

October 7, 2024

Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2024-55)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

RE: Notice 2024-55, Certain Exceptions to the 10 Percent Additional Tax Under Code Section 72(t)

The American Retirement Association (ARA) is writing in response to the request for comments in Internal Revenue Service Notice 2024-55 (the "Notice"), which provides guidance on certain exceptions to the 10 percent additional tax provided under Code section 72(t), as amended by sections 115 and 314 of the SECURE 2.0 Act of 2022, for emergency personal expense distributions (EPED) and domestic abuse victim distributions (DAVD), respectively. ARA thanks the Internal Revenue Service (IRS or the "Service") for the opportunity to provide input on these matters.

The ARA is a national organization of more than 35,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA) and the American Society of Enrolled Actuaries (ASEA). ARA's membership is diverse but united in a common dedication to America's employer-based retirement plan system.

## Summary

ARA thanks the IRS for the guidance to date on certain provisions enacted by the SECURE 2.0 Act (SECURE 2.0), including the guidance on EPEDs and DAVDs in the Notice. **ARA recommends** that the Service clarify a number of details related to these provisions to promote adoption and proper administration of the plans. In particular, ARA recommends the Service provide the following guidance:

- Provide anti-cutback relief to permit the elimination of EPED and DAVD provisions.
- Allow plan administrators to rely upon a participant's certification regarding repayment of an EPED or a DAVD.
- Confirm that plans may restrict the reasons for which an EPED may be made available and continue to rely upon a participant's certification regarding eligibility for the EPED.
- With respect to administration of DAVDs:
  - Clarify that plans partially subject to the requirements under IRC §§ 401(a)(11) and 417 may permit a DAVD to be made from the portion of the plan not subject to those requirements;
  - Provide guidance regarding the applicable maximum limitations on DAVD amounts; and
  - Provide relief from the requirement to exhaust available DAVDs before taking a hardship distribution.

- With respect to the repayment of an EPED or DAVD (or other distribution that permits repayment):
  - Confirm that repayments are not treated as contributions for the Code’s various limitations and nondiscrimination purposes;
  - Confirm that the amount of a repayment is not subject to any distribution restrictions, and that a plan may apply its provisions regarding the distribution of rollover accounts to such repayment; and
  - Clarify whether a repayment that is subsequently distributed from a plan is subject to the 10 percent additional tax provided under IRC § 72(t).

## Discussion

### I. Anti-Cutback Relief for Elimination of EPED and DAVD Provisions

Currently, if a plan sponsor adopts an EPED and/or DAVD feature in its plan the adopted distribution becomes a protected benefit, right, or feature under the plan. As such the elimination of the distribution feature would be a cutback in violation of IRC § 411(d)(6) for amounts already accrued at the time of elimination. The Service has discretion to provide relief from these anti-cutback rules for benefits, rights, and features, and has already done so with respect to hardship distributions. These new EPED and DAVD distribution features are very similar to hardship distributions in that they are intended to meet pre-retirement emergency needs of participants and are not a retirement-type distribution feature. Accordingly, **ARA recommends** that the Service provide cutback relief for elimination of EPED and DAVD features, similar to the relief that applies to a hardship distribution feature, by amending the regulations under IRC § 411(d)(6).<sup>1</sup> Providing this flexibility will promote proper plan administration and encourage the adoption of these provisions by plan sponsors because they will be more certain the feature can be eliminated if it becomes administratively burdensome or a future plan vendor does not support the plan feature.

### II. Reliance Upon Participant Certification

The Notice requests comments on whether the proposed regulations should permit plan administrators to rely on a participant’s certification that their repayment of EPED or DAVD funds meets certain requirements, including that the repayment was made within the applicable 3-year period and that it does not exceed the originally distributed amount.

**ARA recommends** the IRS permit plan administrators to rely on a participant’s certification regarding repayment. Tracking distributions and repayments poses a significant administrative burden on recordkeeping systems, increasing the cost of these features and reducing the likelihood a plan sponsor adopts the feature. Permitting a participant to certify the repayment meets the applicable requirements will simplify plan administration and promote adoption. In addition, ARA believes that such simplification will not create a significant risk of improper plan contributions. ARA members report that the distributions that have permitted repayment (such as CARES Act distributions and qualified birth and adoption distributions) have a very low repayment rate. ARA believes this is likely to be the case with EPEDs and DAVDs as well—and therefore the administrative burden of tracking past distributions will outweigh the limited instance when a taxpayer wishes to repay the distribution. Therefore, **ARA recommends** the Service provide that a plan administrator may rely upon a participant’s self-certification that the repayment of EPED and DAVD funds meets all applicable requirements, including, but not

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<sup>1</sup> ARA also recommends that other contingent non-retirement distribution options, such as qualified birth or adoption (QBAD) be afforded the same relief from the anti-cutback rules to permit the elimination of such ancillary withdrawal rights.

limited to that the repayment of the EPED or DAVD is being made within the three-year period and does not exceed the originally distributed amount.

### **III. Restriction of EPED Availability**

Q&A A-2 in the Notice sets forth certain circumstances that may be considered when determining whether an expense is eligible for EPED treatment. These circumstances include, but are not limited to, (i) medical care, (ii) accident or loss of property due to casualty, (iii) imminent foreclosure or eviction from a primary residence, (iv) burial or funeral expenses, (v) auto repairs, or (vi) any other necessary emergency personal expenses. The language in the Notice suggests that employers have the flexibility to offer EPEDs under all personal emergency situations or a limited selection of those circumstances. For example, ARA understands a plan sponsor could limit EPED eligibility to only two of the noted personal emergency scenarios described in Q&A A-2 (such as expenses related to medical care and burial or funeral expenses). **ARA recommends** the Service's future guidance confirm that plan sponsors may limit the personal emergency reasons that qualify for an EPED under the terms of the plan and that, if a plan imposes such limitation, it may still rely upon a participant's written certification that the individual qualifies under the terms of the plan for the EPED.

### **IV. Additional Guidance on Administration of Domestic Abuse Victim Distribution**

#### **a. Plans partially subject to QJSA rules**

Q&A B-3 in the Notice discusses the types of plans that are permitted to offer DAVDs ("applicable eligible retirement plans") and specifically notes that defined benefit plans and plans to which the spousal consent requirements of IRC §§ 401(a)(11) and 417 ("QJSA requirements") apply are not eligible to offer DAVDs. The Notice does not provide guidance with respect to plans where only a portion of the plan is subject to the QJSA requirements.

While most new defined contribution plans are either subject to the QJSA requirements or not, many legacy plans have a portion of the plan that is subject to the QJSA requirements and a portion that is not subject to the QJSA requirements. This scenario is particularly prevalent in the case of profit sharing plans that were merged with a money purchase plan at some point in the past. It currently is unclear whether such a plan is an applicable eligible plan with respect to the portion of the plan that is not subject to the QJSA requirements or whether the plan is prohibited from offering DAVDs entirely due to existence of historical money purchase plan assets.

**ARA recommends** the Service clarify that if only a portion of a defined contribution plan is subject to the QJSA requirements, the plan may offer DAVDs from the portion of the plan that is not subject to the QJSA requirements. ARA believes that this clarification is consistent with the statute and would promote greater access of DAVDs to these at-risk participants.

#### **b. Maximum DAVD Amount**

The Notice also recites the statutory requirement that "the aggregate amount" an individual may treat as a DAVD is equal to the lesser of (a) \$10,000 (indexed for inflation) or (b) fifty percent (50%) of the participant's vested accrued benefit under the plan. The IRS's guidance should address the practical administration of this maximum limit.

#### **i. Clarification of Application to Multiple Incidents**

The statute provides that a participant is eligible for a DAVD during the one-year period following a domestic abuse incident and the aggregate DAVD cannot exceed the limit described above. It is not clear whether a participant who experiences multiple domestic abuse incidents is (a) eligible for a distribution with respect to each incident (and the aggregate distributions with respect to each such incident is subject to the limit) or (b) eligible for multiple distributions, but the total DAVDs with respect to all domestic abuse incidents in a

participant's lifetime are subject to a single aggregate limit. **ARA recommends** that the Service clarify how the limit applies and, if the limit applies in aggregate for the lifetime of the participant, then the Service should allow plan administrators to rely on a participant's certification that a requested DAVD will not cause the participant to exceed the DAVD limit. ARA believes reliance on the participant certification is reasonable because the population likely to request a DAVD is limited and requiring plan administrators to track distributions over the potentially decades-long tenure of an employee is administratively impracticable and will prevent adoption of this provision to benefit an at-risk population.

## **ii. Clarification of Application to Subsequent Distribution**

ARA recommends the Service also clarify how the maximum limit applies to a subsequent DAVD when the maximum limit has increased due to cost of living adjustments to the dollar limit or increases in the account balance. **ARA recommends** the Service clarify that a plan may permit participants who have previously taken the maximum DAVD to later receive an additional DAVD with the maximum at the subsequent distribution date being the lesser of (i) the applicable DAVD dollar limit (indexed, as applicable) less prior distribution or (ii) 50% of the increased account balance adjusted for the prior distribution.

Example – 50% of Account. A participant with a \$10,000 account balance took a \$5,000 DAVD when the applicable DAVD dollar limit is \$10,000. Six months later (in the same calendar year), participant wishes to take another DAVD. The participant's account balance at the second DAVD date is \$6,000 (the \$1,000 increase is due to earnings and contributions). The maximum DAVD at the second date would be the lesser of (x) \$5,000 (\$10,000 applicable dollar limit minus the \$5,000 prior distribution) and (y) \$500 (50% of the adjusted account (sum of \$6,000 account plus \$5,000 prior distribution) less the \$5,000 prior distribution).

Example – Maximum Dollar Limit. A participant with a \$100,000 account balance took a \$10,000 DAVD when the applicable DAVD dollar limit is \$10,000. Two years later the participant wishes to take another DAVD. The participant's account balance at the second DAVD date is \$110,000 and the maximum DAVD dollar limit is \$12,000. The maximum DAVD at the second date would be \$2,000 (\$12,000 applicable dollar limit minus the \$10,000 prior distribution).

This issue should be clarified regardless of whether the applicable limit is aggregated based on an incident or the participant's lifetime because the 1-year withdrawal period following an incident is likely to cross calendar years and the account is nearly certain to change in value between distribution dates.

## **c. Interaction of DAVD and hardship distribution**

**ARA recommends** the Service clarify the interplay between certain requirements related to hardship distributions and DAVDs. Specifically, Treas. Reg. §1.401(k)-1(d)(3)(iii)(B)(1) states that a plan participant must first obtain all other currently available distributions under a plan, and all other deferred compensation plans maintained by their employer, before they are permitted to receive a hardship distribution. ARA does not believe that a plan participant should be required to request a DAVD to be eligible to request a hardship distribution. DAVD requests are highly personal and sensitive in nature, and ARA believes participants should not be required to take the steps needed to qualify for a DAVD in order to make use of other features in a plan. Accordingly, **ARA recommends** that the Service clarify in future guidance that the rule set forth in Treas. Reg. §1.401(k)-1(d)(3)(iii)(B)(1) does not require plan participants to request a DAVD before they are permitted to receive a hardship distribution.

## **V. Additional Guidance on EPED and DAVD Repayment Administration**

ARA also recommends the Service clarify certain rules related to the repayment of distributions.

### **a. Repayments are not treated as contributions**

*ARA recommends* the Service clarify that an increase in a participant's account balance due to a repayment of an EPED or DAVD (or other repayable distribution) will not be treated as (i) an increase in the participant's accrued benefit under IRC § 411(a)(7), (ii) an annual addition under IRC § 415(c), nor (iii) a contribution under the plan for purposes of IRC § 416(c)(2)(B). Absent this clarification, administering the repayment of such distributions will pose significant difficulties for plan administrators. The benefits of plan participants who utilize an EPED or DAVD feature would also be negatively impacted if the repayment counted toward the above noted limits. Similarly, *ARA recommends* the Service clarify that repayment of an EPED or DAVD is treated as an unrelated rollover under Treasury Regulation § 1.416-1 Q&A T-32 (and therefore not counted in the participant's account balance when determining the top heavy ratio), even if the distribution originated in the same plan that is receiving the repayment, to avoid double counting the amount (as both a distribution and contribution) in the plan's top heavy calculation. Finally, *ARA recommends* the Service's guidance confirm that a plan will not fail to be treated as a plan that consists solely of safe harbor cash or deferred arrangement under IRC § 416(g)(4)(H) merely because a participant repays an EPED or DAVD to the plan.

### **b. Repayments are not subject distribution restrictions, but a plan may apply its provisions regarding the distribution of rollover accounts**

*ARA recommends* the Service confirm that any amount constituting a repayment of an EPED or DAVD will only be subject to the distribution restrictions that the plan would otherwise apply to the distribution of its rollover accounts (and any distribution restrictions that applied to an amount prior to its distribution as an EPED or DAVD would not continue to apply to the funds used to repay such EPED or DAVD). Requiring plan administrators to track previously applicable distribution restrictions on repaid amounts would be administratively impracticable and reduce the likelihood these features are adopted or administered correctly.

### **c. Clarify whether subsequent distribution of repayments is subject to the 10 percent additional tax under IRC § 72(t)**

*ARA recommends* the Service clarify that if an EPED and DAVD is repaid to a plan, the amount repaid will once again be subject to the 10 percent additional tax under IRC § 72(t) at any subsequent distribution. While this may be evident from the statute, the question has been raised to many ARA members and additional clarification for tax professionals and taxpayers would be helpful to proper tax administration.

These comments are submitted on behalf of ARA and were prepared by ASPPA's IRS Subcommittee, Claire P. Rowland, Esq., QPA, QKA, Chair. If you have any questions regarding the matters discussed herein, please contact Kelsey N.H. Mayo, Director of Regulatory Policy, at [kmayo@usaretirement.org](mailto:kmayo@usaretirement.org) or (704) 342-5307. Thank you for your time and consideration.

Sincerely,

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