

# IRS Guidance Clarifies Employers' SECURE Act Obligations

401(k) withdrawals for birth or adoption, plus coverage of part-time workers, are addressed

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**L**ong-awaited IRS guidance answers questions about how employers should implement the Setting Every Community Up for Retirement Enhancement (SECURE) Act, signed into law last December. The SECURE Act seeks to expand retirement plan coverage for U.S. workers.

On Sept. 2, the IRS released Notice 2020-68 (<https://www.irs.gov/pub/irs-drop/n-20-68.pdf>) addressing components of the law such as eased withdrawals from retirement plans for birth or adoption expenses and required retirement plan eligibility for part-time employees.

## Letting Part-Time Workers into the Plan

The SECURE Act includes a new requirement to permit part-time employees to contribute to an employer's 401(k) or similar plan if the employee works at least 500 hours for three consecutive years. Such long-term, part-time workers must be allowed to contribute to plans starting in 2024. Therefore, hours worked for the years 2021 through 2023 need to be tracked to determine eligibility.

The SECURE Act and accompanying guidance requires plans to give long-term, part-time employees "the opportunity to make elective deferrals to your 401(k) plan—it does not require you to allow them to participate in employer matching and profit-sharing contributions (<https://www.huschblackwell.com/newsandinsights/reminder-counting-hours-for-part-time-employee-eligibility-to-take-effect-soon>)," wrote Patricia Martin and Myriem Bennani, attorneys with Husch Blackwell in Kansas City, Mo., and Milwaukee, respectively. "However, this may be a good time to consider whether you want to allow them to receive employer contributions," they said.

Martin and Bennani also noted that some plans use "equivalencies" that give each employee a fixed number of hours for each day, week, pay period or month worked. A plan, for example, may credit an employee with nine hours for each day on which an employee works just one hour. They advised, "If your plan document uses equivalencies to determine eligibility, we recommend reviewing it now to determine whether to use a different method for part-time employees going forward. You are permitted to use different methods for different classes of employees."

## Total Employment Counts Toward Vesting

For purposes of determining when an employee is vested in employer contributions to the fund, the employer must consider all years of service, even those before 2021, (<https://www.bhfs.com/insights/alerts-articles/2020/irs-notice-2020-68-implementing-long-term-part-time-employee-401-k-elective-deferrals>)- advised attorneys at Brownstein Hyatt Farber Schreck, with offices nationwide.

"Many employers were counting on only having to track part-time employee service on a going-forward basis after Jan. 1, 2021. However, this vesting service requirement likely adds a significant administrative burden on employers," the firm said.

The guidance "clarifies that 12-month periods beginning before 2021 can be disregarded for purpose of applying the deferral eligibility rule, but they cannot be disregarded for vesting purposes (<https://www.winston.com/en/benefits-blast/irs-guidance-on-secure-act-and-miners-act-retirement-plan-issues.html>) in any employer contributions provided to such employees," wrote attorneys Nancy Gerrie and Joseph Anderson at Winston & Strawn in Chicago. "This is true unless another rule permits disregarding a part-time employee's years of service for vesting purposes, such as years of service prior to age 18."

A team of attorneys in the Chicago and New York City offices of Seyfarth noted that "Many plans that already permit part-time employees to participate do not provide for employer contributions, so from a systems perspective, these plans will have an easier time implementing the new rules (<https://www.seyfarth.com/news-insights/irs-provides-additional-clarity-on-key-secure-act-provisions.html>).

The new rules may influence some plan sponsors not to make such contributions available to part-time employees for administrative convenience, i.e., to avoid having to maintain separate vesting system requirements, and due to lack of data for hours worked before 2021," the attorneys wrote.

*[SHRM members-only toolkit: Designing and Administering Defined Contribution Retirement Plans ([www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/designingandadministeringdefinedcontributionretirementplans.aspx](http://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/designingandadministeringdefinedcontributionretirementplans.aspx))]*

### **Plan Withdrawals for Birth or Adoption Expenses**

The SECURE Act allows exceptions to the 10 percent early withdrawal penalty for birth or adoption expenses. New parents can now withdraw up to \$5,000 from a retirement account within a year of a child's birth or adoption without the tax penalty that participants younger than 59 1/2 would normally owe.

The penalty-free distribution, which is still subject to income taxes, can be repaid to a retirement account.

Notice 2020-68 "made several clarifications regarding the amount and source of the qualified birth or adoption distributions (<https://graydon.law/update-secure-provides-new-option-to-help-pay-for-birth-or-adoption/>)," wrote Alex Mattingly, an attorney at Graydon in Cincinnati. "It is now clear that the \$5,000 maximum distribution amount is applicable separately to each parent for every child born or every eligible adoptee [who is] adopted in a one-year period," he pointed out.

Mattingly gave this example: "A mother and father of twins would each be eligible to take up to a \$10,000 distribution that would qualify as a qualified birth or adoption distribution, so long as all other requirements are met."

### **Next Steps**

The guidance reaffirms that the deadline for both required and discretionary plan amendments under the SECURE Act and related regulations is the end of the first plan year beginning on or after Jan. 1, 2022 (or 2024 for governmental plans and collectively bargained plans). Any later amendments must follow the usual remedial-amendment-deadline rules.

The guidance indicates that the IRS intends to issue additional guidance under the SECURE Act "as appropriate."

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SECURE Act Alters 401(k) Compliance Landscape ([www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/secure-act-altern-401k-compliance-landscape.aspx](http://www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/secure-act-altern-401k-compliance-landscape.aspx)), *SHRM Online*, January 2020

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