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Working for America's Retirement

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Internal Revenue Service
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Washington, D.C. 20044

SUBMITTED VIA REGULATIONS.GOV

RE: NPRM Regarding Long-Term, Part-Time Employee Rules for Cash or Deferred Arrangements Under Section 401(k)

The American Retirement Association (ARA) is writing in response to the Notice of Proposed Rulemaking regarding long-term, part-time employee (LTPTE) rules for cash or deferred arrangements under section 401(k) of the Internal Revenue Code, published in the Federal Register on November 27, 2023 (the "Proposed Rule"). ARA thanks the Internal Revenue Service ("IRS" or "Service") and the Department of the Treasury ("Treasury") for the opportunity to provide input on these matters.

The ARA is a national organization of more than 35,000 members who provide consulting and administrative services to American workers, savers and sponsors of retirement plans and IRAs. ARA members are a diverse group of retirement plan professionals of all disciplines including financial advisers, consultants, administrators, actuaries, accountants, and attorneys. ARA is the coordinating entity for its four underlying affiliate organizations, the American Society of Pension Professionals and Actuaries (ASPPA), the National Association of Plan Advisors (NAPA), the National Tax-Deferred Savings Association (NTSA) and the American Society of Enrolled Actuaries (ASEA). ARA's membership is diverse but united in a common dedication to America's employer-based retirement plan system.

Summary

ARA recommends that the Service:

- Revise the rules regarding vesting service to conform with Congressional intent or provide relief to mitigate the significant financial consequences imposed on plan sponsors by the timing of the Proposed Rule;
- Clarify that a plan that uses the elapsed time method for purposes of eligibility will be deemed to satisfy the LTPTE requirements;
- Revoke or obsolete the holding for situation 4 of Rev. Rul. 2004-13;
- Provide administrative relief so that employers are not treated as violating applicable requirements merely because employees were not treated as LTPTEs before January 1, 2024;
- Clarify that LTPTEs may be permissively disaggregated regardless of actual eligibility to participate in the plan;
- Provide favorable safe harbor correction methods for eligibility errors that occur prior to December 31, 2025;
- Ensure that employers may satisfy the LTPTE rules on an employer-wide basis;
- Clarify that all discretionary changes to eligibility will be treated as made pursuant to SECURE 2.0 and such delayed adoption does not jeopardize a plan's safe harbor status; and
- Provide section 411(d)(6) relief for the revocation of good faith amendments already adopted to comply with the SECURE Act.

Background

Section 112 of the Setting Every Community Up for Retirement Act of 2019 ("SECURE")[1] and section 125 the SECURE 2.0 Act of 2022 ("SECURE 2.0")[2] added rules regarding long-term part-time employees (LTPTEs). Together, SECURE and SECURE 2.0 require the following with respect to 401(k) plans:

- The plan cannot impose a service condition longer than the applicable 410(a)(1) period (generally 1 year of service) or 3 consecutive 12-month periods during each of which the employee has at least 500 hours of service (2 consecutive periods beginning with the first plan year beginning on or after January 1, 2025);

- Employees are not required to be enrolled based on consecutive periods of 500 hours unless the participant has attained age 21 by the end of the third consecutive year (second consecutive year, beginning with the first plan year beginning on or after January 1, 2025);

- The employer is not required to provide any employer contributions to an employee who is eligible to participate in the 401(k) arrangement solely due to the LTPTE rules and such participants may be excluded from nondiscrimination testing; and

- Whether an employee who is eligible to participate in the 401(k) arrangement solely due to the LTPTE rules has a nonforfeitable right to employer contributions under the plan will be determined by treating each 12-month period for which the employee has at least 500 hours of service as a year of service.

For nearly four years industry practitioners debated what these provisions would mean. While it was clear that LTPTEs would need to be enrolled in the deferral component, the vesting provision was less clear. Interpretations varied, but it was commonly thought that vesting service under the 500-hour rule would be earned only if LTPTEs were provided employer contributions while an LTPTE—an interpretation that matches the Committee Report—and that the continuation provision meant an LTPTE would retain any vesting service earned under the 500-hour rule when he or she ceased to be an LTPTE but would thereafter accrue vesting service under the normal 1000-hour rule.

These were reasonable interpretations that reflected the Congressional intent of these provisions to provide employees who meet the LTPTE rules with the opportunity to defer salary to the plan without increasing the cost of contributions to the employer. In reliance upon their reasonable interpretation of the statute and in the light of this clear understanding of Congressional intent and lack of any IRS guidance to the contrary, many employers understood that they could simply identify employees who met the LTPTE conditions and enroll them with little to no impact on costs.

The Proposed Rule takes a position related to vesting that is inconsistent with Congressional intent and, as illustrated separately, creates a material impact on costs for many plans.

Discussion of Recommendations

ARA recommends that the Service revise the Proposed Rule to eliminate the material cost impact to plan sponsors and also to clarify the rule in a number of other respects. In addition, the timing of the Proposed Rule makes administrative relief absolutely essential as discussed in our November 29, 2023 letter.[3]

[1] Enacted as Division O of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116-94, 133 Stat. 2534 (2019).
[2] Enacted as Division T of the Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 3559 (2022).
3 https://araadvocacy.org/wp-content/uploads/2023/11/ARA-Relief-re-LTPTE-Rules.pdf

1. LTPTE Vesting Only Applies to Contributions Accrued as LTPTE

Under the Proposed Rule, individuals participating solely as LTPTEs and any employee who ever entered the plan as a LTPTE (former LTPTEs) are required to be credited with a year of vesting service for each 12-month period in which they are credited with at least 500 hours of service. This is not consistent with the statute or Congressional intent and creates a material negative impact on plan sponsors.

The statute related to special vesting for LTPTEs clearly applies only to employees who are participating solely based on LTPTE rules. IRC § 401(k)(15)(B)(iii) provides that "for purposes of determining whether an employee [who is eligible to participate in the arrangement solely by reason of [the LTPTE rules]] (i) has a nonforfeitable right to employer contributions (other than [elective deferrals]) under the plan, each 12-month period for which the employee has at least 500 hours of service shall be treated as a year of service". The provision, by its terms, applies only to periods during which the employee is participating as an LTPTE. Thus, the Proposed Rule's application of the 500-hour vesting rule to former LTPTEs is contrary to the statute.

Further, the position in the Proposed Rule that the 500-hour vesting rule applies to all contributions, including those made after the employee ceases to be an LTPTE is contrary to Congressional Intent. The House Ways and Means Committee Report specifically provides:

> The provision does not require a long-term part-time employee to be otherwise eligible to participate in the plan. Thus, the plan can continue to treat a long-term part-time employee as ineligible under the plan for employer nonelective and matching contributions based on not having completed a year of service. However, **for a plan that does provide employer contributions for long-term part time employees**, the provision requires a plan to credit, for each year in which such an employee worked at least 500 hours, a year of service for purposes of vesting in any employer contributions.

(emphasis added). ARA believes the LTPTE vesting provisions can be interpreted consistently with this clear Congressional intent. Specifically, years of vesting service should be credited on the basis of a LTPTE's completion of 500 hours of service per year only with respect to contributions actually accrued while a participant is a LTPTE. With respect to contributions accrued after the employee ceases to be an LTPTE, nothing in the statute requires application of the 500-hour rule. Therefore, the plan should be permitted to credit vesting service under the normally applicable rules of IRC §411 when the employee is not an LTPTE.

The clear Congressional intent was to ensure that if employees were given employer contributions as LTPTEs, then they would have an opportunity to vest in those contributions in light of their reduced work schedules. There was no intent to provide more favorable vesting in all plan contribution sources to LTPTEs than similarly situated employees based on when they earn a year of service. The Proposed Rule creates a seemingly absurd result whereby LTPTEs are treated more favorably than similarly situated employees.

> For example, consider a plan that uses the LTPTE rule but requires employees to earn a 1,000-hour year of service to qualify for matching contributions. The matching contributions are subject to a 6-year graded vesting schedule (and vesting is normally based on performing 1,000 hours of service during the plan year). Employees A and B were both hired on January 1, 2021, and perform the following hours of service in the years indicated:

	2021	2022	2023	2024	2025
Employee A	600	1000	700	600	900
Employee B	600	700	600	1000	900

> At the end of 2025 (after 5 years of employment), both A and B have worked the exact same years with the employer and the exact same number of hours. Both are eligible for matching contributions because they have completed a year of service. However, because A entered the plan under the normal eligibility conditions, A is credited with only one year of vesting service (0% vested), while B entered as a LTPTE and, under the Proposed Rule, is credited with 5 years of vesting service (80% vested) even though both employees received contributions only because they met the requirements to be treated as full-time employees.

This result is inconsistent with Congressional Intent and imposes significant costs on employers. As illustrated separately, the imposition of this onerous vesting rule significantly increases the cost to employers who use a vesting schedule and have employees who enter as LTPTEs and then earn a year of service and become eligible for employer contributions. The costs can be very material to the plan sponsor depending on its demographics. This result is inconsistent with the language and intent of the statute. Therefore, *ARA recommends* that the Service modify the Proposed Rule to provide that years of vesting service are accrued based on the completion of 500 hours of service during the year only with respect to contributions accrued while an employee is a LTPTE.

Further, not only is the imposition of this cost inconsistent with intent, but the timing of the Proposed Rule essentially eliminated the plan sponsor's ability to assess its demographics and adjust the design of the plan to avoid these costs. As detailed in ARA's November 29, 2023 Letter, the Proposed Rule created an irreversible vesting rule with material cost implications and applied that to some plans retroactively and to others with only 25 working days to respond. It is unreasonable and unprincipled to provide fewer than 25 working days for plan sponsors to work with service providers to understand the complex implications of the Proposed Rule and then make appropriate plan design changes.

Plan Sponsors must be given adequate time to understand the Proposed Rule, design their plans in response to the regulation, and adjust administrative programming. It is unconscionable to apply the vesting rule in the Proposed Rule to plan sponsors effective January 1, 2024, when it creates irreversible (and, in some cases essentially retroactive) impacts and fails to give plan sponsors sufficient time to respond by designing their plans to simplify plan administration. The IRS should issue immediate guidance that administrative relief will be applicable for all of 2024 and, if the vesting rule is not modified as recommended above, then the vesting rules of the Proposed Rule will apply only to individuals who are participating as LTPTEs on or after January 1, 2025 (and any good faith interpretation, including that vesting service using the 500-hour rule is credited only if the LTPTE received employer contributions, applies for periods prior to January 1, 2025).

This guidance is necessary to promote sound tax administration by clarifying administration, supporting flexibility in plan design, and improving economic efficiency by reducing the complexity and burdens of the plan sponsor.

2. Elapsed Time Requirements Satisfy Code Section 401(k)(2)(D)

The preamble to the Proposed Rule implies that plans using the elapsed time method to determine eligibility will never have LTPTEs. ARA recommends that the Service clarify this in the text of the Proposed Rule. Under the text of the Proposed Rule, it appears that a plan using the elapsed time method may still have participants who are LTPTEs in certain rehire situations.

> Ex: An employee is hired January 1, 2025, completes 600 hours of service and terminates May 30, 2025. The employee is rehired July 1, 2026, and completes 500 hours of service during 2026. The employee does not have a year of service under the elapsed time method because the employee had a period of severance that was more than 12 months, but has completed 500 hours in two consecutive 12-month periods.

While this situation may be relatively rare, a rule that leaves open this potential compliance trap will effectively cause plans that have never tracked hours to now track hours. This is administratively burdensome with very little to no benefit. In fact, if plans are forced to track hours for eligibility, it may result in employers moving away from the elapsed time method, in favor of a 1,000 hour year of service, which would result in fewer participants becoming eligible—clearly against the intent of the LTPTE provisions.

A similar issue arises with respect to the vesting requirements applicable to LTPTEs. Many plans use hours for eligibility but elapsed time for vesting service. Because the elapsed time method credits vesting service without regard to the employee's hours of service (and provides all employees, including LTPTEs, an equal opportunity to vest in employer contributions), ARA believes the elapsed time method of crediting vesting service should be treated as satisfying the vesting requirements for LTPTEs.

ARA feels strongly that the elapsed time method, which is not based on an employee's level of service, is a reasonable method for both eligibility and vesting that does not violate the intent of the LTPTE rules. Therefore, *ARA recommends* that the Service modify the Proposed Rule to provide that a plan that uses the elapsed time method for eligibility or vesting purposes will be treated as satisfying the applicable requirement of Code section 401(k)(2)(D).

3. Revoke Holding for Situation 4 of Rev. Rul. 2004-13

Under the Proposed Rule, it is clear that a safe harbor 401(k) plan is not required to provide employer contributions to LTPTEs, and the safe harbor 401(k) plan will maintain its safe harbor status and be deemed to not be a top heavy plan. It is also clear under the existing guidance and regulations that employer contributions may be made to LTPTEs under a safe harbor 401(k) plan without affecting its safe harbor status or its deemed not-top heavy status under Code section 416(g)(4)(H). This leads to a presumably unintended result, whereby non-safe harbor contributions may be made for LTPTEs, but cannot be made for non-LTPTEs, if the plan sponsor wishes to preserve the plan's deemed not-top heavy status.

ARA reiterates the position of our December 15, 2023 letter. The holding for situation 4 under Rev. Rul. 2004-13 should be revoked or obsoleted because the underlying statute was changed by Section 310 of SECURE 2.0, it is inconsistent with the current policy objectives reflected in the current Code, and doing so will promote compliance with the tax code, including the LTPTE rules.

Currently, the Rev. Rul. causes a plan that permits otherwise excludible employees only to defer salary under a safe harbor plan to lose its top heavy exemption. We see no sensible policy goal that is met by increasing a plan's required top heavy contributions solely because an employer offers a deferral opportunity to a group of employees for whom top heavy contributions are not required. The clear intent of Section 310 of SECURE 2.0 was to encourage the early participation of employees, and revocation of holding 4 in the Rev. Rul. would further the clear policy objectives of the law and the current Administration's desire to cover more employees under workplace retirement plans and significantly simplify plan administration, which will reduce the instances of inadvertent errors, and promote overall compliance with the tax code. Therefore, ARA recommends that the IRS formally revoke the holding for Situation 4 under the Rev. Rul. or announce that it was obsoleted by Section 310 of SECURE 2.0.

4. Relief for Employees Not Treated as LTPTEs Before January 1, 2024

Although the Proposed Regulation suggests that the LTPTE rules are not effective until 2024, the rules are actually effective in 2023 for certain plans, and relief for those plans is necessary. It is extremely common for 401(k) plans to switch from an anniversary year computation period to a plan year computation period for eligibility determinations. A plan that uses a plan-year switch for eligibility computation periods could have LTPTEs entering during 2023 if it is a non-calendar year plan.

> Ex: A plan uses a July 1 – June 30 plan year. Employee A is hired January 2, 2021, and works 600 hours per year. Employee A's initial eligibility computation period is Jan. 2, 2021, to Jan. 1, 2022. If the plan uses the plan-year switch, then the second computation period is Jul. 1, 2021, to Jun. 30, 2022, and the third computation period is Jul. 1, 2022, to Jun. 30, 2023. Thus, the employee meets the definition of an LTPTE on Jun. 30, 2023, and the employee must be eligible to defer on July 1, 2023.

Ideally, to avoid this 2023 entry, the plan would need to use anniversary dates for LTPTE eligibility. However, the applicable Department of Labor regulations indicate the plan may choose either to count service based on anniversary date or switch to the plan year. It does not contemplate that plans may choose to use different methods for different classes of employees. Nothing in the Proposed Rule changes this result. Thus, assuming the plan uses the plan year switch for full-time employees, it appears the plan may be required to use the same method for LTPTEs, in which case the plan already had LTPTE entrants before the Proposed Rule was ever issued. Further, regardless of technical requirements, many recordkeepers cannot accommodate different computation periods and therefore plan sponsors will be forced to choose a single rule for eligibility computations.

As a result, the irreversible vesting rules contained in the Proposed Rule would already be applicable to the plan—giving the plan sponsor absolutely no time to respond to the Proposed Rule. Regardless of whether this is technically contrary to IRC §7805(b), it would be appropriate for relief to be provided in a manner no less favorable than the relief that would be provided under IRC §7805(b).

ARA recommends that the Service provide administrative transition relief to provide that sponsor will not be treated as violating the requirements of IRC §401(k)(2)(D)(ii) due to failure to enroll an employee as an LTPTE prior to January 1, 2024. ***ARA further recommends*** that, to the extent it is within the Service's authority, the Service modify the Proposed Rule to permit a plan to separately apply the switch-to-plan-year rule to its non-LTPTE and LTPTE service eligibility requirements.[4]

5. LTPTEs May Be Permissively Disaggregated

Under the proposed rule, employees who have satisfied LTPTE eligibility criteria may be disregarded for purposes of sections 410(b), 401(a)(4), 401(k)(3) and 401(m)(2) (collectively, testing) only if they are actually eligible to participate in the CODA. In other words, employees who have satisfied the LTPTE eligibility criteria, but who are not eligible to participate in the CODA (because they are a member of an excluded classification of employees) may not be disregarded for testing. Because these employees satisfied the age and service conditions applicable to LTPTEs, they remain nonexcludable employees for testing under the definition in section 1.410(b)-6(b)(2) of the regulations.

This can cause unavoidable issues with testing in certain cases. For example: Employer has two divisions of employees – division A and division B. The employer sponsors a 401(k) plan that covers division A and excludes division B. Employment in divisions A and B is not service-based.

[4] In addition, the IRS may consider a rule permitting the plan to apply the plan year switch after the initial LTPTE eligibility computation period. For example, a plan could require an employee to complete 500 hours of service in three (or two) consecutive years from the employee's date of hire before switching to the plan year and having overlapping eligibility computation periods.

	Division A	Division B
1 YOS/1000 hrs HCE	3	1
1 YOS/1000 hrs NHCE	8	7
2 YOS/500 hrs HCE	2	0
2 YOS/500 hrs NHCE	2	2

Before the Proposed Rule becomes effective, the plan's coverage ratio will be (8/15)/(3/4)=71.1% which passes the ratio percentage test of section 1.410(b)-2(b)(2). After the Proposed Rule becomes effective, if the plan includes LTPTEs in testing then the coverage ratio will be (10/19)/(5/6)=63.2%, which fails. If the plan elects to exclude LTPTEs from testing then the coverage ratio will (8/17)/(3/4)=62.7%, which also fails.

As acknowledged in the Proposed Rule, these employees will generally be otherwise excludable employees. So, the plan can utilize the option to disaggregate otherwise excludable employees for testing, and in this simplified example the only otherwise excludable employees are those who satisfied the LTPTE eligibility requirements. In a practical situation, however, the plan's normal eligibility service requirements may be less than 1000 hours of service, and the plan sponsor may wish to include these employees in testing. Under the Proposed Rule, the plan sponsor would not be able to perform the testing by including these employees because all otherwise excludable employees must be disaggregated in order to avoid the coverage issue caused by the employees who would otherwise be LTPTEs but are excluded by class.

To resolve this conflict, ARA believes the Proposed Rule should provide that a plan may treat all employees who have satisfied the LTPTE criteria as a separate permissive disaggregation population, akin to the permissive disaggregation population treatment under the regulations of otherwise excludable employees. Moreover, ARA believes that the Proposed Rule should allow plans to separately make testing elections with regard to the disaggregation of otherwise excludable employees and employees who have satisfied the LTPTE eligibility criteria. This would allow employers to include otherwise excludable employees in coverage testing, while at the same time allowing plan sponsors to disaggregate only the LTPTEs and employees who otherwise would be LTPTEs.

Accordingly, ***ARA recommends*** that the Service modify the Proposed Rule to provide that a plan may treat all employees who have satisfied the LTPTE criteria as a permissive disaggregation population, and to permit plans to make separate testing elections regarding the disaggregation of otherwise excludable employees and employees who have satisfied the LTPTE criteria.

6. Safe Harbor Corrections for Eligibility Failures related to LTPTE

As noted and discussed in our November 29, 2023 letter, the Proposed Rule afforded plan sponsors fewer than 25 working days to work with service providers to understand the complex implications of the Proposed Rule and then make appropriate design changes. Given this timeframe, ARA believes the Service should provide favorable safe harbor correction options to permit plan sponsors to address design changes in connection with LTPTE compliance. ***ARA recommends*** that the Service provide a safe harbor correction method under which any eligibility failure related to SECURE 2.0 (including a failure to enroll a non-LTPTE due to a decision to expand eligibility) may be corrected in accordance with the 0% QNEC correction afforded plans with automatic enrollment features. Thus, for example, if a plan failed to enroll an LTPTE on January 1, 2024, no corrective contribution is required to be made for a missed deferral opportunity with respect to such LTPTE if the LTPTE is provided with the opportunity to defer no later than October 15, 2025 (and the plan satisfies the other requirements specified under EPCRS such as notice to the employee).

7. LTPTE Rules Satisfied on Related Employer and Employer-Wide Basis

Certain employers may maintain more than one 401(k) arrangement. To provide employers with design flexibility, ARA recommends the Proposed Rule allow plan sponsors to satisfy the LTPTE rules on an employer-wide basis so that each 401(k) plan need not separately cover LTPTEs, as long as LTPTEs are eligible to defer under at least one 401(k) plan of the employer.[5] Accordingly, ***ARA recommends*** that the Service clarify that employers – including related employers treated as a single employer for employee benefit plan purposes under the Code – may satisfy the LTPTE rules on an employer-wide basis, and further clarify the Proposed Rule to provide that where an employer maintains two or more 401(k) plans, each plan is not separately required to cover LTPTEs provided that LTPTEs are eligible under at least one plan of the employer.

8. Extension of LTPTE Amendment Deadline to December 31, 2026

After issuance of the Proposed Rule, the IRS released Notice 2024-2, which generally extended the deadline for amendments pursuant to SECURE 2.0 to December 31, 2026. Accordingly, ***ARA recommends*** that the Service revise the Proposed Rule to reflect the extension of the plan amendment deadline announced in Notice 2024-2.

In addition to the type of amendment described in the Proposed Rule (allowing employees to make a cash or deferred election immediately upon hire), ARA members have questioned whether other discretionary amendments such as changing the definition of a year of eligibility service, the election to use the switch-to-plan-year rule, and the definition of eligible employee may be made by the SECURE 2.0 deadline. In addition, members have requested confirmation that such discretionary amendments may be made to a safe harbor plan by the extended deadline for SECURE 2.0 amendments without jeopardizing the safe harbor status.

ARA recommends that the Service clarify that any amendment to a plan's eligibility, including changes to eligibility computation periods, the definition of eligible employee, and/or related eligibility for employer contributions, will be treated as made pursuant to SECURE 2.0 and will not jeopardize a plan's safe harbor status.

9. Anti-Cutback Relief for Good Faith Amendments

In some cases, plan sponsors have already adopted good faith plan amendments to comply with the SECURE Act that had unintended and unanticipated results due to the Proposed Rule. For example, in some good faith amendments plan sponsors treated employees who completed 3 consecutive years with at least 500 hours prior to attaining age 21 as LTPTEs and therefore subject to the LTPTE vesting requirement. The Proposed Rule clarified that these individuals are <u>not</u> LTPTEs and therefore are not subject to the 500-hour vesting rule. ***ARA recommends*** that, in the final rule, the Service provide IRC § 411(d)(6) relief for plan sponsors wishing to update good faith amendments related to LTPTEs to reflect the final rule.

Conclusion

ARA believes the recommended guidance will assist plan sponsors and their service providers in expanding coverage for part-time employees, promote compliance with the tax code, and improve economic efficiency by reducing the complexity and burdens of the employer.

[5] ARA notes that permitting the satisfaction of the LTPTE rules on a related employer and employer-wide basis is also relevant for sponsors of Code section 403(b) plans, including those with separate tax deferred annuity and defined contribution plans.

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These comments are submitted on behalf of ARA and were prepared by ASPPA's IRS Subcommittee, Claire P. Rowland, Esq., QPA, QKA, Chair. If you have any questions regarding the matters discussed herein, please contact Kelsey N.H. Mayo, Director of Regulatory Policy, at kmayo@usaretirement.org or 704-342-5307. Thank you for your time and consideration.

Sincerely,

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