AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

December 15, 2023

Internal Revenue Service
Attn: CC:PA:01:PR (REG-104194-23)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

SUBMITTED VIA EMAIL

RE: Impact of Section 310 of SECURE 2.0 on Rev. Rul. 2004-13

The American Retirement Association ("ARA") is writing to offer comments on the impact of Section 310 of the SECURE 2.0 Act of 2022 ("SECURE 2.0") on Revenue Ruling 2004-13 (the "Rev. Rul."). ARA believes that the statutory changes in Section 310 of SECURE 2.0, combined with other policy changes reflected in SECURE 2.0, are inconsistent with the holding for Situation 4 of the Rev. Rul. Therefore, ARA respectfully requests that the Internal Revenue Service ("IRS" or the "Service") revoke the Rev. Rul. or announce that the holding to Situation 4 is no longer considered determinative due to the passage of SECURE 2.0.

ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the American Society of Enrolled Actuaries ("ASEA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has over 35,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

Summary

The holding for situation 4 under Rev. Rul. 2004-13 should be revoked or obsoleted because:

- The underlying statute was changed by Section 310 of SECURE 2.0;
- It is inconsistent with the current policy objectives reflected in the current Code; and
- Doing so will promote compliance with the tax code, including the new long-term part-time employee rules.

Discussion

Section 416(g)(4)(H) of the Code provides an exception to the top heavy plan requirements. Under that exception, a Starter 401(k) plan or a plan that consists solely of a cash or deferred arrangement that meets §401(k)(12) or (13), and matching contributions that satisfy §401(m)(11), (12), or (13) is not treated as top heavy. Revenue Ruling 2004-13 provided interpretive guidance on this provision. In particular, the holding for situation 4 of the Rev. Rul. provides that if a plan permits employees to defer before they are eligible to receive the safe harbor contributions, the plan does not qualify for the top heavy plan exception under §416(g)(4)(H). For the reasons noted below, ARA recommends that the holding with regard to situation 4 be formally revoked or declared obsolete.

1. Section 310 of SECURE 2.0 Obsoletes the Holding for Situation 4 of the Rev. Rul.

At the time the Rev. Rul. was issued, any participant who was a non-key employee was taken into consideration when determining whether the top heavy rules were satisfied. Thus, the conclusion that otherwise excludible employees who were eligible to make deferrals under a CODA that did not satisfy the 401(k) safe harbor provisions caused the plan to not consist solely of safe harbor deferrals and match.

Section 310 to SECURE 2.0 added a new provision to Section 416 that should change this result. The new §416(c)(2)(C) provides that any employees not meeting the age or service requirements of §410(a)(1) (without regard to subparagraph (B) thereof) ("Otherwise Excludible Employees") may be excluded from consideration in determining whether any plan of the employer meets the defined contribution plan minimum benefit requirements. Note that it does not say simply that these employees are not required to receive the minimum benefit, but rather that they are "excluded" for purposes of determining compliance.

This provision should be interpreted to mean that the plan can disregard otherwise excludable employees for all purposes, including whether the exception from top heavy status is met—which is one method of compliance for a defined contribution plan. This interpretation is consistent with the Congressional intent of Section 310 of SECURE 2.0, which was "to encourage employers to permit employees to participate in a retirement plan before the employees have met the minimum age and service requirements."

The intent of Section 310 of SECURE 2.0 was to encourage the early inclusion of employees in 401(k) plans by not requiring employer contributions for this group of participants. The provision attempts to provide that top heavy minimum cost for the employer will not increase solely due to the inclusion of Otherwise Excludible Employees. Currently, however, if the Rev. Rul. is still effective, the inclusion of Otherwise Excludible Employees for deferrals in a safe harbor plan can increase the required top heavy contributions. Further, we see no sensible policy goal that is met by increasing a plan's required top heavy contributions solely because an employer offers a deferral opportunity to a group of employees for whom top heavy contributions are not required. Therefore, **ARA recommends** that the IRS formally revoke the holding for Situation 4 under the Rev. Rul. or announce that it was obsoleted by Section 310 of SECURE 2.0.

2. Policy Reflected in SECURE 2.0 Is Inconsistent With the Holding for Situation 4 of the Rev. Rul.

In addition to Section 310, SECURE 2.0 included a number of provisions that reflect the overarching policy of encouraging employers to cover a broader group of employees in at least the deferral component of the plan. Provisions such as the small employer tax credits, starter 401(k), and expansion of long-term part-time employee rules are all aimed at furthering the overall policy of incentivizing employers to increase the number of working Americans covered by 401(k) plans.

The current holding for situation 4 under the Rev. Rul. provides a strong incentive for employers to not cover employees, even for only the deferral feature of the plan, until the minimum age and service requirements are met. In many cases, particularly for smaller employers, the cost of top heavy contributions can be very material. While eliminating top heavy minimum benefits for Otherwise Excludible Employees is of some help, the top heavy minimum contributions may still be material and therefore cause an employer to consider a plan design to exclude all employees until they have met the minimum age and service conditions.

Formal revocation or obsoletion of the holding for Situation 4 under the Rev. Rul. will further the clear policy objectives of the law and the current Administration's desire to encourage more employers to offer retirement plan benefits to their workers and make it easier for Americans to save.

3. Revocation or Obsoletion Will Promote Compliance With The Tax Code

Finally, the effective date of Section 310 of SECURE 2.0 coincides with the date that most plans are first required to enroll employees to comply with the new §401(k)(2)(D)(ii) ("long-term part-time employee rules"). As we have detailed in a number of other comment letters and conversations, the long-term part-time employee rules introduce significant complexities (particularly with regard to counting service for eligibility and vesting), which may result in inadvertent errors in plans that attempt to apply the maximum permissible age and service conditions as the eligibility condition for deferrals.

As the Service confirmed recently in Proposed Regulation 1.401(k)-5, these administrative complexities can be avoided by allowing employees to defer prior to the date they reach the maximum permissible age and service conditions. This should incentivize employers to expand their plan eligibility provisions to permit earlier entry, which is good public policy, but this incentive is significantly tempered by the current application of the Rev. Rul. because providing safe harbor contributions for all new employees or providing required top heavy minimum benefits may be too costly. Thus, the current holding for situation 4 of the Rev. Rul. will drive employers away from expanding eligibility for deferrals and into the more complex administrative requirements of the long-term part-time employee rules.

It is undeniable that plans with more complex administrative rules are more susceptible to inadvertent plan errors. Therefore, the Rev. Rul. is likely to drive plans to adopt provisions that will result in more complexity and inadvertent errors. Revoking or obsoleting the holding for Section 4 of the Rev. Rul. will allow employers to adopt broader coverage using simpler eligibility criteria. In addition to furthering the objective of covering more working Americans, this will significantly simplify plan administration, which will reduce the instances of inadvertent errors, and promote overall compliance with the tax code.

Conclusion

ARA strongly recommends that the Service formally revoke or obsolete the holding for Section 4 of Rev. Rul. 2004-13. Doing so will give effect to Section 310 of SECURE 2.0, further the policy objectives of SECURE 2.0 and the Administration, promote compliance with long-term part-time employee rules, and improve economic efficiency by reducing the complexity and burdens of the employer. In light of the impending application of long-term part-time employee rules, we recommend this action be taken as soon as possible to provide employers an opportunity to respond by January 1, 2024.

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These comments are submitted on behalf of ARA. If you have any questions regarding the matters discussed herein, please contact Kelsey N.H. Mayo, Director of Regulatory Policy, at kmayo@usaretirement.org or 704-342-5307. Thank you for your time and consideration.

Sincerely,

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