

SECURE 2.0 updates to Employee Plans Compliance Resolution System (EPCRS)



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On December 29, 2022, the SECURE 2.0 Act was included as part of a larger omnibus spending package, the Consolidated Appropriations Act, 2023. The legislation contains 92 provisions which are retirement plan related. SECURE Act 2.0 includes provisions addressing the correction of errors in the day-to-day administration/operation of a retirement plan due to the increasing complexity of plan administration. Historically, plan correction issues have been addressed by the Internal Revenue Service (IRS) through administrative guidance but Congress mandated through the SECURE Act 2.0 provisions that the IRS is to update its plan correction guidance to expand the availability of retirement plan correction opportunities.

Section 301 of the SECURE 2.0 Act amends the Recovery of Retirement Plan Overpayments.

Prior to SECURE 2.0 the plan sponsor was required to recover any distribution that was made in error.

SECURE Act 2.0 provides that a retirement plan fiduciary will not be considered to have breached their ERISA fiduciary duties if the fiduciary exercises discretion to not seek recovery of an overpayment.

Section 305 of the SECURE 2.0 Act expands the errors in which self-correction can be used.

The IRS maintains a Self-Correction Program in which plan sponsors can self-correct certain types of errors without the need to make a submission to the IRS or obtain IRS approval. In 2021, the IRS expanded self-correction opportunities. However, even under the 2021 expanded version of EPCRS, there were limits on the types of errors that could be self-corrected. The Self-Correction Program currently recognizes two types of errors:

Insignificant Operational Errors– Sponsors of qualified retirement plans, can self-correct so-called "insignificant" operational failures at any time. The determination of whether an error is insignificant is based on facts and circumstances. The facts and circumstances include:

- (1) the reason for the failure and occurrence of other failures;
- (2) the relative amount of plan assets/contributions involved;
- (3) the duration of failure and timing of correction; and
- (4) the number of participants affected (relative to those who could have been affected and to the plan population).



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In applying these factors, one-time inadvertent errors that impact only a few participants over a short period of time might reasonably be characterized as insignificant while errors impacting a large number of participants, involving significant plan assets, and/or occurring over a longer period of time might be characterized as significant. EPCRS does not include any safe harbors for determining whether a failure was significant or insignificant, leaving any determination potentially subject to second-guessing on review.

Significant Operational Errors and Plan Document Errors – Sponsors of qualified retirement plans can self-correct "significant" operational failures (i.e., failures that are significant under the relevant facts and circumstances as described above) and certain plan document errors (e.g., the failure to timely adopt a plan document or compliance amendment) only if the following requirements are satisfied:

- (1) the correction is completed or substantially completed by the last day of the third plan year following the plan year in which the failure began;
- (2) the plan or plan sponsor is not "under examination" by the IRS (unless the correction is substantially corrected at the time that the plan or plan sponsor is under examination); and
- (3) the plan is the subject of a favorable determination letter.

SECURE Act 2.0 significantly expands self-correction and permits qualified retirement plans to self-correct. Insignificant and Significant operational errors is being replaced with "eligible inadvertent failure" in order to comply with applicable requirements of the Internal Revenue Code (Code). For these purposes, an "eligible inadvertent failure" is any failure that occurs despite the existence of practices and procedures that are reasonably designed to promote and facilitate compliance with applicable requirements of the Code. It does not however, include any failure that is egregious, relates to the diversion or misuse of plan assets or is related (directly or indirectly) to an abusive tax avoidance transaction. The failures must be corrected with general principles of the Code, regulations, and other guidance (including the current version of EPCRS). The act also directs the IRS to issue updated guidance within two years of the enactment of SECURE Act 2.0.

Self-correcting eligible inadvertent failures is available unless:

- (1) the failure was identified by the IRS before any actions that demonstrate a specific commitment to implement a self-correction with respect to the failure, and
- (2) the self-correction was not corrected within a "reasonable" period of time after the failure was identified.



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Additional relief for plan loan corrections was included. The Department of Labor (DOL) must treat any self-corrected eligible inadvertent plan loan failure as meeting the requirements of the DOL's Voluntary Fiduciary Correction Program (VFCP).

Section 350 of the SECURE 2.0 Act safe harbor correction of employee deferrals errors.

Prior to SECURE 2.0 a plan sponsor was required to deposit missed elective deferrals and lost earnings. They may be required to file with DOL Voluntary Correction Program and File 5330 with the IRS.

SECURE Act 2.0 makes permanent a safe harbor for correcting certain elective deferral failures involving automatic contribution features (i.e., plans with automatic enrollment and/or automatic escalation features). Plans will have 9 1/2 months after plan year-end to correct reasonable errors in administering auto-enrollment and auto-escalation features without penalty. If the employee notifies the sponsor of the error, a shorter period applies. Employers wouldn't have to restore missed deferrals but must pay any matching contributions participants would have received had the error not occurred. The correction is available for both current and terminated employees. By making this safe harbor permanent and extending its application in certain respects, it gives needed relief to plans that use of automatic contribution features. Although the treasury must issue regulations implementing this provision, sponsors may rely on a good-faith interpretation of this provision.

SECURE Act 2.0 unquestionably expands the ability to self-correct retirement plan errors. However, the exact extent of this expanded self-correction will not be entirely clear until the IRS issues updated guidance. The IRS will have interpretative input and discretion over the exact scope and details of the expanded self-correction features and whether the corrections are made in accordance with general principles that apply under the Code, regulations, and other guidance including the EPCRS.



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