

SECURE 2.0 Provides New and Expanded Retirement Plan Correction Rules

by Samuel J. Baldwin on February 10, 2023

With the passage of the SECURE 2.0 Act of 2022 (“SECURE 2.0”) on December 29, 2022, Congress has made several changes related to the correction of errors in administering retirement plans. These changes include expansion of the IRS’s self-correction program for retirement plan failures, changes related to recovery of inadvertent benefit overpayments, and a permanent safe harbor correction method for elective deferral failures related to automatic enrollment arrangements in 401(k) plans and 403(b) plans.

Expansion of IRS self-correction program

SECURE 2.0 makes changes to the IRS’s Employee Plans Compliance Resolution System (“EPCRS”), including an apparently sweeping expansion of the self-correction program. Through EPCRS, the IRS provides plan sponsors with an opportunity to correct operational and plan document failures and avoid potential penalties and plan disqualification. EPCRS has long included a self-correction option for certain failures that does not require any filing with the IRS. Generally, self-correction has only been available for insignificant failures and failures that are corrected within a few years.

SECURE 2.0 expands the self-correction program. Effective December 29, 2022, any inadvertent failure may be self-corrected, so long as the failure: (i) is not egregious, related to the diversion or misuse of plan assets, or directly or indirectly related to an abusive tax avoidance transaction; (ii) is corrected within a reasonable time after it is discovered; and (iii) is not identified by the IRS before the plan sponsor has taken actions that demonstrate a commitment to self-correction. This appears to be a dramatic expansion of the program and would permit self-correction of significant failures and plan document failures regardless of when the failures occurred. On its face, this new rule would permit self-correction of most plan issues without any IRS filing. SECURE 2.0 directs the IRS to issue updated guidance related to these changes, and it will be important to see how the IRS interprets certain aspects of the rule – in particular, whether the IRS provides a definition of “egregious” that imposes meaningful limits on the availability of self-correction and additional guidance as to what is a reasonable time from discovery.

To qualify for self-correction under SECURE 2.0, the plan must maintain practices and procedures designed to prevent failures. This has been a requirement for any plan using self-correction under EPCRS for some time. But SECURE 2.0 and the expanded self-correction program may provide an incentive for plan administrators to revisit, formalize,

and document these practices and procedures. Plan sponsors will be eager to see whether the IRS takes this opportunity to provide guidance on to what constitutes compliant practices and procedures.

In addition to the general expansion of self-correction, SECURE 2.0 specifically authorizes self-correction of inadvertent failures related to plan loans to participants. This is important because failures related to plan loans often result in a breach of fiduciary duty under ERISA. SECURE 2.0 provides that the Department of Labor must treat inadvertent plan loan failures that are corrected under the expanded self-correction program as meeting the requirements of the Department's correction program for breaches of fiduciary duty, the Voluntary Fiduciary Correction Program.

SECURE 2.0 permits the Department to impose filing requirements on fiduciaries self-correcting inadvertent plan loan failures that are seeking protection under the Voluntary Fiduciary Correction Program. It is possible that the Department will impose a reporting requirement for fiduciaries that wish to obtain relief for fiduciary breaches that are self-corrected under the expanded program. The Department recently took this approach in a proposed rule establishing a self-correction program for failures to timely deposit participant contributions, under which self-correctors would be required to submit an online form providing information about the failure and correction.

Recovery of inadvertent benefit overpayments

SECURE 2.0 provides that retirement plan fiduciaries are not required to attempt to recover inadvertent benefit overpayments made to participants or beneficiaries and includes additional requirements if the responsible plan fiduciary does attempt to recover overpayments from a participant or beneficiary. These changes became effective December 29, 2022.

Under prior law, retirement plan fiduciaries generally had a fiduciary responsibility under ERISA to take reasonable steps to attempt to recover overpayments. For tax code compliance, EPCRS provided correction methods for overpayments, which generally required steps to attempt to recover overpayments, and in almost all cases required notice to the participant or beneficiary that the overpayment is not eligible for the same favorable tax treatment as other distributions.

Under SECURE 2.0, a plan fiduciary will not breach their fiduciary duties under ERISA or risk disqualification of the plan because the fiduciary decides not to attempt to recover inadvertent benefit overpayments from a participant or beneficiary. SECURE 2.0 also provides that plan fiduciaries may rely on prior decisions not to seek recoupment of inadvertent benefit overpayments and may leave in place existing arrangements implemented to recover past benefit overpayments.

SECURE 2.0 does not prohibit a fiduciary from attempting to recover overpayments, and explicitly authorizes recovery by reducing future benefits. But if a plan fiduciary does decide to pursue recovery of a benefit overpayment from a participant or beneficiary, SECURE 2.0 imposes several new requirements, which are outlined below. SECURE 2.0 also provides that in determining the amount to try to recover, the responsible plan fiduciary may take into account the hardship that recoupment would impose on the participant or beneficiary.

Any attempt to recover an overpayment of benefits to a participant or beneficiary is subject to the following conditions:

- The participant or beneficiary may not be charged interest, collection costs, or fees, or other similar additional amounts.
- Recovery may not be sought if the first overpayment occurred more than three years before the participant or beneficiary is first notified in writing of the error, except in the case of fraud or misrepresentation by the participant or beneficiary.
- Past overpayments to a participant may not be recovered from any beneficiary of the participant.
- If the plan fiduciary seeks to recover overpayments of a non-decreasing annuity by reducing future benefit payments: (i) the reduction must cease after the plan has recovered the full dollar amount of the overpayment; (ii) the amount recouped each calendar year may not exceed 10 percent of the full dollar amount of the overpayment; and (iii) future benefit payments may not be reduced to below 90 percent of the periodic amount otherwise payable under the terms of the plan. Alternatively, if the plan fiduciary seeks to recover overpayments of a non-decreasing annuity through one or more installment payments, the payments that may be required in a calendar year may not exceed the benefit reductions that would be permitted for the year under the preceding sentence.
- If the plan fiduciary seeks to recover overpayments of a benefit other than a non-decreasing annuity, the plan fiduciary must satisfy requirements to be developed by the Secretary of Labor.
- Efforts to recover overpayments must not be: (i) accompanied by threats of litigation, unless the responsible plan fiduciary makes a determination that there is a reasonable likelihood of success to recover an amount greater than the cost of recovery, or (ii) made through a collection agency or similar third party, unless the participant or beneficiary ignores or rejects efforts to recover the overpayment following either a final judgment in Federal or State court or a settlement between the participant or beneficiary and the plan.

These conditions do not apply if the participant or beneficiary is culpable for the overpayment. A participant or beneficiary is culpable pursuant to SECURE 2.0 if the individual bears responsibility for the overpayment, such as through misrepresentations or omissions, or the individual knew that the benefit payment was an overpayment, unless the individual raised that question with a plan representative and was told the payment

was correct. For all overpayments, the plan may not seek to recover the overpayment unless the participant is given an opportunity to contest all or part of the recovery pursuant to the plan's claims procedures.

Finally, SECURE 2.0 provides that if a fiduciary does not seek recovery of an overpayment, then the payment will be treated as an eligible rollover distribution if the payment would have been an eligible rollover distribution but for being an overpayment.

Permanent safe harbor for correcting elective deferral failures in plans with automatic enrollment features

Since 2015, EPCRS has included a safe harbor correction method for elective deferral failures in 401(k) plans and 403(b) plans with automatic enrollment or automatic escalation features. The safe harbor correction method, which provides that no corrective contribution for missed elective deferrals is required if certain conditions are met, was limited to elective deferral failures that begin on or before December 31, 2023.

SECURE 2.0 removes this limitation and makes this safe harbor correction method permanent. It provides that reasonable administrative errors (i) made in implementing an automatic enrollment or automatic escalation feature with respect to an eligible employee (or an affirmative election made by an eligible employee covered by such feature), or (ii) made by failing to provide an eligible employee the opportunity to make an affirmative election because the employee was improperly excluded from the plan, may be corrected without a contribution for missed deferrals if the following conditions are met:

- The error is corrected prospectively by implementing an automatic enrollment or automatic escalation feature with respect to the eligible employee (or an affirmative election made by the eligible employee) determined in accordance with the terms of the plan's automatic contribution arrangement no later than the affected employee's first paycheck on or after the earlier of: (1) the end of the month after the affected employee notifies the employer of the error; or (2) the last day of the 9-1/2 month period after the end of the plan year in which the error first occurred.
- If the affected employee would have been entitled to matching contributions had the missed elective deferrals been made, the employer makes a corrective contribution equal to the matching contributions (adjusted for earnings) that would have been required if the missed deferrals had been contributed to the plan.
- The employer gives the affected employee notice of the error no more than 45 days after correct deferrals begin. The notice must satisfy content requirements prescribed by the IRS.

The failure may be self-corrected if it otherwise meets the requirements for self-correction. Additionally, unlike under the existing safe harbor, under SECURE 2.0 the correction method may be used to correct errors that relate to former employees and remains available even after the IRS identifies the error.



The SECURE 2.0 correction method applies for elective deferral failures with a correction deadline (as described in the first bullet above) that is after December 31, 2023. The existing EPCRS safe harbor correction method applies for all earlier failures.

If you have questions regarding SECURE 2.0 and how it applies to your retirement plan, please contact a member of Verrill's Employee Benefits & Executive Compensation Group.



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