Retirement Planning- A Final Look Back at 2023

December 26, 2023

Take-Away: What follows is a last look (for me, anyway) at what happened in 2023 regarding retirement plan contributions, distributions and decisions that impact saving for retirement.

A. SECURE Act 2.0 (the Act:)

RMDs: It moved the required minimum distribution (RMD) starting age to the year reaching age 73 for individuals who reach age 72 in 2023 and later. The age becomes age 74 in 2033.

Roth 401(k): Roth 401(k) account holders will not have to take an annual RMD, starting in 2024.

Surviving Spouse Election: A surviving spouse who is much younger than his/her deceased spouse can elect with an inherited IRA to delay taking RMDs until the deceased spouse would have reached his/her required beginning date (RBD.) The Act gives the IRA spouse-beneficiary the ability to elect employee-participant treatment. This provides a longer life expectancy for RMDs and the potential for more tax-deferred growth, starting in 2024.

Charity Trust Beneficiary: The Act gives a Trust created for an *eligible designated beneficiary*, i.e., a disabled individual using *stretch* distributions, the ability to name a charity as its remainder beneficiary. The charity must be eligible to receive qualified charitable distributions (QCDs), accordingly neither a donor advised fund (DAF) , nor a private foundation can be named as the Trust's remainder beneficiary.

Annuities: A qualified longevity annuity contract (QLAC) purchased in an IRA is expanded under the Act, increasing the maximum annuity premium payment to $200,000. The amount set-aside in the QLAC is not 'counted' when the IRA owner's RMD is calculated. The QLAC payouts can be delayed to as late age 85.

Annuity 'Overages:' If an annuity is held in a retirement account, the Act permits an annuity 'overage' payment, i.e., an amount that is larger than the account owner's RMD for the year, to be used to offset RMDs from other IRAs. A challenge with annuities held in an IRA is identifying the year-end valuation of the annuity to compute the RMD for the IRA involved.

Failure to Take RMD Penalty: The Act lowered the excise tax imposed for the failure to take an RMD from 50% to 25%, and even lower to 10% if the failure to take the RMD is timely corrected by the IRA owner.

Statute of Limitations: The Act changes the statute of limitation for the excise tax imposed on excess contributions to an IRA (6% a year until corrected.) It used to be that to start the 3-year statute of limitations that the IRA owner had to timely file Form 5329, which many failed to do (or did even know about.) With the Act's change, the 3-year statute of limitations now starts to run when the IRA owner files his/her Form 1040 for the relevant year for the 25% excise tax on the failure to take an RMD. For the excess contribution excise tax (6%) the statute of limitations is 6 years from the date when the individual filed his/her Form 1040. These 3- and 6-year periods are deemed to start when an income tax return would have been due by the IRA owner.

10% Penalty Exceptions: The Act added to the number of exceptions from the 10% excise tax for taking a distribution from a retirement account prior to age 59 ½. There include:

- A distribution up to $22,000 for a federally declared natural disaster, retroactive to January 26, 2021.
- Unlimited amounts for a terminally ill account owner if a physician certifies that death can be expected within 7 years.
- Starting in 2024 a distribution up to $10,000 for the victim of domestic abuse. Withdrawals can occur within one year of the abuse and can be paid back within three years. The amount is limited to the lesser of 50% of the

participant's account or $10,000. Self-certification applies to this spousal abuse withdrawal.

- Distributions for emergencies up to $1,000, starting in 2024.
- Long-term care up to $2,500 for some LTC insurance contracts, effective three years after December 22, 2022, if the LTC insurance is 'high quality coverage.' However, this applies only to distributions from a qualified plan, not an IRA.

QCDs: The Act authorizes a one-time only contribution to a split-interest charitable entity like a charitable remainder trust (CRT) or a charitable gift annuity (CGA) using a qualified charitable distribution from a traditional IRA. Probably only a CGA will be used to receive the maximum amount of $50,000 ($53,000 starting in 2024.) No other assets can be contributed to the CGA. Spouses could pool their contributions so the aggregate amount contributed to the CGA by the couple would be $100,000 this year.

B. IRS Notices: The two key Notices, 2022-53 and 2023-54 both delay the obligation to take an *annual* RMD from an inherited retirement account when the account owner died after his/her required beginning date (RBD.) This reprieve is for years 2021-2023. Consequently, while there is no penalty imposed for an inheritor who failed to take an *annual* RMD from the inherited retirement account for these three calendar years, the Notices do not extend the original SECURE Act 10-yerr distribution period for emptying the entire inherited retirement account.

C. The Courts: These cases were briefly summarized in the past year in earlier missives.

Caan: Actor James Caan lost big time in the Tax Court. The take-aways from his case were two important reminders. If the IRA owner holds hard-to-value investments, e.g., private equity investments, there is an obligation to provide, annually, end-of-the-year fair market value of that investment. When that value was not timely provided by Caan to his IRA custodian, the custodian resigned. That, then, caused other problems. The new IRA provider refused to take the private equity investment which had been distributed to Caan. Caan then sold the private equity investment and deposited the sales proceeds into his new IRA, but only after 60 days had long passed. Two problems: (i) since the private equity investment had been distributed to Caan, he had to contribute the 'same asset' to his new rollover IRA; he didn't, he contributed cash (the sales proceeds); and (ii) Caan missed the 60-day rollover deadline.

Lucas: Lucas lost his job and withdrew $19,000 from his 401(k) to cover his living expenses. Lucas was under the age 59 ½. The plan sponsor subsequently issued Lucas a 1099-R. Lucas reported this distribution as 'nontaxable' claiming that he was disabled due to his diabetes. The Tax Court found that diabetes did not qualify as a disability, since Lucas was subsequently employed and thus, he 'was able to engage in any substantial gainful activity.'

Gomas: The Gomases were retirees. They were fraudulently induced to take distributions from their retirement accounts of $1.1 million to pay purported defense legal fees, the inducement made their power of attorney agent. After a long series of facts and cascading problems, the Gomases' distributions were reported by them as taxable income and taxes were paid. The Gomases later filed a claim for a tax refund, citing fraud. The IRS refused their refund claim. The Gomases sued, but lost, the Tax Court Judge noting that (i) there was no theft loss deduction available to the Gomases since the 2017 Tax Act suspended the theft loss provision in the Tax Code through 2025; and (ii) even though the Gomases were defrauded by their agent, the distributions came directly to them, not to their agent, which required the Gomases to report the income, even though the money ultimately went to the defrauding power of attorney agent. [IRC 408(d)(1).]

Balint: Balint was in jail for a year. While incarcerated he instructed his wife, to whom he gave his power of attorney, to take withdrawals from his retirement account to pay bills. His wife withdrew over $137,000 while

Balint was in jail from his IRA and cash surrender values from his whole life insurance. His wife transferred the funds to her own bank accounts, and she used the money to move from Florida to Kentucky where the funds were used to renovate a house and to pay for the wife own living expenses. Balint failed to pay any income taxes with respect to these withdrawals. The IRS threatened to levy his property to collect the taxes. Balint won in court. While the account owner is normally treated as the recipient of any income received by an agent under a power of attorney, that rule does not apply when the agent uses the power of attorney to misappropriate funds. Under Florida law a power of attorney agent must act in 'good faith.' The judge concluded that Balint's wife violated that standard and that she, rather than Balint, should be taxed on the 'stolen' funds.

Conclusion: Enough said about 2023 and all the changes that affect retirement plan contributions and distributions. One thing is certain, though. These rules are not getting any simpler as the years pass.