Proposed Regulations for Automatic Enrollment and Roth Catch-Up Requirements under SECURE 2.0

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Mandatory Automatic Enrollment

Background: Automatic Enrollment before SECURE 2.0

- Section 902 of the Pension Protection Act of 2006 added provisions to the Code to allow, but not require, automatic contribution arrangements (automatic enrollment) in qualified CODAs

- Automatic enrollment allows a plan to establish a default contribution election for eligible employees
  - The default election is treated as though the employee elected to have a specified contribution made under the plan on the employee's behalf
  - Employees may instead make an affirmative election to have contributions made in a different amount on the employee's behalf (including no contributions)

Mandatory Automatic Enrollment Under SECURE 2.0

- **Section 101 of SECURE 2.0**: Amended the Code by adding new Section 414A
  - Section 414A provides that a defined contribution retirement plan will not be qualified unless it satisfies the automatic enrollment requirements under Section 414(w). Each plan must:
    - Require automatic enrollment of employees with elective deferral contributions of at least 3% and no more than 10% in the first year of participation
    - Permit participants to withdraw their automatic deferrals within 90 days of first contributions
    - In absence of election, to permit automatic deferrals to be invested in QDIAs

Concerns for Multiemployer Plans

- Under SECURE 2.0, plans established before enactment of the statute are grandfathered from the mandatory automatic enrollment requirement
- However, the statute also says that new employers who join a ***"plan maintained by more than one employer"*** after the enactment of the statute are not grandfathered, and instead are subject to the mandatory automatic enrollment requirement "as if such plan were a single plan"
- This created some concerns regarding the practical issues of how this would be administered if "plan maintained by more than one employer" encompassed multiemployer plans.
  - Practical administrative concerns regarding multiemployer plans having to have different mandatory enrollment requirements for different participating employers?

2025 Proposed Rules – Mandatory Automatic Enrollment

- Published in Federal Register on January 14, 2025
- Proposed rules clarify that language regarding "a plan maintained by more than one employer" ***does not include a multiemployer plan***
  - The preamble cites to similar language in Code Section 413(c) that is commonly understood to apply to multiple employer plans and *exclude multiemployer plans*
- The preamble to the proposed rule, therefore, states that, "[a]s a result, under the proposed regulation, a pre-enactment multiemployer plan . . . would continue to be treated as a pre-enactment plan with respect to an employer that adopts the plan after December 29, 2022."

Practical Application and Administrative Complexities

- Who does this apply to?
  - All plans, including multiemployer plans, adopted after December 29, 2022, must comply with SECURE 2.0's mandatory automatic enrollment requirements
  - Multiemployer plans that were adopted before December 29, 2022, remain grandfathered from the mandatory automatic enrollment requirement, and do not lose grandfathered status if a new signatory employer is added to the plan or if a new plan is merged into the grandfathered plan
    - Additionally, participants under the new employer are not required to be treated differently than other participants in the multiemployer plan
- What is the applicability date?
  - The proposed regulations will apply to plan years starting more than six months after the final regulations are issued (e.g., for a calendar plan year, if the final regulations are issued in September 2025, they would apply beginning January 1, 2027.)

Practical Application and Administrative Complexities (cont'd)

- **Multiple employers and the effects of a transient workforce**
  - One multiemployer plan could have hundreds of employers
  - Union members often move between participating employers and may do so several times in a given year
  - Participating employers do not have oversight of plan administration yet are expected to:
    - Set up members' deferral elections without knowledge of previous elections with prior employers
    - Remit those deferrals to the Fund Office or TPA
- **No central function of handling all deferral changes**
  - Recordkeepers and the Fund Office/TPA typically are not part of the deferral election process
  - Members complete a deferral election form and hand it in to their employer to start deferrals
- **The unknowns**
  - Carry over if a member opted out of automatic enrollment with one employer and moved to another participating employer?
  - Who would be responsible for tracking those opt-outs?
  - Who tracks auto increases up to the statutory maximum and the frequency of those changes?
- **Compliance**
  - Given the complexities, keeping the plan in compliance would be a practical impossibility in most cases
  - The cost involved for corrections would prohibit the adoption of any new multiemployer 401(k) plans from being established

Automatic Enrollment Efforts:
Identifying the Issue AND Articulating a Solution

1

- Issue 1 – Are new employers who adopt a pre-enactment multiemployer plan subject to SECURE 2.0's automatic enrollment mandate?
  - Answer: NO - (for now at least – IRS REG100669-24)

2

- Issue 2 – Are pre-enactment multiemployer plans who did not have a 401(k) feature prior to SECURE 2.0 but chose to add one now subject to SECURE's automatic enrollment mandate?
  - Answer: YES - (additional legislation required to resolve this issue)

3

- Issue 3 – Will new multiemployer plans established going forward be subject to the automatic enrollment mandate?
  - Answer: YES - (additional legislation required to resolve this issue)

Automatic Enrollment Efforts: A Dual-Track Strategy

Pursuing Both Legislative and Regulatory Solutions

REGULATORY RELIEF

- Objective
  - Resolve "Issue 1" - shield new employers adopting a pre-enactment plan from autoenrollment requirements
- Proposed Solution
  - Urge Department of Treasury regulators to issue guidance clarifying that new employers who join a pre-existing plan are not subject to autoenrollment.
- Policy & Legal Argument
  - The combination of language well understood to exclude multiemployer plans coupled with a heading consistent with that well understood meaning makes it clear that the language selected by Congress in SECURE 2.0 excludes multiemployer plans from the exception to the plan-wide exemption for preexisting plans that add an employer after SECURE 2.0's enactment date.
- Advocacy in Action
  - Advocacy meetings with senior Department of Labor leadership
  - Advocacy meetings with Department of Treasury regulators
  - Enlisting congressional allies to join for agency meetings and do outreach to agencies in support of our position
  - Submit public comments on proposed rules
  - Submit informal policy and legal briefing materials to provide policy makers with relevant background and context

Automatic Enrollment Efforts: A Dual-Track Strategy

Pursuing Both Legislative and Regulatory Solutions

LEGISLATIVE ACTION

- Objective
  - Resolve "Issue 2" and "Issue 3" - shield all multiemployer plans from automatic enrollment requirements going forward.
- Proposed Solution
  - Legislation explicitly exempting multiemployer plans from SECURE's automatic enrollment requirements – creating the exact same exemption currently enjoyed by church and government plans.
- Policy Argument
  - The unique structure and mechanics of multiemployer plans, relative to single and multiple employer plans, render automatic enrollment practically impossible to administer – warranting an exemption to automatic enrollment.
  - The separation of the administration of multiemployer plans from the vast-collection of individual employers make it practically impossible to administer automatic enrollment due to the complexities of gathering the necessary information from uncoordinated individual employers and payroll providers – this challenge is distinct to multiemployer plans and does not apply to multiple employer plans.
- Advocacy in Action
  - Advocacy meetings with Members of Congress to educate them on the need for legislative action
  - Presenting Members of Congress will draft legislation so they have tangible substance to review & consider
  - Recruiting Members of Congress to be lead sponsor of legislation in both the U.S. Senate and U.S. House

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(Original Signature of Member)

118TH CONGRESS
2D SESSION

H. R. _____

To amend the Internal Revenue Code of 1986 to establish an exception for multiemployer plan participants to the requirements for automatic enrollment.

IN THE HOUSE OF REPRESENTATIVES

[XXX] introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Internal Revenue Code of 1986 to establish an exception for multiemployer plan participants to the requirements for automatic enrollment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. EXCEPTION TO REQUIREMENTS RELATED TO AUTOMATIC ENROLLMENT.

(a) IN GENERAL.—Section 414A(c)(3) of the Internal Revenue Code of 1986 is amended—

(1) in the heading, by striking "AND CHURCH PLANS" and inserting "CHURCH PLANS, AND MULTIEMPLOYER PLANS", and

(2) by striking "or any church plan (within the meaning of section 414(e))" and inserting "any church plan (within the meaning of section 414(e)), or any multiemployer plan (as defined in section 414(f)).".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2023.

Roth Catch-Up Contributions

Background: Roth Catch-Up before SECURE 2.0

- Section 414(v) of the Code permits a plan to allow eligible participants to make additional elective deferrals that are “catch-up contributions” and sets forth requirements relating to those contributions.
- Under section 414(v)(5), an eligible participant is a participant who is generally eligible to make elective deferrals under an applicable plan who would attain age 50 by the end of the taxable year
  - Contributions limited to the lesser of (1) the applicable dollar catch-up limit under section 414(v)(2)(B) and (2) the excess of the participant’s compensation for the year over any other elective deferrals of the participant made without regard to section 414(v)
  - A plan fails to meet nondiscrimination requirements under section 401(a)(4) unless the plan allows all catch-up eligible participants to make the same election with respect to catch-up contributions

Roth Catch-Up Contributions Under SECURE 2.0

- **Section 603 of SECURE 2.0**: Amended the Code by adding new Section 414(v)(7)
  - Section 414(v)(7) requires that any catch-up contribution for "an eligible participant whose wages . . . for the preceding calendar year from the employer sponsoring the plan exceed $145,000" must be designated as a ***post-tax Roth contribution***.

Relevant Concerns for Multiemployer Plans

- Should Section 603 of SECURE 2.0 even apply to multiemployer plans?
  - The statutory language says the relevant wages are those received from “the employer sponsoring the plan”
  - Multiemployer plans sponsored by boards of trustees, not individual employers
  - Proposed regulations directly address this issue, but could *Loper Bright* come into play in the future based on the language of the statute?
- When looking at wages, how do you determine who is “the employer sponsoring the plan”?
  - Should wages from multiple employers aggregated? What if in a controlled group?
- Many multiemployer plans do not offer Roth contributions currently
  - Many plans are designed to keep it simple for the participant, the employer, and the fund office/TPA by only allowing pre-tax contributions.
  - Is a multiemployer plan obligated to add Roth? If it cannot, must it eliminate the option for catch-up contributions entirely?

2025 Proposed Rules – Roth Catch-Up Contributions

- Published in Federal Register on January 13, 2025
- Proposed rules clarify that, despite confusion surrounding "employer sponsoring the plan" language, ***the Roth catch-up contribution requirements do apply to multiemployer plans***
  - The preamble to the proposed rule says that "employer sponsoring the plan" means, in the context of multiemployer plans, "the participant's ***common law employer*** that is the source of the participant's FICA wages and contributions to the plan."
- Proposed rules also establish that for the purposes of calculating who is subject to the Roth requirement, wages for one participant from multiple common law employers ***should not be aggregated***—even if other employers participate in the same plan or members of a controlled group

2025 Proposed Rules – Roth Catch-Up Contributions (cont'd)

- Plans are ***not required to add Roth contribution options***
- Instead, the proposed regulations say that plans ***may***:
  - Stop participants who are subject to the Roth catch-up contribution requirement under SECURE 2.0 from making catch-up contributions ***at all***
  - At the same time, permit catch-up eligible participants who are not subject to the Roth catch-up contribution requirement to continue making pre-tax catch-up contributions
- Regardless, **if** a plan allows Roth catch-up contributions for participants subject to the Roth catch-up requirement, ***it is required to allow all other catch-up eligible participants to make Roth catch-up contributions.***

Practical Application and Administrative Complexities

- Which participants does this apply to?
  - Determine the common law employer
  - Do (non-aggregated) FICA wages exceed $145,000 in the prior year?
- When ***must*** plans implement these rules?
  - For non-bargained plans, the effective date of the proposed rules is 1/1/2026, but no earlier than 6 months from the date of publication of the final rule
  - **Delayed Effective Date for Bargained Plans:** The effective date is no earlier than the first plan year starting after the termination of the CBA that is in effect on 12/31/2025, or, if later, the general rule for non-bargained plans above
- When ***may*** plans implement these rules?
  - A plan is permitted to apply these rules with respect to contributions in taxable years beginning after December 31, 2023

Practical Application and Administrative Complexities (cont'd)

- Plans without a Roth contribution program must decide whether to add one
  - If Trustees decide not to offer Roth, then those under the $145,000 (as adjusted) threshold will still be allowed to make catch-up contributions (those over the threshold will not be allowed and the employer and/or fund office/TPA will need to make sure they are enforcing the rule).
  - If the trustees elect to add Roth in the plan design, then all participants need to have the ability to make Roth catch-up contributions.

- Tracking the $145,000 threshold
  - Fund Offices/TPAs will need to confirm with each participating employer that their payroll system will know who and when to switch a participant to Roth contributions once the 402(g) limit has been met.
  - Some small participating employers may not have the payroll capability to seamlessly administer this function.
  - Due to the complexities of obtaining compensation data from participating employers, many multiemployer 401(k) plans are designed to be safe harbor to alleviate the non-discrimination testing requirements. This new provision puts them back in the business of tracking compensation for participants.

Practical Application and Administrative Complexities (cont'd)

- The possible unfortunate result
  - If Trustees decide the burden of tracking the compensation threshold is too much, they may need to eliminate catch-up contributions for all participants.
- Other practical considerations
  - What happens if a deferral required to be made on a Roth basis is made pre-tax?
    - The proposed regulations provide two new correction methods
  - Participants must be given an effective opportunity to make an election
    - What does this mean if a participant is ineligible to make deferrals because a plan does not have a Roth option?

Questions?