On December 29, 2022, the "Securing a Strong Retirement" Act (the "SECURE 2.0 Act" or "Act") was signed into law by President Biden as part of the Consolidated Appropriations Act, 2023. The Act was intended to address some of the difficulties Americans face when saving and investing for retirement and is 120 pages long with 90 sections. This memorandum outlines a number of important changes made by the Act, and the impact those changes will have on <u>multiemployer defined benefit plans</u>. We hope this summary of the Act is helpful to you, and we will be prepared to discuss any questions you might have.

A. ***Section 107 – Further changes to required minimum distributions – REQUIRED.***

- Under the SECURE Act of 2019, §401(a)(9) of the Internal Revenue Code (Code) was modified to increase the age at which "required minimum distributions" or "RMDs" must begin. The prior age was 70.5, and the SECURE Act of 2019 increased that to age 72 for those born on and after July 1, 1949.

- The Act makes further changes to the RMD rules. Specifically, for a person who both reaches age 72 after December 31, 2022 <u>and</u> age 73 before January 1, 2033, the RMD age is increased to 73. In addition, for an individual who attains age 74 after December 31, 2032, the RMD age is further increased to 75.

<u>EFFECTIVE DATE</u>: The change in RMD age applies to all retirement plans (both defined benefit and defined contribution), and is effective for distributions under Code §401(a)(9) that take place on or after January 1, 2023, with respect to individuals who attain age 72 after that date.

<u>OTHER CONSIDERATIONS</u>:

✓ For those who previously attained age 70.5, OR age 72 (based on earlier changes made by the SECURE Act of 2019), prior to January 1, 2023, their required beginning date has locked in (age 70.5 or 72, as applicable) and any future RMDs must be made as scheduled.

✓ Multiemployer pension plans will need to update their systems to account for four distinct "tracks." Specifically, those who have already reached their required beginning dates under the age 70.5 rule and the age 72 rule, as well as those individuals who have not yet reached their required beginning dates and who fall under either the age 73 rule or the age 75 rule. This change will also impact certain distributions that are eligible for direct rollover treatment, as RMDs are <u>not</u> eligible to be rolled over.

- ✓ Please note that these changes *do not* modify the rule that RMD payments must initially begin by April 1st of the calendar year following the calendar year in which the participant reaches the applicable RMD age.

- ✓ A number of multiemployer pension plans have "suspension of benefits" rules, which generally prohibit a retired participant (pensioner) from engaging a certain number of hours of covered or non-covered employment (as defined by the plan) over a set time frame. It is possible that a pension plan may be structured such that a pensioner is permitted to work an unlimited number of hours *in covered employment* <u>once he or she attains his or her required beginning date</u>, as opposed to the attainment of a specific age. Based on this possibility, each pension plan should also review its rules governing suspension of benefits to ensure that these provisions are coordinated and reflect the intention of its Board of Trustees.

- ✓ The SECURE Act of 2019 and this Act, entitle participants to an "actuarial increase" if they both continue to work in covered employment after age 70.5 and delay their retirement. This actuarial increase applies when the participants actually do retire (per Code §401(a)(9)(C)(iii)). So, while a pension plan's definition of required beginning date will have to change, this "actuarial increase" rule of the Code remains in effect for those who attain age 70.5 and pension plans must comply with it.

B. ***Section 301 - Recovery of retirement plan overpayments - REQUIRED.***

- The Act amends ERISA §206 and Code §414 to provide fiduciaries of tax-qualified retirement plans with discretion to decide whether to seek recoupment of overpayments mistakenly made to participants or beneficiaries.

- Under this provision of the Act, tax-qualified retirement plans will not lose their qualified status simply for the failure to recover an inadvertent benefit overpayment. Prior to the Act, such plans risked the loss of their qualified status if they did not take reasonable steps to recover (or attempt to recover) an overpayment. In the event that a qualified plan chooses not to seek recoupment of an overpayment, then that overpayment is treated as an "eligible rollover distribution" (to the extent that amount would have been an eligible rollover distribution but for the fact that it was an overpayment).

- We note that if a tax-qualified plan is seeking repayment from a participant or beneficiary, then that individual will have new protections under the Act. For example, a plan cannot impose any interest or collection fees above and beyond the actual dollar amount of the overpayment, and recovery may not be sought from any beneficiary of the participant, including a surviving spouse. Additionally, recoupment generally cannot be sought if the first overpayment occurred more than three (3) years before the applicable participant or beneficiary is first notified in writing of the error.

EFFECTIVE DATE: Effective at the Act's date of enactment, December 29, 2022, with retroactive relief available to plan sponsors in certain circumstances for good faith interpretations of previously existing guidance.

OTHER CONSIDERATIONS:

- ✓ A participant or beneficiary who is "culpable" for an overpayment is not entitled to the protections provided with respect to recoupment of overpayments noted above. The statute defines culpability as when a participant or beneficiary made misrepresentations or omissions that led to the overpayment, or when a participant or beneficiary knew that the benefit payment or payments received were materially in excess of the correct amount.

- ✓ Notwithstanding the rule above, a participant or beneficiary is deemed "not culpable" if the individual informed a plan representative of the individual's belief that a benefit payment or payments may have been in excess of the correct amount, and that plan representative subsequently tells the individual that the payment or payments were correct.

C. ***Section 302 - Reduction in excise tax on certain accumulations in qualified retirement plans – REQUIRED.***

- Under prior law, if an RMD payment was not made in a timely manner, the applicable participant or beneficiary was subject to a 50% excise tax under Code §4974(a). Under the Act, this excise tax has been reduced to 25%. In addition, the 25% excise tax is further reduced to 10% if the applicable participant or beneficiary: (1) receives all of his or her past-due RMD for the applicable tax year, (2) files a tax return paying the applicable tax before receiving notice of assessment of the RMD excise tax from the IRS, and (3) takes the actions required by (1) and (2) within two years after the year of the missed RMD.

EFFECTIVE DATE: Effective for taxable years beginning after December 29, 2022.

D. ***Section 303 - Retirement savings lost and found database – AWAITING FURTHER GUIDANCE.***

- The Act requires the establishment of a national online "Retirement Savings Lost and Found" database, where individuals who may have lost track of their defined benefit plan(s) and related benefits can search and obtain contact information for their plan administrator.

EFFECTIVE DATE: The Act mandates that the DOL and the IRS establish the database no later than two years after the Act's enactment date of December 29, 2022.

OTHER CONSIDERATIONS: Funds will eventually need to provide information to the government so that this database can be populated. We expect that Funds will have a good sense of "inactive" or "lost" participants and beneficiaries, and the Fund's Form 8955-SSAs (Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits) filings will likely be helpful in this regard.

E. ***Section 304 - Updated dollar limit for mandatory distributions – REQUIRED.***

- The Act amends ERISA and the Code to increase the dollar limit that is allowed to be taken as a mandatory distribution without participant and/or spousal consent (under Code §417(e)), from $5,000 to $7,000.

<u>EFFECTIVE DATE</u>: Effective for distributions made on or after January 1, 2024.

<u>OTHER CONSIDERATIONS</u>: As a general rule, most Funds require participants to apply for their benefits in all circumstances, and the vast majority of vested participants will have the actuarial value of their otherwise payable monthly benefits far exceed this amount. We see this dollar limit coming into play in rare situations, such as a pro-rata pension (if the Pension Plan has adopted pro-rata rules) or in certain death benefit scenarios.

F. ***Section 305 - Expansion of Employee Plans Compliance Resolution System – AWAITING FURTHER GUIDANCE.***

- The Act significantly expands the scope of the Employee Plans Compliance Resolution System (EPCRS), which is a correction program initially implemented by the IRS. Under the Act, tax-qualified plans can self-correct an "eligible inadvertent failure" in order to comply with Code §401(a).

- Under this provision of the Act, an "eligible inadvertent failure" can be self-corrected using EPCRS *at any time*, unless: (1) the IRS has identified the failure before the plan began to make efforts to self-correct, or (2) the self-correction is not completed in a reasonable period of time after the failure was discovered.

- Eligible inadvertent failures can be self-corrected under EPCRS regardless of whether they are significant or insignificant, but self-correction cannot be used for any failure that is "egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction."

<u>EFFECTIVE DATE</u>: Effective as of the Act's enactment date of December 29, 2022.

<u>OTHER CONSIDERATIONS</u>: Further IRS guidance is to be issued on the implementation of this provision, and we expect that this will result in substantial revisions to Revenue Procedure 2021-30 (the current EPCRS guidance document). According to the Act, this guidance will include specific correction methods for some errors, as well as general principles to guide self-correction efforts under EPCRS for errors for which a specific method is not provided. The Act mandates that this guidance be released no later than two years after the enactment date of December 29, 2022.

G. ***Section 316 - Amendments to increase benefit accruals under plan for previous plan year allowed until the plan sponsor's tax return due date – OPTIONAL.***

- The Act amends current law to expand the window in which a plan sponsor is allowed to make discretionary plan amendments. Under the Act, a plan sponsor may now make an amendment to the plan that increases benefits up until its tax filing deadline for the fiscal year in which the amendment is effective.

- Previously, a plan sponsor was required to adopt a plan amendment that increases benefits by the last day of the plan year in which the amendment is effective.

EFFECTIVE DATE: Effective for plan years beginning on or after January 1, 2024.

H. ***Section 326 - Exception to penalty on early distributions for individuals with a terminal illness – OPTIONAL.***

- The Act creates a new exception to the Code §72(t) 10% tax penalty typically assessed on early distributions from tax-qualified retirement plans for distributions to individuals suffering from a terminal illness. In order to qualify for this exception, an individual must have the individual's physician certify that the individual has an illness that is reasonably expected to result in death within 84 months or less.

EFFECTIVE DATE: Effective for distributions occurring on or after January 1, 2023.

OTHER CONSIDERATIONS: While this provision creates an exception to the 10% tax on early distributions for terminally ill individuals, it makes no corresponding change to the rules governing distributions from tax qualified plans. So, to take advantage of this new exception, an individual would still need to have a normal distribution event (e.g., disability as defined by the Plan, attainment of early or normal retirement age, etc.).

I. ***Section 327 - Surviving spouse may elect to be treated as the deceased participant for RMD purposes - REQUIRED.***

- The Act amends Code §401(a)(9)(B)(iv) to allow for a surviving spouse to elect to be treated as the deceased participant for the purposes of the RMD rules. The RMD date for the surviving spouse cannot be earlier than the RMD date would have been for the deceased participant if the surviving spouse chooses to make this election. This will be useful in situations where the surviving spouse was older than his or her participant spouse.

EFFECTIVE DATE: Effective for calendar years beginning on or after January 1, 2024.

OTHER CONSIDERATIONS: Multiemployer plans should consider preparing appropriate election forms before the beginning of 2024 that will allow for the spouse of a deceased participant to make this election if he or she so chooses.

J. ***Section 338 - Requirement to provide paper statements in certain cases – AWAITING FURTHER GUIDANCE.***

- The Act amends ERISA to mandate that, unless a participant elects otherwise, a defined benefit plan must provide a statement of accrued benefits *on paper* to participants once every three (3) years. A participant may also elect to have this statement provided electronically.

EFFECTIVE DATE: Effective for plan years beginning on or after January 1, 2026.

OTHER CONSIDERATIONS: The Act dictates that new regulations with changes to the DOL electronic delivery rules are to be written by December 31, 2024. These new regulations will mandate certain participant protections to ensure that participants are aware of their rights to receive plan disclosures on paper.

K. ***Section 343 - Annual Funding Notices - REQUIRED.***

- The Act amends the existing requirements for defined benefit plan annual funding notices (AFNs) to provide additional information in order to clarify a plan's funding status for participants. While the majority of changes in this provision are directed toward single-employer plans, the AFNs of multiemployer plans will need to be changed slightly as well (e.g., showing average return of assets for the plan year and additional participant-based data for preceding plan years).

EFFECTIVE DATE: Effective for plan years beginning on or after January 1, 2024.

L. ***Section 501 - Provisions relating to plan amendments - REQUIRED.***

- Plan amendments made, or required, pursuant to the Act are generally to be adopted on or before the last day of the first plan year beginning on or after January 1, 2025 (i.e., December 31, 2025 for calendar year plans), so long as the plan operates according to such amendments as of the effective date of the requirement or amendment in question. However, for collectively bargained plans (plans maintained pursuant to one or more collective bargaining agreements that were ratified before December 29, 2022), plan amendments must be adopted on or before the last day of the first plan year beginning on or after January 1, 2027 (i.e., December 31, 2027, for calendar year plans).

- The deadline for plan amendments under the SECURE Act of 2019, the CARES Act, and the Taxpayer Certainty and Disaster Relief Act of 2020 have also been pushed back to the end of a plan's 2025 (or 2027) plan year, in line with guidance from recent IRS notices.

EFFECTIVE DATE: Effective as of the Act's enactment date of December 29, 2022.

OTHER CONSIDERATIONS: While the extended deadline for collectively bargained plans is useful, Pension Plans may be amended for any SECURE 2.0 changes in advance, and it is always useful to adopt plan amendments in the event any permissive SECURE 2.0 change is adopted by a Fund's Board of Trustees to ensure the plan's administration lines up with the actual plan terms.

This edition of the Multiemployer Benefit Plans Alert was written by the Multiemployer Benefit Plans practice at Reid and Riege, P.C. The practice provides counsel to a significant number of jointly-administered employee benefit funds established under collective bargaining agreements.

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