February 6, 2025

IRS RELEASES PROPOSED MANDATORY AUTOMATIC ENROLLMENT REGULATION

The Internal Revenue Service (IRS) has issued a proposed regulation, providing guidance for employers that are required to include an automatic enrollment provision with their 401(k) or 403(b) plan in order to comply with the SECURE 2.0 Act of 2022 (SECURE 2.0).

Background

When Congress passed SECURE 2.0, it included a provision that requires most employers who establish a 401(k) or 403(b) plan on or after December 29, 2022, to include an eligible automatic contribution arrangement (EACA) as part of their retirement plan by the beginning of the 2025 plan year. Plans established before December 29, 2022, (known as pre-enactment plans), are not required to comply with the mandatory automatic enrollment provision. The proposed regulation explains how to meet the mandatory automatic enrollment requirements. Previously, the IRS released Notice 2024-02, which provided guidance in a question and answer format in order to help employers implement mandatory automatic enrollment, among other SECURE 2.0 provisions.

Mandatory Automatic Enrollment Requirements Defined by Proposed Treasury Regulation 1.414A-1

The newly proposed Treasury Regulation (Treas. Reg.) 1.414A-1 provides guidance on applying the mandatory automatic enrollment requirements as required by Section 101 of SECURE 2.0. It states that a 401(k) or 403(b) plan must meet the following mandatory automatic enrollment requirements or satisfy the exception criteria described below to be considered a qualified retirement plan.

- **Plan Year Determination.** The determination as to whether a 401(k) or 403(b) plan meets the mandatory automatic enrollment criteria will be made on a plan year basis.
- **Long-Term, Part-Time Employees.** The proposed regulation states that a 401(k) or 403(b) plan will satisfy the mandatory automatic enrollment requirement only if the plan provides an EACA that covers all employees in the plan who are eligible to elect to have contributions made on their behalf. This includes long-term, part-time employees.
- **Exception for Employees with an Affirmative Election.** An EACA will not fail to satisfy the mandatory automatic enrollment requirements merely because the default election under the EACA does not apply to an employee who, on the date that the plan is first required to satisfy the mandatory automatic enrollment requirements, had an affirmative election in effect (and that remains in effect). This exception applies even if an employee affirmatively elects to have contributions made in a different amount or opts out of making any contributions to the plan.
- **Permissible Withdrawals.** An EACA will satisfy the mandatory automatic enrollment requirements only if the plan that includes the EACA allows employees to request a permissible withdrawal of any default elective contributions made under the EACA.

- **Contribution Requirements.** An EACA will satisfy the mandatory automatic enrollment requirements only if the default election set for an employee under the EACA is a uniform percentage of each employee's compensation. This default election will not apply if the employee elects to contribute a different amount or not to contribute to the plan.
    - Each employee's default contribution percentage during the "initial period" (i.e., the first year of participation) must be a uniform percentage ranging from 3 percent to 10 percent of compensation. The initial period begins when an employee is first eligible to elect to have contributions made, or if later, when the plan is first required to satisfy the mandatory automatic enrollment requirements. The employee's initial period ends on the last day of the following plan year.
    - For each year after an employee's initial period, the default contribution percentage must increase by one percentage point until the percentage is at least 10 percent (not to exceed 15 percent).
    - The proposed regulation allows an employer to design its plan to redetermine an employee's initial period if no default elective deferrals are made for an entire plan year after the employee's initial period began. This option applies to both employees who became ineligible (e.g., rehired employees) and to those who have made an affirmative election (e.g., employees who have affirmative elections below the default rate are automatically re-enrolled).
- **Investment Requirements.** Contributions made under an EACA without a participant investment election in place must follow the qualified default investment alternative (QDIA) regulation requirements.

Exceptions for Certain Types of Retirement Plans and Businesses

The mandatory automatic enrollment requirements do not apply to SIMPLE 401(k) plans, governmental plans as described in Internal Revenue Code Section (IRC Sec.) 414(d), or church plans as described in IRC Sec. 414(e). Certain businesses are also exempt from the mandatory automatic enrollment requirements.

- **New Businesses.** The proposed regulation states that the mandatory automatic enrollment requirements do not apply to a 401(k) or 403(b) plan for a plan year if, as of the beginning of the plan year, the employer maintaining the plan (aggregated with any predecessor employer) has been in existence for less than three years.
- **Small Businesses.** The proposed regulation clarifies that the mandatory automatic enrollment requirements do not apply to any 401(k) or 403(b) plan before the first plan year that begins at least 12 months after the close of the first taxable year of the employer maintaining the plan with respect to which that employer normally employed more than 10 employees. The proposed regulation also states that the number of employees that the employer normally employs for a taxable year is determined using the rules of Q&A-5 of Treas. Reg. Sec. 54.4980B-2, which employers rely on for determining whether they are subject to COBRA continuation coverage.
    - An employer is considered to have normally employed fewer than 11 employees during a particular calendar year if it had fewer than 11 employees on at least 50 percent of its typical business days during that year.
    - All full-time and part-time common-law employees are taken into account in determining whether an employer had fewer than 11 employees (self-employed individuals and directors are not counted).
    - Each full-time employee is counted as one employee and each part-time employee is counted as a fraction of an employee, determined in accordance with paragraph (e) of Q&A-5 of Treas. Reg. 54.4980B-2.
- **Multiple Employer Plans (MEPs).** The proposed regulation clarifies that the phrase "a plan maintained by more than one employer" refers to a multiple employer plan (MEP), including pooled employer plans (PEPs). The exceptions for new and small businesses discussed previously will apply on an employer-by-employer basis for those employers that participate in a MEP.

Implications for Pre-Enactment Plans

401(k) plans that allow elective deferrals under a cash or deferred arrangement (CODA) are not subject to the mandatory automatic enrollment requirements if the plan terms providing for the elective deferrals were initially adopted before December 29, 2022—even if the plan terms providing for the elective deferrals are effective after that date. The same holds true for a 403(b) plan initially adopted before December 29, 2022, without regard to when the plan terms providing for salary reduction agreements were adopted. These plans are referred to as "pre-enactment plans."

- **Plan Amendments.** The proposed regulation clarifies that a plan will not lose its pre-enactment status merely because the plan is amended, provided that the amendment is not related to the adoption of a MEP or a plan merger. This is true even if the plan amendment expands eligibility for employees of the employer that maintains the 401(k) or 403(b) plan or allows employees of another employer in the same controlled group to make elective deferrals or to enter into a salary reduction agreement.
- **Merger of Pre-Enactment Plans.** If two pre-enactment plans are merged, then the surviving merged plan will be treated as a pre-enactment plan. If a pre-enactment plan is merged with a plan that does not allow elective deferrals or permit any salary reduction agreements, then the merged plan will continue to be a pre-enactment plan after the merger. If either of these pre-enactment plans are MEPs, then the merger will not affect whether the merged plan is treated as a pre-enactment plan for any employer that maintained the MEP before the merger.

Implications for Post-Enactment Plans

Generally, 401(k) plans that do not allow elective deferrals and 403(b) plans that do not permit a salary reduction agreement as of December 29, 2022, are subject to the mandatory automatic enrollment requirements. These plans are referred to as "post-enactment plans".

- **Merger of Post-Enactment Plan with a Pre-Enactment Plan.** Generally, the merger of a post-enactment plan with a pre-enactment plan results in the surviving plan being treated as a post-enactment plan that is required to meet the mandatory automatic enrollment criteria.
- **Exception for Certain Business Transactions.** A pre-enactment plan will continue to be treated as a pre-enactment plan after a merger with a post-enactment plan if
  - the transaction is an asset or stock acquisition, merger or other similar transaction described in Treas. Reg. 1.410(b)-2(f) (business transaction),
  - the pre-enactment plan is designated as the ongoing plan, and
  - the plan merger occurs within the transition period described in IRC Sec. 410(b)(6)(C)(ii).
- **Merger of Post-Enactment Single Employer Plan into a MEP.** The business transaction exception also applies in certain situations in which a single-employer post-enactment plan is merged into a MEP. According to the proposed regulation, the MEP will be treated as a pre-enactment plan with respect to the employer sponsoring the merged-in plan (i.e., the MEP participating employer) if the MEP was already considered a pre-enactment plan with respect to the MEP participating employer before the business transaction.

Implications for MEPs

Neither an employer's adoption of a MEP nor a merger of an employer's plan into a MEP after December 29, 2022, would affect whether the MEP is treated as a pre-enactment plan for any other employer maintaining the plan.

- **Adoption of a MEP.** An employer that adopts a MEP after December 29, 2022, will treat the MEP as a post-enactment plan with respect to that employer. But this treatment will not affect employers who adopted the MEP on or before December 29, 2022.
- **Merger with a MEP.** An employer that merges a pre-enactment plan into a MEP after December 29, 2022, will treat the post-merger MEP as a pre-enactment plan with respect to that employer. This rule applies regardless of the MEP's establishment date. But, if an employer merges a post-enactment plan into a pre-enactment MEP after December 29, 2022, the employer will generally treat the MEP as a post-enactment plan with respect to that employer, after the merger.

Implications for Spin-Off Plans

Similar to Notice 2024-02, the proposed regulation states that if a portion of a pre-enactment plan is spun off, the resulting spin-off plan will also be treated as a pre-enactment plan if either

- the plan from which the spin-off occurred was not a MEP, or
- the plan from which the spin-off occurred was a MEP that was treated as a pre-enactment plan with respect to the employer maintaining the spun-off plan.

Implications for Multiemployer Plans and Controlled Groups

The proposed regulation states that "a plan maintained by more than one employer" would be interpreted *not* to include a multiemployer plan or a plan maintained by members of a controlled group.

- **Multiemployer Plan.** A pre-enactment multiemployer plan would continue to be treated as a pre-enactment plan for an employer that adopts the plan after December 29, 2022, or for an employer that maintains a plan that is merged into the multiemployer plan after December 29, 2022 (regardless of the date that the merged-in plan was established).
- **Controlled Group.** A pre-enactment plan would continue to be treated as a pre-enactment plan for additional members of an employer's controlled group if eligibility to participate in the plan is expanded to include employees of those employers after December 29, 2022.

Implications for Pension Linked Emergency Savings Accounts (PLESAs)

The proposed regulation states that an affirmative election to contribute to a pension linked emergency saving account (PLESA) would be considered an affirmative election under a 401(k) plan that permits elective deferrals or a salary reduction agreement under a 403(b) plan if the plan is subject to the mandatory automatic enrollment requirements and permits participants to contribute to a PLESA. But, automatic contributions to a PLESA could not be used to satisfy the mandatory automatic enrollment requirements under IRC Sec. 414A because automatic contributions to a PLESA are not invested in accordance with the QDIA regulations.

Integration of Mandatory Automatic Enrollment Requirements into Existing Treasury Regulations

The proposed regulation also provides details regarding amendments to Treas. Reg. 1.414(w)-1. The regulatory amendments are designed to align with the mandatory automatic enrollment requirements described in Section 101 of SECURE 2.0. They also support SECURE 2.0 provisions that allow employers to forego sending annual EACA notices to unenrolled participants (Section 320) and to combine two or more mandatory notices (Sections 127 and 341). Treas. Reg. 1.414(w)-1 generally provides guidance on the topic of permissible withdrawals from a plan with an EACA, but it also details the criteria required to be considered an EACA. The proposed regulation amends subsections of Treas. Reg. 1.414(w)-1 in the following ways.

- **Employees Covered by an EACA.** Treas. Reg. 1.414(w)-1(b)(1) currently states that a plan with an EACA provision is not required to cover all employees who are eligible to elect to make contributions. The proposed amendments clarify that in order to satisfy the mandatory automatic enrollment requirements, the newly proposed Treas. Reg. 1.414A-1 will override this existing rule and require an EACA to cover *all* employees who are eligible to elect to make contributions.
- **Special Notice Rules for Unenrolled Participants.** An “unenrolled participant” is generally considered an employee who chooses not to participate in a plan even though he is eligible to participate and has received a summary plan description and other required eligibility notices. The proposed amendment states that an unenrolled participant will not need to receive an annual EACA notice as long as the participant is provided with the following notices as described in IRC Sec. 414(bb)(1).
    - An annual notice reminding the participant of his ability to participate in the plan and any deadlines to make a deferral election.
    - Any document that the participant requests (if the participant would be otherwise entitled to receive the requested document).
- **Consolidation of Notices.** The proposed amendment generally permits an employer to combine the EACA notice with one or more other required notices—including a QDIA notice, an automatic enrollment notice, a safe harbor notice, and an EACA permissible withdrawal notice. The combined notice must
    - include the required content,
    - identify the issues addressed in a clear manner,
    - be provided at the time and with the frequency required for each notice,
    - be presented in a manner that is reasonably thought to be understood by the average participant, and
    - not obscure or fail to highlight the primary information required for each notice.

Effective Dates

IRC Sec. 414A applies to plan years beginning after December 31, 2024. The proposed regulation applies to plan years that begin more than six months after the date that final regulations under IRC Sec. 414A are issued. For earlier plan years, a plan would be treated as having complied with IRC Sec. 414A if the plan complies with a reasonable, good faith interpretation of IRC Sec. 414A.

Also, because the proposed mandatory automatic enrollment rules require an EACA to include all eligible employees starting with the 2025 plan year, the IRS states that employees who (1) became eligible to participate before the first day of the 2025 plan year; (2) did not have an affirmative election in effect; and (3) were not automatically enrolled at the start of the 2025 plan year must be automatically enrolled under the EACA on the first day of the first plan year that the final regulations apply (the “first applicable plan year”). Employers may use one of the following options to determine the default contribution percentage for impacted employees.

- The default contribution percentage would be the percentage that would apply under the EACA had the employees been automatically enrolled starting on the first day of the 2025 plan year.
- Alternatively, plan terms could provide for the redetermination of the initial period. In that case, the default contribution percentage would be the percentage that would apply under the EACA had the employees been automatically enrolled starting on the first day of the first applicable plan year.

Next Steps

The IRS is accepting written comments on this proposed regulation until March 17, 2025, and has scheduled a public hearing on April 8, 2025. Visit ascensus.com for the latest developments on this and other essential legislative and regulatory updates.