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MEMORANDUM

To: Board of Trustees
Defined Benefit Pension Fund Clients

From: Slevin & Hart, P.C.

Date: February 21, 2020

Re: The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019

The Setting Every Community Up for Retirement Enhancement Act (the "SECURE Act" or "the Act"), enacted on December 20, 2019, changes numerous provisions of the rules governing defined benefit pension plans. These changes are generally effective starting in 2020, although several provisions have delayed effective dates, in some cases pending further guidance.

This memorandum describes the most significant changes made by the SECURE Act that affect defined benefit pension funds. We will discuss plan amendments and changes to affected plan operations with you as the guidance is issued. For non-collectively bargained plans, amendments to reflect any changes under the SECURE Act are required by the last day of the plan year beginning on or after January 1, 2022. For collectively bargained plans, this deadline is delayed to the last day of the first plan year beginning on or after January 1, 2024.

Summary of Key Change and Compliance Steps

Required Minimum Distributions and the Required Beginning Date: Currently, the Internal Revenue Code requires participants who are not actively working to begin taking distributions from a defined benefit plan no later than the April 1 of the calendar year following the year in which they reach age 70½ (the "required beginning date"). If permitted under the plan terms, participants who are actively working may defer taking a distribution until the April 1 of the calendar year following the calendar year in which they stop working. This provision limits the participant's ability to defer receipt, and thus taxation, of pension benefits.

Effective December 31, 2019, the SECURE Act delays the required beginning date by which benefit payments must commence under a qualified plan by increasing the age for determining a participant's required beginning date from age 70½ to age 72 for participants who reach age 70½ after December 31, 2019.

The impact of the Act on your plan will depend upon several factors, particularly how the Plan defines the required beginning date. Unless your plan defines the required beginning date solely by reference to Code Section 401(a)(9) (without actually stating the rule), it is likely that any decision on how and whether to change the rule will need further Internal Revenue Service ("IRS") guidance. For past changes to the required beginning date rule, the IRS has provided plans with the option to: (1) make the change without violating the anti-cutback rule; (2) make no change; or (3) maintain the prior rule as an option. If the IRS uses the same approach this time, plans will need to decide whether and how to change the required beginning date.

To be ready to evaluate the Plan's options under the Act once guidance is issued, plans should: (1) confirm the current Plan rule (for example, those that provide for required beginning dates at 70½ even if the person is working); (2) review plan records for participants who will turn 70½ in 2020; and (3) discuss whether to adopt the updated required beginning date rules as guidance is issued.

Given that participants attaining 70½ in 2020 would not receive a distribution until April 1, 2021 at the earliest, there is no change required to your administrative practices until anticipated guidance from the IRS is issued.

Analysis

1. Benefit Commencement and Distributions – the Required Beginning Date and Minimum Distributions. The SECURE Act makes a significant change to when and how participants in defined benefit retirement plans take distributions of their benefits.

As background, the definition of "required beginning date" under the Code has changed several times over the years. Generally, prior to 1999, the Code required that qualified plans commence benefits no later than the April 1 following the calendar year that the participant reaches age 70½, regardless of whether the participant kept working ("pre-1999 RBD"). In 1999, the Code was amended to require qualified plan benefits to begin no later than the April 1 following the later of the calendar year in which: (1) the participant reaches age 70½; or (2) retires. At the time of those changes, plans were permitted to retain the pre-1999 RBD rule and many plans did so. As a result, some plans require distributions to commence at age 70½ even if the participant still is working, while other plans allow participants to delay distributions until they retire.

Under the SECURE Act, the age for determining a participant's required beginning date increases from 70½ to age 72. Thus, there are many open issues that will need to be addressed in IRS guidance on how the SECURE Act will be implemented. In particular, the IRS will need to confirm that plans that do not use the current Code definition of "required beginning date" will have the option of changing the plan's definition to the new rule (and delaying mandatory distributions) without causing an impermissible cutback, as the Act seems to indicate.

Once the trustees determine whether a change will be made, the plan documents will need to be amended, a notice describing the change will need to be distributed, and distribution forms will need to be updated. In addition, since there are a number of Code-required rules that depend on the required beginning date, other rules imposed by the Code may change, and plan operations and language may need to be updated even if the Plan's required beginning date does not change.

For example, the Code requires that plan benefits that do not commence at age 70½ (regardless of which required beginning date the plan uses) be actuarially increased to reflect the period between age 70½ and when the benefit actually commences. Since the law did not change the Code section requiring this adjustment, it is unclear whether the Act will delay this required adjustment until age 72. As it stands, even the benefits of participants whose payments are suspended for prohibited employment must receive actuarial increases from age 70½ until benefits commence.

Because the Act specifies that this change applies to participants who reach age 70½ after December 31, 2019, plans should continue to apply the 2019 70½ rule to participants who reach age 70½ on or before December 31, 2019.

Other Changes Impacting Defined Benefit Plans

2. **Optional Change to Minimum Age for In-Service Distributions**: Previously, defined benefit plans could allow in-service distributions to working participants only on or after the date they reached age 62. The Further Consolidated Appropriations Act of 2020 (the "Appropriations Act"), of which the SECURE Act is part, amends the law to reduce the minimum age for in-service distributions in defined benefit plans to 59½ for plan years beginning after December 31, 2019. This is an optional provision. Thus, defined benefit plans that do not currently offer in-service distributions may choose to add such an option, and defined benefit plans that offer in-service distributions at age 62 may choose to reduce the eligibility age to 59½.

3. **Reporting and Penalties:** The SECURE Act substantially increases the penalties for failure to timely file Form 5500 and other required filings and disclosures. Penalty amounts are increased as follows:

- For failure to file a Form 5500 or Form 5310-A (Notices of Plan Merger, Spinoff, etc.), the penalty is increased from $25 per day to $250 per day and the cap on the maximum penalty is increased from $15,000 to $150,000.

- For failure to file a required notification of a change in status with a plan's Form 5500 (i.e., plan name change, address change, plan termination or merger), the penalty is increased from $1 to $10 per day and the cap on the maximum penalty is increased from $1,000 to $10,000.

- For failure to file Form 8955-SSA (the annual registration statement identifying separated participants with deferred vested benefits) by a pension plan, the penalty is increased from $1 per participant to $10 per participant and the cap on the maximum penalty is increased from $5,000 to $50,000.

- For failure to provide a required withholding notice to recipients of periodic pension distributions, the penalty is increased from $10 per failure to $100 per failure and the cap on the maximum penalty is increased from $5,000 to $50,000.

- For a general failure to file a required income tax return, for instance a Form 990-T (an exempt organization tax return) or Form 5330 (an employee benefit plan excise return), the penalty is increased from $205 per day to $435 (after adjustment for inflation).

These changes apply to returns, statements and notifications required to be filed, and notices required to be provided, after December 31, 2019.

4. Nondiscrimination Relief for Closed Defined Benefit Plans: In recent years, the IRS has provided temporary extensions of relief from the nondiscrimination testing rules for certain defined benefit plans that exclude new hires but allow accruals to continue for existing participants ("closed" or "frozen" plans). The SECURE Act extends permanent nondiscrimination testing relief if certain requirements are met to help these plans satisfy the Code's nondiscrimination and minimum participation requirements.

5. Mid-Year Plan Adoptions: For taxable years after December 31, 2019, the SECURE Act permits plans adopted before the employer's extended filing due date of the tax return for the taxable year to treat the plan as in effect during that tax year. This change allows employers additional time to establish qualified retirement plans and gives employees the opportunity to receive and accumulate retirement savings earlier in the year.

Conclusion

As noted above, further guidance is expected from the IRS and other agencies that will expand on and clarify the impact of the new law. We look forward to discussing these requirements with you.

cc: Co-Counsel

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