



IRS Provides COVID-19 Relief for Mid-Year Changes to Safe Harbor 401(k) Plans

JULY 8, 2020

The Internal Revenue Service (IRS) has issued new guidance intended to provide employers sponsoring safe harbor 401(k) (and 403(b)) plans with flexibility in responding to the coronavirus (COVID-19) pandemic.

Background

Safe harbor plans allow employers to avoid the need for nondiscrimination testing by providing a required level of either matching or non-elective contributions. Employers generally are required to satisfy the contribution requirements for the entire 12-month plan year; mid-year reductions or suspensions of safe harbor contributions are permitted only if the employer: (1) is operating at an economic loss for the plan year (as defined by the Internal Revenue Code); or (2) the employer included in its annual safe harbor notice a statement that contributions could be reduced or suspended mid-year with at least 30 days' notice.

The IRS acknowledged that the existing rules regarding mid-year changes to safe harbor contribution levels were difficult to apply in the present environment because an employer may be uncertain as to whether it is operating at an economic loss for the plan year. In addition, due to the unexpected nature of the COVID-19 pandemic, the employer may not have foreseen the need to have included a statement in the plan's safe harbor notice that safe harbor contributions may be reduced mid-year.

As a result, the IRS provided: (1) a helpful clarification of the existing rules (that technically is not limited to 2020 or to COVID); and (2) specific, temporary COVID Relief. Each of those items is discussed below:

Clarification of Requirements for Reducing Contributions for HCEs. The IRS clarified that a mid-year change that reduces contributions only for HCEs is not a reduction or suspension of safe harbor contributions in violation of the applicable Treasury Regulations (because contributions made on behalf of HCEs technically are not safe harbor contributions). However, for safe harbor *matching* plans, such a change would be a mid-year change to a plan's required safe harbor notice content, requiring that affected HCEs be provided with an updated safe harbor notice and at least 30 days to adjust their deferral elections.

Temporary COVID-19 Relief. Notice 2020-52 provides plan sponsors with two forms of temporary relief.

1. **Mid-Year Reductions or Suspensions of Safe Harbor Matching or Nonelective Contributions Permitted.**

Despite the normal restrictions on changing safe harbor contributions mid-year, Notice 2020-52 provides that, in 2020, a plan sponsor may adopt an amendment between March 31, 2020, and August 31, 2020, to *prospectively* reduce or suspend safe harbor contributions.

2. **Relief from Notice Requirement—for Nonelective Safe Harbor Plans only.** A plan sponsor does not need to provide participants in non-elective safe harbor plans with 30 days' advance notice of the mid-year change as long as notice is provided by August 31, 2020, and the safe harbor plan is amended no later than the date that the reduction or suspension is effective. (There is no relief for plans that rely on safe harbor *matching* contributions because matching contribution levels communicated to employees directly affect employee decisions regarding contribution levels.)

Winston Takeaway

Notice 2020-52 provides helpful clarification of the existing rules, as well as flexibility to employers considering suspending safe harbor contributions in response to the COVID-19 pandemic. Employers should note that if they wish to rely on the temporary COVID relief, (1) action is required by August 31; (2) the plan must be amended prior to the date the reduction/suspension is effective; (3) for safe harbor matching plans, the employer will need to provide 30 days' advance notice of the change; and (4) for all plans, the employer will need to perform nondiscrimination testing (ADP/ACP testing) for the entire 2020 plan year.

Please contact your Winston & Strawn relationship attorney or the authors if you would like to discuss application of the new guidance to your plan.

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