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# SECUREing 401(k) Participation With Student Loan Matching Contributions

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# The Legal and Administrative Stuff

- This presentation is not legal advice
- Information presented as of August 23, 2023
- Laws, regulations, and guidance continuously evolving
- Treasury directed to issue regulations and model amendment—Pending
- Will try to field questions as we go

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# Agenda

- Overview of SECURE 2.0
- Why Now?
- “QSLP” Match Under SECURE 2.0
- Employer Considerations and Open Issues
- Recommended Action Steps

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# SECURE 2.0

- Bipartisan legislation included as Division T of Consolidated Appropriations Act, 2023 (signed December 29, 2022)
- Follow up to the Setting Every Community Up for Retirement Enhancement (“SECURE”) Act passed December 20, 2019
- Intended to:
  - Modernize retirement system
  - Encourage retirement savings
  - Ease administrative burdens
- Student loan match (Section 110 of CAA) primarily serves second goal

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# Student Loan Matching Contributions

- Employers may treat “qualified student loan payments” as elective deferrals or after-tax contributions for matching contribution purposes
- Exception to the Code’s contingent benefit rule
  - Prohibits directly or indirectly conditioning any benefit—Other than a matching contribution—On employee’s decision to make elective deferrals
- Long-sought tax-favored incentive for employees with student loan debt to save for retirement through employer-sponsored plans
- Previous IRS guidance (Private Letter Ruling—Abbott Labs) was limited and unworkable

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## Why Now?

- **Polling Question:** What was the total amount of student loan debt held by borrowers in the United States in 2022?
  - A. \$520 billion
  - B. \$860 billion
  - C. \$1.05 trillion
  - D. \$1.76 trillion

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# Why Now?

**Historic Total\* National Student Loan Debt**  
(in trillions)



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## Why Now?

- Skyrocketing cost of higher education
  - Accounting for inflation, in the last 30 years:
    - Tuition and fees for **public** 4-year colleges increased 124.6%
    - Tuition and fees for **private** 4-year colleges increased 80.2%
  - The percentage of U.S. households with student loan debt more than doubled from 1992 to 2019
- Proliferation of student loan debt
  - 43.6 million Americans have federal student loan debt
  - Total debt exceeds \$1.7 trillion

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## Some Statistics

- Average federal student loan balance in 2023 = \$37,717
- Average **total** student loan balance (including private) in 2023 = \$40,505
- 55% of students graduating from public 4-year colleges have student loan debt (57% from private institutions)
- Average debt for new hires by degree:
  - Undergraduate—\$28,000
  - MBA—\$66,000
  - JD—\$130,000
  - Healthcare (doctors)—\$203,000

*Source: Forbes (July 7, 2023)*

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## Some Statistics

- **Question:** Which demographic carries the highest amount of student loan debt:
  - A. Age 24 and younger
  - B. Age 25-34
  - C. Age 35-49
  - D. Age 50-61
  - E. Age 62 and older

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Age group	Amount owed	Number of borrowers
24 or younger	\$110 billion	7.6 million
25 to 34	\$500 billion	14.9 million
35 to 49	\$622 billion	14.4 million
50 to 61	\$282 billion	6.4 million
62 and older	\$98 billion	2.4 million

Source: *Federal Student Aid*

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# Behavioral Economics

- Debt burden negatively affects retirement savings
  - Employees unable to make student loan payments and elective deferrals to retirement plans at same time
  - Delayed retirement savings can significantly reduce total savings over time
- Average 401(k) balance for younger (*i.e.*, under age 35) employees with student loan debt significantly lower than those without
  - Those without a student loan—\$46,768
  - Those with a student loan—\$25,581

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# Is the Time Right for Student Loan Match?

- Other debt relief options are limited
  - Biden debt forgiveness plan ruled unconstitutional by Supreme Court June 30
  - Loan payments and interest accruals paused under Covid relief since March 2020 scheduled to resume in Fall 2023
- Employers wishing to provide tax-advantaged assistance have few options
  - Direct payments or reimbursements generally create taxable income
  - Code Section 129 education assistance plans
    - \$5,250 tax free assistance under CARES Act (extended through 2025)
  - Previous IRS guidance (Abbott Labs PLR) limited and unworkable

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# Abbott Labs Private Letter Ruling

- In August 2018, IRS issued PLR to Abbott Labs covering unique plan design
- Structure:
  - Under individually designed plan, 5% ***nonelective contribution*** (not match) for participants who commit at least 2% of pay to repay student loans
  - Participants eligible for nonelective contribution not eligible for match under plan
- Limits:
  - Ruling addressed only the contingent benefit rule (no other qualification issues, such as nondiscrimination)
  - PLR not binding for other taxpayers (protects only taxpayer who receives it)

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# SECURE 2.0 Student Loan Matching Contributions

- Optional provision for 401(k), 403(b), governmental 457(b), and SIMPLE plans
- Effective for plan years beginning on/after January 1, 2024
  - Note: Matching contributions made in 2024 for the 2023 plan year not eligible
- Allows contributions to be treated as matching, not nonelective (exception to contingent benefit rule)
- Deductible in same manner as traditional match

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## SECURE 2.0 Student Loan Matching Contributions

- SECURE 2.0 directs Treasury to issue implementing regulations that (among other things):
  - Permit plans to make QSLP match at a different frequency than other (elective deferral) matching contributions, *but at least annually*
  - Permit employers to establish reasonable procedures for participants to claim the match
  - Require that the annual deadline to claim a QSLP match be *no earlier than three months after the close of the plan year*
  - Provide model amendments to adopt the feature
- Regulations are not currently on Treasury's list of regulatory priorities

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## Student Loans Eligible for Match—“QSLPs”

- Student loan match can be offered to any eligible employee, even if not currently contributing to plan
- Sponsors of eligible plans may make matching contribution based on student loan payments if:
  - Contribution is made on account of a “**qualified student loan payment**” (**QSLP**)
  - **QSLP** is an employee’s repayment of a “**qualified education loan**” for higher education expenses of:
    - The employee;
    - Employee’s spouse; or
    - Employee’s dependent at time debt arose

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## Qualified Education Loan

- A “**qualified education loan**” (as defined in Code § 221(d)(1)) is indebtedness incurred by the taxpayer solely to pay “**qualified higher education expenses**” of the taxpayer or his/her spouse or dependent at the time the loan was incurred
  - Includes indebtedness to refinance debt that qualifies as a qualified education expense
  - *Excludes* loans taken to cover private elementary or high school tuition
  - Loan *voluntarily* paid by employee for dependent probably does not qualify

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# Qualified Higher Education Expenses

- A “**qualified higher education expense**” is the “cost of attendance” under the Higher Education Act (as in effect prior to Taxpayer Relief Act of 1997)
- Expenses related to enrollment or attendance at an eligible post-secondary school
- Generally includes:
  - Tuition and fees
  - Books, supplies and equipment
  - Room and board
- Employers should clarify which expenses are covered in communications with employees

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## Cap on QSLPs

- Student loan payments may be treated as QSLPs to extent payments combined with elective deferrals do not exceed Code § 402(g) limit (or employee's § 415 compensation, if less)
  - SECURE 2.0 silent on whether catch-up eligible employees have higher QSLP cap
  - SIMPLE plan QSLPs capped at SIMPLE deferral limit (\$15,500 plus \$3,500 catch-up for 2023)
- QSLPs do not count as deferrals for any purpose other than the QSLP match (e.g., student loan payments do not count toward plan's actual deferral percentage (ADP) test)

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# Annual Certification

- Employees must certify **annually** to employer that QSLPs have been made in order to claim match
- Employers **may** rely on employee certification without substantiation
  - Treasury directed to issue regulations allowing employers to establish reasonable procedures
  - *Could* allow employers to require substantiating documentation
- Employees must have **at least three months after close of plan year** to claim match
  - Effectively requires QSLP match to be made on annual basis (even if regular match is more frequent)

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# Annual Certification

- What if employee terminates before claiming QSLP match?
  - Guidance needed
  - May plan condition QSLP match on remaining employed through QSLP match allocation date, even if no such condition applies to regular match?
- Deadline to claim QSLP match affects ADP/ACP testing for non-safe harbor plans
  - Test failures generally must be corrected within 2½ months after close of plan year to avoid excise tax
  - Three-month window to claim QSLP match is outside the testing window

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## Requirements for QSLP Match

- Matching contributions on QSLPs made at same rate as match on elective deferrals
- All employees eligible for plan's "regular" match are eligible for QSLP match
  - e.g., if part-time employees eligible for regular match, must be eligible for QSLP
- QSLP matching contributions made only on behalf of employees otherwise eligible for "regular" match
  - e.g., 1 year of service eligibility requirement for regular match must apply for QSLP
- QSLP and regular match must "vest in the same manner"
  - Guidance needed on equivalence of 3-year cliff and 6-year graded
  - Can 3-year cliff be applied to regular match, and 6-year graded to QSLP match?

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## Requirements for QSLP Match

- QSLP match can be made at different frequency than regular match
  - QSLP match must be made at least annually
- QSLP match can be made as Roth contribution if plan allows participants to designate regular match as Roth pursuant to SECURE 2.0
- Discretionary QSLP match?
  - Nothing in SECURE 2.0 suggests QSLP match cannot be discretionary
  - But if regular match is not discretionary, QSLP match probably cannot be
- Safe harbor plans
  - QSLPs can be treated as elective deferrals for safe harbor plan rules
- QSLP match not limited to preapproved plan documents

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## Example

- ABC Co. sponsors a 403(b) plan with a fixed 50% match on elective deferrals up to 6% of compensation, allocated on a payroll basis, with a 3-year cliff vesting schedule. Effective for the plan year beginning 1/1/2024, ABC adds a match on QSLPs for all participants eligible for the match on deferrals, equal to 50% of QSLPs paid, up to 6% of compensation, allocated on an annual basis, subject to 3-year cliff vesting.
- This program satisfies the SECURE 2.0 standards because:
  - It provides matching contributions on QSLPs at the same rate as on elective deferrals
  - QSLP matching contributions are made only to participants otherwise eligible for the match on deferrals, and all participants eligible for the deferral match are eligible for the QSLP match
  - The same vesting rules apply

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# Nondiscrimination Relief

- Absent relief, QSLP matching contributions could raise coverage and nondiscrimination issues
  - Coverage (§ 410(b)) and “benefits, rights and features” (§ 401(a)(4)) testing—  
Is benefit considered currently available to employees who do not have student loan debt?
  - SECURE 2.0 relief—QSLP match considered available to all employees, regardless of student loan debt
- ADP testing
  - QSLPs do not count as deferrals for ADP testing
  - If NHCEs reduce elective deferrals in order to pay student loan debt (and get match), potential downward pressure on HCE deferrals

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## Nondiscrimination Relief

- Under SECURE 2.0, ADP test may be applied separately to group of employees who receive QSLP match
  - By disaggregating, employees who lower their elective deferrals in favor of making QSLPs (who are more likely to be NHCEs) will not adversely affect ADP of other group (who are more likely to be HCEs)
  - If plan has more HCEs receiving QSLP match than NHCEs, ADP test results may improve without disaggregation
- No similar relief for ACP testing
  - But if more NHCEs receive QSLP match than HCEs, ACP test results should improve

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## Who Should Consider QSLP Match?

- Employers with large populations of employees with graduate degrees
  - Health care (nurses, nurse practitioners, doctors)
  - Engineers and architects
  - Professional service companies (accounting firms, law firms, advertising firms)
- Employers that struggle to attract or retain employees
- Employers with a benefit philosophy to address employees' debt problems and retirement readiness
- Employers searching for a creative, new benefit offering

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## Open Issues

- **3-Month Certification Period**—Will Treasury provide excise tax relief for ADP/ACP test failures?
- **QSLP Match on Different Frequency**—Will plans that match elective deferrals on payroll period basis be forced to adopt an annual true-up if QSLPs are matched annually?
- **Types of Loan Payments**—May employers limit the types of student loan payments that qualify for match (e.g., only loans for employee's *personal* education)?
- **Eligibility for QSLP Match**—May employers exclude HCEs or collectively bargained employees from QSLP match?

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## Open Issues

- **Employee Certification**—May employers impose additional substantiation requirements on QSLP payments (e.g., penalty of perjury statement or registration of eligible loans for employer tracking)?
  - May certification be required more often than annually?
  - Method of certification?
- **Eligible Loans**—Are loans co-signed by a parent eligible?
- **Application to Safe Harbor Plans**—Must safe harbor notice describe QSLPs and how they are claimed?

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## Open Issues

- **Vesting Rules**—May plans use different vesting rules for regular and QSLP match if both schedules are permissible under ERISA?
- **Correcting QSLP Match Errors**—Will IRS update EPCRS for QSLP match errors?
- **Forfeiture of QSLP Match**—Must QSLP match based on loan payments that are later refunded or returned be forfeited?

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# Action Steps for Plan Sponsors

- Evaluate value to your workforce
  - Do you have significant populations with student loan debt?
  - Will a student loan match be an impactful recruiting tool?
  - What are competitors doing?
  - Will employees with no student loan debt feel left out?
- Forecast cost
  - Addition of QSLP match could dramatically increase cost
  - Consider polling workforce (anonymously)
- Determine recordkeeper capabilities
  - Many recordkeepers may wait for Treasury regulations before building systems

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## Action Steps for Plan Sponsors

- Review effect on nondiscrimination testing
- Consider privacy issues if you require substantiation of QSLPs other than employee certification
- Evaluate other options
  - Code § 129 education assistance plans (using CARES Act relief, extended through 2025, for employer payment of student loan debt up to \$5,250)
  - Abbott Labs model—Nonelective contributions

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# Action Steps for Plan Sponsors

- Document decisions and administrative rules **before** amending plan
- Notify and educate employees
- Amend plan
  - SECURE 2.0 amendment deadline is end of plan year beginning on/after 1/1/2025 (2027 for governmental and collectively bargained plans)

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## Presenter



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- Greg is the Chair of the Employee Benefits practice group at the Kansas-City based Spencer Fane law firm. With 30 years of employee benefits experience, Greg helps his clients maximize the value and minimize the risks inherent in their retirement, health and welfare, and executive compensation plans.
- Greg advises clients on the entire spectrum of benefits issues. He knows the retirement industry inside and out, representing not only employers but also large record keepers and other service providers.
- Greg also leads Spencer Fane's ERISA Litigation practice group. He uses his substantive knowledge of the Internal Revenue Code and ERISA to create unique litigation avoidance strategies and, when necessary, winning defense arguments.

# Thank You!

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# SECURE 2.0 Summary Chart

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# SECURE 2.0 Summary

SECURE 2.0 Provision	Optional/Required	Effective Date
Reduction in Excise Tax for RMD Failures	N/A	Immediate
Small Incentives for Participation	Optional	Immediate
457(b) 1 <sup>st</sup> -Day Rule	Optional	Immediate
Qualified Birth/Adoption Repayment	Optional	Immediate

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# SECURE 2.0 Summary

SECURE 2.0 Provision	Optional/Required	Effective Date
Terminal Illness W/Ds	Optional	Immediate
Hardship Self-Certification	Optional	Immediate
Federal Disaster Distributions	Optional	Immediate
Roth Treatment of Match or Non-Elective Contributions	Optional	Immediate

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# SECURE 2.0 Summary

SECURE 2.0 Provision	Required/Optional	Effective Date
Recovery of Overpayments	Required	Immediate
EPCRS Expansion	N/A	Immediate
Increased RMD Age	Required	Plan Years On/After 1/1/23
Notices to Unenrolled Ees	Optional	Plan Years On/After 1/1/23
403(b) MEPs	Optional	Plan Years On/After 1/1/23

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# SECURE 2.0 Summary

<b>SECURE 2.0 Provision</b>	<b>Required/Optional</b>	<b>Effective Date</b>
Safe Harbor Correction for Elective Deferral Errors	Optional	Plan Years On/After 1/1/24
Student Loan Match	Optional	Plan Years On/After 1/1/24
Catch-Ups Treated as Roth for High Earners	Required	Plan Years On/After 1/1/24
In-Service W/D and Emergency Savings A/Cs	Optional	Plan Years On/After 1/1/24

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# SECURE 2.0 Summary

SECURE 2.0 Provision	Optional/Required	Effective Date
Cash-Out Limit Increase	Optional	Plan Years On/After 1/1/24
Plan Amendments to Increase Benefits	Optional	Plan Years On/After 1/1/24
Surviving Spouse RMD Election	Required	Plan Years On/After 1/1/24
403(b) Hardship W/Ds	Optional	Plan Years On/After 1/1/24

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# SECURE 2.0 Summary

SECURE 2.0 Provision	Optional/Required	Effective Date
Roth RMD Rules	Required	Plan Years On/After 1/1/24
Mandatory Auto-Enrollment for New Plans	Required	Plan Years On/After 1/1/25
Higher Catch-Up Limit	Optional	Plan Years On/After 1/1/25
Long-Term Part-Time Eee Eligibility	Required	Plan Years On/After 1/1/25

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# SECURE 2.0 Summary

SECURE 2.0 Provision	Optional/Required	Effective Date
Long-Term Care Distributions	Optional	Plan Years On/After 1/1/26
Paper Statements	Required	Plan Years On/After 1/1/26

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