SECURE Act Top Ten Need-to-Know

#1

Section 101. Multiple Employer Plans; Pooled Employer Plans

- Effective for plan years *after* 12/31/20.
- Currently, MEPs have 2 main types:
    1. Closed MEPs – between employers and a sponsor with sufficient "nexus." One audit, one 5500, multiple plan design options, same investments. Generally, these are sponsored by trade associations.
    2. Open MEPs – multiple unrelated employers. Each plan is considered a separate single plan (separate audits, 5500s, etc…), but have one pooled investment account (trust). Note that Open MEPs really don't exist. Like "solo 401k plans" they are an industry term, not a legal one. Open MEPs are simply single-employer plans that have reduced investment expense due to the use of a pooled investment account across plans.
- Removes the "one bad apple" rule whereby one Participating Employer in a MEP can disqualify the entire plan even if no one else is at fault.
- The "one bad apple" rule is removed for MEPs with "nexus" and for PEPs (Pooled Employer Plans) that are sponsored by PPP (Pooled Plan Providers). Both PEPs and PPPs are created by the SECURE Act. A PEP does not require "nexus."
- To remove the "one bad apple" the plan document of the PEP or MEP must specify that the offending employer will be removed from the plan and that no other employer will be liable.
- A PPP is a person who is the named plan fiduciary, the plan administrator, and the person responsible for all administrative duties.
- A PPP must register with the Secretary of the Treasury and is open to audit and inspection.
- Each employer is still responsible as plan sponsor for the plan as it relates to their employees. It is not yet clear exactly what this responsibility involves. More than likely the employer will have fiduciary responsibility to select the PEP/PPP, make necessary employee and employer contributions timely, and have fiduciary responsibility with regards to the plan assets of their employees unless there is an ERISA 3(38) investment manager.
- If no one employer in the PEP has more than 100 participants and the PEP has no more than 1,000 participants, then an audit is *not* required.
- Plan amendments are required by 12/31/22. This date could be later.
- Good faith compliance prior to the ability to amend is allowed.
- **Opportunity!** This is the big one in the SECURE Act. Now we can "build" a retirement plan for different unrelated employers. We can be a PPP for a PEP for those that had been in SIMPLE IRAs, those that have never had a plan, or those that are all in a similar industry and have like emphasis on plan design. A PEP could be developed for employers in a particular geographic area, particular size, particular industry. Introducing the "General Contractor PEP" or the "Index Fund Only PEP." Basically, ask "What do I want to do?" Chances are there is a way to do it!
- **Opportunity!** The PEP could be kept under the audit threshold. Once it grows close to the audit level, start a 2nd PEP and keep it under the audit threshold.
- **Opportunity!** Investment advisory costs are kept low because there is one set of investments, one trust, one investment account, one IPS, and one monitoring report. Custodial costs are kept low because there is just one investment account. Administrative costs are little changed. Plan design consultation is identical. There is a slight savings on the paperwork involved, but not much. The recordkeeping setup is similar, especially if the PEP is receiving an existing plan into it. The biggest administrative savings is that a new investment account does not need to be established and there is no further coordination on what plan investments will be made available.
- **Beware!** The DOL and Treasury have yet to provide guidance. The "Devil's in the details." Exactly what liability is assumed by the PPP vs each employer is not yet known.

- **Beware!** Who is going to be willing to assume the liability as PPP? How can they be compensated? Can the PPP be composed of a board of service providers vs a board of adopting employers? For example, in a closed MEP the oversight of the MEP must be controlled by the Participating Employers. Is that true for a PEP? This is not yet clear.
- **Beware!** Plan design provisions do not change when an employer joins a PEP. If they had Safe Harbor, they keep Safe Harbor. Over 90% of the administrative work is the same for many clients in their own plan or many clients in a PEP. Therefore, administrative costs are *not* an opportunity for much savings. Each employer in a PEP has their own plan design, their own payroll to process, their own distribution rules, their own SPD, their own contribution types, etc… That's the beauty of a PEP! Individuality in design and contributions to allow uniformity in investments.
- **Beware!** PEPs and MEPs have a lot in common with "Hotel California": "You can check out any time you like, but you can never leave." Not exactly true, but an employer does not easily end their participation in a PEP. They must "spin out." That is, an employer cannot terminate the "plan" when they are only part of the plan. To terminate, they have two options:
    1. Freeze contributions but stay in the PEP. If so, then every participant with a balance remains in the plan with no opportunity for distribution while they are employed, unless they qualify for an in-service distribution.
    2. They spin out into their own plan for the sole purpose of terminating it. Spinning out to terminate is difficult, because who is going to hold plan assets for only a couple of months? Insurance companies, banks, and trust companies are leery of doing this due to money laundering concerns. Spinning out is more than nuance. It is a critical step.
- **What you can do now!** Think about how you would like to market a PEP to clients. Do you want to market a plan based solely on its investments? What about a plan for those in a specific geographic area or industry? For "startups" only? Pretend there are no rules to how you get clients in a single plan. Then talk to MVP about how we can make this happen! We've got a year to research, analyze, learn, and develop.
- **What you can do now!** Develop your fees around the use of the new tax credit and a PEP. Imagine 40 employers with at least 20 NHCEs each in a PEP. That's up to $5,500 in tax credits (more to come on these) for 3 years for 40 employers. That's $660,000 in tax credits to cover up to 50% of fees!
- The big question you might be asking is "Is MVP going to be a PPP?" Great question! We are diligently researching and assessing this. We will let you know what our plans are as more guidance is given.

#2

<u>Section 103. Simplification of Safe Harbor 401(k) Rules</u>

- Effective for plan years beginning in 2020.
- No more Safe Harbor Notices for *Nonelective* plans! Notices are still required for Match plans.
- Plans can be amended until 30 days from the end of the plan year to allow for a 3% Safe Harbor Nonelective Contribution (SHNE). Amendment dated 12/1/20 can allow for a 2020 plan year 3% SHNE.
- Plans can be amended until the end of the following year to allow for a 4% SHNE for the prior year. Amendment dated 12/31/21 can allow for a 2020 plan year 4% SHNE.
- Note that there may be issues with amending as late as the end of the following year. This is because, for employer contributions to be tax-deductible, they must be made no later than the tax filing deadline or extension deadline. 3/15 or 9/15 for S-Corps and Partnerships and 4/15 or 10/15 for C-Corps or Sole Props.

- More than likely, the 4% SHNE will need to be amended no later than 9/15/21 to be tax-deductible for 2020.
- **Opportunity!** Yes, this means as you are reading this our clients can elect SHNE for 2020 even if they have not yet provided notices or amended the plan.
- **Beware!** Guidance is required from the IRS in order to compliantly amend the plan document to allow for this. Once guidance is provided, we'll let you know so that our clients can have the opportunity to make this election.
- **What you can do now!** Continue talking to prospects and existing clients about their needs and the ability to elect Safe Harbor for 2020. Do **not** tell them they can elect SHNE now. Wait for us to give you the OK. We will let you know if interim plan amendments are required or if the legislative language is clear enough to put these plans in place.

#3

Sections 104-105. Increase Credit Limitation for Small Employer Pension Plan Start-Up Costs and Small Employer Automatic Enrollment Credit.

- Effective for plans started after 12/31/19.
- Currently, a start-up plan gets a 50% tax credit when up to $1,000 ($500 limit) is paid in fees outside the plan in each of the first three years.
- For plans started now, the tax credit will be the greater of $500 or the lesser or $250 times the number of NHCEs or $5,000. Note that the 50% cap on plan expenses still applies.
- For example, an employer with 10 NCHEs wants to start a 401k plan. The total cost for the year is $4,000, then she gets a credit of $2,000. 50% of $4,000 = $2,000 is lesser than $250 * 10 = $2,500.
- In another example, an employer with 15 NCHEs wants to start a 401k plan. The total cost for the year is $9,000. She gets a credit of $3,750. $250 * 15 = $3,750 is lesser than 50% of $9,000 = $4,500.
- An additional credit of $500 per year for the first three years that *any* employer can claim who institutes an automatic enrollment feature in their plan.
- **Opportunity!** This allows pricing to be structured to minimize costs and maximize the deduction. Let's say the anticipated fees for all services is estimated to be $8,000. We can provide services that puts fees at $10,000/year so that there is maximization of the tax credit for 3 years. Pricing could then decrease after 3 years.
- **Opportunity!** Such a deduction will be especially beneficial in offsetting costs for Cash Balance Plans and start-up 401k plans for larger organizations. For example, an employer wants to start a 401k plan paired with a Cash Balance Plan. Assume such total costs are $10,500 annually for all services for 2 plans. Now fees can be quoted incorporating the $5,500 credit showing their net cash cost. Also, you can show the tax deduction available for the other $5,000 they must pay. So, assuming a 40% tax rate, $10,500 in fees nets only to a $3,000 actual out of pocket cash expense! When explaining to the prospect, show the $3,000 as the bottom line net cost, not the $10,500!
- **Opportunity!** If you are like me, you may be thinking that a small plan's fees could be less than $10,000 between all service providers. 50% of $10,000 in fees = $5,000 maximum tax credit. Why not price the plan so that the fees are higher in the first 3 years and drop for a while afterward? Let's say that fees are only $8,000/yr. Why not price them to be $10,000/yr for 3 years with years 4 and 5 dropping to $5,000? This pricing saves the client $3,000 and gets you paid faster! Plus, it's incentive for them to stay for that 4th and 5th year! Contracts can be written to accommodate this is in a reasonable and prudent manner for all parties.
- **Opportunity!** If your client is on the fence about auto enrollment, then this is $1,500 total in tax credits ($500 * 3 years) to encourage them to institute it.

- **Beware!** Not much negative here but be clear that the credits end after 3 years as employers do not like surprises.
- **Beware!** Your competitors are going to be pushing hard on the low-cost nature of startup plans. You, too, need to be aggressive. For some small employers, plans are now going to be "half off" for 3 years. Why not tell the business owner with a few employees that he can have a plan with fees that are 50% less because of the tax credit?
- **What you can do now!** Immediately begin developing marketing and prospecting materials around this tax credit. Work with MVP on developing a tax credit maximization cost structure for startup plans. MVP will help you with this! Then tell every business owner and executive you no with no 401k plan that they have no reason to not have a plan!

#4

Section 107. Repeal of Maximum Age for Traditional IRA Contributions.

- Effective for 2020, the 70½ age limit is removed for making IRA contributions.
- This is important for retirees who are no longer covered by an employer plan but have taxable income from work that they may wish to defer.
- This is also a way for an age 72 RMD participant to defer their RMD. For example, Sally is age 72, still working, and must take an RMD from her IRAs. Between her SS and her wages, she doesn't need the RMD nor wish to pay taxes due on it. Her RMD is $5,000/year. Sally puts $5,000 into her IRA each year and the RMD has no tax effect. In essence, she just put her RMD back into her IRA.
- **What you can do now!** Tell your clients at or near age 70½, that they may wish to consider contributing to an IRA as part of a valid tax planning opportunity.

#5

Section 109. Portability of Lifetime Income Options. Section 204. Fiduciary Safe Harbor for Selection of Lifetime Income Provider.

- Effective beginning in 2020. As you may know, the biggest hinderance to offering a lifetime income option in a defined contribution plan is that participants who terminate employment "lose" this option. They also may incur surrender fees and other charges.
- Now if a plan does offer a lifetime income option, the trustee may transfer such participants' investment in it to an IRA or other qualified plan via a distribution annuity.
- This should encourage plan sponsors and advisors to offer lifetime income options in their plans as the biggest drawback is effectively removed.
- The other big hinderance in offering a lifetime income option is the liability under ERISA for losses that could occur if a lifetime income provider failed to meet their obligations to the participant.
- Now the fiduciaries can obtain a "safe harbor" in selecting the provider.
- **Opportunity!** You can now consider the development and/or offering of a lifetime income option for your clients, if you deem this a prudent investment.
- **Opportunity!** There is now a "safe harbor" in selecting the provider. Lowest cost is *not* a requirement.

- **Beware!** There are a number of specific steps that must be followed in order to obtain the safe harbor protection. These could be new to you and could be cumbersome enough to prevent you and the other investment fiduciaries from wishing to pursue a lifetime income option.
- **Beware!** Just because you can, doesn't mean you should. You still must understand the investment and the fees associated with any offering. This is not a "safe harbor" for *offering* a lifetime income option. Nor do fees *not* matter. ERISA prudence is still required.
- **What you can do now!** If you want to do it, then now begin developing your own guaranteed income offering. Don't want to do that? Then research, analyze, and determine the best ones available. New ones will be developed quickly. Soon, they will be everywhere. Follow the legislative guidance and prudently pick the best one for your clients. Then make it a part of your offerings. While the legislation does not mandate these, sponsors will probably demand these. If you don't offer one, then your competitors will say that your lineup is deficient. There is not a right or wrong on offering a lifetime income option. Just be prepared with what others will expect and say.

#6

Section 112. Allowing Long-term Part-time Workers to Participate in 401(k) Plans.

- Effective after 12/31/20. Service during 2020 is not taken into account.
- Currently, a plan may require an employee to work 1,000 hours in any year before they become eligible.
- Beginning for service in 2021, any such requirement must also stipulate that if any employee completes 500 hours in 3 consecutive years, the s/he must be allowed into the plan.
- For example, if Sally is hired on 1/1/21 and works 700 hours in each year through 2023, then she will become eligible for the plan on 1/1/24, even though she never worked 1,000 hours in any year.
- The 500-hour rule only must apply to the ability to defer, not to employer contributions nor to vesting.
- Such employees, like Sally, are excluded from coverage and nondiscrimination testing and do not have to be provided a Top Heavy Minimum contribution, if the plan is deemed Top Heavy.
- **Opportunity!** Some employers may wish to allow such employees into the plan anyway for simplicity. There is no testing "harm" and, if the employee does not defer, there would be no matching contribution required.
- **Beware!** This potentially requires dual eligibility tracking for every 401(k) plan. This will increase complexity and diligence on the part of the client and their payroll provider to provide complete and accurate data to their TPA.
- **What you can do now!** Nothing. There is no impact until 2021 and the practical impact will not be felt until 2024.

#7

Section 114. Increase in Age for Required Beginning Date for Mandatory Distributions.

- Effective for participants who reach age 70½ *after* 12/31/19.
- Very simply, the RMD age is now 72.
- For example, Bob was born on 10/1/1949. He is 70½ on 4/1/2020. Therefore, if he is otherwise required to take an RMD, he can wait until his 72nd birthday. His first RMD won't be due until 2021.

- **Opportunity!** More time for owners to delay taking RMDs from their plans and more time for future retirees to defer their RMD at least 1 more year.
- **Beware!** This only applies to those who first reach age 70½ after 12/31/19. If Bob were born on 10/1/1948, he would have reached age 70 ½ on 10/1/2019. Since he is still working, he defers his RMD. On 2/1/2020 he retires at age 71. Since he reached age 70½ *before* 12/31/19, he must still take his RMD in 2020.

- **What you can do now!** Look at birth dates of your clients. Anyone born before 7/1/49 must take RMDs starting in 2019 (one) or 2020 (two). Anyone born 7/1/49 or after will not have to take an RMD until 2021 at the earliest. Determine where your clients fall and let them know what to expect. Do know that only the age has changed. All other rules remain the same.

#8

Section 201. Plan Adopted by Filing Due Date for Year May Be Treated as in Effect as of Close of Year.

- Effective for plans adopted for taxable years after 12/31/19.
- Previously, plans had to be adopted (signed plan document) no later than the last day of that plan year.
- Now, an employer may adopt a plan up until the extended filing due date of their tax return for the year they wish to have a plan.
- To be effective for 2019, a plan had to be adopted no later than 12/31/19.
- To be effective for 2020, a plan has to be adopted no later than 9/15/21. This assumes an S-Corp on extension.
- **Opportunity!** Obviously, this gives employers the ability to retroactively install a plan once their cash and tax situation is better understood.
- **Opportunity!** You can market not just what they can do now and for the future, but you can market to clients what they still can do for the prior year. Your discussion in July with a prospect with no plan is not just on what they can do now, but what they can still do for the prior year.
- **Beware!** 401(k) plans cannot be retroactive. Only Profit Sharing plans and pension plans will be able to take advantage of this.

- **Beware!** This will encourage employers to wait just that much longer. Remember funding must be made no later than 9/15/21 (again, assumes an S-Corp on extension), so they may not want to wait until the last minute to sign the document and fund the plan.
- **Beware!** This applies to plans for 2020, not 2019. So, this impact will not be felt until 2021.
- **What you can do now!** Continue to reach out to new prospects about the benefits of a plan now. Just because they can wait does not mean that they should. Also, do tell them that they cannot retroactively add a 401k plan. If they wish the benefits and leverage, they can gain in a 401k plan, they still need to put the plan in place during 2020. Also, in order for that plan to be Safe Harbor, it must be in place by 10/1/20 for the 2020 plan year. This 90-day plan year rule for Safe Harbor plans did not change. This is in contrast to the 30-day SHNE amendment rules identified above. Plans can now add SHNE up to 12/1 and can do so even after that date but the contribution bumps to 4%.

SECURE Act Top Ten Need-to-Know

#9

<u>Section 203. Disclosure Regarding Lifetime Income.</u>

- Effective 12 months after the latest of final rules, model disclosure, or assumptions.
- More than likely this will not affect benefit statements any earlier than during 2021. Best guess is 12/31/21.
- Applies at least annually.
- Benefit statement must disclose the value of the participant's accrued benefit as a monthly single life annuity and 50% Joint & Survivor annuity, assuming spouse of same age.
- **Opportunity!** This will provide you with information on each participants' future benefit in an easy to understand monthly income stream.
- **Beware!** There is so much yet to be decided on this. Will the monthly annuity assume earnings? Inflation? Be as of age 65? Normal retirement age of the plan? Full Social Security age? Assume an annuity as of today? Imagine assumptions of a monthly annuity for a 22-year-old who just started contributing. Is that a monthly annuity now or assuming 8% growth and no inflation at age 65? The assumptions yet to be determined will make all the difference.
- **What you can do now!** Let our mutual clients know that MVP already offers a monthly annuity payment amount on our website for every participant! Tell them MVP will continue to not only stay current with the legislative requirements, but we are ahead of the curve on participant tools and information!

#10

<u>Section 403. Increased Penalties for Failure to File Retirement Plan Returns.</u>

- Effective now! Any returns filed after 12/31/19.
- Previously, failure to file a Form 5500 was $25/day with a maximum penalty of $15,000.
- Now the fee is $250/day with a maximum penalty of $150,000.
- **Opportunity!** This makes the DOL's DFVCP program highly valuable to mitigate costs associated with failure to file the Form 5500 timely. But in order to utilize the program the plan cannot have already been contacted by the DOL for failure to file. The key is to act quickly and file in the program with reduced penalties before it is too late.
- Opportunity and Beware! Obviously, these fees are deemed to be punitive. The focus is for you and us to remind plan sponsors to take their role seriously. The key is that our clients provide the necessary information so that we can complete the filings timely.
- **Beware!** Plan sponsors should never abandon their plan. Even if their business is struggling, they must take steps to terminate their plan and not just leave it. While the maximum penalties are rare, sponsors do not wish to run the risk of facing 5 or 6 figures in penalties because they "ghosted" their plan.
- **What you can do now!** Encourage your clients to provide their year-end information timely and accurately to MVP. This is not at all cumbersome. If they believe it is, all they need to do is contact us. We will work with them on a solution so that accurate data can be gathered and provided with minimal effort.