The SECURE Act: Significant Changes for Retirement Plans and IRAs

Mamta K. Shah, Troutman Sanders
Paul Porretta, Pepper Hamilton

March 5, 2020

Pepper Hamilton LLP
Attorneys at Law

troutman sanders

Troutman Sanders and Pepper Hamilton Announce Plans to Combine

Troutman Sanders and Pepper Hamilton LLP have agreed to merge effective April 1, 2020. Troutman Pepper will offer expanded capabilities and practice strengths, with a hallmark focus on client care.

troutman sanders

Pepper Hamilton LLP
Attorneys at Law

Paul L. Porretta

Partner, Employee Benefits and Executive Compensation Practice
Pepper Hamilton LLP

212.808.2725

porrettap@pepperlaw.com

- Focuses his practice on a wide range of services related to 401(k) plans, pension plans, multiemployer plans, employee stock ownership plans (ESOPs) and ERISA issues. In addition, he has extensive experience with executive compensation, executive employment arrangements, equity-based compensation, health and welfare plans and HIPAA compliance
- Advises clients on the design, implementation and ongoing compliance of retirement and pension plans. His services include drafting plan documents, trust agreements and plan amendments; preparing IRS determination requests; advising on fiduciary, plan administration, funding and withdrawal liability issues; and correcting compliance failures through IRS and Department of Labor programs.

Pepper Hamilton LLP
Attorneys at Law

troutman sanders

Mamta K. Shah

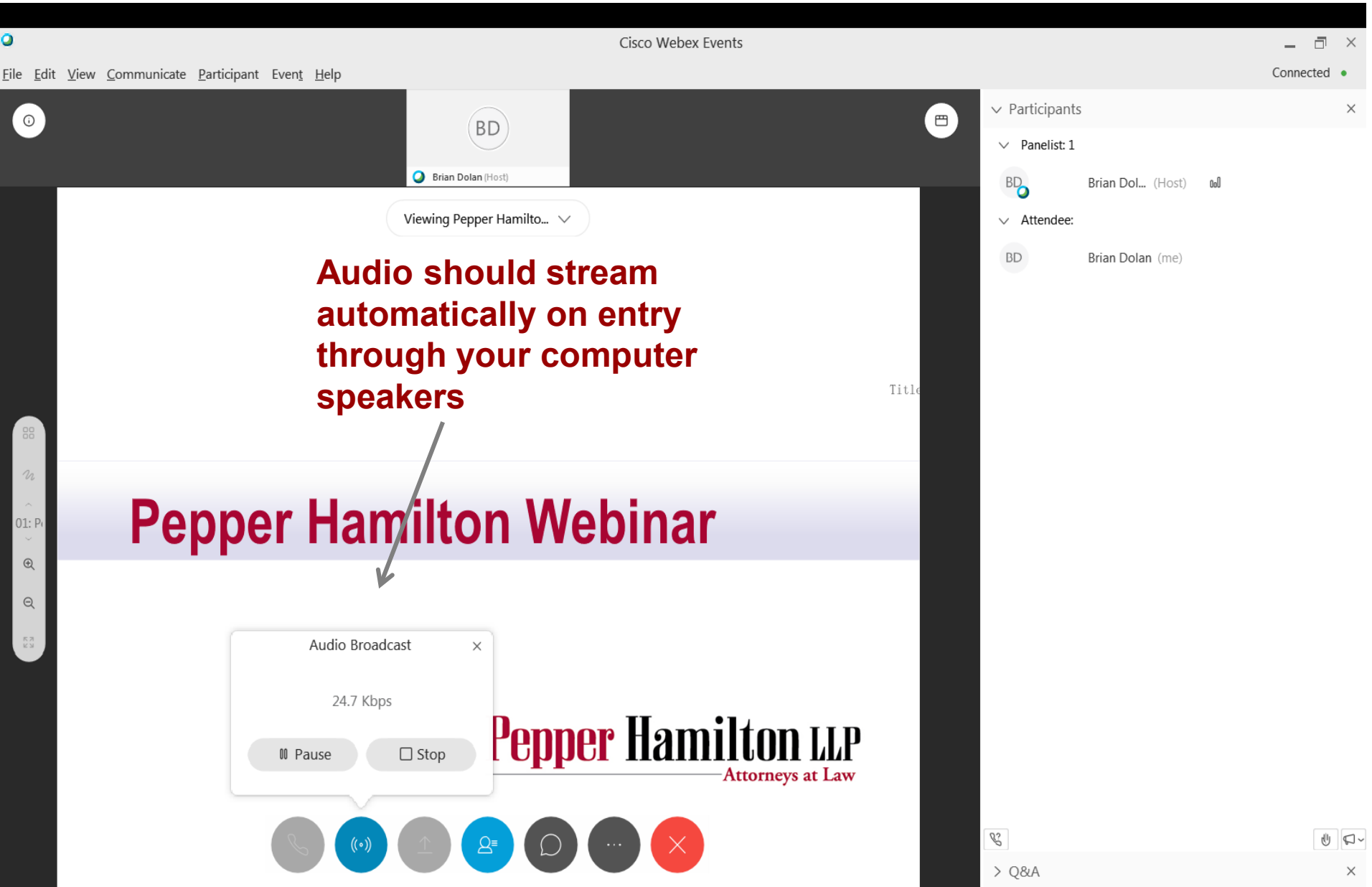
Partner,
Troutman Sanders
212.704.6178
mamta.shah@troutman.com

- Has experience advising public and privately-held companies on all aspects of employee benefits law, including the implementation, design and administration of qualified employee benefit plans (such as 401(k) plans, profit sharing plans and defined benefit plans), nonqualified deferred compensation arrangements, health and welfare plans, and severance, stock option and other equity and/or incentive based compensation plans
- Also has experience in employee benefits issues arising in the context of business transactions, such as corporate mergers, acquisitions and dispositions, with an expertise in benefits integration and disintegration.

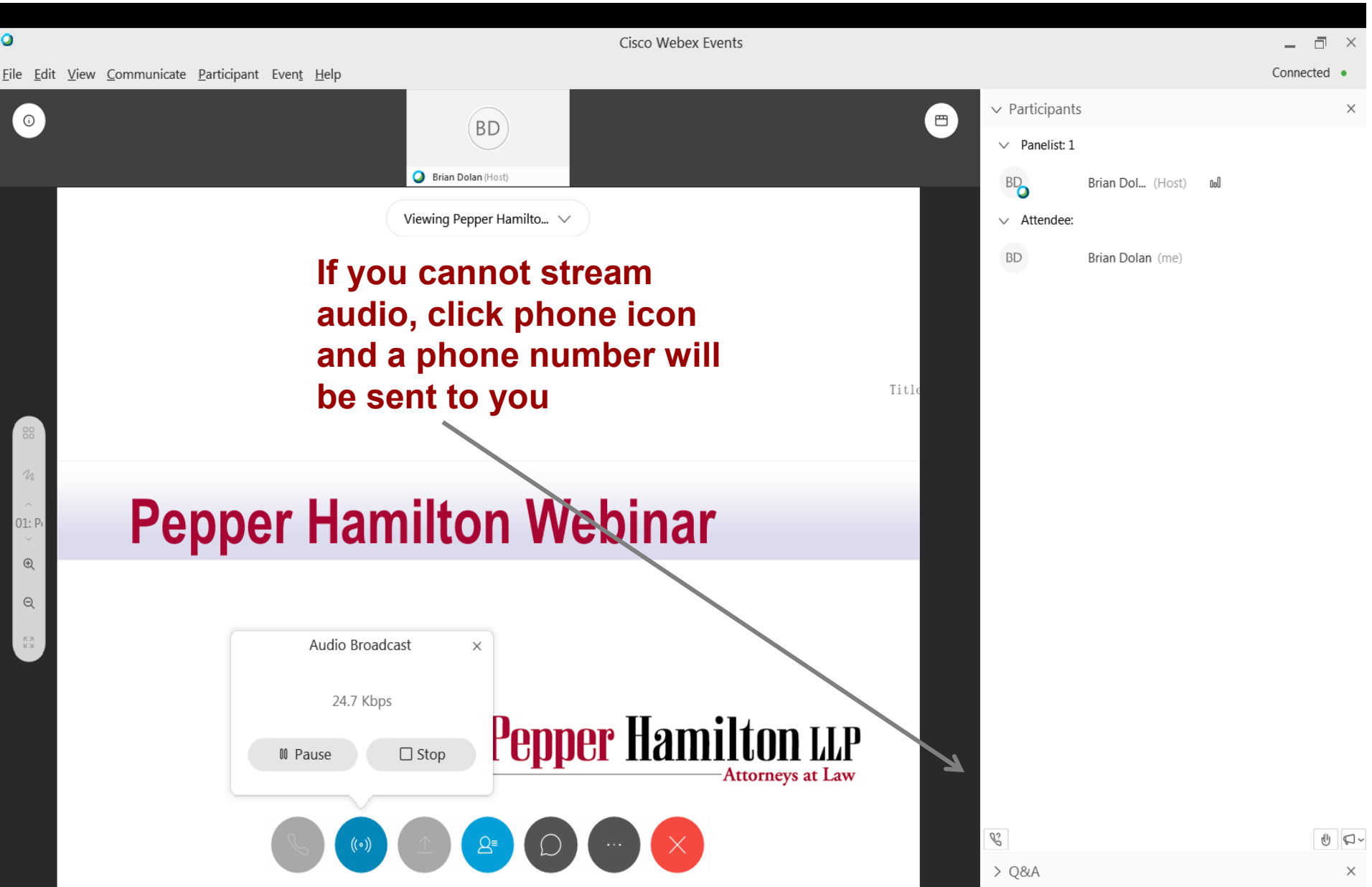
Pepper Hamilton LLP
Attorneys at Law

troutman sanders

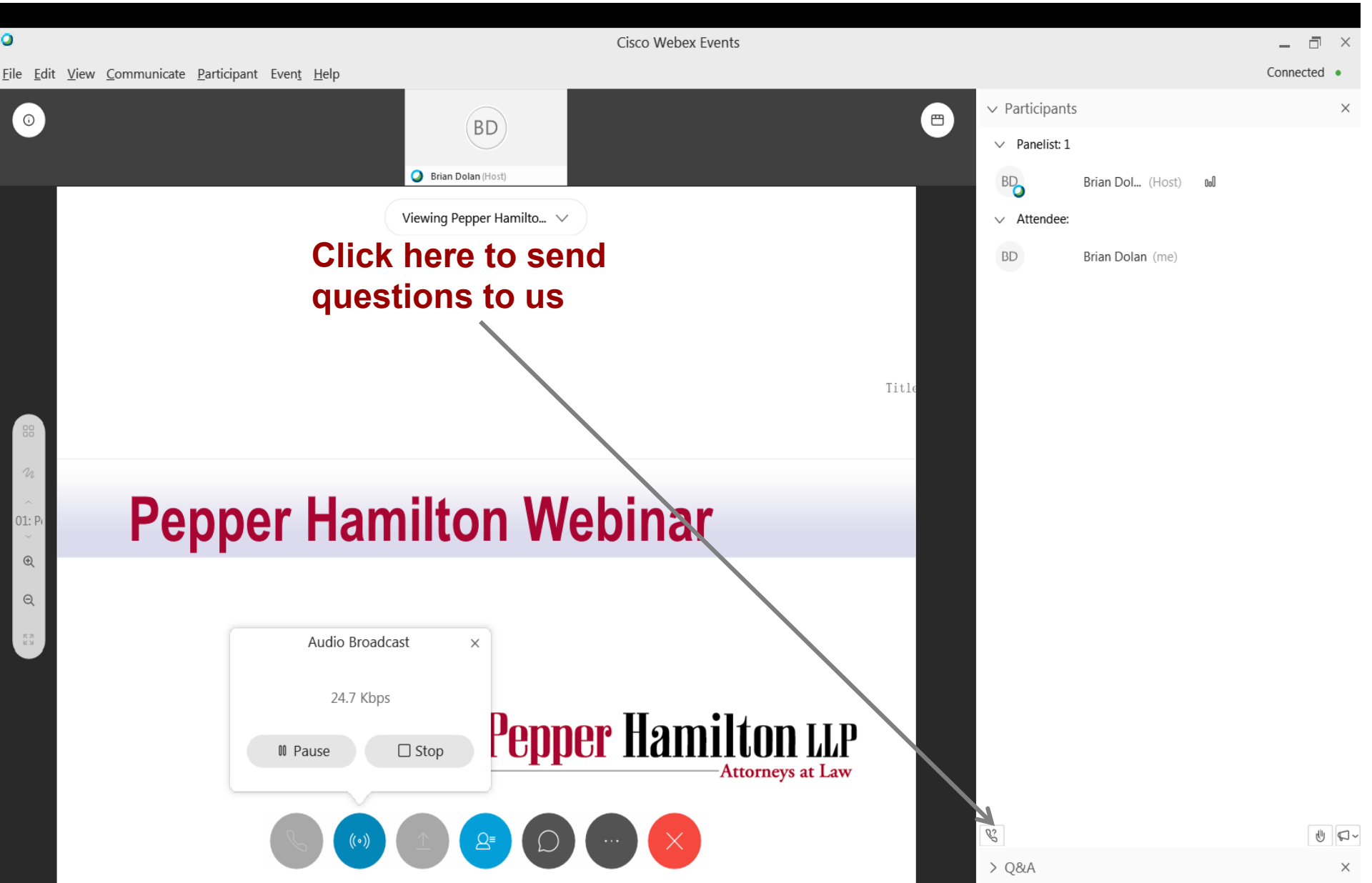
Audio


Cisco Webex Events
File Edit View Communicate Participant Event Help
Connected
BD
Brian Dolan (Host)
Participants
Panelist: 1
BD
Brian Dol... (Host)
Attendee:
BD
Brian Dolan (me)
Viewing Pepper Hamilto...
Audio should stream automatically on entry through your computer speakers
Pepper Hamilton Webinar
Audio Broadcast
24.7 Kbps
Pause
Stop
Pepper Hamilton LLP
Attorneys at Law
Q&A

Audio


Cisco Webex Events
File Edit View Communicate Participant Event Help
Connected
BD
Brian Dolan (Host)
Viewing Pepper Hamilto...
If you cannot stream audio, click phone icon and a phone number will be sent to you
Pepper Hamilton Webinar
Audio Broadcast
24.7 Kbps
Pause
Stop
Pepper Hamilton LLP
Attorneys at Law
Participants
Panelist: 1
Brian Dol... (Host)
Attendee:
Brian Dolan (me)
Q&A

Q&A


Cisco Webex Events
File Edit View Communicate Participant Event Help
Connected
BD
Brian Dolan (Host)
Participants
Panelist: 1
BD
Brian Dol... (Host)
Attendee:
BD
Brian Dolan (me)
Viewing Pepper Hamilto...
Click here to send questions to us
Pepper Hamilton Webinar
Audio Broadcast
24.7 Kbps
Pause
Stop
Pepper Hamilton LLP
Attorneys at Law
Q&A

Email dolanb@pepperlaw.com if interested in receiving a CLE form.

Pepper Hamilton LLP
Attorneys at Law

troutman sanders

The webinar will be starting at approx. 12:00pm ET.
There is currently no audio until we start.

Pepper Hamilton LLP
Attorneys at Law

troutman sanders

The SECURE Act – Significant Changes for Retirement Plans and IRAs

The **Setting Every Community Up for Retirement Enhancement Act of 2019** (the "SECURE Act"), signed into law on December 20th, has a wide-ranging impact on tax-qualified retirement plans and individual retirement accounts, through amendments to the Internal Revenue Code of 1986 (the "Code") and the Employee Retirement Income Security Act of 1974 ("ERISA"), and administrative directives to the IRS and the U.S. Department of Labor.

For employer retirement plans, the SECURE Act will necessitate changes to plan documents, administration and employee communications.

The following discusses key SECURE Act provisions, including changes to the required minimum distribution rules, changes affecting safe harbor plans, and easing of 401(k) eligibility requirements for long-term employees.

I. Multiple Employer Plans - Protection from a Participating Employer's Qualification Failures

Before the SECURE Act,

(i) multiple employer plans could only be maintained by participating employers who shared a "common interest" other than the plan, and

(ii) a qualification failure by any participating employer in a multiple employer plan could jeopardize the qualification of the entire plan and adversely impact all participating employers (the "one bad apple" rule).

I. Multiple Employer Plans - Protection from a Participating Employer's Qualification Failures (cont'd)

The SECURE Act

(i) allows a multiple employer plan that is maintained by employers with a common interest other than the plan or a multiple employer plan in which unrelated employers participate if the plan is maintained by a vendor satisfying the requirements of a "pooled plan provider" (a "pooled employer plan"); and

(ii) eliminates the "one bad apple" rule - a qualification failure by any participating employer in a multiple employer plan would not adversely affect the entire plan – if the plan contains certain provisions with respect to participating employers that fail qualification requirements.

I. Multiple Employer Plans - Protection from a Participating Employer's Qualification Failures (cont'd)

Pooled Plan Provider. A "pooled plan provider" is a person designated as a multiple employer plan's named fiduciary, administrator and responsible party for administrative duties, and is registered with the IRS and DOL as the plan's pooled plan provider.

Required Provisions for "One Bad Apple" Protection. In order for a multiple employer plan and its complying employers to have protection from a "bad apple" employer's qualification failures, the plan must provide for (i) the transfer of all of the bad apple employer's assets in the plan and the account balances of its employees to a single employer plan sponsored by such employer or to IRAs, and (ii) the bad apple employer's full liability for the qualification failure.

Effective: Plan years beginning after December 31, 2020.

II. Automatic Enrollment ADP Safe Harbor Plans - Increase in Maximum Plan Default Contribution Rate

Before the SECURE Act, the safe harbor for a 401(k) plan satisfying the actual deferral percentage ("ADP") test through the automatic enrollment of participants at an elective deferral contribution default rate allowed for a maximum default rate of 10% of the participant's compensation.

The SECURE Act increases to 15% of the participant's compensation the safe harbor maximum deferral contribution default rate, beginning with the participant's third plan year of automatic contributions. (For the participant's first and second plan years of automatic contributions, the maximum default rate still can not be more than 10% of compensation.)

Effective: Optional - Plan years beginning after December 31, 2019.

III. Safe Harbor 401(k) Non-elective Contributions - Flexibility for Safe Harbor Notice and Timing of Plan Amendments

Before the SECURE Act, a safe harbor 401(k) plan that intended to satisfy the actual deferral percentage ("ADP") test for a plan year using employer non-elective contributions of at least 3% of compensation for each eligible non-highly compensated employee had to meet the following requirements:

(i) a safe harbor notice had be provided to all eligible employees at least 30 days before the beginning of the plan year, and

(ii) a plan amendment providing for such safe harbor contributions had be adopted not later than 30 days before the end of the plan year.

III. Safe Harbor 401(k) Non-elective Contributions - Flexibility for Safe Harbor Notice and Timing of Plan Amendments (cont'd)

The SECURE Act

(i) eliminates the notice requirement for the employer non-elective contribution ADP safe harbor, and

(ii) extends the time to adopt a plan amendment for such safe harbor contributions for a plan year until the end of the following plan year; provided, that an amendment adopted *after* the 30th day before the end of the plan year must provide for a non-elective safe harbor contribution of at least 4% of participant compensation, rather than 3%.

III. Safe Harbor 401(k) Non-elective Contributions - Flexibility for Safe Harbor Notice and Timing of Plan Amendments (cont'd)

Note: These changes allow employers to amend their way into an ADP safe harbor after discovering that their plan otherwise fails the ADP test, and effectively caps the cost of ADP compliance at 4% of eligible non-highly compensated participant compensation.

Effective: Plan years beginning after December 31, 2019.

IV. Elective Deferral Contribution Eligibility for Long-Term Part-Time Employees

Before the SECURE Act, employer defined contribution plans, such as 401(k) plans, could exclude from eligibility to participate any employee who had not completed at least 1,000 hours of service during a 12-month "computation period" and reached age 21.

The SECURE Act provides that, except for collectively bargained plans, employer defined contribution plans with an employee elective deferral arrangement (such as a 401(k) plan) cannot exclude from eligibility to make elective deferral contributions an otherwise eligible employee who had completed at least 500 hours of service in each of three consecutive 12-month computation periods. Under this change, a plan can continue to impose the age 21 requirement.

Note: This change to the eligibility requirement is applicable to employee elective deferral contributions only, and is not required for employer matching or non-elective contributions for such long-term employees, including safe harbor matching and non-elective contributions.

Pepper Hamilton LLP
Attorneys at Law

troutman sanders

IV. Elective Deferral Contribution Eligibility for Long-Term Part-Time Employees (cont'd)

Effective: Required - For employee service in plan years beginning after December 31, 2020, including the determination of the 3-consecutive plan year requirement (as a result, an employee in a calendar year plan cannot become eligible under this provision until after December 31, 2023).

V. Prohibition on Employer Plan Loans Through Credit Cards

Before the SECURE Act, the Internal Revenue Code did not expressly address the practice of using credit cards to fund employer plan loans to participants (e.g. loans from 401(k) plans) through credit cards.

The SECURE Act prohibits an employer savings plan from funding participant loans through credit cards, by adding an express provision to this effect in the Internal Revenue Code.

Effective: Required - Loans made after December 20, 2019.

VI. Increase in Required Minimum Distribution Age from 70½ to 72

Before the SECURE Act, qualified retirement plan participants had to begin required minimum distributions ("RMDs") by April 1st of the year following the year in which they attain age 70½, with participants other than 5% owners allowed to postpone the commencement of RMDs until April 1st of the year following the year of retirement.

The SECURE Act increases the RMD age from 70½ to 72. Plan participants must begin RMDs by April 1st of the year following the year in which they attain age 72, with participants other than 5% owners still allowed to postpone the commencement of RMDs until April 1st of the year following the year of retirement.

VI. Increase in Required Minimum Distribution Age from 70½ to 72 (cont'd)

Note: The Secure Act also increases the RMD age for IRA owners from 70½ to 72 – IRA owners must begin RMDs by April 1st of the year following the year in which they attain age 72.

Effective: Individuals attaining age 70½ after December 31, 2019.

VII. Repeal of IRA Contribution Age Limit and Limitation on Qualified Charitable Distribution Exclusion

Before the SECURE Act, individuals were not permitted to contribute to an individual retirement account (IRA) in the year they attained age 70½ or in subsequent years.

The SECURE Act eliminates this restriction, allowing individuals to contribute to an IRA without a maximum age restriction. However, along with eliminating this age restriction, the SECURE Act provides an anti-abuse provision - the annual exclusion from taxable income of $100,000 for qualified charitable distributions from an individual's IRA after attaining age 70½ is now subject to a reduction equal to the excess of the individual's total IRA deductions for all years ending on or after attaining age 70½, over the total of all qualified charitable distributions made in prior years.

Effective: Required - IRA contributions and qualified charitable distributions in tax years beginning after December 31, 2019.

VIII. New Required Minimum Distribution Rules upon Death of Defined Contribution Plan Participant /IRA Owner

Before the SECURE Act, required minimum distributions ("RMDs") upon the death of a qualified employer plan participant or IRA owner were as follows:

- If the participant's or IRA owner's death was after their RMD date, death benefits generally had to be distributed at least as rapidly as the participant's or IRA owner's benefits were being distributed.
- If the participant's or IRA owner's death was before their RMD date, benefits to a non-spouse designated beneficiary generally were payable over such beneficiary's life expectancy; provided that distributions began within one year after the participant's or IRA owner's date of death.
- If the participant's or IRA owner's death was before their RMD date, benefits to a surviving spouse beneficiary generally were payable over such beneficiary's life expectancy; provided that distributions began by the year in which the participant or IRA owner would have attained age 70½.
- If the participant's or IRA owner's death was before their RMD date but there was no designated beneficiary, benefits generally had to be distributed within five years after the participant's or IRA owner's death.

VIII. New Required Minimum Distribution Rules upon Death of Defined Contribution Plan Participant/IRA Owner (cont'd)

The SECURE Act provides for RMDs upon the death of a qualified employer plan participant in a defined contribution plan or IRA owner as follows:

- If the participant's or IRA owner's death was before or after their RMD date, death benefits to a beneficiary who is an individual other than an "Eligible Designated Beneficiary" must be distributed within 10 years after the participant's or IRA owner's death, and within 5 years to a beneficiary who is not an individual.
- If the participant's or IRA owner's death was before or after their RMD date, death benefits to an "Eligible Designated Beneficiary" generally must be distributed over such beneficiary's life expectancy; provided that distributions begin within one year after the participant's or IRA owner's death.

An "Eligible Designated Beneficiary" is a (i) surviving spouse, (ii) child of the participant or IRA owner who is under the age of majority as of the date of death, (iii) an individual who is disabled as of the participant's or IRA owner's death, (iv) an individual who is chronically ill (as defined in Section 7702B(c)(2) of the Internal Revenue Code) as of the participant's or IRA owner's death, or (v) an individual who is not more than 10 years younger than the participant or IRA owner as of the date of death.

VIII. New Required Minimum Distribution Rules upon Death of Defined Contribution Plan Participant /IRA Owner (cont'd)

Effective Dates:

- For IRAs and employer retirement plans, other than collectively bargained and governmental plans, RMDs with respect to IRA owners and participants who die after December 31, 2019.
- For collectively bargained plans, RMDs with respect to participants who die in calendar years beginning after the earlier of (i) the later of the termination date of the last collective bargaining agreement ratified before December 20, 2019 (without regard to extensions of such agreement after December 20, 2019) or December 31, 2019, or (ii) December 31, 2021.
- For governmental plans, RMDs with respect to participants who die after December 31, 2021.

IX. Early Withdrawal 10% Penalty Exception for Qualified Birth and Adoption Distributions

Before the SECURE Act, the penalty exceptions for pre-age 59½ qualified retirement plan distributions, such as hardship withdrawals, did not include an exception for expenses in connection with the birth or adoption of a child.

The SECURE Act provides that distributions from an "Applicable Retirement Plan" in connection with expenses for the birth of a participant's or IRA owner's child or their adoption of a child will not be subject to the 10% early withdrawal (pre-59½) penalty; provided that the distribution (i) is within one year after the child's date of birth or date of adoption and (ii) does not exceed $5,000.

An "Applicable Eligible Retirement Plan" generally means an IRA or qualified employer plan, except for defined benefit plans.

A participant or IRA owner may recontribute birth or adoption distributions; however, they are not eligible rollover distributions.

Effective: Distributions made after December 31, 2019.

Pepper Hamilton LLP
Attorneys at Law

troutman sanders

X. Relief from Nondiscrimination Requirements for Closed and Frozen Pension Plans

Before the SECURE Act, a defined benefit pension plan that had been amended to exclude new participants (referred to as a plan with a "soft freeze" or "closed plan") or that had also been amended to cease benefit accruals for any participants (a "frozen plan") generally had no relief from ongoing nondiscrimination requirements.

The SECURE Act provides the following relief, which may be available to closed plans or frozen plans with respect to nondiscrimination, minimum coverage and minimum participation requirements:

1. Relief from Benefits, Rights and Features Testing

If a closed plan:

(i) was not amended during the 5-year period immediately preceding the year it became a closed plan by substantially increasing the number of participants covered or the value of their benefits, rights and features (subject to exemption for certain grandfathered plans), and

(ii) passes benefits, rights and features testing in the year it becomes a closed plan and in the two plan years immediately following,

then it may be deemed to satisfy the benefits, rights and features requirements in subsequent years; provided that it is not amended after the year it becomes a closed plan by changing the group of participants covered or their benefits, rights and features in a way that significantly favors highly compensated employees.

X. Relief from Nondiscrimination Requirements for Closed and Frozen Pension Plans (cont'd)

2. Availability of Aggregate Testing with Defined Contribution Plan

If a closed plan:

(i) was not amended during the 5-year period immediately preceding the year it became a closed plan by substantially increasing the number of participants covered or the value of their benefits (subject to exemption for certain grandfathered plans),

(ii) passes nondiscrimination and coverage testing in the year it becomes a closed plan and in the two plan years immediately following, and

(iii) is not amended after the year it becomes a closed plan by changing the group of participants covered or their benefits in a way that significantly favors highly compensated employees,

then the closed plan may utilize combined testing with a defined contribution plan of the same employer on a defined benefit basis (which is often advantageous) for nondiscrimination and coverage; however, this combined testing is available only if the defined contribution plan (A) provides matching contributions, (B) is a 403(b) annuity plan funded by employer matching or non-elective contributions, or (C) is an employee stock ownership plan (ESOP).

X. Relief from Nondiscrimination Requirements for Closed and Frozen Pension Plans (cont'd)

3. Relief from Minimum Participation Testing

If a closed plan:

(i) is amended by ceasing all benefit accruals or by providing future accruals to a closed class of participants only,

(ii) passed the minimum participation test as of the date it became a closed plan or a frozen plan, and

(iii) was not amended during the 5-year period immediately preceding the year it became a closed plan by substantially increasing the number of participants covered or the value of their benefits (subject to exemption for certain grandfathered plans),

then the plan is deemed to pass the minimum participation test.

Effective: December 20, 2019.

XI. Extended Time for Employers to Adopt New Retirement Plans

Before the SECURE Act, an employer could adopt a qualified retirement plan effective for a tax year no later than the last day of the tax year.

The SECURE Act extends the deadline by which an employer may adopt a qualified plan effective as of a tax year to no later than the due date (with extensions) of the employer's tax return for the tax year.

Note: Notwithstanding this provision, a qualified retirement plan that provides for employee contributions or elective deferral contributions must be adopted before such contributions or deferrals are made to the plan.

Effective: Plans adopted effective in tax years beginning after December 31, 2019.

XII. New Defined Contribution Plan Participant Statement Requirements for Lifetime Income Streams

Before the SECURE Act, defined contribution plan benefit statements to participants were not required to include information on lifetime income payment options.

The SECURE Act requires defined contribution plans to provide participants a benefit statement at least once each 12-month period illustrating benefits in the form of monthly payments for lifetime income streams, including a qualified joint and survivor annuity and a single life annuity.

Effective: Defined contribution plan benefit statements issued more than 12 months after the Department of Labor's release of *latest* of (i) interim final rules on lifetime income stream statements, (ii) a model lifetime income stream statement, or (iii) assumptions to be used in converting accrued benefits into lifetime income streams for purposes of such statements.

XIII. Penalty Increases for Retirement Plan Filing and Notice Failures

Before the SECURE Act, penalties were as follows:

- Failure to timely file a Form 5500 was subject to a penalty of $25 per day, up to a maximum penalty of $15,000.
- Failure of a plan with vesting requirements to file an IRS deferred vested participant registration statement was subject to a penalty of $1 for each participant for each day until filed, up to a maximum penalty of $5,000.
- Failure of a plan that terminates or changes its plan name, address or administrator to file an IRS notice of change was subject to a penalty of $1 for each day until filed, up to a maximum penalty of $1,000.
- Failure to notify participants of the right to elect no withholding on distributions was subject to a penalty of $10 for each failure, up to a maximum penalty of $5,000 for all failures in a calendar year.

XIII. Penalty Increases for Retirement Plan Filing and Notice Failures (cont'd)

The SECURE Act significantly increases these penalties:

- Failure to timely file a Form 5500 is subject to a penalty of $250 per day, up to a maximum penalty of $150,000.
- Failure of a plan with vesting requirements to file an IRS deferred vested participant registration statement is subject to a penalty of $10 for each participant for each day until filed, up to a maximum penalty of $50,000.
- Failure of a plan that terminates or changes its plan name, address or administrator to file an IRS notice of change is subject to a penalty of $10 for each day until filed, up to a maximum penalty of $10,000.
- Failure to notify participants of the right to elect no withholding on distributions is subject to a penalty of $100 for each failure, up to a maximum penalty of $50,000 for all failures in a calendar year.

Effective: Forms and notices required to be filed or issued, as applicable, after December 31, 2019.

XIV. Small Employer Tax Credit Increase for Pension Plan Startup Costs and Added Credit for Automatic Enrollment

Before the SECURE Act, employers with no more than 100 employees receiving at least $5,000 in annual compensation were eligible for an annual tax credit for up to three years for expenses incurred in establishing and administering a tax-qualified plan covering at least one non-highly compensated employee ("Qualified Startup Costs"), up to a maximum annual credit of the lesser of (i) $500 or (ii) 50% of Qualified Startup Costs. There was no separate or additional credit for such small employer including an automatic enrollment feature.

The SECURE Act increases the maximum annual tax credit to the *greater* of (i) $500, or (ii) the lesser of (A) $250 for each eligible non-highly compensated employee or (B) $5,000. In addition, the SECURE Act adds an annual small employer tax credit of $500 for the first three years that the plan includes an automatic enrollment feature.

Effective: Plan years beginning after December 31, 2019.

Questions?

Mamta K. Shah
Partner, Troutman Sanders LLP
875 Third Avenue
New York, NY 10022
212 704-6178
mamta.shah@troutman.com

Paul L. Porretta
Partner, Pepper Hamilton LLP
622 Eighth Avenue
New York, NY 10018
212 808-2725
porrettap@pepperlaw.com

Pepper Hamilton LLP
Attorneys at Law

troutman sanders