**AMENDMENT TO IMPLEMENT SECURE ACT PROVISIONS (EMPLOYER) -- INSTRUCTIONS**

FIS has developed an amendment which may be used to update plans for most provisions of the Further Consolidated Appropriations Act (and particularly the SECURE Act). It also addresses an RMD issue in the CARES Act and recent updates of RMD life expectancy tables. The amendment can be used for all types of qualified plans, 403(b) plans, and 457(b) plans. It reflects the guidance contained in Notice 2020-68. There is a separate amendment for document sponsors to use for their adopting employers.

We anticipate that most employers can simply fill in the identifying information in section 2.1, check Election 2.3(a) and sign the amendment. Section 2.3 lists the amendment’s default provisions. If an employer wishes to override one or more of those defaults, to reflect options SECURE makes available, the employer can check Election 2.3(b) and make the appropriate Elections in sections 2.4 through 2.11.

Some employers have already adopted amendments which address specific SECURE provisions. For example, may already have amended its pension plan to allow for in-service distributions at age 59 ½, as provided in Article 10 of this amendment. This amendment will not override those earlier specific amendments unless the employer checks section 1.6(a). Checking 1.6(a) means that this amendment will override any previous amendments the employer has adopted relating to SECURE.

Each article 3-16 is self-contained and lists the statutory citation for ease of reference. Section 1 of each article identifies the plans to which the article applies.

|  |  |  |  |
| --- | --- | --- | --- |
| Article | Subject | Plan Types | Elections |
| 3 | No need for notice for safe harbor 401(k) plans with nonelective contributions; allows retroactive amendment to add SHNEC | 401(k) | None |
| 4 | Qualified birth and adoption distributions | DC, 403(b), gov’t 457(b) | Turned OFF by default. To allow distributions, select 2.4(a). Distributions are available to all participants from all accounts unless otherwise provided in Article 4 on in elections 2.4(b), (c), or (d) |
| 5 | Required beginning date (RBD) based on age 72 rather than 70 ½  | All | If plan disregards RBD change in making distributions, check Election 2.5(a) and enter dates as appropriate. The election to continue to use 70 ½ automatically expires with the 2022 distribution calendar year. |
| 6 | 10-year limit on most beneficiary RMD distributions | DC, 403(b), 457(b) | Elections 2.6(a) through (d) define whether an Eligible Designated Beneficiary of a Participant who died before the RBD can select between the 10-Year Rule or the Life Expectancy Rule. The default is to follow the existing plan option for the 5-Year Rule. Election 2.6(d) shortens the 10-Year Rule. |
| 7 | CARES RMD Waivers for 5-Year Rule | DC, 403(b), gov’t 457(b) | If Participant died during 2015-2019, and distributions follow the 5-Year Rule, will the distribution be extended one year?Default is yes, unless beneficiary waives it. Election 2.7(a) keeps distributions at 5 years unless beneficiary requests one-year extension. Election 2.7(b) leaves plan provisions unchanged. See explanation below. |
| 8 | LTPT Employees | 401(k) | Implements LTPT rules. There are several elections. LTPT Participants can only defer unless Election 2.11(a) is selected. All deferral rules that apply generally apply to LTPT Participants unless Election 2.11(b) is selected. LTPT Participants enter on semi-annual entry dates unless Election 2.11(c) is selected. Election 2.11(d) allows exclusion of LTPT Employees by category (see important warning below). The minimum age for LTPT Employees is 21 unless Election 2.11(e) is selected. |
| 9 | QACA maximum default deferral can be 15% after first year | 401(k), 403(b) | Turned OFF by default. To allow automatic deferrals to increase to 15%, check Election 2.9(a). You can optionally enter the schedule of default distributions in 2.9(b). See explanation below. |
| 10 | In-service distributions at age 59 ½  | Pension, gov’t 457(b) | Turned OFF by default. To allow in-service distributions, select Election 2.10(a). To apply a later in-service distribution age than 59 ½, select 2.10(b) and enter the age.  |
| 12 | Updates RMD tables | All | None |
| 13 | Permit retroactive plan adoption after end of tax year | Qualified | None. Applies to new plans only |
| 14 | Difficulty of care payments | DC, 403(b) | None |
| 15 | Amendment to facilitate 403(b) plan terminations with custodial accounts | 403(b) | None |
| 16 | Deemed IRA accounts are not subject to maximum age | All | None. Few plans have deemed IRA or designated IRA provisions. Among Relius preapproved documents, only the PPD document allows deemed IRAs. September 30, 2021, FIS provided a standalone amendment to add a deemed IRA feature.  |

**Warning: Excluding LTPT Employees (Election 2.8(d))**

Some practitioners believe that the plan can exclude a classification of LTPT employees from deferring if that group is excluded for other purposes and the plan passes coverage. For example, many plans routinely exclude Reclassified Employees or employees working for related employers which have not signed Participation Agreements. However, neither the statute nor IRS guidance to date states that this is possible. Thus, any 2.8(d) Election may ultimately need to be revoked in operation, depending on guidance. Any exclusion in 2.8(d) based on service (such as status as a part-time employee) is invalid, even if it applies for other plan purposes. See Section 8.8(c).

**How does Article 7 impact plans? Do I need to make an election?**

Article 7 addresses an issue in CARES not previously addressed directly in our CARES amendment. The issue is limited to beneficiaries of participants who died between 2015 through 2019, and who are taking distributions pursuant to the 5-year rule under the RMD rules. Many plans will not have anyone in the category, and therefore article 7 is immaterial and election 2.7 can be disregarded.

Article 7 does not apply to defined benefit plans or to 457(b) plans of tax-exempt employers. It gives the beneficiary the option to extend the RMD deadline under the 5-year rule by one year. So, a beneficiary of a Participant who died in 2017 could wait until 2023 to withdraw the participant’s account. The default is that the deadline is extended by one year unless the beneficiary waives the extension. By electing 2.7(a), the default is that the deadline is not extended unless the beneficiary requests the extension. Election 2.7(b) says that Article 7 will not apply. The impact of election 2.7(b) will differ depending on the plan document. For example, the Relius preapproved 403(b) document incorporates the RMD rules by reference, and since the extension is built into the statute, it is automatically built into the document. By contrast, the Relius qualified plan documents generally spell out the RMD rules, and therefore the extension is not available at all if section 2.7(b) is elected.

**How does Article 9 impact QACAs?**

Since their inception, the law has provided the automatic deferral percentage in a QACA cannot exceed 10% of compensation. That is hardcoded into the plan document. SECURE allows the automatic deferral percentage to rise to 15% after the end of the first plan year that begins after automatic deferrals begin. (For example, suppose Jane enters a calendar year QACA in 2022. For 2022 and 2023, her automatic deferral percentage cannot exceed 10%. In 2024 and subsequent years it can be as high as 15%.)

By default, Article 9 does not apply, and therefore the automatic deferral percentage remains capped at 10%. Selecting 2.9(a) changes the maximum to the SECURE limit as described above. If the QACA schedule in the Adoption Agreement says that automatic deferrals and increase 1% per year, then adopting Article 9 will allow the increase to continue to 15% without the need for any further amendment of the QACA schedule. Alternatively, you can enter the revised schedule of default deferrals at 2.9(b).

**Can I use this amendment for ongoing and for terminating plans?**

Yes. It replaces the amendments we have previously released for terminating plans.

**Can a document Provider sign this amendment on behalf of the employer?**

No. However, we provide a separate document Provider version of this amendment.

**What other SECURE amendments does FIS provide?**

We have a separate amendment for pooled employer plans (PEPs). This amendment does not include provisions related to (PEPs) or modifications of the “bad apple rule” for multiple employer plans.

We have a separate retroactive amendment to convert an ADP-tested 401(k) plan to a safe harbor nonelective 401(k) plan. Article 3 authorizes (but does not implement) such an amendment.

We will provide a separate amendment for retirement income account 403(b) plans to expand participation to certain affiliated employers.

**When should this amendment be adopted?**

In general, the deadline to adopt this amendment is December 31, 2022. Governmental plans have until December 31, 2024. Most collectively bargained plans also have until December 31, 2024.

**Can I modify this amendment?**

Yes. This is a good faith amendment, and the IRS has not reviewed or approved it. We anticipate that Elections available in this amendment will appear in our documents for upcoming restatement cycles, but employer modifications to this amendment may not be supported in restatements.

**Will FIS update this amendment?**

We anticipate updating the amendment as needed based on IRS guidance. Please check online to find the most current version of the amendment.

**Are other documents available?**

In addition to the Amendment, we have provided a sample Adopting Resolution (for an employer to evidence adoption of the Amendment). We have not provided a unanimous written consent or other form to actually adopt the amendment, because this will vary depending on local law and on the structure of the employer.

We have also provided a Summary of Material Modifications that can be modified based on the selections in the amendment. The footnotes, brackets, and italics in the model SMM are to guide the user in adapting the SMM to the selections made in the amendment and should be deleted before providing the SMM to participants.