AMERICAN RETIREMENT ASSOCIATION

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Working for America's Retirement

November 2, 2020

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2020-68) Room 5203
Box 7604
Ben Franklin Station
Washington, D.C. 20044

RE: Notice 2020-68: Long-Term, Part-Time Employees - Comment Invited on How to Reduce Potential Administrative Burdens

The American Retirement Association ("ARA") is writing in response to Internal Revenue Service ("IRS") Notice 2020-68, regarding comments on how to reduce potential administrative burdens related to counting years of service beginning before January 1, 2021, for purposes of determining a long-term, part-time ("LTPT") employee's nonforfeitable right to employer contributions pursuant to § 112 of the SECURE Act Public Law 116-94. ARA thanks the Internal Revenue Service ("IRS" or "Service") and the Department of the Treasury for the opportunity to provide input on these very important matters.

The ARA is the coordinating entity for its five underlying affiliate organizations representing the full spectrum of America's private retirement system, the American Society of Pension Professionals and Actuaries ("ASPPA"), the National Association of Plan Advisors ("NAPA"), the National Tax-Deferred Savings Association ("NTSA"), the American Society of Enrolled Actuaries ("ASEA"), and the Plan Sponsor Council of America ("PSCA"). ARA's members include organizations of all sizes and industries across the nation who sponsor and/or support retirement saving plans and are dedicated to expanding on the success of employer-sponsored plans. In addition, ARA has nearly 28,000 individual members who provide consulting and administrative services to sponsors of retirement plans. ARA's members are diverse but united in their common dedication to the success of America's private retirement system.

ARA thanks the Service for its willingness to consider ways the administrative burdens of plan sponsors can be reduced when implementing the LTPT employee rules of § 112 of the SECURE Act, particularly the counting of vesting service for years prior to 2021. The myriad of rules applicable to counting vesting service are difficult for plan sponsors to navigate, and particularly difficult for small businesses that may not employ dedicated benefits personnel. The ability of plan sponsors to easily determine prior vesting service of LTPT employees is important in a sponsor's decision to adopt and maintain a retirement plan.

ARA recommends that the Service:

I. Disregard years for which the plan sponsor is not otherwise required to retain records when counting years of vesting service for LTPT employees;

II. Allow plan sponsors to use the equivalency method of determining hours of service of LTPT employees in years prior to 2021, even if the terms of the plan otherwise use the actual hours method;

III. Clarify the LTPT rules do not apply when the terms of the plan document allow employees to defer immediately;

IV. Clarify how the LTPT rules are applied if a plan is amended from immediate eligibility to a year of service (with a 1,000 hours);

V. Clarify the application of the vesting rules for employees who move from part-time to full-time or vice versa;

VI. Clarify that plans may exclude LTPT employees as part of an excludable classification that is not based on service;

VII. Provide guidance on section 112 of the SECURE Act as soon as reasonably possible to allow plan sponsors and practitioners to timely collect records and update systems necessary to accurately implement these provisions.

ARA believes that each of the suggestions:

- Will reduce the burdens on the plan sponsor related to counting years of service for LTPT employees prior to 2021;
- Will resolve significant issues relevant to a great many retirement plan sponsors and practitioners;
- Will provide plan sponsors the information they need to make decisions regarding plan design;
- Will promote sound tax administration by helping plan sponsors and practitioners to maintain retirement plans in compliance with § 112 of the SECURE Act while still complying with the requirements of §§ 401(k)(15)(B)(iii) and 411(a)(4) of the Code; and
- Will be easily understood and applied by plan sponsors and practitioners.

Discussion

I. Disregard years for which plan sponsor is not otherwise required to retain records when counting years of vesting service for LTPT employees.

We are thankful for the Service's response to concerns about the administrative burden related to counting vesting years of service of LTPT employees. In Notice 2020-68, the Service clarified that while plan sponsors are not required to begin counting service of LTPT employees for eligibility purposes until 2021, vesting years of service must be counted for years prior to 2021. This requirement will create a significant administrative burden for many plan sponsors unless the Service provides reasonable parameters regarding the counting of such service. Many plan sponsors have not collected or at least not provided this information to the plan's recordkeeper historically and sponsors may be unable to obtain data earlier than a certain date, especially if payroll vendors have changed.

ARA requests that the IRS allow employers to disregard years for which the plan sponsor is not otherwise required to retain records when determining years of vesting service for LTPT employees prior to 2021. This would not include situations where hours of service records are in fact available to the plan sponsor. Because plan sponsors are not required to retain payroll records longer than seven years, they should not be required to retroactively credit service for LTPT employees prior to that date, if the information is no longer available, because of the otherwise significant administrative burdens that would arise. The Service has allowed a disregard of prior hours in other situations. For example, the Service recently provided a fresh-start date in Notice 2018-95 which provided relief from the Once-In-Always-In rule for excluding part-time employees from making elective deferrals under a section 403(b) plan.

II. Allow plan sponsors to use equivalency methods of determining hours of service of LTPT employees in years prior to 2021, even if the terms of the plan otherwise use the actual hours method.

ARA requests that for years prior to 2021, the IRS allow plan sponsors to use the equivalency methods described in DOL Reg. 2530.200b-3, which include equivalencies based on working time, periods of employment, and earnings – even if these equivalencies were not set forth in the plan document for such years. ARA believes such a safe harbor would be a helpful compliance tool for plan sponsors whose plan documents did not explicitly provide for the use of equivalency methods for determining hours of service for LTPT employees during prior plan years, and who are now unable to retroactively determine hours of service for LTPT employees using the actual hours method.

For example, using the "periods of employment" equivalency method described in DOL Reg. 2530.200b-3(e), if an employee would be credited with one hour of service during that unit of time, the employee must be credited with a fixed number of hours for that unit. The DOL Regulations provide that the hours credited for these units are 10 hours for a day, 45 hours for a week, 95 hours for a semi-monthly payroll period, and 190 hours for a month.

However, in the case where a plan sponsor chooses to use the equivalency method based on periods of employment for determining hours of service for a LTPT employee, ARA suggests that the number of hours credited per unit of time under this equivalency method be reduced by a factor of 50%. Because the total number of hours of service required for a LTPT employee to accrue a vesting year of service is 50% of the total number of hours of service required for a non-LTPT employee to accrue a vesting year of service, ARA believes it would be reasonable to apply a factor of 50% to the number of hours credited under the equivalency method when determining hours of service for vesting purposes for a LTPT employee.

Example – Period of Employment Equivalency:

Plan Provisions

- Actual hours method used for vesting years of service
    - Employer chooses to use a monthly equivalency method (190 hours/month) under the safe harbor to calculate vesting years of service for LTPT employees prior to 2021
- Six-year graded vesting schedule

- 1,000 hours required for vesting service on match and discretionary contributions

Employee Information

Applying a factor of 50% to the number of hours credited under the monthly equivalency method (190) to Employee A and Employee B below results in the crediting of 95 hours per month and the crediting of the following total hours of service for vesting purposes for each year:

- Employee A: Working part-time each month from his 11/1/2015 date of hire

Year	Total Months Worked	50% Equivalent Hours Credited
2015	2	190
2016	12	1140
2017	12	1140
2018	12	1140
2019	12	1140
2020	12	1140

Total years of service credited for vesting purposes: 5

- Employee B: Working as a part-time seasonal employee June-September since 6/1/2016 date of hire

Year	Total Months Worked	50% Equivalent Hours Credited
2016	4	380
2017	4	380
2018	4	380
2019	4	380
2020	4	380

Total years of service credited for vesting purposes: 0

Permitting use of a reasonable equivalency for calculating LTPT employees' hours will permit sponsors who do not have detailed hour records for LTPT employees a reasonable avenue for compliance with § 112 of the SECURE Act while still complying with the requirements of §§ 401(k)(15)(B)(iii) and 411(a)(4) of the Code.

III. Clarify the LTPT employee rules do not apply if the terms of the plan allow employees to defer immediately

ARA requests that the Service confirm the LTPT employee rules do not apply when the terms of the plan document allow employees to defer immediately (or at any time before the maximum period under the LTPT eligibility rule). The complexity of the issues surrounding application of these rules can be clarified by probing various situations that employers will face. The examples below help to describe that complexity. ***ARA recommends*** the Service issue guidance addressing each of the following examples:

Example 1:

Employee Information

- Employee A: Worked 500-999 hours since 2018; in 2026 works more than 1,000 hours; in 2027 and forward, works 500-999 hours a year.
- Employee B: Worked 1,000 hours per year since 2018; from 2019 onward, works 500-999 hours
- Employee C: Worked 500-999 hours in 2019 and 2020; works over 1,000 hours from 2021 onward

Plan Provisions

- Immediate eligibility for deferrals, match, and discretionary contributions
- 1,000 hours required for vesting service on match and discretionary contributions
- 1,000 hours in plan year required to receive match and discretionary contribution

ARA requests confirmation, that since all employees are eligible to participate in the plan, no LTPT employee rules would apply and the normal plan rules regarding calculating vesting years of service would apply, meaning vesting years of service would only be granted for plan years in which the employees worked at least 1,000 hours.

Example 2:

Employees

- Same as Example 1

Plan Provisions

- Same as Example 1 except, 1 year of service with 1,000 hours required to be eligible for match and discretionary contributions

ARA suggests that the answer to how vesting is calculated for the employees in Example 2 is the same as Example 1 and requests the Service confirm. Because all employees are eligible to defer into the plan, no LTPT employee rules should apply. Eligibility for employer contributions does not affect whether the LTPT employee rules should apply.

IV. Clarify how the LTPT rules are applied if a plan is amended from immediate eligibility to a year of service (with 1,000 hours).

Additional complexity around calculating vesting years of service of LTPT employees arises in the situation where the plan is amended from immediate eligibility to requiring a year of service, which would mean the LTPT rules apply, as set forth in the following example.

Example 3:

Employees

- Same as Example 1

Plan Provisions

- Same as Example 1, except the Plan is amended in 2025 to require a year of service with 1,000 hours for deferrals, match and discretionary contributions

ARA requests the Service confirm that in this situation the answer to how vesting is calculated would be the same as in Example 1. Even though Employee A would now be considered a LTPT employee and would continue to be eligible to defer because of that status, it is not the sole reason Employee A is a participant, and therefore the LTPT employee rules regarding vesting years of service should not apply. The LTPT rules regarding vesting service would apply to an individual who has participated in the plan only as a LTPT rule.

V. Clarify the application of the vesting rules for employees who move from part-time to full-time status or vice versa.

ARA also requests that the Service clarify how the LTPT employee vesting rules apply in situations where employees go from part-time to full-time status or vice versa.

Example 4:

Employees

- Same as Example 1

Plan Provisions

- One-year of service with 1,000 hours required to be eligible for deferrals, match and discretionary contributions
- 1,000 hours required for vesting service on match and discretionary contributions

Prior to the LTPT employee rule, eligibility for the plan, and vesting years of service would have been as follows:

- Employee A – Becomes eligible to participate in the plan in 2027 because the year of service requirement was satisfied in 2026. He or she earns a vesting year of service only for 2026 (the year the employee worked at least 1,000 hours)
- Employee B – Enters the plan in 2019 after completing a year of service. Earns vesting years of service for 2018 and 2019 (the years the employee worked at least 1,000 hours). No vesting years of service granted for years where employee worked less than 1,000 hours
- Employee C – Enters the plan in 2022 after completing a year of service in 2021. Earns a vesting year of service for 2021 and subsequent years in which employee works at least 1,000 hours.

ARA proposes that after application of the LTPT employee rules, the eligibility and vesting for each employee should be determined as follows:

- Employee A – Becomes eligible to defer in 2024 after 3 consecutive years of employment with more than 500 hours of service. Becomes eligible for employer contributions in 2027, after completing a year of service with 1,000 hours in 2026. As of the end of 2026, employee is credited with 9 vesting years of service, which represent all the years since 2018 the employee worked more than 500 hours. After 2026, the employee no longer accrues vesting years of service for years the employee worked between 500-999 hours because the "normal" one-year of service requirement for eligibility was satisfied and he or she is no longer a LTPT employee.

- Employee B – Becomes eligible for deferrals and employer contributions in 2019 after completing a year of service. Credited with vesting years of service for the years worked at least 1,000 hours (2018 and 2019). Employee accrues no vesting years of service after 2019 because the employee does not work at least 1,000 hours each year. Because the employee is not participating in the plan due to the LTPT rule, the employee does not accrue vesting years of service in years the employee works between 500-999 hours.

- Employee C – Becomes eligible for deferrals in 2022 after meeting one-year of service requirement. Because employee began participating in the plan based on the "normal" eligibility provisions, no vesting years of service are granted for years the employee worked between 500-999 hours. Years of vesting service are granted only for years in which the employee worked 1,000 hours.

ARA requests that the IRS confirm that the LTPT eligibility and vesting rules should be applied as stated above for each employee.

VI. Clarify that plans may exclude LTPT employees as part of an excludable classification that is not based on service.

Section 410(a)(1) of the Code generally prohibits plans from requiring completion of more than a year of service as a condition of participation. A special rule allows some plans to require completion of two years of service provided accrued benefits are always fully vested.[1] Section 401(k)(2)(D) prohibits the use of the 2-year rule for a CODA.

Treasury regulations under § 410(a) specifically permit a plan sponsor to place conditions on participation that are not age or service related:

> "Section 410(a), §1.410(a)-(4), and this section relate solely to age and service conditions and do not preclude a plan from establishing conditions, other than conditions relating to age or service, which must be satisfied by plan participants. For example, such provisions would not preclude a qualified plan from requiring, as a condition of participation, that an employee be employed within a specified job classification.[2]"

ARA believes nothing in the amendments made by the SECURE Act would preclude the use of non-service-related conditions of participation. Obviously, any such condition could not have the effect of imposing an age or service requirement.[3] An employer who, for valid business reasons, excludes a class of employees from plan participation should not be forced to enroll LTPT employees who would not otherwise be eligible to participate in the plan. ARA believes that the SECURE Act was

[1] IRC § 410(a)(1)(B).
[2] Treas. Reg. §1.410(a)-3(d).
[3] Treas. Reg. §1.410(a)-3(e).

not intended to override the provision of the Treasury regulations cited immediately above with respect to LTPT employees.

ARA recommends that the IRS clarify that non-service or age-related conditions of participation may indeed be applied to exclude LTPT employees who fall within the excluded class as defined under the terms of the plan document.

VII. Provide guidance on Section 112 of the SECURE Act as soon as reasonably possible to allow plan sponsors and practitioners to timely collect records and update systems necessary to accurately implement these provisions.

ARA urges the Service to provide guidance on the issues above, as well as other outstanding questions regarding application of Section 112 of the SECURE Act as soon as reasonably possible. Although the earliest the provision requiring LTPT employees be allowed to defer would apply is January 1, 2024, plan sponsors need guidance and certain relief more urgently for several reasons:

- To the extent LTPT vesting rules apply to individuals currently receiving contributions (because plan eligibility is more rapid than the maximum LTPT rules), immediate guidance is needed to avoid plan administration errors in the calculation of vesting.

- The provision requires hours of service to be counted for eligibility beginning in 2021 and for vesting service to be counted for pre-2021 years. It will take recordkeepers a significant amount of time to program their systems to handle these new rules. Over 45% of respondents to a survey sent to ARA members indicated it would take more than one year to make these changes.

- As stated previously, many plan sponsors have not collected, or at least provided to the plan's recordkeeper, hours of service for part-time employees historically, and sponsors may be unable to obtain data earlier than a certain date, especially if payroll vendors have changed.

- Answers to the outstanding questions and concerns may impact plan design decisions. For example, in order to manage or avoid application of these rules, plan sponsors may decide to change their plan's eligibility provisions. It would be very helpful if these changes are made during the current restatement cycle to avoid a subsequent amendment in another twelve months.

In addition to this comment letter, ARA will be reaching out to the Department of Labor regarding a concern that the implementation of Section 112 of the SECURE Act will result in an increased participant count on the Form 5500, causing plans that otherwise would have been considered a small plan, to move to the large plan filer status. The increased costs associated with administration of a retirement plan that must file Form 5500 as a large plan, specifically the costs associated with an independent audit, may discourage plan sponsors from choosing to adopt or continuing to maintain a retirement plan. As such, ***ARA recommends*** that the Form 5500 and related instructions be revised so that the determination of whether a plan is exempt from the annual audit requirement is based on the number of plan participants (including LTPT employees) with account balances as of the beginning of the plan year, rather than the total number of participants at the beginning of the plan year.

If you have any questions regarding the matters discussed herein, please contact Martin Pippins, Director of Regulatory Affairs, at (703) 516-9300, ext. 146. Thank you for your time and consideration.

Sincerely,

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