SCWA Legislative Update

November 16, 2020

Election Implications

While the latest election results have been extensively covered and analyzed, we did want to share a few thoughts on what we anticipate for the lame duck session and 2021.

As of now, it appears that Joe Biden and Kamala Harris will be our next President and Vice-President. Of course this will have significant implications regardless of whether or not the Republicans maintain control of the Senate (more on that below). We expect to see the new Biden Administration take swift action to reassess and repeal many of the Trump Administration's regulations and Executive Orders. From the ever important tax area, despite President-Elect Biden having said during the campaign that he would roll back the Trump tax reform act right away, most observers believe that he will first tackle the COVID pandemic and the economic crisis before turning to tax changes. Thus, many believe we will not see any tax bill until 2022. We will be monitoring this situation closely and if it appears tax changes are coming we will alert you right away.

There was extensive prognosticating leading up to the election about whether the Republicans would be able to hold on to their majority in the Senate. While the Democrats did net one seat, it seems likely that the Republican majority will hold. However, this will depend on the outcome of the races for the two Georgia Senate seats, which both still appear to be headed to a runoff on January 5, 2021. If the Democrats were to prevail in both races (which is unlikely), this would make for an even split with the Vice President serving as the tie breaker which would mean a Democrat controlled Senate. The reason why it is unlikely that both Georgia seats will go to the Democrats is that the race with Republican Senator Kelly Loeffler was basically a three way race with two Republicans and one Democrat. The feeling is that in the two candidate run-off between Senator Loeffler (who netted

approximately 26% of the vote) and Democrat Raphael Warnock (who won approximately 33% of the vote), Senator Loeffler will win since the Republican/conservative vote isn't being divided. In the race between Republican Senator David Perdue and Democratic challenger Jon Ossoff, Perdue won but did not garner 50% of the vote so under Georgia law the race will also go to a run-off on January 5th.

Thus, with the Democrats retaining control of the House, though with a few less seat than previously, we expect that we will still be working with a split Congress. With the highly charged election behind us and both parties hopefully having learned some lessons from the process, we are optimistic that this will provide an opening for movement on some bi-partisan measures.

Of course the first big question that most Washington observers will be raising is when will Congress attempt to negotiate another COVID stimulus package. After the pre-election negotiations that were being conducted largely between Speaker of the House Nancy Pelosi and Treasury Secretary Steve Mnuchin fell apart, there was broad speculation about the impact that the presidential election would have on the possibility for progress in the lame duck session – which has only amplified since. Given the ever increasing pressure being generated by the spike in coronavirus cases across the country, we remain hopeful and will continue to advocate for prompt relief for the many small businesses that continue to face serious challenges. The general wisdom has been that it might be hard for the parties to reach a deal during the lame duck session – particularly with the Democrats looking ahead to a Democrat president and an open question about the control of the Senate. However, there are some indications that President-Elect Biden, who has already stated that he plans to push Congress to pass a comprehensive relief bill for him to sign during his first weeks in office, may have a hand working with his former Senate colleague Mitch McConnell to broker a deal (or at least make headway towards that end) during the lame duck.

The Securing A Strong Retirement Act of 2020 – The Long-Awaited Bipartisan Retirement Plan Bill AKA The Secure Act 2.0

Last week, House Ways and Means Committee Chairman Richard Neal (D MA) and Ranking Member Kevin Brady (R TX) introduced

their much anticipated bipartisan retirement bill the Securing a Strong Retirement Act of 2020, also dubbed the SECURE Act 2.0. Unlike the original SECURE Act which was passed last year and which had several provisions that clearly hurt small businesses (primarily the elimination of the stretch IRA and the outrageous increases in penalties primarily affecting small businesses), this is a bill where the provisions are positive for small businesses.

This Alert will summarize some of the key provisions of the bill which will affect our members and their members the most. The key provisions to note are as follows:

Requiring Automatic Enrollment in new 401(k), 403(b) and SIMPLE Plans (Section 101). All existing 401(k), 403(b) and SIMPLE plans would be grandfathered from this new requirement. Also exempt would be businesses who have not been in business for 3 years, those with 10 or fewer employees, government and church plans. *All other new plans would be required to have automatic enrollment upon participants becoming eligible with a minimum auto deferral of 3% but not more than 10%. If the percentage is less than 10%, it automatically escalates each year by 1% until it reaches 10%. Employees can opt out.*

Ways and Means listened to the concerns with respect to administrative problems that small businesses could have with a required automatic enrollment provision by including a safe harbor for corrections of employee elective deferral failures (Section 114). This section provides for a 9 ½ month "grace period" after the end of the plan year in which the errors were made to correct "reasonable" errors made by employers administering these required automatic enrollment and automatic escalation provisions.

Required Beginning Date for Required Minimum Distributions Would be Pushed Back from 72 to 75 (Section 105). As you may know the SECURE Act recently moved back the required beginning age from 70 ½ to 72 and this new bill would move it back another 3 years. Obviously, this is a change that the TIA strongly supports because it is not prudent to require people to take money out from their retirement plans or IRAs before they need it to live on, particularly because people are living longer.

Another push has been to eliminate any required minimum distributions (RMDs) for those participants with retirement plan accumulations below a certain amount. The SECURE Act 2.0 provides that if the aggregate amount of retirement plan assets from plans and IRAs (not counting defined benefit plans) is $100,000 or less as of the December 31 of the year before the participant or owner attains age 75, no RMDs will be required. There is no such exemption for RMDs from defined benefit plans. (Section 307).

Higher Catch-up Contribution to Apply at Age 60 (Section 108). Individuals who have attained the age of 60 would have a new higher catch-up contribution of $10,000 rather than the current $6,500 level for individuals who are 50 or older. There are similar increases for SIMPLE plans – the $3,000 level is in place between ages 50 and 59 and then at age 60 the amount would increase to $5,000. Both amounts are indexed. This is a welcome change.

One-year reduction in the service requirement for long-term, part-time workers (Section 115). You may recall that the SECURE Act provided for a new eligibility requirement for 401(k) plans for employees who completed 3 consecutive years of service with at least 500 hours of service. Under this provision these long-term, part-time employees were able to participate in the 401(k) portion of the plan but were not entitled to any employer contributions. Secure Act 2.0 reduces the 3 year period of service to 2 years.

Reduction in excise tax on certain accumulations in qualified retirement plans (Section 302). The penalty for failure to take required minimum distributions would be reduced from 50% to 25%. If the failure to take the RMD from an IRA is corrected in a timely manner (defined in the bill), the excise tax is further reduced from 25% to 10%.

Expansion of Employee Plans Compliance Resolution System (EPCRS) (Section 308). A number of small business groups have been asking the Treasury/IRS to expand EPCRS to allow for more self-correction. This legislation expands the scope of EPCRS. The summary of the bill acknowledges that it can be burdensome to go to IRS to correct a single loan error and explains that "the bill would allow for correction of many plan loan errors through self-correction." We know it is not only burdensome to go to the IRS, but also expensive

if you are a small business. ***When IRS significantly increased the fees for small business plans to go through VCP, we asked them to expand the types of errors that could be fixed by self-correction. The IRS responded to some extent but this legislation would expand it even further.***

Retirement plan distributions for charitable purpose and one-time election for qualified charitable distribution to split-interest entity (Sections 311 and 310). The annual IRA charitable distribution is increased from $100,000 to $130,000 and under this legislation would also include distributions from qualified plans. Also, a one-time distribution to charities through charitable gift annuities, charitable remainder unitrusts and charitable remainder annuity trusts would be allowed.

Review and report to the Congress relating to reporting and disclosure requirements (Section 304). As noted in the bill summary, the Secure Act 2.0 directs "Treasury, DOL and PBGC to review the current ERISA and Code reporting and disclosure requirements and make recommendations to Congress to consolidate, simplify, standardize and improve such requirements."

Deferral of tax for certain sales of employer stock to ESOPs sponsored by S corporations (Section 106). The very favorable Section 1042 tax treatment that applies to C corps whereby an owner may elect to defer taxation on the sale of stock to an ESOP if the proceeds are reinvested into "qualified replacement property" would be extended to S corps. This would be a welcome change for owners of Sub-S corporations that want to have their employees own the company.

Treatment of student loan payments as elective deferrals for purposes of matching contributions (Section 110). Employers would be permitted to make matching contributions under a 401(k), 403(b) or SIMPLE IRA with respect to "qualified student loan payments."

Qualifying longevity annuity contracts (Section 202) which in effect allow participants to manage their longevity risk are made more attractive by Secure Act 2.0 reducing limits placed on them by IRS by repealing the 25% limit and increasing the dollar limit from $135,000 to $200,000. This is welcome news since purchasing a QLAC with a

portion of the account balance allows a participant that purchased the QLAC to be paid out as an annuity starting at a later date such as 75 or 80 which will continue until death. This section would also make it easier to purchase QLACs with spousal rights. Additionally Section 203 directs the Treasury to update their regulations so that a new type of ETF can be "insurance dedicated."

Retirement savings lost and found (Section 306). The legislation would create a national online lost and found for Americans' retirement accounts by using data that employers are already required to report to Treasury. This is something that would be welcomed by many small businesses.

Requirement to provide paper statements in certain cases (Section 315). While most of the provisions in Secure 2.0 are favorable, an unexpected and unwanted change from current DOL requirements is a proposed amendment to ERISA to provide with respect to defined contribution plans (unless a participant elects otherwise) that the plan must provide a paper benefit statement at least once annually. For a defined benefit plan, unless a participant elects otherwise, the statement that must be provided once every 3 years under ERISA must be a paper statement.

There are a number of other positive provisions such as:

Section 102 which increases the credit for small employer retirement plan startup costs;

Section 111 which allows employers joining a MEP to have the 3 year credit;

Section 103 which simplifies and increases the Saver's Credit;

Section 104 which expands investment choices for 403(b) plans; and

Section 113 which allows employers to give small financial incentives – like giving out gift cards in small amounts in order to induce plan participants to make 401(k) contributions.