of deferral rates after the first year of enrollment. The provision applies to plan years beginning after December 31, 2019.
- Ease Rules for Safe Harbor 401(k) Plans (§103). The bill eliminates the safe harbor notice requirement for 401(k) safe harbor plans using nonelective contributions (NECs) and permits delayed adoption of NEC safe harbor provisions. The provision applies to plan years beginning after December 31, 2019.
- Expand Small Employer Tax Credits (§§104 and 105). The bill extends a more generous tax incentive to small businesses that start a qualified retirement plan and adds a new tax credit for small businesses that automatically enroll participants. The new credit equals \$500 per year for up to three years for startup costs for new section 401(k) plans and SIMPLE IRA plans that include automatic enrollment, as well as for adding automatic enrollment as a feature of an existing plan. The provisions apply to taxable years beginning after December 31, 2019.
- Expand Compensation for IRA Contribution Purposes (§106). The bill expands the definition of compensation for purposes of making IRA contributions, to include gross income attributable to payments for graduate or post-doctoral study. The provision

applies to taxable years beginning after December 31, 2019.

- **Repeal Maximum Age for Traditional IRA Contributions (§107).** The bill allows taxpayers to continue making contributions to traditional IRAs after reaching age 70-1/2. The provision applies to contributions made for taxable years beginning after December 31, 2019. The provision also reduces the amount of any qualified charitable distributions excluded from income if deductible contributions are made to a traditional IRA after age 70-1/2. The reduction will apply to distributions made for taxable years beginning after December 31, 2019.
- **Prohibit Credit Card Plan Loans (§108).** The bill prohibits plans from making loans through credit cards or “similar arrangements,” effective for loans made after the date of enactment.
- **Permit Distributions Upon Elimination of Certain Lifetime Income Investment Options (§109).** The bill allows distribution of a “lifetime income investment” from a qualified defined contribution (DC) plan, 403(b) plan, or governmental 457(b) plan, within 90 days before the investment is no longer authorized to be held in the plan. The bill requires either a direct trustee-to-trustee transfer of the lifetime income investment to another eligible retirement plan (including an IRA) or distribution of a qualified plan distribution annuity contract. A “lifetime income investment” must have election rights to a “lifetime income feature,” which must either guarantee a minimum level of income at least annually for the participant’s life (or joint lives of the participant and designated beneficiary), or pay an annuity in substantially equal periodic payments at least annually over the participant’s life (or joint lives of the participant and designated beneficiary). The provision applies to plan years beginning after December 31, 2019.
- **Allow 403(b) Custodial Accounts Under Terminated Plans to be Distributed in Kind (§110).** The bill resolves a long-standing problem associated with terminating 403(b) plans funded through individually-owned custodial accounts. Under the bill, Treasury must issue guidance that an individual 403(b) custodial account can be distributed “in kind” to the participant in a terminating plan and that the “distributed” account would retain its 403(b) tax-deferred status. The provision directs that such guidance shall be retroactively effective for taxable years beginning after December 31, 2008.
- **Clarify Retirement Income Account Rules (§111).** The bill clarifies which employees are eligible for a section 403(b)(9) retirement income account (a program provided by a church or a convention or association of churches). The provision applies to years beginning before, on, or after the date of the enactment.
- **Allow 401(k) Plan Participation by Long-Term Part-Time Workers (§112).** The bill requires 401(k) plans (except for collectively-bargained plans) to permit participation by workers who complete at least three consecutive years of service with at least 500 hours of service each year. Such workers would not need to be included in testing for nondiscrimination and coverage requirements or application of the top-heavy rules. The provision applies to plan years beginning after December 31, 2020, except that for determining whether the three consecutive year period has been met, 12-month periods beginning before January 1, 2021 will not be taken into account.
- **Exempt from Early Withdrawal Penalty Certain Distributions for Birth or Adoption of a Child (§113).** The bill adds a new exception from the 10 percent early distribution penalty for qualified withdrawals from a DC plan or IRA for the birth or adoption of a child. Under the new exception:

- Qualified withdrawals are limited to \$5,000 in the aggregate across an individual's accounts with respect to a birth or adoption.
- The withdrawal must be made within one year after the birth or adoption date.
- The distribution may be recontributed to an eligible retirement plan or IRA, subject to certain rules, and is treated as a rollover.

The provision applies to distributions made after December 31, 2019.

- **Increase Age for Required Minimum Distributions (§114).** The bill increases the age at which required minimum distributions (RMDs) must begin, from age 70-1/2 to age 72. The provision is effective for distributions required to be made after December 31, 2019, with respect to individuals who attain age 70½ after December 31, 2019.
- **Provide Funding Relief for Community Newspaper Pension Plans (§115).** The bill provides an alternative pension funding calculation standard for certain specified community newspaper plans. The provision applies to plan years ending after December 31, 2017.
- **Treat Payments to Home Healthcare Workers as Compensation for Purposes of Contributing to a Plan or IRA (§116).** The bill permits home healthcare workers to contribute to a retirement plan or IRA based on compensation (so-called "difficulty of care" payments) that is tax-exempt under Code section 131. The provision applies to plan years beginning after December 31, 2015.
- **Permit Delayed Adoption of a Qualified Retirement Plan (§201).** The bill allows a qualified plan adopted after the close of a taxable year—but by the due date (with extensions) for the employer's tax return for that year—to be treated as in effect as of the close of that taxable year. The provision applies to plans adopted for taxable years beginning after December 31, 2019.
- **Permit Combined Annual Reports for Similar Plans (§202).** The bill directs the IRS and Department of Labor (DOL) to work together to modify Form 5500, Annual Return/Report of Employee Benefit Plan, so that all members of a group of DC plans meeting certain requirements (including having the same trustee, named fiduciary, and plan administrator) may file a single consolidated Form 5500. The consolidated Form 5500 must be implemented not later than January 1, 2022, and shall be effective for returns and reports for plan years beginning after December 31, 2021.
- **Require Lifetime Income Disclosures (§203).** The bill requires DC plans to include an annual lifetime income stream estimate on participant benefit statements, setting forth the lifetime income stream equivalent of the participant's total account balance under the plan. The lifetime income illustration required under the bill mandates a calculation based on an annuity payout. The bill requires DOL to provide a model lifetime income disclosure, issue rules, and prescribe assumptions. The requirement to provide a lifetime income disclosure applies with respect to benefit statements provided more than 12 months after the latest of the issuance by DOL of (1) interim final rules, (2) the model disclosure, or (3) prescribed assumptions.
- **Provide a Fiduciary Safe Harbor for Selecting Annuity Providers (§204).** The bill provides a fiduciary safe harbor for satisfying the prudence requirement with respect to the selection of an insurer for offering guaranteed income contracts under a plan. The provision is effective on the date of enactment.
- **Modify Nondiscrimination Testing Rules for Soft-Frozen Defined Benefit Plans (§205).**

The bill provides nondiscrimination testing relief to defined benefit plans meeting certain requirements, with respect to a closed class of participants. The provision is generally effective on the date of enactment, without regard to whether any plan modifications referred to in the provision are adopted or effective before, on, or after the date of enactment. However, at the election of a plan sponsor, the provision will apply to plan years beginning after December 31, 2013.

- **Modify PBGC Premiums for CSEC Plans (§206).** The bill conforms PBGC premium levels for cooperative and small employer charity (CSEC) plans to funding relief for such plans made permanent in 2013. The provision applies for plan years beginning after December 31, 2018.
- **Provide Benefits to Volunteer Firefighters and Emergency Medical Responders (§301).** The bill extends and increases certain tax benefits provided to qualified volunteer emergency response organizations.^[7] The provision's exclusions are reinstated only for taxable years beginning during 2020.
- **Expand 529 Plans (§302).** The bill expands section 529 plans to permit qualified distributions for:
 - Certain specified apprenticeship program expenses.
 - Qualified education loan repayments for the designated beneficiary or a sibling of the beneficiary, but limited to \$10,000 total over the lifetime of an individual beneficiary.

The provision applies to distributions made after December 31, 2018.

- **Modify RMD Rules for Beneficiary Payments (§401).** The bill modifies the required minimum distribution (RMD) rules for post-death distributions from DC plans and IRAs to beneficiaries. It requires the account to be fully distributed within 10 years following the year of the participant's or IRA owner's death, unless the distribution is made to an "eligible designated beneficiary" (e.g., a surviving spouse, a disabled or chronically ill individual,^[8] an individual who is not more than ten years younger than the participant or IRA owner, or a child of the participant or IRA owner who has not reached the age of majority). The provision is generally effective for required minimum distributions with respect to employees (or IRA owners) with a date of death after December 31, 2019, although there are special rules for certain situations and a delayed effective date for governmental and collectively bargained plans.
- **Increase Failure to File Penalties (§§402 and 403) and Information Sharing (§404).** The bill increases tax penalties for failure to file individual tax returns^[9] and retirement plan returns (e.g., Form 5500). The bill also allows the sharing of tax return information with US Customs and Border Protection for purposes of administering certain excise taxes. The provisions generally apply to returns, statements, and notifications required to be filed, and notices required to be provided, after December 31, 2019. The information sharing provision is effective on the date of enactment.
- **Modify Rules Relating to the Taxation of Unearned Income of Certain Children (§501).** The bill reduces taxes on certain unearned income of children (including military survivor benefits). The provision is generally effective for taxable years beginning after December 31, 2019, although a taxpayer may elect retroactive application for taxable years beginning in 2018, 2019, or both.^[10]
- **Provide a Remedial Amendment Period (§601).** In a new section that was not part of H.R. 1994,^[11] the bill provides for a remedial amendment period for retirement plans

and annuity contracts, such that plan or contract amendments needed to reflect changes under the legislation (including regulatory changes pursuant to the legislation) generally must be adopted by the last day of the first plan year beginning on or after January 1, 2022 (or a later date as provided by Treasury).^[12]

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endnotes

[1] H.R. 1865 is available at https://www.appropriations.senate.gov/imo/media/doc/H1865PLT_44.PDF.

[2] H.R. 1994 is available at <https://www.congress.gov/116/bills/hr1994/BILLS-116hr1994rds.pdf>. A summary of the bill is available at <https://www.congress.gov/bill/116th-congress/house-bill/1994>. The Ways and Means Committee Report (prepared prior to final amendments in the House) is available at <https://www.congress.gov/116/crpt/hrpt65/CRPT-116hrpt65.pdf>.

[3] See ICI Memorandum No. 31774, dated May 24, 2019. Available here: https://www.ici.org/my_ici/memorandum/memo31774.

[4] We note that some changes were made to sections 301, 401, 402, and 501 of the SECURE Act as passed in H.R. 1865, as described later.

[5] The Department of Labor recently finalized regulations providing for association-based MEPs, as well as MEPs sponsored by professional employer organizations. See ICI Memorandum No. 31881, dated August 1, 2019. Available here: https://www.ici.org/my_ici/memorandum/memo31881. Concurrent with the final rule, the Department issued a request for information on open MEPs, with respect to which ICI filed a comment letter. See ICI Memorandum No. 32030, dated October 29, 2019. Available here: https://www.ici.org/my_ici/memorandum/memo32030.

[6] The Treasury Department and IRS recently proposed changes to the regulations relating to the “one bad apple” rule that would similarly provide a process for dealing with violations of qualification requirements by one or more participating employers in a defined contribution MEP, without jeopardizing the tax-qualified status of the entire MEP. See ICI Memorandum No. 31990, dated October 1, 2019. Available here: https://www.ici.org/my_ici/memorandum/memo31990.

[7] This provision in H.R. 1865 includes a new technical correction to correct a section reference in the Code.

[8] This provision in H.R. 1865 includes a new special rule for multi-beneficiary trusts for disabled or chronically ill beneficiaries.

[9] This provision in H.R. 1865 includes updated dollar amounts.

[10] The general effective date of this provision in H.R. 1865 was delayed by one year, as

compared to H.R. 1994.

[\[11\]](#) In H.R. 1994, this remedial amendment period language appeared in section 401 (relating to post-death RMD requirements), but was not applicable to the other bill provisions.

[\[12\]](#) Special deadlines apply in certain situations, such as for governmental plans (for which the deadline is the last day of the first plan year beginning on or after January 1, 2024).

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