



(510) 906-4710
www.sjlawcorp.com

MEMORANDUM

TO: All Defined Benefit and Defined Contribution Plan Clients

FROM: Saltzman & Johnson

DATE: March 31, 2023

RE: SECURE 2.0 Act – Updates for Defined Benefit and Defined Contribution Plans

On December 29, 2022, the President signed the Consolidated Appropriations Act of 2023 (“Appropriations Act”) into law, which includes, the SECURE 2.0 Act of 2022 (“SECURE 2.0 Act”). This memorandum summarizes the provisions of the SECURE 2.0 Act most relevant to multi-employer pension plans. Plans will be allowed to operate in accordance with the SECURE 2.0 Act without having to immediately amend the plan documents; collectively bargained pension plans will have until January 1, 2027, to adopt conforming amendments.¹

ANNUITY PLANS and PENSION PLANS

Increase in Age for Required Beginning Date for Mandatory Distributions: Section 107 (Amends IRC 401(a)(9))

The previous SECURE Act increased the required beginning date for mandatory distributions from April 1st following age 70 ½ to age 72 effective for required distributions for participants who turn 70 ½ on or after January 1, 2020. SECURE 2.0 Act increases the required beginning date for mandatory distributions to age 73 for participants that attain age 72 after December 31, 2022. The required beginning date again increases to 75 for participants that attain age 74 after December 31, 2032. The provision applicable to the actuarial equivalent adjustments remains at April 1st following age 70 ½.

- **Effective Date:** effective for required distributions for participants who turn 72 after December 31, 2022 (for required distributions due April 1, 2025).
- **Action Items:** Amendment optional (and otherwise subject to 5% owner, retirement, actuarial adjustments due to delayed retirement, and suspension of benefit rules, etc.)

¹ SECURE 2.0 Act, Section 501.

Reduction in Excise Tax on Missed Required Minimum Distributions (RMD): Section 302 (Amends IRC Section 4974(a))

The excise tax imposed on a participant or beneficiary for a failure to take RMDs is reduced from 50% to 25%. There is also a further reduction to 10% if the participant or beneficiary corrects the shortfall during a two-year correction window.

- Effective Date: Tax years beginning after December 29, 2022.
- Action Item: Trust Fund Office should review and revise any notices concerning RMDs.

Mandatory Distributions Allowed up to \$7,000: Section 304 (Amends ERISA 203(e), IRC 401(a)(31) and 411(a)(11))

The non-consent cash-out limit increases from \$5,000 to \$7,000. If the balance is over \$1,000, the amount must still be rolled over to an IRA if the participant does not consent to the distribution.

- Effective Date: Tax years beginning after December 31, 2023.
- Action Item: Optional plan amendment to implement higher cash-out limit.

Overpayments: Section 301 (Amending ERISA 206 and IRC 402(c))

Fiduciaries of defined contribution plans and defined benefit plans have the option not to seek recoupment of benefits *inadvertently* overpaid to participants or beneficiaries. Fiduciaries may still seek recoupment of inadvertently overpaid benefits without interest or fees. Reduction of future benefits or installment payments for recoupment may account for hardship on the participant or beneficiary and shall:

- Not exceed 10% of inadvertent overpayment per year

- Not exceed 10% of the future benefits
 - Not be accompanied by threat of litigation unless likely to recover greater than the cost of recovery
 - Not be made through collections agency unless there is a court judgment or settlement
 - Not be prior to 3 years from the date of written notice to the participant of the error (unless fraud or misrepresentation by participant)
 - Cannot recover overpayment made to the participant from a surviving spouse or beneficiary
- Any inadvertently overpaid rollover that is not repaid shall still be treated as an eligible rollover.

- Effective Date: December 29, 2022.
- Action Item: Plans should review plan overpayment/recoupment language and adopt overpayment procedures since SECURE 2.0 Act allows participants/beneficiaries to challenge recoupment efforts.

“Lost and Found” Database: Section 303

The Department of Labor (DOL) is directed to create a “lost and found” database by December 2025 that will allow retirement savers, who may have lost track of their retirement plan, to search for contact information for the plan administrator. The plan administrator will have to provide certain information to the Department of Labor, including (1) Plan name changes, (2) changes in the name or address of the Plan Administrator, and (3) the name and taxpayer ID number for certain plan participants.

□ Action Item: Legal Counsel is monitoring additional guidance.

Projected Interest Crediting Rate: Section 348 (Adds IRC 411(b)(6) and ERISA 204(b)(6))

To demonstrate compliance with the anti-backloading accrual rules in IRC Section 411(b), cash balance and other statutory hybrid plans that credit interest at a variable rate will be able to use a reasonable projection of the actual interest-crediting rate, not to exceed 6%.

□ Effective date: Plan year beginning after December 29, 2022.

□ Action Item: Review Plan to determine if amendment would be advisable.

Termination of Variable Rate Premium Indexing: Section 349

The PBGC variable rate premium (“VRP”) is indexed each year by a cost-of-living index. The Act freezes the VRP for single-employer defined benefit plans at the 2023 level of 5.2% (\$52 per \$1,000 of unfunded vested benefits).

□ Effective date: Plan year beginning after December 29, 2022.

□ Action Item: No action is needed.

Requirement to Provide Paper Benefit Statements: Section 338 (Amends ERISA 105(a)(2))

Effective for plan years beginning after December 31, 2025, paper benefit statements under ERISA 105(a)(2) must be provided as follows:

a) For defined contribution plans, unless the participant elects to receive it electronically, at least one benefit statement each year must be provided on paper; and

b) For defined benefit plans, a paper statement must be provided at least once every three years unless the participant elects to receive it electronically.

□ Effective Date: The DOL will release guidance by December 31, 2024.

□ Action Item: The Trust Fund Office should review its electronic disclosure procedures.

Expansion of Employee Plans Compliance Resolution System: Section 305

The EPCRS correction rules for pension plans have been updated to allow any “eligible inadvertent failure” to be self-corrected at any time (regardless of whether the error is significant or insignificant) unless the IRS identified the failure before the plan commenced corrective measures, or the self-correction was not completed in a reasonable period after the failure was identified. An eligible inadvertent failure includes any failure to operate within the Internal Revenue Code despite the existence of practices and procedures. Eligible inadvertent failure does not include egregious plan failures, related to the diversion or misuse of plan assets, or directly or indirectly related to an abusive tax avoidance transaction.

These changes will expand the plan failures that are eligible for self-correcting plan failures without a need to file for voluntary correction with the IRS.

The Secretary of the Treasury is directed to update the Revenue Procedure on pension plan corrections in line with these changes by December 29, 2024.

□ Action Item: No Action needed.

Report and Review of the Reporting and Disclosure Requirements of DOL, IRS and PBGC: Section 318

The Secretary of Labor, Secretary of Treasury and Director of PBGC are tasked with conducting a review of the reporting and disclosure requirements applicable to pension plans by December 29, 2026. These agencies will report on the effectiveness of reporting and disclosure requirements and make recommendations to consolidate, simplify, standardize, and improve these requirements.

□ Action Item: Legal counsel will monitor any changes to reporting and disclosure requirements.

Tribal QDROs: Section 339 (Amends IRC 414(p)(1) and ERISA 206(d)(3)(B))

The Act amended the IRC and ERISA to recognize qualified domestic relations orders (“QDRO”) from tribal governments.

□ Effective date: Tribal QDROs received by the Plan after December 31, 2022 (even if the tribal QDRO was entered into before that date).

□ Action Item: The Plan’s QDRO Procedures should be reviewed to confirm that the Plan will accept QDROs from tribal governments.

Terminally Ill Participants: Section 326 (Amends IRC 72(t)(2))

Distributions from a defined benefit plan or defined contribution plan to an *eligible* employee who is “terminally ill” are not subject to the 10% early withdrawal tax penalty and can be repaid within three years. The employee must furnish proof certified by a physician as having an illness that can reasonably be expected to result in death in 84 months or less. Unlike other provisions added by SECURE 2.0 Act, this is

not a new distribution right. Instead, this provision requires the participant to be terminated from employment or otherwise.

- Action Item: The Trust Fund Office should update election form and rollover notices.

Clarification of Substantially Equal Periodic Payments: Section 323 (Amends IRC 72(t))

The 10% tax penalty on distributions from defined benefit plans and defined contribution plans prior to age 59 ½ applies except when substantially equal periodic payments are made over the life expectancy of the participant's life expectancy.

- Effective date: Under Section 323 the exception applies to annuity distributions effective December 29, 2022, and to rollover transfers, rollovers, and annuity exchanges effective December 31, 2023.

- Action Item: Trust Fund Office to update election form.

Mortality Tables (Section 335)

For purposes of minimum funding rules, a pension plan is not required to assume beyond the plan's valuation date future mortality improvements at any age which are greater than 0.78%.

- Effective date: December 29, 2022, though Treasury Secretary has yet to amend the regulation.
- Action Item: Plan Actuary to review and implement.

Report by the Secretary of Labor on the Impact of Inflation on Retirement Saving: Section 347

The Secretary of Labor is tasked with conducting a study on the impact of inflation on retirement savings and reporting on such to Congress by March 29, 2023.

- Action Item: No action necessary.

Health Benefits for Retirees from Overfunded Pension Plans: Section 606 (Amends IRS 420(h))

Pension plans have the ability to set up health plans for retirees, which are tax-free to retirees and their beneficiaries. An overfunded pension plan may transfer assets to a separate account that will contain the health and welfare benefits. This law extended the time period in which a pension plan could transfer benefits from 2026 until 2033.

ANNUITY PLANS²

Small Emergency Distributions to DC Plan Participants: Section 115 (Amends IRC 72(t)(2))

In case of a financial emergency, a defined contribution plan participant may take a small distribution (the lesser of \$1,000 or the individual's nonforfeitable accrued benefit over \$1,000) per calendar year without incurring a 10% premature distribution penalty. The administrator may rely on the participant's certification of financial need. A participant may repay the distribution within three years and be immediately eligible for another distribution; otherwise, if not repaid, the participant must wait three years from the previous distribution before becoming eligible for a subsequent emergency distribution.

□ Effective date: Effective for distributions made after December 31, 2023.

□ Action Item: Optional plan amendment to allow participants to benefit from this distribution.

Distributions in Connection with Qualified Federally Declared Disasters: Section 331 (Amends IRC 72(t)(2))

Allows up to \$22,000 to be distributed by defined contribution plans in the case of a federally declared disaster to an individual in the disaster area who has sustained an economic loss due to the disaster. Such distributions are not subject to the 10% early withdrawal tax and are taken into account as gross income by the participant over 3 years. These distributions may be repaid by the participant, but repayment is not required. This section also allows individuals who took a withdrawal within 180 days prior to a federal disaster in order to buy or construct a home as a first-time homebuyer but was unable to do so because of the disaster, to repay the distribution within 180 days after the disaster.

□ Effective date: Effective for disasters occurring on or after January 26, 2021. □ Action Item: Optional plan amendment to allow participants to benefit from this distribution.

Long-Term Care Contracts Purchased with Retirement Plan Distributions: Section 334 (Adds ERISA 401(a)(39))

A participant may take a distribution of up to the lesser of (1) 10% of the present value of their defined contribution account; or (2) \$2,500, to pay for high-quality long-term care insurance for themselves or their spouse, without being subject to the 10% early withdrawal tax.

□ Effective Date: December 29, 2025.

² SECURE 2.0 Act also provides additional tax relief to victims of domestic abuse and firefighters:

- a) Section 314 allows certain defined contribution plans to create a new distribution right for domestic abuse victim's up to the lesser of \$10,000 or 50% of the participant's account balance. However, this provision does not apply to plans subject to the joint and survivor annuity and preretirement rules.
- b) Section 308 allows public and private sector firefighters to take a distribution from a governmental retirement plan or a qualified trust, annuity plan, or annuity contract at age 50 without paying a 10 percent premature distribution penalty.

- Action Item: Optional plan amendment to implement change.

Qualified Birth or Adoption Distributions: Section 311 (Amends IRC 72(t)(2)(H)(v)(I))

The original Secure Act allows defined contribution plans to add a provision allowing individuals to receive a distribution from a defined contribution or annuity plan for up to \$5,000 per child upon a birth or qualified adoption without paying the additional 10% early withdrawal penalty. The distributions are treated as rollovers and can be recontributed to the plan at any time. Secure 2.0 Act restricts the recontribution period to a period of 3 years, which is the period in which taxpayers can be issued a refund under other IRS provisions.

- Effective Date: December 29, 2022, though special rules apply for distributions taken out prior to that date.
- Action Item: If the Plan previously adopted the Qualified Birth or Adoption Distributions, an amendment is needed concerning the recontribution period.

Hardship Self-Certification: Section 312 (Adds Subsection C to IRC 401(k))

Defined contribution profit-sharing plans that allow hardship distributions may rely on the participant to self-certify in writing that (a) an eligible hardship exists; (b) amount in excess of the hardship is not being requested; and (c) no alternative to hardship withdrawal exists. Plans no longer must require the participant to substantiate the hardship.

- Effective Date: Plan years after December 31, 2022.
- Action Item: Legal Counsel will review hardship provision (if any) and advise as to optional amendment.

Unenrolled Participants: Section 320 (Amends ERISA 111)

Defined contribution plans are exempt from intermittent disclosure requirements (*i.e.*, plan document, notices, etc.) with respect to individuals who elect not to participate, and who have already received a summary plan description and other notices related to initial eligibility to participate.

- Effective Date: Plan years after December 31, 2022.
- Action Item: An unenrolled participant, if any, must still receive an annual reminder notice of their eligibility to participate in the plan, as well as any applicable plan deadlines.

Rollover Simplification: Section 324

No later than January 1, 2025, the Secretary of Treasury shall issue simplified forms to be understood by the average person to effectuate rollovers.

- Action Item: Legal counsel will monitor changes to rollover notices.

Saltzman & Johnson Law Corporation

Page 8

March 31, 2023

RMD and Surviving Spouse: Section 327 (Amends IRC 409(a)(9)(B)(iv))

After December 31, 2023, surviving spouses can elect to be treated as if the surviving spouse was the deceased employee for purposes of Required Minimum Distributions from defined benefit plans and defined contributions plans.

- Effective Date: Plan years after December 31, 2023.
- Action Item: Trust Fund Office to update election form.

Performance Benchmarks for Asset Allocation Funds: Section 318 (Guidance ERISA 404)

The DOL is directed to issue regulations under Section 404 of ERISA providing that, in the case of a designated investment alternative that contains a mix of asset classes, the administrator may, but is not required to, use a benchmark that is a blend of different broad-based securities market indices if:

- The blend is reasonably representative of the asset class holdings of the designated investment alternative;
- For purposes of determining the blend's return for 1, 5 and 10-calendar-year periods (or the life of the alternative, if shorter), the blend is modified at least once per year if needed to reflect changes in the asset class holdings of the designated investment alternative;
- The blend is provided to participants and beneficiaries in a manner that is reasonably calculated to be understood by the average plan participant; and
- Each securities market index that is used for an associated asset class would separately satisfy the requirements of such regulation for such asset class.

The DOL is directed to issue a study of the utilization and participants' understanding of the benchmarking requirements under this new section within 3 years of the applicable date of the regulation.

- Effective Date: Pending issuance of guidance from DOL.
- Action Item: The Plan's Investment Consultant should review the new requirements to determine if changes are recommended to the benchmarking of the Plan's investment's options. Legal Counsel will monitor the issuance of the expected regulation.

Financial Options: Section 342 (Amends ERISA 113)

At least 90 days prior to the time a participant can make an election a pension plan must provide the participant with information on benefits offered under the plan (i.e. single life annuity, JSA, etc.) and the lump sum so that they can compare and elect the option that is most beneficial for their financial futures. The plan also needs to explain to participants how the lump sum was calculated, mortality assumptions, the ramifications of accepting a lump sum, such as the loss of certain federal protections, rollover options, tax rules with disclaimer that plan does provide tax advice. The DOL must issue regulations implementing this

provision and a model notice by December 29, 2023, effective no later than December 29, 2024.

- Action Item: Legal counsel will monitor issuance of the DOL regulations and model notice.

P:\Research\SECURE Act 2.0\Memorandum\Drafts\FINAL Memo re Secure Act 2.0 cash balance 03-31-2023.docx

Saltzman & Johnson Law Corporation

Page 9

March 31, 2023

Required Minimum Distribution Rules for Special Needs Trusts: Section 337 (Amends IRC 401(a)(9)(H)(iv-v))

The SECURE Act placed limits on the ability of beneficiaries of defined contribution retirement plans and IRAs to receive lifetime distributions after the account owner's death. Special rules apply in the case of certain beneficiaries, such as those with a disability. This section clarifies that a special needs trust established for a disabled beneficiary may provide for a charitable organization as the remainder beneficiary.

- Effective Date: Effective January 1, 2023.
- Action Item: Plans should review provisions for naming individuals and charitable organizations as beneficiaries.

Consolidation of Defined Contribution Plan Notices: Section 341 (Adding DOL and Treasury Regulations)

Defined contribution plans may combine notices that are due before each plan year concerning certain automatic contribution and default investment arrangements. The DOL and Treasury will promulgate regulations by December 29, 2024.

- Action Item: Legal counsel will monitor for additional guidance on automatic contribution and default investment arrangements.

Comptroller Must Report to Congress about IRC Section 402(f) Notices: Section 336

This section requires the Comptroller General to report to Congress about Internal Revenue Code Section 402(f) notices provided by retirement plan administrators to participants concerning distributions that are eligible for rollover.

- Action Item: Legal counsel will monitor for additional guidance on model notices.

Defined Contribution Plan Fee Disclosure Improvements – Report to Congress: Section 340

The Secretary of Labor is directed to review fiduciary requirements for disclosures in participant-directed individual account plans and report to Congress by December 29, 2025.

- Action Item: Legal counsel will monitor for additional guidance on participant disclosures.

Revisions to Annual Funding Notice: Section 343 (Amends ERISA 101(f)(2)(B))

There are small required revisions to the contents of the Annual Funding Notice.

- Effective Date: Applies to Plan Years beginning after December 31, 2023.
- Action Item: Legal counsel will monitor for additional guidance on participant disclosures.

