

# SECURE 2.0: Benefit Recoupment Provisions, Etc.

Presented to **LEGAL SERVICES**  
of  
NORTHERN CALIFORNIA



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- It is also anticipated that further guidance from IRS and other official sources may clarify and potentially change some of the information provided.

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## What We Will Cover:

- Correction of Benefit Overpayments
  - “Current” Law (pre-SECURE 2.0)
  - New SECURE 2.0 Provisions
- Retirement Plan Lost & Found

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## General Information

- SECURE 2.0 is set forth in Division T of the Consolidated Appropriations Act, 2023, signed into law on December 29, 2022
  - 90+ provisions; 358 pages of statutory text.
- Biggest overhaul of retirement plan provisions since the Pension Protection Act of 2006.
- Amendments to qualified plans are generally required by the end of 2025 but that deadline may be extended.

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# Correction of Benefit Plan Overpayments

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# Overpayments: Current Law

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## Overpayments: Current Law

- Concept: retirement plan overpayments are amounts that a participant receives in excess of what is allowed by the plan's terms, or regulatory limits.
- Overpayments may result from:
  - Correct amounts being paid too soon (e.g., impermissible in-service distribution from a 401(k) plan) or
  - From payment of incorrect amounts (e.g., miscalculated pension payments).

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## Overpayments: Current Law

- ERISA does not directly address recovery of overpayments, as an express fiduciary duty.
- Payment of excess amounts means the plan has not been operated in strict accordance with its written terms.
- The decision on whether and how to recover overpayments is part of fiduciary duties.
- A plan fiduciary may pursue overpayment as modified by SECURE 2.0.

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## Overpayments: Current Law

- The Employee Plans Compliance Resolution System (EPCRS), currently set forth in Revenue Procedure 2021-30, generally requires plan sponsors to attempt to recoup overpayments in excess of \$250.00.
- The recoupment methods differ for defined contribution plans and defined benefit plans.
  - Defined contribution plans - Rev. Proc. 2021-30, Section 6.06(4), Appendix B, Section 2.04
  - Defined benefit plans - Rev. Proc. 2021-30, Section 6.06(3), Appendix B, Section 2.05
- SECURE 2.0 directs IRS to update EPCRS Revenue Ruling within 2 years of enactment date.

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## Overpayments: Current Law

- Defined contribution methods:
  - Correct via plan amendment; or
  - Attempt to recoup amounts exceeding \$250:
    - Single sum, installment agreement, or adjustment to future payments.
  - Notify recipient that tax-favored treatment is not available for any overpayment that exceeds a statutory limit, even if  $\leq \$250$
  - If overpayment is not recouped, plan sponsor may need to restore amounts to the plan.

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## Overpayments: Current Law

- Defined benefit methods: basically the same as for defined contribution plans but two additional options exist:
  - Funding exception correction method -for fully funded plan, future payments adjusted to correct amount with no attempt to recoup prior overpayment.
  - Contribution credit correction method -future payments are adjusted to correct amount and total required repayment is reduced by the “contribution credit.”
    - If a net overpayment remains after contribution credit is applied, the plan sponsor or another party must reimburse the plan.

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## Overpayments: SECURE 2.0

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## Overpayments: SECURE 2.0

- Section 301 of SECURE 2.0 amends both ERISA and the Internal Revenue Code regarding recovery of “inadvertent benefit overpayments.”
- Two basic rules:
  - Recovery of overpayments is now optional with the plan fiduciaries/plan sponsor; and
  - If recovery of overpayment is sought, certain new restrictions on recovery efforts apply.

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## Overpayments: SECURE 2.0

- As an alternative to not pursuing recovery of overpayments, a plan sponsor may amend the plan to increase benefits. SECURE 2.0 greatly expands the ability to self-correct via plan amendment.
- The plan sponsor may also:
  - Reduce future benefit payments to the correct amount provided under the terms of the plan; or
  - Seek recovery from the person or persons responsible for the overpayment.

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## Overpayments: SECURE 2.0

- Whatever method chosen, the plan sponsor remains responsible for meeting minimum funding obligations under the Code, from providing benefits due to other participants and beneficiaries under a defined benefit plan, and for preventing or restoring an impermissible forfeiture of benefits under an individual account plan.
- Decision on whether or not to seek recoupment, or what method to use, is a fiduciary decision.

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## Overpayments: SECURE 2.0

- SECURE 2.0 imposes new restrictions on recouping inadvertent overpayments:
  - May not recoup interest or other additional amounts such as collection costs or fees.
  - Recoupment efforts must cease after full dollar amount is recovered
  - No more than 10% of an overpayment may be recouped from a participant's nondecreasing annuity payments in any calendar year, and the participant's benefit payments may not be reduced below 90% as a result of recoupment of an overpayment.
  - For recoupment of overpayments of other types of benefits, the plan must satisfy requirements to be developed by the Department of Labor

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## Overpayments: SECURE 2.0

- Additional restrictions on recoupment efforts, cont'd:
  - May not be accompanied by **threats of litigation** unless there is a reasonable likelihood of recovering an amount greater than the cost of recovery.
  - May not be made **through a collection agency or similar third party**, unless allowed by court judgment or settlement.
  - May not be sought, in the case of overpayments to a particular plan participant, **from any beneficiary of the participant**, including a spouse, surviving spouse, former spouse, or other beneficiary.
  - May not be sought if the first overpayment occurred **more than 3 years** before the participant or beneficiary is first notified in writing of the error, except in cases of fraud or misrepresentation by the participant.

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## Overpayments: SECURE 2.0

- The above restrictions on recoupment efforts (slides 16 & 17) do NOT apply if the participant or beneficiary is **“culpable.”**
  - “Culpable” means the individual bears responsibility for the overpayment (such as through misrepresentations or omissions that led to the overpayment), or the individual knew that the benefit payment or payments were materially in excess of the correct amount.
  - An individual is not “culpable” merely because the individual believed the benefit payment or payments were or might be in excess of the correct amount, if the individual raised that question with an authorized plan representative and was told the payment or payments were not in excess of the correct amount.

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## Overpayments: SECURE 2.0

- Additional protections related to recoupment:
  - Participants or beneficiaries facing recoupment efforts may contest all or part of the process under the claims procedures of the plan that made the overpayment.
  - In determining the amount of recoupment to seek, the responsible plan fiduciary may take into account the hardship that recoupment likely would impose on the participant or beneficiary.

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## Overpayments: SECURE 2.0

- The Secretary of the Treasury will issue guidance on how recoupment or failing to recoup impacts tax qualification of the plan.
- Inadvertent benefit overpayments that are permitted to be retained are treated as eligible rollover distributions.
- Amounts that are recouped can be returned to the plan and treated as an eligible rollover distribution back to the plan.

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## Overpayments: SECURE 2.0

- Effective date: the overpayment provisions are effective December 29, 2022, the date of enactment of SECURE 2.0.
- For recoupment efforts that commenced prior to that date, plans, fiduciaries, employers and plan sponsor are entitled to rely on a reasonable, good faith interpretation of the existing administrative guidance.
- They are also entitled to rely on determinations to recoup or not recoup overpayments made before the date of enactment.
- Repayments, or reductions in benefit payments that pre-dated the passage of SECURE 2.0 may continue in effect.

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## Overpayments: SECURE 2.0

- What does this all mean for representatives of plan participants and beneficiaries?
  - Recoupment efforts that were in progress as of December 29, 2022 may continue but new restrictions on methods may apply.
  - Plans will need to act quickly on overpayments in order to meet new 3-year rule.
  - Recoupment efforts may be more limited to instances of culpability - fraud, clear knowledge of overpayment.

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# Retirement Plan Lost & Found

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## Retirement Plan Lost & Found

- Within two years of enactment date (by December 29, 2024), Department of Labor (in consultation with Treasury Dept.) must create an online, searchable database with information on unclaimed retirement benefits, and missing and lost participants.
- The database must allow participants and beneficiaries to search for plan sponsors and locate contact information for same.
- The database must protect plan and personal information and DOL's Inspector General must conduct regular integrity audits.
- Individuals must be able to opt out of inclusion in the database.

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# Questions??



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# Contact Information

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