Brownstein Hyatt Farber Schreck

Employee Benefits News

September 9, 2020

IRS Notice 2020-68: Implementing Long-Term Part-Time Employee 401(k) Elective Deferrals

As described in greater detail below, **Notice 2020-68** includes guidance for implementing the mandatory participation of long-term part-time nonunion employees in 401(k) plans for plan years beginning Jan.1, 2021.[1]

Brownstein Comment: The IRS admits that **Notice 2020-68** "is not intended to provide comprehensive guidance as to the specific provisions of the SECURE Act and the Miners Act[2] it addresses, but rather is intended to provide guidance on particular issues to assist in the implementation of these provisions." Accordingly, the IRS asks for comments by Nov. 2, 2020, about what additional guidance may be needed.

Other Areas Covered by Notice 2020-68. In addition to the guidance on long-term part-timers' participation in 401(k) plans, **Notice 2020-68** includes initial guidance related to:

- Small employer automatic enrollment credit (Section 105 of the SECURE Act).
- Repeal of the maximum age for making traditional IRA contributions (Section 107 of the SECURE Act).
- Penalty-free distributions for qualified birth or adoption expenses (Section 113 of the SECURE Act).
- Consideration of "difficulty of care payments" as compensation for certain purposes certain retirement contribution limitations (Section 116 of the SECURE Act).
- The reduction in the minimum age for permissive in-service distributions under qualified pension plans and governmental 457(b) plans, from ages 62 and 70½, respectively, to age 59½ (Section 104 of the Miners Act).
- Plan amendment deadlines and implications on the anti-cutback provisions of Section 411(d)(6) of the Code.

IRS Seeks Comments by Nov. 2, 2020. In **Notice 2020-68**, the IRS also announces that it is seeking taxpayer questions and comments about the SECURE Act and Miner Act provisions referenced in the Notice (listed above). **The deadline for submitting comments and questions is Nov. 2, 2020**. ***Brownstein Comment:*** We encourage you to submit comments to the IRS on these provisions, as your comments help the IRS write its guidance.

Implementing Long-Term Part-Timers' Participation in 401(k) Plans

Eligibility to Participate. For plan years beginning after Dec. 31, 2020, a 401(k) plan must allow any nonunion employee of the sponsoring employer (or other participating employer) to participate in making elective deferrals as of:

- The close of the first 12-consecutive month period during which the employee is credited with at least 1,000 hours of service or, if later, the employee's attainment of age 21, or

- The close of the first period of three consecutive 12 months during which the employee is credited with at least 500 hours of service in each 12-month period or, if later, the employee's attainment of age 21. (An employee who meets this three-year eligibility requirement is referred to as a "***long-term part-time employee***.")
    - No 12-month period before Jan. 1, 2021, is required to be considered for purposes of determining an employee's eligibility to make elective deferrals to the 401(k) plan, but see the discussion below regarding vesting.

Brownstein Comment: Section 112 of the SECURE Act does not require that long-term part-time employees be eligible to receive safe harbor contributions or other allocations of employer matching contributions or discretionary contributions. Long-term part-time employees also appear to be excludable for purposes of nondiscrimination and top-heavy requirements—but IRS guidance as to the specifics of these exclusions would be helpful.

Vesting in Employer Contributions. With respect to any employer contributions allocated to the plan account of a long-term part-time employee, the employee must be credited with one year of vesting service for each 12-month period during which the employee completes at least 500 hours of service. **Notice 2020-68** (FAQ C-1) clarifies that ***all*** years of service, even years before 2021, must be considered for determining a long-term part-time employee's vesting in any employer contributions allocated to that participant's account, unless those years otherwise may be disregarded (e.g., years before the employee's attainment of age 18, if so provided in the plan document).

Brownstein Comment: We think 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. While an employer always could be more generous in the application of service for vesting, that simply may not be possible. Employers presumably have employment records on hourly paid part-time employees that will enable them to determine whether such employees have actually been credited with 500 hours of service in all years since the employee's start date, but collecting that data might seem to be a Sisyphean task. Alternatively, and for those jobs that are not paid hourly (e.g., part-time commissioned sale positions), an employer may want to explore whether the equivalency method of determining hours of service, as set forth in 29 C.F.R. §2530.200b-3(c), could be utilized (where, for example, a day is equivalent to 10 hours, a week is equivalent to 45 hours, a month is equivalent to 190 hours). However, using equivalencies results in more generous service crediting and, if a plan applies one of the equivalencies to a group of employees, then those employees are deemed to earn the number of hours of service in the stated period, so long as they work at least one hour of service in that period. In addition, an employer must ensure that the manner in which employees' service is credited for all purposes under the plan cannot discriminate in favor of highly compensated employees. Nevertheless, the service crediting requirement would seem to impose a significant administrative burden on employers. It certainly would be helpful for more guidance to be issued on how service should and could be credited. In fact, the IRS in **Notice 2020-68** specifically requests comment on how to reduce potential administrative burdens related to counting years of service beginning before Jan. 1, 2021, for purposes of determining a long-term part-time employee's vesting service.

401(k) Plan Amendment Deadline

The deadline to adopt a 401(k) plan amendment, which includes long-term part-time employee participation provisions, is the last day of the first plan year beginning on or after Jan. 1, 2022 (that is, Dec. 31, 2022, for a calendar year plan), but the amendment must reflect an operational effective date retroactive to the statutory effective date (i.e., the first day of the first plan year beginning on or after Jan.1, 2021) *and* the plan must in fact have been operated in accordance with the applicable requirements as of that statutory effective date. An amendment adopted by this date would not be considered to violate the anticutback rules under Section 411(d)(6) of the Code or Section 204(g) of ERISA, so presumably the amendment could include a change in how service is credited without resulting in a prohibited cutback. While a plan could be amended after that date, such later adopted amendments no longer would be able to rely on the anticutback relief provided under Rev. Proc. 2016-37, as modified by Rev. Proc. 2017-41 and Rev. Proc. 2020-40.

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How We Can Help

Please contact us if you would like assistance in communicating your comments to the IRS or to answer questions about the rules governing the participation of long-term part-time employees in 401(k) plans, or any other provision of the Tax Cuts and Jobs Act, the SECURE Act or the CARES Act. Please also contact one of us or your regular Brownstein attorney for answers to any other employee benefits questions you may have.

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[1] The mandate was enacted in Section 112 of the Setting Every Community Up for Retirement Enhancement Act of 2019 (the "**SECURE Act**") of Division O of the Further Consolidated Appropriations Act, 2020, P.L. 116-94, 133 Stat. 2534 (Dec. 20, 2019).
[2] Section 104 of Division M of the Further Consolidated Appropriations Act, 2020, known as the Bipartisan American Miners Act of 2019 (the "Miners Act").