



Services

[Employee Benefits and Executive Compensation](#)

[Fiduciary Duties and Governance](#)

[Qualified Retirement Plans](#)

[Taft-Hartley Plans](#)

[Health and Welfare Plans](#)

[Government Plans](#)

[Higher Education](#)

[Employee Stock Ownership Programs \(ESOPs\)](#)

[Executive Compensation and Nonqualified Plans](#)

[ERISA and Benefits Litigation](#)

[College Savings and ABLE Plans](#)

[Mandatory Paid and Unpaid Leave](#)

[Audits and Investigations](#)

SECURE 2.0 Makes Several Changes Affecting Annuities

In 2019 Congress passed the *Setting Every Community Up for Retirement Enhancement Act* (“SECURE Act”) to help individuals better prepare for retirement. On December 29, 2022, Congress passed the SECURE 2.0 Act of 2022 (“SECURE 2.0”) as part of its annual appropriations process. These laws contained several provisions intended to increase the adoption of annuity options in defined contribution retirement plans, because increasing lifespans, rising inflation, and unstable markets have made participants *and* plan sponsors more interested in investment options that provide guaranteed lifetime retirement income. This article explains what annuities are, whether a plan sponsor must offer them, and the initial and ongoing compliance considerations if a plan sponsor elects to add annuity options to its plan.

Annuities in a Nutshell

There are many kinds of annuities—fixed v. variable, immediate v. deferred, single life v. joint-and-survivor—but all annuities essentially provide guaranteed payments later in exchange for money today. Most insurance companies offer products that convert retirement assets into annuities. These products can be purchased by individual participants outside of the plan using plan assets, but retirement plans can also offer in-plan annuity options, usually at lower cost than individually purchased annuities.

Annuities offer advantages such as tax benefits, guaranteed payments, and guaranteed rates of return. However, annuities are relatively illiquid and expensive and very complex, and have historically been difficult to integrate into other more traditional retirement plan income streams because of required minimum distribution (“RMD”) rules. The RMD problems have been addressed with the SECURE Act and SECURE 2.0, though the cost, liquidity, and complexity issues remain.

Plan Sponsor Considerations

With the increased participant interest in annuity products, plan sponsors are now confronted with questions concerning whether such products must be offered to participants and how such options must be evaluated. Sponsors of retirement plans are generally not obligated to add any particular product (including an annuity) to a retirement plan investment lineup. However, if fiduciaries wish to consider adding annuity products as an investment option, evaluating and offering such products involves special considerations.

The starting point for any retirement plan fiduciary is ERISA Section 404, which requires fiduciaries to, among other things, discharge their duties for the exclusive purpose of providing benefits to participants, minimize plan expenses, act as a prudent expert would under the circumstances, and diversify the plan's investments to minimize the risk of large losses.

Plan sponsors seeking to add annuity products to their plans must do the following, as described in ERISA 404(e), 29 C.F.R. § 2550.404a-4, and Field Assistance Bulletin 2015-02:

- Engage in an objective, thorough and analytical search for the purpose of identifying and selecting providers from which to purchase annuities. The process must avoid self-dealing, conflicts of interest, and other improper influence. The process should involve consideration of competing providers when possible.
- Appropriately weigh the cost (e.g., fees, commissions, surrender penalties) of the annuity contract against the benefits and services to be provided thereunder, although they are not required to choose the lowest-cost annuity.
- Appropriately consider the financial capability of the annuity provider to satisfy its obligations under the annuity contract, which means obtaining certain written representations (e.g., the insurer is licensed to offer annuities, it has filed audited financial statements, it maintains sufficient reserves, it undergoes a financial examination at least once every five years).
- Conclude that, at the time of the selection, the annuity provider is financially capable of satisfying its future payment obligations under the annuity contract, and the relative cost of the annuity contract is reasonable in relation to the benefits and services to be provided under the contract.

Plan sponsors may also have plan-specific considerations, such as the plan's demographic makeup, the projected life expectancy of its participant population at retirement, the portability of annuity products between plans (or recordkeepers), and the level of participant education needed.

After considering these items, plan fiduciaries may determine that offering in-plan annuity products are not in the best interests of the participants and beneficiaries. However, if the plan sponsor elects to add one or more annuity options to the plan's investment lineup, the sponsor also has several ongoing responsibilities. First, the plan fiduciary must receive annual representations from the annuity provider, containing similar content to the initial representation disclosures detailed above. Also, the plan sponsor needs to proactively investigate if it becomes aware of facts that cause it to question one or more of the annuity provider's representations. If a plan fiduciary satisfies all these conditions, it is relieved of all liability for losses that may result from an insurer's inability to pay the promised annuity benefits.

Contacts

John E. Schembari

Omaha
402.231.8886
john.schembari@kutakrock.com

Michelle M. Ueding

Omaha
402.661.8613
michelle.ueding@kutakrock.com

William C. McCartney

Omaha
949.852.5052
william.mccartney@kutakrock.com

P. Brian Bartels

Omaha
402.231.8897
brian.bartels@kutakrock.com

Ruth Marcott

Minneapolis
612.334.5044
ruth.marcott@kutakrock.com

Sevawn Foster Holt

Little Rock
501.975.3120
sevawn.holt@kutakrock.com

John J. Westerhaus

Omaha
402.231.8830
john.westerhaus@kutakrock.com

Robert J. Hannah

Omaha
402.661.8667
robert.hannah@kutakrock.com

Emma L. Franklin

Omaha
402.231.8842
emma.franklin@kutakrock.com

Aaron D. Schuster

Kansas City
816.960.0090
aaron.schuster@kutakrock.com

Jacob S. Gray

Minneapolis
612.334.5053
jacob.gray@kutakrock.com

Annuity Offerings Going Forward

Congress' stated intention was that the provisions of the SECURE Act and SECURE 2.0 would help Americans achieve long-term financial security. However, these provisions are also a boon for insurance companies and other annuity issuers. We have already seen an increase in annuity offerings, with insurers actively reaching out to plan sponsors and retirement committees to present information on their annuity products. Plan fiduciaries that are considering the addition or enhancement of annuity offerings must understand their initial and ongoing fiduciary and compliance duties, which will require expert investment, actuarial, and legal advice.

If you have questions about annuities and how to conduct a fiduciary review of available annuity products, please reach out to a member of Kutak Rock's [Employee Benefits and Executive Compensation Group](#).

