

INSIDE THE LAW

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THE SECURE ACT – HOW IT IMPACTS YOUR RETIREMENT PLANNING. WHAT YOU NEED TO KNOW IN A NUTSHELL.

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On December 20, 2019, President Donald J. Trump signed the Setting Every Community Up for Retirement Enhancement Act of 2019 (“SECURE Act”) into law.

If you have a retirement account and/or if you anticipate being named as a beneficiary of a retirement account, here is a summary of what you need to know about the new rules and their limited exceptions.

The SECURE Act contains some **new taxpayer-friendly provisions**. If you are part of a retirement plan, you are now free to continue making contributions to the retirement plan at any age. You are no longer prohibited from making retirement contributions after age 70½. Also, under the pre-SECURE Act rules, you were required to begin taking required minimum distributions (thus paying income tax on those distributions) in the year following the year in which you turned 70½ years old. Under the new rules of the SECURE Act, that age changes to 72, so you are not required to begin taking required minimum distributions from your retirement accounts until the year following the year in which you turn age 72.

Now for some **new not-so-taxpayer-friendly changes**. It is estimated the SECURE Act will generate an additional \$15.7 billion in tax revenue to the federal government. In large measure, this new tax revenue will be generated because the required time for the beneficiaries to take distributions after the death of an account owner has been drastically shortened. The few exceptions are described below. These changes apply only to retirement accounts of people who die after December 31, 2019.

But, before considering the changes, note that the rules concerning a surviving spouse have not changed: If a spouse is the beneficiary, after the account owner’s death the account can still be rolled over into an IRA owned by the surviving spouse.

For a beneficiary who is not a surviving spouse, the rules, with some exceptions, have changed dramatically. Under prior law, a beneficiary could elect to take required minimum distributions over his or her life expectancy pursuant to the IRS Table (the so-called “stretch rule”). In this way the stretch rule significantly

enhanced the potential to defer income tax for retirement accounts, as taxpayers could obtain a huge extension of the tax-deferral period. The impact of the stretch rule could be further magnified if grandchildren were designated as beneficiaries. A similar result could be obtained by naming a See-Through Trust as the designated beneficiary of the account. The inherited account stretch rule was largely repealed by the SECURE Act.

The SECURE Act allows most beneficiaries a maximum deferral of 10 years. Unless one of the following four exceptions to this new rule applies, the entire balance of the account must be paid out within 10 years of the original account owner’s death. The SECURE Act provides these four exceptions to the new 10-year distribution requirement:

1. A minor. The life expectancy payout method applies until the child reaches the age of majority (age 18 in Massachusetts), at which point the 10-year payout rule applies.
 2. A person with a disability which prevents him or her from being able to engage in any substantial gainful employment.
 3. A person who is certified as being chronically ill.
 4. A person who is less than 10 years younger than the retirement account owner.
- Under the prior law, if a trust was named as the beneficiary of a retirement account, the trust had to be a See-Through Trust to qualify for the stretch rule.
 - Under the SECURE Act, to qualify for the payment within 10 years of an account owner’s death, a trust must also be a See-Through Trust.



Under the new law, Conduit Trust provisions will require the entire retirement account to be distributed to the beneficiary within 10 years after the account owner's death.

- See-Through Trusts are either Conduit Trusts or Accumulation Trusts.
- For Conduit Trusts, the retirement account proceeds must be distributed to the trust's conduit beneficiary(ies) when withdrawn from the retirement account. The trust may have estates and charities as remainder/contingent trust beneficiaries.
- For Accumulation Trusts, once distributed from the retirement account, the retirement account proceeds may remain in trust indefinitely, in accordance with the trust's terms. The trust may not have an estate or a charity as a trust beneficiary.
- Other than Supplemental Needs Trusts, most trusts which were named as beneficiaries of retirement accounts under prior law were drafted as Conduit Trusts.

We believe that most of our clients with a trust named as beneficiary of their retirement accounts should replace the Conduit Trust provisions in their trusts with Accumulation Trust provisions. This is because under the new law, Conduit Trust provisions will require the entire retirement account to be distributed to the beneficiary within 10 years after the account owner's death. Once distributed to the beneficiary, the retirement account funds are subject to attack by the beneficiary's creditors, including a divorcing spouse, and are includible in the beneficiary's own future estate for estate tax purposes. In contrast, the Accumulation Trust provisions would allow the retirement account proceeds to remain in trust – potentially for the beneficiary's entire lifetime – thereby extending the creditor protection period and sheltering the retirement account

If you have a trust – other than a Supplemental Needs Trust – which is named as the beneficiary of a retirement account, then you likely should amend that trust to insert the Accumulation Trust provisions.



balance from being included in the beneficiary's taxable estate. Depending on the value of the retirement account, however, the Accumulation Trust could also cause the withdrawn retirement account proceeds remaining in trust to be subject to a higher income tax bracket.

A Supplemental Needs Trust is a trust established for a beneficiary who has a disability and may qualify for certain government benefits. As described above, (i) a person with a disability which prevents him or her from being able to engage in substantial gainful employment or (ii) a person who is certified as being chronically ill is not subject to the new 10-year maximum deferral but can take distributions over his or her life expectancy (the stretch rule). Similarly, if a Supplemental Needs Trust has been established for the benefit of such an individual, and that Supplemental Needs Trust is the beneficiary of a retirement account, the trust may take distributions over that individual's life expectancy. To qualify for the stretch rule, the Supplemental Needs Trust must contain certain provisions and qualify as an Accumulation Trust. Supplemental Needs Trusts which were executed in 2017 or later already include the Accumulation Trust provisions. However, older Supplemental Needs Trusts and any Supplemental Needs Trusts which include one or more non-disabled person(s) as beneficiaries in addition to a disabled beneficiary should be amended to incorporate the appropriate Accumulation Trust provisions.

So, what does all this mean to you?

1. Fortunately, for the purposes of the new 10-year payout requirement, the rules for determining how beneficiaries are designated do not come into play until the death of the original account holder. This reprieve provides you with an opportunity to reevaluate existing trust documents and ensure the tax language is consistent with the new rules and your estate planning objectives.
2. If you have a trust – other than a Supplemental Needs Trust – which is named as the beneficiary of a retirement account, then you likely should amend that trust to insert the Accumulation Trust provisions.
3. If only individuals are named as beneficiaries of your retirement accounts, then there is probably no need to update your estate plan.
4. If your estate plan contains a Supplemental Needs Trust for a family member with a disability, it is likely that the SECURE Act will permit the life expectancy of the Supplemental Needs Trust beneficiary to govern the required minimum distributions, rather than the compressed 10-year payout rule. As described above, Supplemental Needs Trusts that are older or have multiple beneficiaries should be amended.
5. If it appears that your estate plan is affected by the SECURE Act, or you are not sure, you should schedule an appointment with your estate planning attorney at Fletcher Tilton PC. **FT**

CIVIL LITIGATION BASICS I. FIRST SHOTS FIRED – FILING OF SUIT AND INITIAL PLEADINGS.

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In earlier publications, my colleagues have written about best practices to avoid civil litigation. Those articles are available on Fletcher Tilton’s website under the Knowledge Center, and I recommend giving them a read. The purpose of this series is to provide some basic information for individuals or businesses that find themselves beyond the point of avoidance, and have either been brought unwillingly into the world of civil litigation as a party to a lawsuit, or find themselves in a position where the filing of a lawsuit against another individual or business seems to be the only remaining option.

CIVIL LITIGATION GENERALLY

“Civil litigation” is a term that describes the process of resolving a legal dispute between two or more parties and often involves one or both parties seeking monetary compensation, referred to as the party’s damages, from the other for the wrongs they claim to have suffered. Other forms of relief that may be sought through the litigation process are injunctive relief – asking for a court order to stop the other party from doing something, and specific performance – asking for a court order compelling the other party to do something. The party that files the lawsuit is known as the plaintiff, and the party against whom the lawsuit has been brought is referred to as the defendant.

Unlike transactional law, which is characterized by two adverse parties negotiating toward a common goal such as a purchase and sale agreement, civil litigation involves an existing legal dispute that has arisen between two or more parties and must be resolved by a third party, either a judge in a courtroom or an arbitrator in an arbitration proceeding.

Civil litigation should also be distinguished from criminal litigation where the state, through a prosecutor, brings a prosecution against an individual accused of committing a crime and seeks prison time or other punishment for the alleged criminal. There are some important differences between a criminal prosecution and a civil lawsuit, most notably the burden of proof that the plaintiff must meet. In a civil lawsuit, the plaintiff must prove his claims “by a preponderance of the evidence,” which in simpler terms means “more likely than not.” In a criminal prosecution, the defendant must be found guilty “beyond a reasonable doubt,” which is difficult to simplify other than to say that it is considered a substantially

higher standard than the “more likely than not” standard applied in civil cases. The prosecution must present evidence that removes any reasonable doubts from the jurors’ minds that the defendant is guilty of the alleged crime.

Anyone who followed O.J. Simpson’s criminal “Trial of the Century” for the murder of Nicole Brown and Ron Goldman, and the subsequent civil proceedings by the Brown and Goldman families for wrongful death, has seen the different outcomes that can result between a criminal lawsuit and a civil lawsuit arising out of the same occurrence, due to the different legal rules and standards applied. Simpson was acquitted of murder charges and thereby avoided prison time in his criminal trial. But following a civil lawsuit, he was found liable to the Brown and Goldman families for the deaths, and the families were awarded \$33.5 million in damages.



The plaintiff in a civil lawsuit initiates the lawsuit by filing with the court and serving upon the other parties a Complaint, which is the first of the initial pleadings filed with the court.

FILING OF THE LAWSUIT AND INITIAL PLEADINGS

The plaintiff in a civil lawsuit initiates the lawsuit by filing with the court and serving upon the other parties a Complaint, which is the first of the initial pleadings filed with the court. The Complaint sets forth in numbered paragraphs the plaintiff’s version of the relevant facts and the ways in which the defendant(s) violated the plaintiff’s rights. Each specific basis for relief is known as a cause of action, and a single dispute may give rise to several causes of action. For example, if a dispute arose between a property owner and a general contractor over whether certain construction work was performed properly, the owner might assert claims against the contractor for breach of the parties’ contract, negligent performance of the work, breach of express or implied warranties, and negligent or intentional misrepresentations that were allegedly made by the contractor. The plaintiff’s Complaint is served on the defendant with a summons, which directs the defendant to file a response to the Complaint within a certain period of time or risk being defaulted in court.

The Complaint sets forth in numbered paragraphs the plaintiff's version of the relevant facts and the ways in which the defendant(s) violated the plaintiff's rights.



Once he has been served with a copy of the Complaint, our defendant contractor is on the clock to respond to the plaintiff's claims. Within twenty days (twenty-one in federal court), the defendant can file an Answer which responds to each of the assertions contained in the plaintiff's Complaint, paragraph by paragraph. Or he may file a Motion to Dismiss the claims. By filing a Motion to Dismiss, the defendant is asserting that there is some legal defect in the plaintiff's claims – for example, the statute of limitations to file the plaintiff's claims has run and therefore the plaintiff's claims are time-barred. This is also the time at which the contractor may want to assert claims of his own.

The contractor in our dispute may feel that he completed the work in accordance with the parties' agreement, in a workmanlike and appropriate manner, and therefore is entitled to full payment. If the owner has failed to make full payment, then the contractor will want to include with his Answer a Counterclaim, which sets forth his version of the relevant facts and his own claims for relief against the owner. The contractor may also feel that, if in fact work was performed incorrectly as alleged by the owner, the work in question was the responsibility of one of his subcontractors. The contractor could therefore also include in his initial pleadings a Third-Party Complaint, which would bring one or more of his subcontractors into the lawsuit. With the number of owners, professionals, contractors, subcontractors and suppliers that can be involved in a large development project, the docket can become crowded in a hurry.

Once all parties have been named in the initial pleadings and have responded to the assertions made against them, and all preliminary legal issues have been resolved (such as our statute of limitations issue above), the parties can proceed to the next stage of the civil litigation process – discovery. **FT**

H-1B CAP REGISTRATION BEGINS MARCH 1

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On December 6, 2019, U.S. Citizenship & Immigration Services announced that it had completed its pilot testing phase and would be implementing the planned registration process for the coming H-1B “cap” lottery. The full USCIS announcement, which can be found at www.uscis.gov/news/news-releases/uscis-announces-implementation-h-1b-electronic-registration-process-fiscal-year-2021-cap-season, includes the following key details:

- Brief Registration Period: USCIS will open an initial registration period of twenty days, from March 1, 2020, through March 20, 2020.
- Minimal Registration Fee: Employers seeking to file H-1B cap-subject petitions for the fiscal year 2021 cap allotment must first register electronically and pay an associated \$10 employer fee.

Once the initial registration period is ended, a random selection process will be run. Only those selected individual registrations will be eligible for the filing of full H-1B cap-subject nonimmigrant petitions. The benefit of this, per the USCIS announcement, will be the elimination of needless full H-1B petition filings for non-selected beneficiaries, as has been the standard H-1B cap practice to date.

How employers can begin to prepare: As we previously shared, USCIS had provided a preview of its registration portal, for the collection of individual H-1B cap petition data. Based on this, and ongoing discussions between USCIS and the American Immigration Lawyers Association, employers are urged to gather the following information now from planned FY2021 H-1B cap candidates, in advance of the registration period:

- Full legal name
- Country of citizenship
- Gender
- Passport number
- Date of birth
- Does the beneficiary possess a master's degree from a U.S. university (Y/N)?
- Country of birth

As all of this information can be gleaned from a candidate's passport biographical page and education documents (diplomas and transcripts), we suggest that employers begin to compile these basic materials now, from all candidates.

USCIS has also confirmed that the agency will soon publish step-by-step instructions for proper completion of the process, along with key dates and time lines, as the initial registration period nears. USCIS will also conduct outreach activities with the legal community and employers to ensure that registrants and interested parties are familiar with the new system. **FT**

Firm News



JOIN US IN CONGRATULATING OUR NEW OFFICERS

In recognition of their accomplishments, expertise, commitment and community involvement, Fletcher Tilton is proud to announce that the following attorneys have been elected as officers of the firm:



Michael Duffy **Courtney Harris** **Scott Regan**

METROWEST CHAMBER CREATES SERVICE AWARD TO HONOR FLETCHER TILTON ATTORNEY PETER BARBIERI



Fletcher Tilton attorney Peter Barbieri poses with Jill Schindler, first recipient of the award that bears his name.



FIVE FLETCHER TILTON ATTORNEYS HAVE BEEN DESIGNATED SUPERLAWYERS® FOR 2019

From left to right: Richard C. Barry, Jr., vice chair of the Trust & Estate Department; “Rising Star” Brian J. Coughlin of the Immigration Department; William D. Jalkut, chair of the Litigation Department; Frederick M. Misilo, Jr., chair of the Trust & Estate Department; “Rising Star” Nelson L. Santos of the Real Estate and Civil Litigation departments. *Congratulations to all!*

UPCOMING SEMINARS

ESTATE PLANNING – *Speaker:* Michael Lahti, Esq.

Tues., Feb. 11: 10 a.m. & 1 p.m.
Location: Crowne Plaza
Warwick, RI

Tues., Apr. 14: 10 a.m. & 1 p.m.
Location: Kirkbrae Country Club
Lincoln, RI

Tues., Mar. 3: 10 a.m. & 1 p.m.
Location: Col. Blackinton Inn
Attleboro, MA

Tues., May 26: 10 a.m. & 1 p.m.
Location: Crowne Plaza
Warwick, RI

Tues., Mar. 24: 10 a.m. & 1 p.m.
Location: The Lobster Pot
Bristol, RI

For details and to register for these seminars and others, visit FletcherTilton.com/seminars-events.

SAVE THE DATE

SPECIAL NEEDS & ELDER LAW PLANNING FOR CPAs & CFP® PROFESSIONALS

Tues., May 12 – Courtyard Marriott, Marlborough, MA

HOUSING & SUPPORTED DECISION-MAKING

Sat., Sept. 19 – Courtyard Marriott, Marlborough, MA

EMPLOYMENT LAW SEMINARS

Wed., Oct. 7 – Sheraton Hotel & Conference Center, Framingham, MA

Thur., Oct. 15 – Cyprian Keyes Golf Club, Boylston, MA

HOW TO ADMINISTER A SPECIAL NEEDS TRUST

Sat., Nov. 7 – Courtyard Marriott, Marlborough, MA

Details and enrollment information will be posted on our website approximately 60 days prior to seminar dates.

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