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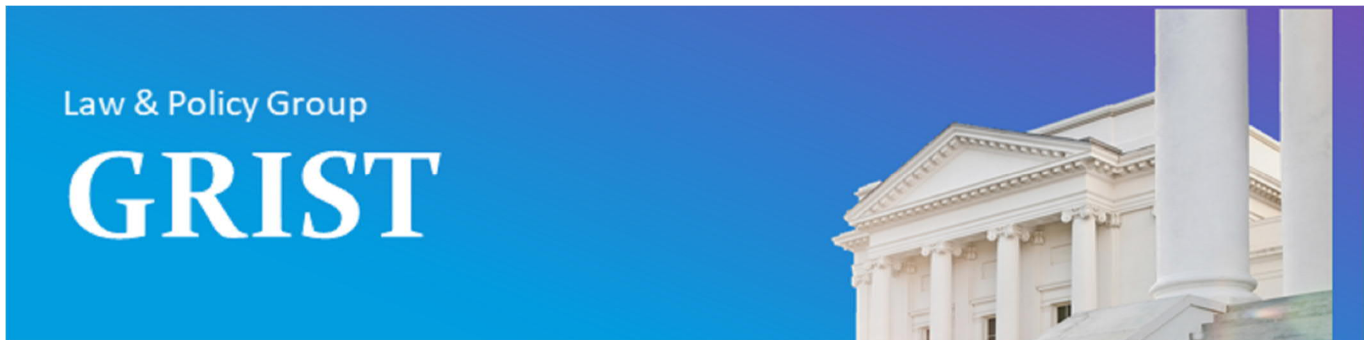

Broad 'SECURE 2.0' retirement bill gets overwhelming House approval

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Major bipartisan retirement legislation — the Securing a Strong Retirement Act of 2022 (SSRA) (HR 2954) — has passed the House in a 414–5 vote. This sets the stage for Senate action and raises hopes that Congress can build on the 2019 Setting Every Community Up for Retirement Enhancement (SECURE) Act (Div. O of Pub. L. No. 116-94) and approve a final "SECURE 2.0" package this year. The wide-ranging bill contains provisions aimed at expanding plan coverage, boosting savings, increasing lifetime income options and streamlining plan administration. Several revenue-raising proposals would direct more workplace savings into after-tax Roth accounts. In addition, the Department of Labor (DOL) would have to review its fiduciary guidance for defined benefit (DB) pension risk transfers. This GRIST highlights key SSRA provisions of interest to employers. Updates to this article on April 18 clarify the scope of the bill's provisions relating to 403(b) plans' investment in collective investment trusts.

SECURE 2.0 action moves to Senate

The House-passed measure carries over most provisions from an earlier version of the bill approved by the Ways and Means Committee and substantially similar legislation — the Retirement Improvement and Savings Enhancement (RISE) Act (HR 5891) — cleared by the Education and Labor Committee. Action now shifts to the Senate, where the Health, Education, Labor and Pensions (HELP) and the Finance committees are working on their own SECURE 2.0 proposals. The committees will need to reconcile those bills, perhaps while negotiating with the House on final legislation that the president could sign later this year. Stand-alone retirement bills don't often pass the Senate, and finding a larger legislative

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vehicle this year to include the retirement provisions could be a challenge. However, a post-election lame-duck measure tying up legislative loose ends could carry a SECURE 2.0 package over the finish line.

Student loan matching payments

The SSRA would let sponsors of 401(k), 403(b), governmental 457(b) and savings incentive match plans for employees (SIMPLE plans) match employees' qualifying student loan payments as if the payments were salary-reduction contributions. Employers offering the benefit would have to make it available to all employees eligible to receive matching contributions on salary deferrals. The match rate and vesting schedules for both salary deferrals and student loan payments would have to be the same. Plans could apply the actual deferral percentage (ADP) test separately to employees who receive these matching contributions. The benefit would apply only to repayments of student loan debt incurred for higher education, and employers could rely on an employee certification that the loan repayments were made.

Mandated automatic enrollment and escalation for new plans

New 401(k) and 403(b) plans adopted after the SSRA's enactment would have to offer automatic contribution and escalation features beginning in 2024. The requirement would also apply to employers that first begin participating in a multiple-employer plan (MEP) after enactment, even if the plan was established before enactment. Small employers with fewer than 10 employees, new employers in business less than three years, and sponsors of governmental and church plans would be exempt from the requirement.

Plans (or new employers in a MEP) subject to this requirement would have to automatically enroll new participants at a deferral rate between 3% and 10%, with auto-escalation at a rate of one percentage point per year up to a specified cap. For safe harbor automatic contribution arrangements, the maximum would be 15%. For non-safe harbor arrangements, the cap would be 10% for plan years ending before 2025 and 15% for later plan years.

Employees could opt out of automatic enrollment or choose a different contribution percentage. Plans would have to allow those employees to withdraw their contributions within 90 days after the first automatic deferral.

Expanded coverage of part-time workers

The SSRA would allow some part-time workers to participate in workplace retirement plans a year earlier than they currently are eligible. Sponsors of noncollectively bargained 401(k) and 403(b) plans would have to let part-time workers voluntarily contribute to the plan if they have completed at least 500 hours of service in two consecutive years (reduced from three) and have attained age 21. Pre-2021 service would not be counted, but some part-time employees could still be eligible as early as the 2023 plan year.

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Defined contribution plan distribution changes

The bill would make the following changes to the distribution rules for defined contribution (DC) plans:

- **Three-year limit for repaying qualified birth or adoption distributions (QBOADs).** Current law does not limit the period during which a QBOAD may be repaid to the plan and qualify as a rollover contribution. The bill would restrict the repayment period to three years.
- **Self-certification of hardship.** Employers could rely on an employee's certification of meeting two requirements:
  - The employee has experienced a hardship event qualifying for a hardship withdrawal from a 401(k) or 403(b) plan or an unforeseeable emergency distribution from a governmental 457(b) plan.
  - The distribution does not exceed the employee's financial need.
- **Penalty-free withdrawals in cases of domestic abuse.** Penalty-free early withdrawals up to $10,000 (or 50% of the value of the vested benefit, if less) would be available to victims of domestic abuse by a spouse or a domestic partner. Eligible distributions could be repaid to any eligible retirement plan within three years, subject to certain requirements.

Required minimum distribution changes

The bill would make a number of changes to Internal Revenue Code Section 401(a)(9) rules for required minimum distributions (RMDs):

- **Starting age.** A participant's RMD start date would increase from the current age of 72 to age 73 in 2023, age 74 in 2030 and age 75 in 2033.
- **Actuarial increase for defined benefit (DB) plan participants.** The bill would clarify that DB plan participants who retire after the year in which they turn age 70-1/2 are still entitled to an actuarial increase for the period after age 70-1/2 when they are not receiving distributions. This is a technical correction to the SECURE Act, which some practitioners read as limiting the increase to participants who retire after age 72. (This interpretation is also reflected in a recently proposed IRS regulation on Section 401(a)(9).)
- **Removal of certain barriers to life annuities.** DC plans could offer annuity options with certain increasing or accelerated payment features — such as guaranteed increases of up to 5% (if applied at least annually), full or partial lump sum commutations, and return of premium death payments — without violating the RMD rules.
- **Reduced penalty tax.** The excise tax for failure to take an RMD would decrease from 50% to 25% beginning in 2023. For RMDs from individual retirement accounts (IRAs), the excise tax would further drop to 10% if the failure is corrected before the earlier of (i) the date IRS initiates an audit

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concerning the failure or (ii) the end of the second tax year beginning after the end of tax year in which the penalty is imposed.

DOL required to revisit pension risk transfer guidance

The bill directs DOL to review its current guidance on how ERISA's fiduciary standards apply when a DB plan sponsor outsources some or all of its pension risk by purchasing annuities from an insurance company or other provider. These pension risk transfers have drawn fire from some policymakers who say that participants' benefits are potentially at risk if the annuity provider goes out of business or otherwise cannot meet its contractual obligations.

The SECURE Act created a safe harbor for DC plan fiduciaries selecting annuity providers, but it didn't apply to DB plans. The SSRA would require DOL to determine whether Interpretive Bulletin (IB) 95-1 (29 CFR § 2509.95-1) needs amendments and report the findings, including an assessment of any risk to participants, to Congress within one year.

Qualified longevity annuity contracts

Qualified longevity annuity contracts (QLACs) let employees use a portion of their retirement savings to purchase an annuity starting as late as age 85 without violating the RMD rules. The bill directs Treasury to amend its QLAC regulations within a year of the bill's enactment as follows:

- **Premiums.** QLAC premiums would no longer be limited to 25% of the account balance.
- **Joint and survivor benefits after divorce.** The bill would clarify the rules for joint and survivor benefits for married participants who divorce after purchasing a QLAC but before payments begin. The changes would facilitate the sale of QLACs with survivor protection.
- **"Free look" periods.** The regulatory prohibitions on QLACs having commutation benefits, cash surrender rights and similar benefits would not prevent the insurer from providing a rescission period of up to 90 days.

Expanded Self-Correction Program

The bill would significantly expand the Self-Correction Program (SCP) under IRS's Employee Plans Compliance Resolution System (EPCRS) and add a new safe harbor correction for elective deferral failures:

- **Inadvertent errors.** Plans could use the SCP to correct eligible inadvertent failures at any time before Treasury identifies the error. Eligible inadvertent failures would include those that occur despite practices and procedures reasonably designed to promote and facilitate overall compliance with applicable IRC requirements. Plans could not use SCP to correct failures that are egregious, involve the diversion or misuse of plan assets, or directly or indirectly relate to an abusive tax avoidance transaction.

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- **Loan failures and the Voluntary Fiduciary Correction Program (VFCP).** The bill would make the SCP available for more plan loan failures and require DOL to treat inadvertent loan failures corrected under the SCP as meeting VFCP requirements.
- **Safe harbor corrections.** EPCRS would provide more safe harbors for correcting inadvertent errors, including a safe harbor method for calculating earnings that must be restored to a plan.
- **Additional safe harbor correction for elective deferral failures.** In addition to expanding the SCP, the bill would give plans 9-1/2 months after plan year-end to correct — without penalty — reasonable errors in administering automatic enrollment and automatic escalation. This would make permanent one of the temporary safe harbor corrections available under EPCRS that are currently scheduled to sunset at the end of 2023.
- **Correction by IRA custodians.** The bill directs Treasury to expand EPCRS to allow IRA custodians to correct inadvertent errors.

Recovery of retirement plan overpayments

The bill would give retirement plan fiduciaries the latitude to decide not to recoup certain inadvertent benefit overpayments. If plan fiduciaries choose to recoup overpayments, limitations and protections would apply to safeguard retirees and their beneficiaries, including a prohibition on charging interest and curbs on threatening litigation and using collection agencies. Notably, fiduciaries wouldn't be able to recoup overpayments from a participant or a beneficiary if the first overpayment occurred more than three years before the participant or beneficiary first receives written notice of the error.

These limitations wouldn't apply to participants and beneficiaries who are culpable for the overpayment (including those who knew or should have known that the payments were materially in excess of the correct amount). The limitations also wouldn't apply to recoupment arrangements in place prior to the SSRA's enactment.

Reporting and disclosure

Several provisions aim to simplify reporting and disclosure requirements, though the bill also would require DC plans to deliver at least one annual paper benefit statement:

- **Annual paper benefit statement.** The bill would require DC plans to deliver at least one paper benefit statement per year (one every three years for DB plans) beginning in 2024, unless a participant affirmatively requests electronic delivery. In addition to summarizing the participant's benefits, the paper statement would contain information on how participants can opt out of receiving the paper disclosure or request delivery of some or all disclosures on paper for no additional cost. This change wouldn't apply to benefit statements furnished electronically to current employees under DOL's 2002 regulatory safe harbor for e-delivery, but only if the plan provides a one-time paper notice informing those employees about their ability to request paper copies of required disclosures.

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- **Joint agency report.** Treasury, DOL and the Pension Benefit Guaranty Corp. (PBGC) would have to review how to consolidate, simplify, and standardize reporting and disclosure requirements. The agencies would have to consult with participant and employer representatives and report recommendations to Congress within two years of the bill’s enactment.
- **Blended performance benchmarks for asset allocation funds.** DOL’s current participant investment disclosure rules for DC plans only allow blended benchmarks as a supplement to a broad-based securities market index. Within one year of the bill’s enactment, DOL would have to issue new guidance allowing (but not requiring) DC plan administrators to benchmark a designated investment alternative holding a mix of asset classes — such as a target-date or balanced fund — against a blend of securities market indices reasonably representative of the fund’s asset holdings. DOL would also need to report to Congress on the effectiveness of the agency’s regulatory benchmarking requirements within three years.
- **Simplified disclosure for nonparticipating employees.** Starting in 2023, DC plans would only have to provide an annual reminder notice to employees who received the plan’s summary plan description (SPD) and other required disclosures on first becoming eligible, but chose not to participate and have no account balance. Nonparticipating eligible employees could continue to request any documents available to participants.

Retirement savings lost and found

The bill would require DOL, in consultation with Treasury, to establish within two years an online searchable database of information about retirement benefits. Plan administrators would have to provide DOL with information about current and former participants to enable the agency to construct and operate the database — called the Retirement Savings Lost and Found. Individuals who had been a retirement plan participant or beneficiary would be able to search the database to get contact information for the plan’s administrator.

Provisions specific to 403(b) plans

Several of the bill’s provisions relate specifically to 403(b) plans:

- **Investment in group trusts.** The bill would expand the IRC’s list of permitted investments for 403(b) custodial accounts to include collective investment trusts (CITs) beginning in 2023. The IRC currently allows these accounts to invest only in mutual funds. CITs — which are managed by banks or trust companies — are generally less expensive than mutual funds. In recent years, many private-sector 401(k) plans have shifted to CITs. Even with the IRC change, CIT providers would likely want to see several technical revisions to federal securities laws before admitting 403(b) plans sponsored by tax-exempt organizations. Although included in earlier versions of the bill, those changes were dropped just before House approval due to committee jurisdictional issues. Still, any final Senate legislation is expected to include this provision, along with the necessary securities law amendments.

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- **MEP reforms expanded.** The SECURE Act's provisions allowing pooled employer plans (PEPs) would be expanded to permit multiple employer 403(b) plans.
- **403(b) hardship rules conformed to 401(k) rules.** A revenue-raising provision would conform the 403(b) plan hardship rules to the 401(k) hardship rules. While current law allows hardship distributions of employee contributions (without interest) from 403(b) plans, the bill would allow such distributions from qualified matching contributions, qualified nonelective contributions and account earnings.

Provisions of interest to small employers

Some provisions will be of special interest to small employers:

- **Increased start-up tax credits.** Starting in 2023, the current retirement plan start-up tax credit for 50% of administrative costs would increase to 100% (capped at $5,000 per year) for employers with 50 or fewer employees. The credit for employees with 51–100 employees would remain at 50%, but additional credits would be available to all employers with up to 100 employees that contribute to DC plans on behalf of employees.
- **Start-up credits extended to MEPs.** Small employers that join a MEP — including a PEP — could claim the start-up credit for their first three years in the MEP, regardless of how long the MEP has existed.
- **Military spouse eligibility credit.** Small employers could receive a three-year tax credit if they (i) make employees who are military spouses eligible for DC plan participation within two months of hire, (ii) let eligible military spouses receive any matching or nonelective contribution they would otherwise have been eligible to receive at two years of service, and (iii) immediately vest 100% of all employer contributions for military spouses. The credit would apply only to contributions for military spouses who are not highly compensated employees.

Miscellaneous provisions

Other miscellaneous provisions that might be of interest to employers include:

- **Catch-up contribution limits.** Beginning in 2024, qualified and 403(b) plans could allow larger catch-up contributions of up to $10,000 for individuals who will be at least age 62 but less than age 65 by the end of the tax year. The maximum catch-up contribution for SIMPLE plans would increase to $5,000. All catch-up contribution limits (including the current $1,000 limit for IRAs) would undergo annual cost-of-living increases.
- **Cashout limit increased.** The permissible mandatory cashout limit would increase from $5,000 to $7,000 for distributions beginning in 2023.

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- **Administrative clarification for PEPs.** A PEP could designate a named fiduciary — other than a participating employer — to be responsible for implementing written contribution-collection procedures and collecting contributions to the plan.
- **457(b) deferrals.** Governmental 457(b) plans could allow employees to change their deferral rates at any time before the deferred compensation would otherwise have been available to the employees. Current rules require making the change before the month of deferral.
- **Retroactive benefit accrual amendments allowed.** Retroactive amendments to increase benefits (except matching contributions) for a plan year beginning in 2024 or later could be made by the due date of the employer's tax return for the tax year that includes the plan year. This would give existing plans the same flexibility to retroactively enhance benefits that the SECURE Act provided by allowing employers to retroactively sponsor new plans.
- **Separate application of top-heavy rules to DC plans covering excludable employees.** Employers could perform separate top-heavy tests on nonexcludable and excludable employees. This provision is intended to remove the financial incentive for many small employers to limit participation in their retirement plan.
- **Enhancement of saver's credit.** Beginning in 2027, the saver's credit for eligible taxpayers who contribute to an employer-sponsored retirement plan or a traditional and/or Roth IRA would increase, subject to limits based on annual income. The credit would phase out at certain dollar limits that would be indexed for inflation. The bill omits an earlier proposal from Democrats to make the credit refundable and payable only to workplace retirement plans or IRAs. The bill also instructs Treasury to take steps to increase public awareness of the saver's credit and report to Congress on the department's anticipated efforts in this area within 90 days of the bill's enactment.
- **Small financial incentives for contributing to plans.** Employers could offer small financial incentives (e.g., gift cards) — without violating ERISA's prohibited transaction rules — to encourage employees to participate in a 401(k) or 403(b) plan. The bill doesn't define a monetary threshold for these financial incentives or address their taxability to employees.

Revenue-raising provisions

- **Mandated Roth treatment for catch-up contributions.** Beginning in 2023, 401(k), 403(b) and governmental 457(b) plan participants age 50 or older could only make catch-up contributions on a Roth (i.e., after-tax) basis.
- **Matching contributions permitted on Roth basis.** Employers could permit employees to elect to have some of all of their matching contributions treated as Roth contributions under 401(k), 403(b) or governmental 457(b) plans.
- **Roth contributions allowed for SIMPLE and SEP plans.** Employers could let employees elect Roth treatment of both employer and employee contributions to SIMPLE plans and simplified

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employee pension (SEP) plans. All contributions to these plans must be pretax under current law, and SEPs currently cannot receive employee contributions.

Related resources

Non-Mercer resources

- HR 2954, the Securing a Strong Retirement Act of 2022 (Congress, March 29, 2022)
- Section-by-section explanation of HR 2954 (House Ways and Means Committee, March 28, 2022)
- Estimated revenue effects of the Securing a Strong Retirement Act of 2021 (Joint Committee on Taxation, March 28, 2022)
- HR 5891, the RISE Act (Congress, Nov. 5, 2021)
- Section-by-section explanation of the RISE Act (House Committee on Education and Labor, Nov. 5, 2021)

Mercer Law & Policy resources

- Host of retirement bills may hitch ride on final SECURE 2.0 package (March 25, 2022)
- 2022 legislative, regulatory and judicial outlook for retirement plans (March 15, 2022)
- House retirement bill advances, seeks scrutiny of pension risk transfers (Nov. 15, 2021)
- Senate bills seek spousal consent for DC plans, expanded saver's credit (July 29, 2021)
- Senators revive major retirement reform legislation (May 28, 2021)
- Senate bill boosts PEPs, eases fixes for plans with automatic features (May 24, 2021)
- Major bipartisan retirement reform bill gets House committee approval (May 6, 2021)

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