

FINANCIAL LIFE BENEFITS®

Legislative and regulatory brief

As of November 2022

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Legislative activity

- “SECURE Act 2.0” status
 - House passed Securing a Strong Retirement (SECURE) Act of 2022
 - Senate Finance Committee proposed EARN Act
 - Senate HELP Committee proposed RISE & SHINE Act
- Additional congressional activity



“SECURE Act 2.0”

STATUS: Retirement legislation still enjoys bipartisan support in both the House and Senate. While Congress is occupied with domestic and international issues, it is still possible we could see passage of expanded retirement legislation provisions by the end of 2022.



Status in Washington

House status

On March 29, 2022, the House overwhelmingly passed the *Securing a Strong Retirement Act of 2022* (SSRA), aka “SECURE Act 2.0”

Senate status

There are two draft versions in the Senate: one from the Finance Committee and one from the Health Education Labor & Pensions (HELP) Committee as follows:

Senate Finance: EARN Act of 2022

Senate HELP: RISE & SHINE Act of 2022

Current legislative status: Legislative staff from both House and Senate are working on a final draft of legislative language incorporating much of what is in the passed House bill and in each of the individual proposals in the Senate. Final language, and a final title of the bill, have not yet been released.

Potential for passage in 2022: With strong support in both the House and Senate and in both parties, the bill is well positioned for passage this year. The final bill will not likely be brought to a vote on its own, but rather as part of a larger piece of year-end legislation as happened with the first SECURE Act in 2019.

Highlights of elements common to both House and Senate proposals

- Additional \$5,000 catch-up contribution at age 60.
- Emergency savings provisions, including an “emergency personal expense” distribution (up to \$1,000) exempt from the 10% premature distribution penalty and a “pension-linked emergency savings account” as part of a 401(k) plan.
- Recovery of retirement plan overpayments
- Expand charitable distributions at age 70½ to employer plans.
- Raise beginning age for required minimum distributions (RMD) to age 75.
- Permit “matching contributions” based on student loan payments.
- Enhance Saver’s Credit and make it refundable.
- Provide long-term, part-time employees access to elective deferrals after two years.

A final bill could include some or all of these as well as other additional provisions.



Our Point of View

- Most elements of the proposals enjoy bipartisan support in both Houses of Congress.
- All three proposals provide for simplification of administration of employer plans, which is positive for plan sponsors.
- There remain provisions that are good for the participant or taxpayer, but will provide administrative challenges for providers and plan sponsors if they are part of the final legislation, including:
 - Creation of a new pension-linked emergency savings account, which will be an optional plan design add-on, but will likely require providers to enhance systems to support the new feature.
 - Requirement for an annual hard copy benefit statement. On the heels of expanded electronic delivery safe harbors, this feels like a step backward and may impact plan sponsor use of the new safe harbor.

Potential for passage

- The legislation has broad support in House and Senate and from both parties, setting it up for possible passage in 2022.
- The final version of the bill that is in the process of being drafted will not likely be brought to a vote in the House or Senate as a standalone bill. It would likely get added to another, larger piece of year-end legislation. This is how the first SECURE Act was passed in 2019.
- A shift in control of the House or Senate after the midterm elections could impact additional legislation for the remainder of 2022 and into 2023.



Additional congressional activity

STATUS: Congress has been focused on domestic issues like inflation and gas prices, but retirement plans and retirement security remain topics of review and study. See the Appendix for additional legislative proposals of interest.



Status in Washington

Inflation Reduction Act of 2022, signed into law August 16, 2022 by President Biden

- This Act was a reconciliation package that needed only a simple majority to pass (50 Senate Democrats plus Vice President Harris)
- The original version of this bill was titled the *Build Back Better Act* which included retirement-related provisions, such as discontinuing after-tax Roth conversions and capping individuals' accumulated retirement savings at \$20 million among them.
- **ALL retirement-related provisions were dropped from the legislation before the *Inflation Reduction Act of 2022* was drafted.**
- There are no provisions in the *Inflation Reduction Act of 2022* that impact employer sponsored defined contribution plans or IRAs.

House passes bill proposing limits on ERISA arbitration and class action waivers

- On September 29, 2022, the House of Representatives passed the *Mental Health Matters Act* on a party line vote 220-205, with Title VII being the *Employee and Retiree Access to Justice Act*.
- The legislation would substantially limit the ability of ERISA-covered plans and plan sponsors to use arbitration clauses, class action waivers, and discretionary clauses.
- The bill will now go to the Senate.

GAO issues report on international retirement security efforts

- In August, the Government Accountability Office (GAO) released a public report: "Retirement Security: Recent Efforts by Other Countries to Expand Plan Coverage and Facilitate Savings"
- The report focused on the effectiveness of automatic enrollment, financial incentives to contribute, default investment and contributions, as well as plan flexibility to change contributions or withdraw funds.

Congressional Research Service (CRS) releases report "Cryptocurrency in 401(k) Retirement Plans"

- CRS noted that policymakers have paid increasing attention to the prospect of defined contribution (DC) pension plan participants being able to invest in cryptocurrency and raised similar concerns to the Department of Labor (DOL).
- While some contend that cryptocurrency in retirement accounts could benefit participants, others have expressed concern about its appropriateness as an investment option.



Our Point of View

- Many of the retirement-related provisions in the original bill would have limited retirement savings.
- Removal of these provisions from the final draft and legislation is a positive development.
- We will continue to monitor future legislative proposals to see if some of these provisions are brought to the table again.

- This bill was passed along party lines with mostly Democratic support.
- As it heads to the Senate, it likely faces an uphill battle.
- Legislation like this could result in an increase in plan litigation.
- We will continue to watch this closely and track the progression of the bill.

- In the report, GAO found similarities between U.S. policy and that of several other countries.
- Automatic enrollment is utilized by most countries for at least some portion of the employee population, and most have some means of transferring balances to new employers and taking hardship withdrawals, and are looking at ways to improve emergency savings and reduce leakage.
- The report findings may support ongoing efforts in Congress to expand or potentially mandate automated savings as well as other current voluntary auto provisions.

- Cryptocurrency investments are still relatively new and considered to be speculative; as such, the various regulatory agencies have suggested caution if a plan fiduciary is considering adding them to their investment lineup. To date, there has been mild interest in cryptocurrency from plan fiduciaries.
- We will watch as the regulatory framework develops for these crypto assets for potential impacts on retirement plans.



Regulatory Updates

Department of Labor



Department of Labor (DOL)

STATUS: We finally have a Senate-confirmed head of Employee Benefits Security Agency (EBSA). Lisa Gomez is the new assistant secretary of EBSA. Ms. Gomez was confirmed in September and joins the DOL with a very busy EBSA agenda.

Status in Washington

ERISA Advisory Council (EAC)

- The EAC held their second hearing of the year in September.
- The EAC heard testimony on their study for 2022 including cybersecurity issues affecting health benefit plans, and cybersecurity insurance for employee benefit plans.
- Acting Assistant Secretary of EBSA Ali Khawar from the DOL gave testimony at the hearing.
- There were twelve witnesses in total.
- The discussions around cybersecurity insurance for plans addressed:
 - The types and coverage of various cybersecurity insurance policies
 - Litigation involving cybersecurity breaches and insurance coverage
 - Development of a plan sponsor survey to learn more about insurance coverage of losses suffered by participants in defined contribution plans due to cybersecurity incidents
 - Witnesses were asked about their thoughts on potential regulatory guidance and/or education efforts pertaining to cybersecurity insurance
- In November 2022, the EAC met to draft their recommendations to the DOL following their study of the 2022 issues around cybersecurity insurance and defined contribution plans, resulting in two recommendations to DOL:
 1. Given the breadth and complexity of this topic and the evolving nature of insurance coverage for cyber incidents, the DOL should continue to study the issue of cybersecurity insurance and employee benefit plans.
 2. The DOL might consider developing an educational document for employee benefit plan fiduciaries and others concerning the types of insurance coverages that are available to protect against losses resulting from cyber incidents
- The EAC cautioned the DOL to:
 - Not issue any educational material that could be perceived as a “soft-mandate,”
 - To provide an adequate notice and comment period before issuing any further guidance,
 - To further study the complexity of cybersecurity insurance
- The EAC is scheduled to present its final recommendations to DOL officials on December 8-9, 2022.

Our Point of View

- It will be interesting to see the final recommendations from the EAC.
- It is important to note that the EAC makes recommendations to the DOL, but it is up to the DOL to decide if they will implement the recommendations from the EAC.
- The cost of cybersecurity insurance, as well as what the coverage entails are complex issues.
- This is a developing topic and we will continue to monitor.



Regulatory Updates

Treasury, Internal Revenue Service



Treasury, Internal Revenue Service

STATUS: The IRS has been busy issuing guidance. While “SECURE Act 2.0” may pass in 2022, we are still awaiting final guidance on some issues from the original SECURE Act.

Status in Washington

IRS extends deadlines for SECURE Act amendments

IRS issued [Notice 2022-33](#) in August 2022.

- The notice extended the deadlines for retirement plans and IRAs to adopt amendments reflecting changes included in the *SECURE Act*; section 104 of the *Bipartisan American Miners Act* of 2019 and section 2203 of the *Coronavirus Aid, Relief, and Economic Security (CARES) Act*, which waived required minimum distributions (RMDs) for 2020.
- Without this notice, many plans would have a deadline to adopt amendments by December 31, 2022, while still awaiting guidance on the amendments from the IRS.
- The extended plan amendment deadline for qualified retirement plans is December 31, 2025.
- This includes the anti-cutback relief for plans.

IRS Notice 2022-55 announces 2023 retirement plan contribution limits

On October 21, 2022, the IRS announced cost of living adjustments for 2023 plan contribution limits:

- Elective deferral contribution limit is increased from \$20,500 to \$22,500.
- Overall limitation for defined contribution plans under Internal Revenue Code (Code) section 415(c)(1)(A) is increased from \$61,000 to \$66,000.
- Limit on annual compensation that can be taken into account pursuant to Code section 401(a)(17) will increase from \$305,000 to \$330,000.
- The dollar limitation under Code section 414(v)(2)(B)(i) for catch-up contributions to an applicable employer plan for individuals aged 50 or over is increased from \$6,500 to \$7,500.

IRS provides temporary relief from proposed RMD interpretations in [Notice 2022-53](#)

- IRS announced temporary relief from some of its proposed interpretations of the SECURE Act’s changes to the required minimum distribution (RMD) rules that apply after death.
- IRS’s proposed interpretations are different than previously thought. When the 10-year rule applies, instead of just taking a lump sum at the end of the 10-year period, there are cases in which annual distributions must be taken during each year of the 10-year period, as opposed to allowing a lump-sum distribution at the end of that period.
- Under this relief, a defined contribution plan that failed to make a “specified RMD” will not be treated as having failed to satisfy Code section 401(a)(9) merely because it did not make the required distribution.
- This temporary relief is available for the 2021 and 2022 distribution calendar years.

Our Point of View

- All of this guidance and relief is welcome.
- The IRS still needs to finalize guidance, without which it would be difficult for plans to be amended by the original stated deadlines.
- The RMD relief is very helpful, as the IRS interpretation of the 10-year rule differed from how many in the industry previously interpreted the guideline.



Appendix: Additional legislative proposals

Various legislative proposals that address the following subjects:

- Environmental, social, and governance (ESG) investing in plans
- Alternative assets in retirement plans
- Emergency savings
- Expanded use of qualified default investment alternatives (QDIA), including annuities
- Expanding auto enrollment and mandating auto re-enrollment



Additional legislative proposals of interest

STATUS: While it is not likely all of these proposals will move forward on their own, elements of these proposals could be added to other legislation.

Proposal	Sponsor	Provisions
Safeguarding Investment Options for Retirement Act	Rep. Greg Murphy (R-NC)	<ul style="list-style-type: none"> The proposed legislation effectively codifies the Trump Administration Department of Labor rule. Would require plan fiduciaries to act solely based on “pecuniary” factors when selecting investments that take ESG factors into account. Investments would be permitted on a plan menu that promote non-pecuniary goals, but only if the investment otherwise meets ERISA’s rules and the investment is not the plan’s default investment.
Retirement Savings Modernization Act	Sen. Pat Toomey (R-PA) Sen. Tim Scott (R-SC) Rep. Peter Meijer (R-MI)	<ul style="list-style-type: none"> Bill would clarify that plan fiduciaries may select investment options that include a range of asset classes, including private equity. Fiduciaries must still select investments through a prudent process. There is no safe harbor from fiduciary duties.
Lifetime Income for Employees Act	Rep. Don Norcross (D-NJ) and Rep. Tim Walberg (R-MI)	<ul style="list-style-type: none"> QDIA expansion: Would amend QDIA regulations to allow (but not require) a QDIA to include a limited investment in a non-liquid annuity component in the mix of asset classes, which provides a guaranteed return on investment. Default annuity component. Permits a plan to limit the default annuity component to no more than 50 percent of the periodic contributions and no more than 50 percent of the total account value after a rebalancing, and must be an annuity contract that does not impose any liquidity restriction on amounts invested during the 180-day period beginning after the initial investment. Notice requirement: Each participant or beneficiary would be required to receive a new notice at least 30 days before the imposition of a liquidity restriction on the defaulted investment.
Enhancing Emergency and Retirement Savings Act	Sens. James Lankford (R-OK) and Michael Bennet (D-CO)	<ul style="list-style-type: none"> Creates a new penalty-free distribution from plans and IRAs for “emergency personal expense distributions” (EPEDs). Limited to one EPED per calendar year. Maximum amount that may be treated as an EPED by any individual in any calendar year is the lesser of (i) \$1,000 and (ii) the amount of the individual’s nonforfeitable accrued benefit that exceeds \$1,000. May be repaid within three years.
Auto Reenroll Act	Sen. Tim Kaine (D-VA) and Rep. Kathy Manning (D- NC)	<ul style="list-style-type: none"> Would require all new automatic contribution arrangements to institute automatic re-enrollment. Auto re-enrollment would have to occur at least every three years in order to (1) satisfy the 401(k) automatic contribution nondiscrimination safe harbor, and (2) permit plans to allow employees who are automatically enrolled to take “permissive withdrawal” of the automatic contributions within 90 days of the first such contribution.

