

Retirement **Spotlight**

Illuminating current industry news and events

July 17, 2023

IRS Issues Interim Guidance on Plan Corrections under SECURE 2.0 Act

The SECURE 2.0 Act of 2022, (SECURE 2.0) provisions affecting the Employee Plans Compliance Resolution System (EPCRS) support the IRS trend toward shifting certain types of retirement account corrections to the Self Correction Program (SCP). For example, Sec. 305 of SECURE 2.0 provides for expanding EPCRS to allow certain “eligible inadvertent failures” to be corrected under the SCP. This provision also directs the Treasury Secretary to update guidance on correcting such failures under the SCP by December 2024. The IRS has responded by issuing [Notice 2023-43](#) to provide interim guidance in advance of updating [Rev. Proc. 2021-30](#).

NOTE: Although plan sponsors may self-correct an eligible inadvertent failure before Rev. Proc. 2021-30 is updated, IRA custodians do not have this option.

SCP Immediately Available to Qualified Plan Sponsors

Sec. 305 of SECURE 2.0 allows self-correction of any eligible inadvertent failure as long as the correction is completed within a reasonable time after the error is discovered. Notice 2023-43 specifies that plan sponsors can self-correct certain eligible inadvertent failures that meet specific conditions and limitations *before* the update of Revenue Procedure 2021-30.

- **Eligible Inadvertent Failure Definition.** SECURE 2.0 defines an “eligible inadvertent failure” as a failure that occurs despite the existence of suitable practices and procedures and that is *not*
 - egregious,
 - related to the diversion or misuse of plan assets, or
 - related to an abusive tax avoidance transaction.
- **Conditions.** Employers may now correct eligible inadvertent failures under SCP at any time as long as two conditions are met. First, the IRS must not discover the failure (e.g., during an audit) before the employer has taken any actions that demonstrate a commitment to implement a self-correction. Second, the self-correction must be completed within a reasonable period after the failure is identified. Notice 2023-43 states that a plan sponsor must consider the facts and circumstances of the incident to determine whether the correction has been completed within a reasonable period. The interim guidance also states that the IRS will consider a failure that is corrected within 18 months after the failure is identified to have been corrected within a reasonable period. For an employer eligibility failure, the plan sponsor must cease all contributions to the plan as soon as practicable after identifying the failure, but no later than six months following the identification of the failure, to be considered resolved within a reasonable period.

NOTE: Employers may self-correct *insignificant* failures even if initially discovered by the IRS.

- **Limitations.** There are also circumstances in which an employer is simply not able to self-correct an eligible inadvertent failure. While any failure may normally be corrected using EPCRS' Voluntary Correction Program (VCP), the following cases *require* correction through the VCP.
 - A failure to initially adopt a written plan
 - A failure in an orphan plan
 - A significant failure in a terminated plan
 - A failure involving excess contributions to a SEP or SIMPLE IRA plan that is corrected by permitting the excess contributions to remain in an affected participant's IRA
 - A demographic failure that is corrected using a method other than what is specified in [Treas. Reg. 1.401\(a\)\(4\)-11\(g\)](#) (e.g., a plan sponsor cannot use cross-testing or plan aggregation to correct a demographic failure under [IRC section 401\(a\)\(4\)](#))
 - An operational failure that is corrected by a plan amendment in a manner that is less favorable for a participant or beneficiary than the original plan terms
 - A failure occurring in a SEP plan not using a Model Form 5305-SEP or 5305A-SEP or a prototype SEP with a favorable opinion letter
 - A failure occurring in a SIMPLE IRA plan not using a Model Form 5305-SIMPLE or 5304-SIMPLE or a prototype SIMPLE with a favorable opinion letter
 - A failure in an ESOP that involves section 409 in which tax consequences other than plan disqualification are associated with the failure (e.g., a failure under section 409(p))

Plan sponsors may prefer to correct failures through the VCP if they are interested in using a correction method not described in Rev. Proc. 2021-30, if the failure involves an excise or additional tax and a waiver of the tax is desired, or if they would like to obtain assurance that the selected correction method has received IRS approval.

- **Unchanged Recordkeeping Requirements.** Employers should continue to document corrections under the SCP according to IRS requirements, which include identifying the details of the failure (e.g., a description of the failure, the date the failure was identified, the number of affected employees), explaining how the failure occurred, identifying and substantiating the correction method and the date it was completed, and identifying any changes made to established procedures to ensure that the same failure doesn't recur.
- **Immediate Effective Reliance.** Employers may immediately rely on the guidance provided by Notice 2023-43, continuing through the date that Rev. Proc. 2021-30 is updated, even if the failure occurred before the release of SECURE 2.0. If a self-correction is completed by a plan sponsor on or after December 29, 2022, and before May 26, 2023, (the date this notice was issued), the plan sponsor will be considered to have applied a good faith, reasonable interpretation of Sec. 305 of SECURE 2.0 in completing the self-correction.

Limited Scope of Interim Guidance

Notice 2023-43 pertains only to the EPCRS provisions under the authority of the IRS; it does not address any elements of Sec. 305 of SECURE 2.0 over which the Department of Labor has authority. This notice also does not address Sections 301 and 350 of SECURE 2.0, which relate to the recovery of overpayments by administrators of qualified retirement plans and the employer's ability to correct automatic contribution errors in certain plans.

Moving Forward

The Department of Treasury and the IRS invite comments on this notice by August 23, 2023. The agencies welcome comments that specifically relate to additional correction methods or general principles of correction if a specific correction method is not specified by the Secretary, as well as descriptions of common IRA failures and suggestions on how to correct them. Ascensus will continue to analyze new guidance as it is released. Visit [ascensus.com](https://www.ascensus.com) for the latest developments.