Morgan Lewis

MEMORANDUM

TO:	Board of Trustees of the Warehouse Employees Union Local 730 Pension Fund (the "Fund")
FROM:	Co-Counsel
DATE:	March 3, 2023
SUBJECT:	SECURE 2.0: Changes in law for defined benefit plans

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Overview

On December 29, 2022, the SECURE 2.0 Act of 2022 ("SECURE 2.0") became law as part of the Consolidated Appropriations Act, 2023 (H.R. 2617). SECURE 2.0 makes numerous changes to employer sponsored defined benefit and defined contribution plans. This memorandum focuses on the following changes for defined benefit plans: new rules on the recoupment of overpayments, the increase in the required beginning date to 73, the increase in the small benefit cash-out rules, updates to the IRS self-correction program and establishment of a new governmental "DOL Lost and Found" database.

Summary of Changes

Overpayments and Recoupment

Pension plan overpayments generally are payments that a participant receives in excess of what is permitted by the plan terms or under applicable law. Overpayments may include amounts that a participant is not entitled to receive under the terms of the plan because the benefit was incorrectly calculated or direct deposits into a participant's bank account after the participant's death but before the plan is notified of the death.

ERISA contains no specific rules or requirements relating to the recovery of overpayments to participants. However, Trustees have a fiduciary duty to act in the interests of all plan participants, and therefore DOL has historically required Trustees to take reasonable steps to attempt to recoup any overpayments, including filing a lawsuit suit when warranted.

SECURE 2.0 makes clear that the Fund does <u>not</u> have to recoup overpayments that were mistakenly made to participants provided the Fund satisfies ERISA's minimum funding rules and the overpayment does not put other participant benefits at risk. The Fund is also required to maintain and follow procedures to prevent and minimize overpayments. Under prior law it was assumed that a failure to recoup or attempt to recoup an overpayment could be a fiduciary breach. SECURE 2.0 allows the Trustees latitude to decide not to recoup overpayments without it being considered a fiduciary breach.

SECURE 2.0 also provides that the Fund will not violate Internal Revenue Code Section 401(a) because the Fund fails to recoup an overpayment or because the Trustees amend the plan (including retroactively) to increase past benefits to adjust for overpayments.

While SECURE 2.0 still allows the Fund to recoup overpayments, the law imposes the following new conditions on attempts to collect overpayments:

- in determining the amount of recoupment to seek, the Trustees may consider the hardship that recoupment would impose on the participant or beneficiary (even if the participant or beneficiary is culpable in the overpayment);
- the Trustees may not seek to recoup interest or other additional amounts (e.g., collection costs or fees) other than the actual overpayment;
- the Trustees may not seek to recover past overpayments to a participant from any beneficiary of the participant (including a spouse, former spouse, or other beneficiary);
- the Trustees may not seek to recover past overpayments from a participant or beneficiary if the first overpayment occurred more than three years before the participant or beneficiary is first notified of the error in writing;
- the Trustees may not undertake efforts to recoup overpayments through threats of litigation, unless the Trustees determine that the amounts recovered are reasonably likely to exceed the litigation costs;
- the Trustees may not undertake efforts to recoup overpayments through the use of a collection agency or other similar third party, unless the participant or beneficiary ignores or rejects a legal judgment or settlement agreement;
- in situations where the recoupment of overpayments is undertaken by reducing annuity benefit payments, the Trustees may not
    - (1) continue the reduction after the plan has recovered the full dollar amount of the overpayment,
    - (2) recoup more than 10% of the full dollar amount of the overpayment in a calendar year, and
    - (3) reduce future benefit payments below 90% of the periodic benefit payment amount otherwise payable under the terms of the plan; and
- must provide the overpayment recipient with the opportunity to contest the recoupment of the overpayment through the plan's claims and appeals procedure.

Most of these rules to recoup overpayments, however, will not apply in situations in which the participant or beneficiary is "culpable." A culpable individual bears responsibility for the overpayment based on misrepresentations or misstatements or knows that the overpayments were materially in excess of the correct amount due under the terms of the plan. SECURE 2.0 also provides certain retroactive relief for recoupment efforts undertaken before SECURE 2.0's effective date. The Trustees are therefore entitled to rely on:

(1) a good faith interpretation of administrative guidance in effect for recoupments and recoveries that started before December 29, 2022 (including relief allowing reduced payments that were put in place before December 29 to continue in future); and

(2) determinations made by the Trustees not to seek recoupment of overpayment.

Both the IRS and the Department of Labor are expected to issue guidance on the recoupment of overpayments at a later date.

Required Beginning Date

Under the original SECURE Act, which was passed in 2019, the Trustees had the option to amend the plan to increase participants' "required beginning date" for commencing receipt of their pensions from age 70.5 to age 72. The Trustees opted not to amend the Plan to increase the Required Beginning Date to 72. Under SECURE 2.0, the Trustees may increase the "required beginning date" to age 73 starting on January 1, 2023. SECURE 2.0 further allows the fund to increase the "required beginning date" to age 75 starting on January 1, 2033. This amendment is optional.

Small Benefit Cash-outs

Under current law, the Fund may "cash out" a terminated participant whose vested accrued benefit is worth $5,000 or less without the participant's consent. Under SECURE 2.0, this cash-out threshold is increasing to $7,000 for distributions on or after December 31, 2023.

Self-Correction

SECURE 2.0 expands the ability of plans to self-correct certain failures through the IRS Employee Plans Compliance Resolution System. SECURE 2.0 allows for the self-correction of any "eligible inadvertent failures" through self-correction. An "eligible inadvertent failure" means a failure that occurs despite the existence of practices and procedures designed to comply with the applicable Internal Revenue Code requirement, but does not include any failure that is egregious, relates to the diversion or misuse of plan assets, or is directly or indirectly related to an abusive tax avoidance transaction. This expanded opportunity to self-correct eligible inadvertent failures is available unless (1) the failure was identified by the IRS before any actions that demonstrate a specific commitment to implement a self-correction with respect to the failure and (2) the self-correction was not corrected within a "reasonable" period of time after the failure was identified.

Retirement Saving Lost and Found

Under current law, the Fund must annually report to the IRS information relating to each terminated vested participant covered by the Fund. Under SECURE 2.0, the DOL will take this information from the IRS and use this information to set up an online, searchable database known as the "Retirement Savings Lost and Found." The DOL is expected to issue regulations regarding the information needed to set up the database, but it is not expected to create an additional burden on the Fund. The Retirement Savings Lost and Found is expected to be set up by December 29, 2024. The goal of the database is to allow participants to search for benefits themselves, and to decrease the problem of missing participants more generally.

Considerations for the Fund

The new overpayment recoupment rules were effective December 29, 2022 and the Fund currently is required to follow them. The Trustees may wish to amend the Plan document or adopt an overpayment policy that is consistent with the SECURE 2.0 overpayment recoupment requirements.

The Trustees also need to decide whether to amend the Plan to increase the Plan's required beginning date from 70.5 to 73 for those participants who attain age 73 on or after January 1, 2023. The deadline to adopt such an amendment is on or before the last day of the first plan year beginning on or after January 1, 2025 (December 31, 2025 for the Fund), or such a later date as prescribed by the Secretary of the Treasury.