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INSIGHT

WEP and GPO Repeal

IN THIS ISSUE

The impacts of the Windfall Elimination Provision (WEP) and the Government Pension Offset (GPO) on Social Security benefits received by public sector employees have been reviewed frequently by Congress. As noted in the January 2023 issue of GRS Insight[1], bills seeking to eliminate the WEP and GPO have been introduced in each Congress dating back to 2001.

On January 5, 2025, one such bill was finally enacted, as President Biden signed into law the *Social Security Fairness Act of 2023* (H.R. 82, the Act). The Act eliminates the WEP and GPO reductions in Social Security benefits for millions of public sector employees who are not covered by Social Security, but receive certain other governmental pension benefits.

Background

Many state and local government employees are not covered by Social Security. Rather, they participate in government pension plans based on work that is not covered by Social Security, such that Social Security taxes are not withheld (referred to as a non-covered position).

At a high level, the WEP reduces Social Security benefits for those employees who also receive a pension or disability benefit from an employer for services in a non-covered position, while the GPO reduces Social Security benefits for spouses, widows, and widowers who also receive government pensions of their own.

The WEP and the GPO provisions were put in place to prevent certain retired state and local government employees from receiving what were considered inappropriate Social Security benefit "windfalls." The WEP and GPO provisions were designed to address perceived disparities in Social Security benefits for workers who spent some or all of their careers in a non-covered position.

Increased Monthly Benefits

The WEP and GPO reduced or eliminated the Social Security benefits of over 3.2 million people who receive a pension based on a non-covered position.

However, due to the passage of the Act, December 2023 was the last month that WEP and GPO will apply and these rules no longer apply to benefits payable for January 2024 and later.

Beginning in February 2025, the Social Security Administration (SSA) began to pay retroactive benefits to the January 2024 removal of the WEP and GPO and is prospectively increasing monthly benefit payments to those with benefits that have been affected by the WEP and GPO.

[1] https://grsconsulting.com/wp-content/uploads/2023/01/GRS-Insight-January-2023-FINAL.pdf

Affected individuals will generally begin receiving their new monthly benefit amount in April 2025 (for March 2025), though certain individuals may have a delay based on their particular circumstances.

Impact

The impact of these changes due to the repeal of the WEP and GPO will vary greatly between individuals, with some having only a minor increase and others having a monthly increase in excess of $1,000.

According to a report released by the Congressional Budget Office (CBO) on September 9, 2024, eliminating the WEP would increase monthly benefits in December 2025 by an average of $360 for approximately 2.1 million Social Security beneficiaries. By December 2033, that increase would reach an average of $460 for 1.8 million beneficiaries.[2]

In addition, the CBO report estimated that eliminating the GPO would increase monthly benefits in December 2025 by an average of $700 for approximately 380,000 spouses and $1,190 for 390,000 surviving spouses. By December 2033, the increase would reach an average of $860 for 330,000 spouses and $1,520 for 480,000 surviving spouses.[3]

The CBO report also projected that as a result of the elimination of the WEP and GPO, the exhaustion date for the combined Social Security Old-Age and Survivor's Insurance (OASI) Trust Fund and the Disability Insurance (DI) Trust Fund would be accelerated by approximately six months.[4]

Action Steps

In most cases, no action is required for an impacted individual to receive these increased benefits. However, individuals may need to file an application for benefits if one was never filed due to the existence of the WEP and/or GPO. Generally, if the Social Security Administration does not have the information needed to calculate an individual's benefit, the individual will receive a request for information from the SSA.

The SSA has also created a "Frequently Asked Questions" section about the *Social Security Fairness Act* on their website that provides updated information related to WEP and GPO.[5]

IRS Guidance on Plan Overpayments

On October 15, 2024, the Internal Revenue Service (IRS) issued Notice 2024-77[6] that provides guidance on the treatment of "inadvertent benefit overpayments" from retirement plans under Section 301 of the *SECURE 2.0 Act* (SECURE 2.0).

Changes were made under *SECURE 2.0* to both ERISA and the Internal Revenue Code (the Code), and while many of the changes under ERISA are restrictive, the Code changes allow for more flexibility in recouping certain overpayments, which is helpful for governmental plans.[7]

Background

Prior to *SECURE 2.0*, corrective action was generally required to restore benefit overpayments to a plan. In addition, the member or other recipient should have been notified that the overpayment was not eligible for tax-free rollover treatment, in accordance with the principles set forth in the IRS' Employee Plans Compliance Resolution System (EPCRS) (currently, Revenue Procedure (Rev. Proc.) 2021-30).[8]

Secure 2.0 Relief

Section 301(b) of *SECURE 2.0* added important relief when there is an "inadvertent benefit overpayment." Generally, corrective action is not required. In other words, a plan is not required to seek recoupment or to

[2] *See* https://www.cbo.gov/system/files/2024-09/hr82.pdf
[3] *Id*.
[4] *Id*.
[5] https://www.ssa.gov/benefits/retirement/social-security-fairness-act.html
[6] https://www.irs.gov/pub/irs-drop/n-24-77.pdf.
[7] Section 301(a) of *SECURE 2.0* amends ERISA and does not apply to governmental plans, while the amendments to the Code under Section 301(b) of SECURE 2.0 will apply.
[8] https://www.irs.gov/pub/irs-drop/rp-21-30.pdf.

have the inadvertent benefit overpayment restored to the plan, pursuant to new Section 414(aa) of the Internal Revenue Code (the Code). Further, the overpayment may retain its treatment as an eligible rollover distribution in certain cases, pursuant to new Code Section 402(c)(12).

Notice 2024-77

Notice 2024-77 provides the first round of IRS guidance regarding the scope of the new overpayment relief, and explains the options available under EPCRS in light of the relief.

Importantly, Notice 2024-77 makes clear that recoupment of inadvertent benefit overpayments may still be sought from members and beneficiaries.

The Notice is effective as of October 15, 2024, and provides for a good faith, reasonable compliance standard prior to its effective date. To the extent the Notice is followed, this good faith standard is deemed to be satisfied.

Inadvertent Benefit Overpayment

An "inadvertent benefit overpayment" is an eligible inadvertent failure (as defined in Section 305(e) of SECURE 2.0 Act[9]) that occurs due to a payment made from a Code Section 401(a) qualified plan, Section 403(a) annuity, Section 403(b) tax-sheltered annuity or governmental plan that exceeded the amount payable under the terms of the plan or a limitation provided in the Code or regulations.

An "eligible inadvertent failure" is a failure that:

1) occurs despite the existence of established practices and procedures (*see* Rev. Proc. 2021–30, Section 4.04[10]);
2) is not egregious;
3) does not relate to the diversion or misuse of plan assets; and
4) is not directly or indirectly related to an abusive tax avoidance transaction.

An inadvertent benefit overpayment also includes a payment made before a distribution is permitted under the Code or under the terms of the plan (*i.e.*, an impermissible in-service distribution). However, an inadvertent benefit overpayment does not include a payment that is made pursuant to a correction method provided under EPCRS for a different qualification failure.

Impact on EPCRS

For governmental plans, except for failures related to Code Section 401(a)(17) and Code Section 415, there is no requirement to restore the overpayment to the plan.

Therefore, the corrective payments, such as lump sum repayments or offsets against future payments, referenced in EPCRS are optional (*see* Rev. Proc. 2021-30, Section 6.06 and Appendix B, Section 2.04 or 2.05), though related failures may still require a corrective payment.

The following provisions of EPCRS are modified or are no longer applicable with respect to an inadvertent benefit overpayment:

- the definition of "overpayment" is revised by Notice 2024-77;
- the requirement to notify an individual that an overpayment is not an eligible rollover distribution no longer applies if recoupment is not sought (or is sought and returned);
- the requirement of a corrective payment (other than as noted for Code Section 401(a)(17) or 415 failures); and
- the 6% excise tax (Code Section 4973) and additional 10% tax (Code Section 72(t)) relief no longer apply if the overpayment is eligible for rollover treatment.

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[9] https://www.congress.gov/117/plaws/publ328/PLAW-117publ328.pdf (*see* Division T, beginning on page 817).
[10] See footnote 8.

Recoupment of Inadvertent Benefit Overpayments

Although seeking recoupment of inadvertent benefit overpayments from the recipient is not required, it is still permitted. For example, the overpayment correction methods under EPCRS, such as amending the plan to permit the increased payment or requiring the repayment of the overpayment, may still be followed (*see* Rev. Proc. 2021-30, Section 6.06(3)(c) and (4)(c) and Appendix B, Section 2.05(2)).

Rollovers of Inadvertent Benefit Overpayments

In the case of an inadvertent benefit overpayment that would be an eligible rollover distribution but for the overpayment:

- **If recoupment <u>is not</u> sought**, such distribution will remain an eligible rollover distribution (provided that the overpayment is not attributable to a Code Section 401(a)(17) or 415 failure).
- **If recoupment <u>is</u> sought**:
  - The portion of the overpayment for which recoupment is sought, but not repaid, is treated as an ineligible rollover distribution to another plan.
  - The portion of the overpayment for which recoupment is sought retains its treatment as an eligible rollover distribution to the originating plan to the extent it is repaid to the originating plan.

To the extent that an overpayment is not treated as an eligible rollover distribution to another plan, in accordance with EPCRS, the individual must be notified that the unreturned portion is not eligible for favorable tax treatment (specifically, not eligible for tax-free rollover). These rules apply as of December 31, 2022, regardless of when the inadvertent benefit overpayment was made.

Implications of a Code Section 401(a)(17) or 415 Failure

The limitations imposed by Code Sections 401(a)(17) and 415 continue to apply in the event of an inadvertent benefit overpayment. Further, a plan may enforce those limitations using any method approved by the IRS for recouping benefits previously paid in excess of those limitations. Therefore, in the case of a Code Section 401(a)(17) or 415 failure, a corrective payment must be made to the plan (either by the individual or another party) in accordance with EPCRS.

To the extent that the overpayment is not recouped by the plan, it is not treated as an eligible rollover distribution and, as noted above, the individual must be notified that any unreturned portion is not eligible for favorable tax treatment (specifically, not eligible for tax-free rollover).

Further, although a plan sponsor has the ability to correct inadvertent benefit overpayments by plan amendment, an amendment to increase past benefit payments in a manner that results in a violation of Code Sections 401(a)(17) or 415 for a past year is not permitted.

New Employer Mandate and ACA Reporting Relief

On December 23, 2024, President Biden signed into law the *Paperwork Burden Reduction Act* (H.R. 3797) and the *Employer Reporting Improvement Act* (H.R. 3801) (New Law). The New Law provides relief related to Code Section 4980H employer mandate penalties, Code Section 6055 minimum essential coverage reporting, and Code Section 6056 employer mandate reporting. On February 21, 2025, the IRS released Notice 2025–15[11], which provides limited guidance under the New Law.

[11] https://www.irs.gov/pub/irs-drop/n-25-15.pdf

Employer Mandate Relief

The New Law provides the following employer mandate relief:

- *Statute of Limitations on Penalty Assessment*: There is now a six-year statute of limitations on employer mandate penalty assessments which begins on the later of: 1) the due date for filing Form 1095-C; or 2) the date the employer filed the Form 1095-C. Previously, the IRS took the position that there was no statute of limitations on these assessments. This is effective for Forms due after December 31, 2024.

- *Time for response to Letter 226-J*: Employers will now have at least 90 days to respond to the Letter 226-J, the proposed penalty assessment letter. This is a significant increase from the previous 30-day deadline. This is effective for assessments proposed in taxable years beginning in 2025 or later.

ACA Reporting Relief

The New Law provides the following ACA reporting relief:

- *Taxpayer Identification Number (TIN) Reporting Flexibility*: If a reporting entity is "unable to collect" a covered individual's TIN (e.g., SSN), the entity can instead report the individual's date of birth on Form 1095-B or -C. Previously, a reporting entity was only permitted to report the date of birth if the entity followed specific "TIN solicitation procedures," which required that the entity ask for the TIN three times at certain specific periods. It is not entirely clear whether the New Law changes the three-ask requirement or not. This is effective for Forms due after December 31, 2024.

- *Electronic Distribution*: If an individual has previously consented to receive Form 1095-B or -C electronically, the individual will be deemed to have consented to receive the statement electronically in the future unless the consent was revoked. Before the New Law, the consent must have specifically stated this information. This is effective for Forms due after December 31, 2024.

- *Alternative Manner of Furnishing Forms*: All reporting entities can, in lieu of distributing Forms 1095-B or -C to individuals, post a "clear and conspicuous" notice of the accessibility of Forms 1095-B or -C on their websites and must furnish the Forms upon request. This relief existed previously, but not for large employers subject to the employer mandate. This is effective for Forms for calendar years after 2023.

Notice 2025-15

On February 21, 2025, the IRS released Notice 2025-15 to provide additional clarity on what reporting entities must do to use the alternative method of furnishing statements under the New Law.

Notice 2025-15 provides that, subject to certain changes, if reporting entities comply with the 2022 final regulations on the alternative method of furnishing, then reporting entities will satisfy their furnishing obligations under the New Law.

Under Notice 2025-15, if a reporting entity wants to use the alternative manner of furnishing statements, it needs to provide the following:

- A clear and conspicuous notice of the availability of Forms 1095-B or -C on its website;

- By the due date of the Form (March 3, 2025 for 2024 Forms), a notice of the availability of the Forms written in plain, non-technical terms that remains on the website until October 15 of the following year; and

- An email address, a physical address, and a phone number to field these requests.

Although many of the rules provided in the New Law and Notice 2025-15 are unchanged from prior IRS guidance, there are a few differences. For example, the New Law provides that the deadline for furnishing Forms upon request is the later of: 1) 30 days after the date of the request; or 2) January 31 of the year following the calendar year to which the Form relates. This ensures that, if an individual requests Form 1095-B or -C during the year, reporting entities will have at least until January 31 of the following year to furnish the Form.

While the alternative manner of furnishing these Forms provides helpful flexibilities to reporting entities, specifically large employers, this does not change the requirement to file the Forms with the IRS. Nothing in the New Law or Notice 2025-15 changes the obligations to report health coverage under state laws.

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