

Professional Perspective

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Changes to EPCRS Enacted in SECURE 2.0

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The SECURE 2.0 Act of 2022, signed into law on Dec. 29, 2022, as Division T of Public Law No. [117-328](#), addresses several long-standing issues related to correction of tax qualification failures in retirement plans under the Employee Plans Compliance Resolution System of the IRS (EPCRS). This article discusses two provisions of the new law addressing those corrections and practical steps that plan fiduciaries can take to maximize the advantages of these changes.

Note that these provisions of the Act are now in effect:

- Plan fiduciaries are granted discretion in deciding whether to seek recovery of benefit overpayments, and the form and timing of any recoupment methods undertaken are subject to specific limitations; see Section 301 of the Act.
- The definition of an eligible inadvertent failure, which may be corrected under the self-correction program (SCP) of the EPCRS, has been altered significantly, accompanied by a broad expansion of the types of failures that may be self-corrected; see Section 305 of the Act.

Recovery of Retirement Plan Overpayments (Sec. 301)

Generally, ERISA imposes on the plan fiduciaries a duty to correct an operational failure by fully restoring the plan to the financial position it would be in if the failure had never occurred. An overpayment is considered such a qualification failure. Before enactment of this provision, the strict application of this rule forced plan fiduciaries to pursue repayment of inadvertent excess benefits from every payee, regardless of the circumstances, which often resulted in financial hardship for unsuspecting retirees.

Section 301 of the Act grants plan fiduciaries the discretion not to seek recoupment of overpayments. If recovery is attempted, the legal limitations on recovery are narrowed significantly, as further discussed below. The provision relieves the plan sponsor, in most cases, of any obligation to pay unrecovered overpayments to the plan. Finally, inadvertent overpayments that are rolled over into other qualified plans, or into IRAs, are no longer deemed to be ineligible rollovers. Similarly, any recovered overpayments are deemed to be eligible rollovers.

In the event the plan fiduciaries choose to recoup overpayments, the Act applies certain limitations for the protection of innocent retirees, as follows:

If a plan decides to seek a return of an overpayment, various restrictions apply, including:

- No interest may be charged, or any other collection fees or expenses.
- Reduction of future payments to offset an overpayment is subject to certain minimum payment requirements and conditions.
- A fiduciary may not threaten litigation as a means to recoup the overpayment, or engage a collection agency to recover the overpayment, except under certain limited circumstances.
- Overpayments may not be recouped from death beneficiaries.
- Any overpayments that are more than three years old may not be recouped, unless caused by the individual's fraud or misrepresentation.

Practice Tip: If the affected plan is a defined benefit (DB) plan, carefully review the relevant facts, such as the nature of the failure and the plan's funding level, which will determine whether recoupment is available as a possible correction method. Note that certain overpayment failures, such as those resulting from incorrect benefit calculations or failures to reduce a beneficiary's benefit on the participant's death, may never lead to a recovery from the payee, but may only be corrected using one of the two new methods found in [Rev. Proc. 2021-30](#): (i) the funding exception correction method, and (ii) the contribution credit correction method.

Practice Tip: If the affected plan is a defined benefit (DB) plan, carefully review the relevant facts, such as the nature of the failure and the plan's funding level, which will determine whether recoupment is available as a possible correction method. Note that certain overpayment failures, such as those resulting from incorrect benefit calculations or failures to reduce a beneficiary's benefit on the participant's death, may never lead to a recovery from the payee, but may only be corrected using one of the two new methods found in [Rev. Proc. 2021-30](#): (i) the funding exception correction method, and (ii) the contribution credit correction method.

For DB plans, recoupment is available as a correction for such inadvertent failures as overpayments due to violations of the Internal Revenue Code's benefit limits—e.g., the [§ 401\(a\)\(17\)](#) limit on compensation or the [§ 415\(b\)](#) limit on annual distributions.

Practice Tip: While awaiting new administrative guidance to be issued on this provision, plan administrators must interpret the Act reasonably and in good faith, and should continue to apply correction methods consistently across the plan, as generally required under EPCRS.

Expansion of the Self-Correction Program of EPCRS (Sec. 305)

Eligibility for correction under SCP used to be defined in terms of the relative impact of the failure on the plan, by reference to the number of participants affected, the percentage of plan assets affected, and/or the duration of the failure. Section 305 of the Act has replaced that eligibility analysis with a new condition for SCP eligibility, that is, the inadvertent failure must have occurred in spite of the existence of administrative procedures that generally ensure operational compliance. Within that context, nearly every type of operational failure may be self-corrected by a qualified employer plan, a [§ 403\(b\)](#) plan or even by an IRA custodian.

No later than Dec. 29, 2024, which is two years after enactment of the Act, the law mandates the IRS to issue guidance, or revisions to guidance, required by [§305](#) and to update [Rev. Proc 2021-30](#), or any successor guidance, to take into account the provisions of this section.

Practice Tip: Create and document the administrative procedures within the plan sponsor organization that satisfy the conditions for self-correction. Reliance on a third-party administrator and/or a payroll company will not suffice to ensure that the employer's plan activities comply with the law and with the terms of the plan document.

Make sure that inside the plan sponsor organization:

- There are at least two individuals responsible for knowing the details of the plan document.
- The knowledgeable individuals have the authority to arrange internal systems for operational compliance.
- Routine operational compliance, such as the process for transmitting employee salary deferrals from payroll to the plan account, is documented and followed.

Conclusion

Instituting and documenting routine compliance will not only reduce the instance of errors, but will also make SCP available for the correction of occasional operational errors, even large ones. In the long run, the up-front investment in compliance within the organization is likely to be much more cost effective than correcting failures by seeking IRS approval in the Voluntary Compliance Program of EPCRS, which entails payment of a fee by the plan sponsor when applying for IRS approval for the proposed correction.