



Q3 2022 Retirement Legislation Update

The House and Senate are closer to reaching common ground on retirement savings enhancement legislation the industry has named “SECURE 2.0.” The chambers are scrutinizing and synthesizing the latest iterations of the following three bills:

1. HR 2954 Securing a Strong Retirement Act (SSRA)
2. S 4353 Retirement Improvement and Savings Enhancement to Supplement Healthy Investments for the Nest Egg (RISE & SHINE) Act and
3. Enhancing American Retirement Now (EARN) Act. (A formal bill is yet to be released. Please see a section-by-section summary.)



This legislative trifecta builds on the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 (hence the SECURE 2.0 moniker). With much overlap of provisions, all three of the bills share the common goals of expanding access to workplace retirement plans, increasing savings, broadening lifetime income options in defined contribution plans and simplifying plan administration. Both the House and Senate are eager to reconcile any differences between the bills, work to merge key elements and approve one final piece of legislation that could be attached to a final tax measure for President Biden to sign, possibly, by year end.



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Background

On March 29, 2022, the full House passed the SSRA, with a 414-5 vote, and sent the proposal to the Senate Finance Committee. As it currently stands, the SSRA has 51 retirement-related provisions.

The Senate Health, Education, Labor & Pensions (HELP) Committee unanimously approved the RISE & SHINE Act on June 14, 2022. The full Senate is now considering the bill's 26 provisions.

All 28 members of the Senate Finance Committee approved the EARN Act with its 70 provisions on June 22, 2022. It, too, is now being considered by the full Senate.





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Overlapping Provisions

- Delaying Required Minimum Distributions (RMDs) from age 72 to 75
- Allowing employer matching contributions based on student loan payments
- Increasing catch-up contribution limits
- Raising the plan cash-out limit
- Permitting plan repayments of withdrawals related to birth or adoption, or domestic abuse expenses
- Enhancing plan coverage of long-term part-time employees
- Sanctioning Multiple Employer Plans (MEPs) and Pooled Employer Plans (PEPs) for 403(b) plans
- Allowing for participant health benefits in overfunded pension plans
- Adding special ESOP tax provisions for S-corporation owners
- Permitting retroactive plan amendments to increase plan benefits
- Foregoing certain plan disclosures for nonparticipants
- Including comparative benchmarking procedures for blended funds such as target date
- Clarifying employee self-certification of hardship withdrawals
- Creating a “Retirement Savings Lost and Found”
- Permitting de minimis financial incentives to encourage 401(k) plan participation
- Issuing pension risk transfer guidance for purchasing annuities
- Allowing 403(b) plans to invest in collective investment trusts (CITs)
- Clarifying life annuities and qualifying longevity annuity contracts for plan withdrawals
- Broadening the Internal Revenue Service’s (IRS) plan correction programs





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Novel Provisions

Each bill has some novel proposals for Congress to consider, too, as outlined next. The EARN Act includes the following items not mentioned in the other two bills:

- A new automatic 401(k) plan safe harbor design that would require higher employer contributions than those currently prescribed under existing arrangements
- Penalty-free withdrawals for long-term care contract premiums and terminally ill participants
- Penalty-free disaster relief for withdrawals that could be recontributed to the distributing plan
- Automatic rollovers of a participant's default IRA (established in connection with a distribution from a former employer's plan) into the participant's new employer's retirement plan, unless the participant affirmatively elects otherwise
- Standardized direct rollover forms that may be used by both the incoming and outgoing retirement plan or IRA
- 401(k) designated Roth accounts would not be subject to RMDs
- A surviving spouse could elect to be treated as the deceased plan participant for RMD purposes

Here is what is unique in the RISE & SHINE Act:

- Automatic re-enrollment every three years for those who previously opted out
- Use of a reasonable projection for interest crediting rates in certain Cash Balance plans
- Added requirements for defined benefit plans offering lump sum windows
- Expanded information in the annual funding notice for defined benefit plans
- Permitting incidental expenses incurred related to plan design, such as automatic enrollment and reenrollment or automatic escalation, to be charged to the plan





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The SSRA includes these distinct provisions:

- Require automatic enrollment provisions in all new 401(k) and 403(b) plans
- Expand rules for determining when securities are considered publicly traded for diversification purposes
- Require a one-time paper notice to participants subject to the electronic disclosure rules and at least one paper benefit statement annually (or every three years for defined benefit plans)





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The DOL's PTE 2020-02 Is Now Fully Enforceable

Financial professionals who provide investment advice for a fee to plan sponsors and retirement investors must follow a Department of Labor (DOL) prohibited transaction exemption (PTE) in order to receive compensation for the advice given. The DOL's latest PTE for this purpose is PTE 2020-02.



PTE 2020-02 originally took effect February 16, 2021. Later, the DOL implemented a “nonenforcement policy” under Field Assistance Bulletin (FAB) 2018-02 until December 20, 2021, for those who diligently and in good faith complied with the “Impartial Conduct Standards.” FAB 2021-02 further extended the nonenforcement policy through January 31, 2022. The three Impartial Conduct Standards mandate that advice be given

- In the best interest of the retirement investor;
- At a reasonable price;
- Without any misleading statements.

After January 31, 2022, investment advice fiduciaries following PTE 2020-02 are required to continue to follow the Impartial Conduct Standards and

- Acknowledge in writing their fiduciary status under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code;
- Describe in writing the services to be provided and any material conflicts of interest that may exist;
- Adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and that mitigate conflicts of interest; and
- Conduct an annual retrospective review of their compliance with the requirements and produce a written report that is certified by one of the financial institution's senior executive officers.



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The DOL delayed enforcement of PTE 2020-02's specific requirements for rollover advice until July 1, 2022. On and after that date, if the advice involves a rollover recommendation, then advisors must

- Document the reasons that a rollover recommendation is in the best interest of the retirement investor; and
- Disclose the justification for the rollover in writing to the retirement investor.



IRS Pilots New Pre-Examination Compliance Program

The IRS is assessing a new pre-examination compliance program. Under this program, the IRS will notify a plan sponsor by letter that its retirement plan has been selected for an upcoming examination and permit the sponsor to use less costly self-correction measures to remedy errors that are found. Usually, once the IRS issues a letter of examination, the plan sponsor is limited to correcting any errors under the more expensive Closing Agreements Program (CAP) and cannot use the voluntary correction methods with lower fees. At the end of this pilot, the IRS will evaluate the program's effectiveness and determine if it should continue to be part of its overall compliance strategy.



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“Bad Apple” MEP Proposed Regulations

The IRS has issued new proposed regulations under Internal Revenue Code Sections (IRC§§) 413(c) and (e), which provide for an exception to the “unified plan rule,” (a.k.a., the one-bad-apple rule) for closed multiple employer and pooled employer plans (closed MEPs and PEPs). The proposed rule allows MEPs and PEPs to avoid disqualification should one or more participating employers fail to comply with applicable IRS mandates. For the exception to the unified plan rule to apply, the plan administrator must satisfy plan document language requirements, provide up to three notices to any noncompliant plans and, in certain circumstances, separate plan assets attributable to the participants of a nonconforming employer who fails to correct its errors. The IRS will allow plans to operate under a good faith compliance umbrella until the issuance of final regulations.



2022 Plan Year Forms 5500 Released

The DOL released final forms and instructions for the Form 5500, Annual Return/Report of Employee Benefit Plan and Form 5500–SF, Short Form Annual Return/Report of Small Employee Benefit Plan, effective for plan years beginning on or after January 1, 2022. The changes to the forms and instructions primarily implement annual reporting changes for defined benefit plans, along with a limited number of instruction changes focusing on MEPs (including PEPs).



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DOL's Spring 2022 Regulatory Agenda

The DOL has released its Agency Rule List for Spring 2022—the agency's "to do" list, which includes a list of regulations that the Employee Benefits Security Administration (EBSA) intends to release in the coming months.



Stage of Development	Regulation	Tentative Date for Release
Prerule Stage	Improving Participant Engagement and Effectiveness of ERISA Retirement Plan Disclosures	06/2022
Prerule Stage	Pooled Employer Plans	06/2022
Proposed Rule Stage	Improvement of the Form 5500 Series and Implementing Related Regulations Under the Employee Retirement Income Security Act of 1974 (ERISA)	03/2023
Proposed Rule Stage	Definition of the Term "Fiduciary"	12/2022
Proposed Rule Stage	Prohibited Transaction Exemption Procedures	06/2022
Final Rule Stage	Pension Benefit Statements-Lifetime Income Illustrations	08/2022
Final Rule Stage	Adoption of Amended and Restated Voluntary Fiduciary Correction Program	07/2022
Final Rule Stage	Implement SECURE Act and Related Revisions to Employee Benefit Plan Annual Reporting on the Form 5500	03/2023
Final Rule Stage	Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights	12/2022
Final Rule Stage	Amendment of Abandoned Plan Program	08/2022