
IRS Provides COVID-19-Related Relief to Employers with Safe Harbor 401(k) Plans - Action to Claim Relief Generally Required by August 31, 2020

By Luke D. Bailey / Jul 07, 2020

On June 29, 2020, the IRS released additional guidance to help employers cope with the financial strain of the COVID-19 pandemic. This time, in Notice 2020-52, the IRS has clarified, and in some cases temporarily relaxed, rules governing when an employer with a safe harbor 401(k) plan can stop making safe harbor contributions without disqualifying the plan.

Basic Points of Relief

Under Notice 2020-52, employers sponsoring safe harbor 401(k) plans (including qualified automatic enrollment, or "QACA" safe harbor 401(k) plans) who previously determined that under the existing rules they could not reduce or eliminate safe harbor contributions to their 401(k) plan for the rest of 2020 may immediately take either of the following actions:

- Amend the plan so that highly compensated employees ("HCEs") will stop receiving safe harbor contributions, but non-highly compensated employees ("NHCEs") will continue to receive them. An employer that takes this action and whose plan otherwise satisfies the safe harbor requirements will continue to be a safe harbor plan and will not need to satisfy the average deferral percentage ("ADP") and average contribution percentage ("ACP") tests.
- Amend the plan to suspend safe harbor contributions for both NHCEs and HCEs, in which case the plan will cease to be a safe harbor plan and will need to pass ADP and ACP tests for the 2020 plan year.

Under Notice 2020-52, an employer may suspend safe harbor contributions as described above even if its annual safe harbor notice did not reserve the right to suspend safe harbor contributions during the year, and regardless of whether the employer is operating at an economic loss.

Important Details

It is important for an employer considering taking advantage of the relief provided by Notice 2020-52 to understand the following additional points:

- Unlike some of the other COVID-19-related employee benefit relief measures that have been enacted by Congress or been the subject of IRS guidance in recent months, the above actions require a written plan amendment before they can be put into effect.
 - In the case of an amendment to stop safe harbor contributions for HCEs only, the amendment may be adopted at any time and will take effect for contributions that would otherwise have been required for periods after the later of (i) the provision of reasonable advance notice to the affected HCEs (30 days is deemed to be reasonable, but a shorter period might be reasonable depending on the surrounding facts and circumstances) or (ii) adoption of the amendment.
 - In the case of an amendment to stop safe harbor contributions for all employees, both NHCEs as well as HCEs, the amendment must be adopted no later than August 31, 2020. In the case of a safe harbor plan that was using the nonelective contributions safe harbor, the amendment will take effect immediately for contributions that otherwise would have been required after the date the amendment is adopted. In the case of a safe harbor plan that was using the matching contributions safe harbor, the amendment will take effect for contributions that otherwise would have been required after the later of (i) 30 days after notice of the amendment is provided to the plan's participants or (ii) the date when the amendment is adopted.
- The IRS's guidance in Notice 2020-52 regarding an employer's ability to suspend safe harbor contributions for HCEs is described by it as an interpretation of existing law, not a COVID-19-related relaxation of otherwise applicable rules. This has two important consequences for employers. First, as already noted, if an employer suspends safe harbor matching or nonelective contributions for HCEs only, and keeps making safe harbor contributions for NHCEs, its 401(k) plan will still be a safe harbor plan, so that the ADP and ACP tests are still not required. Second, as an interpretation of existing law, the ability to stop making safe harbor contributions only for HCEs mid-year is not a temporary relief measure, but rather applies to all years (that is, to 2020 and years before and after 2020).

Background

Because employers that adopt safe harbor 401(k) plan designs must commit to making a certain minimum level of matching or nonelective contributions for NHCEs to avoid the requirements of the ADP and ACP tests, safe harbor 401(k) plans are generally subject to a "plan year" requirement. Under the plan year requirement, employers generally may not modify their safe harbor 401(k) contributions during the plan year to reduce the promised safe harbor contributions. Amending a safe harbor 401(k) plan during the plan year in a way that violates this plan year requirement generally results in plan disqualification.

The Code and regulations have provided limited exceptions to the plan year requirement. Specifically, if the employer's safe harbor notice, delivered before the beginning of the plan year, contained a disclosure that the employer reserved the right to stop making safe harbor contributions, whether matching or nonelective, during the plan year, or if the employer finds itself "operating at an economic loss," the employer can stop safe harbor

contributions mid-year, 30 days after providing notice to the plan's participants that it is stopping them. If an employer stops making safe harbor contributions during the year under these rules, then the plan is not disqualified but must pass the ADP and ACP tests for the plan year.

Beginning in March of this year, as the potential depth of the COVID-19-related interruption to the economy became evident, many employers with safe harbor 401(k) plans sought to stop making safe harbor contributions for the remainder of 2020. Employers whose annual safe harbor notices contained the required disclosure were able to do so, on 30 days' notice.

However, employers whose safe harbor notices did not contain the required disclosure, and who were unsure of whether they were "operating at an economic loss," found themselves potentially unable to end their commitment to making safe harbor contributions for the rest of 2020. Additionally, many employers wanted to stop making safe harbor contributions for HCEs, while continuing safe harbor contributions for NHCEs, but were informed by their advisers that this was likely a prohibited mid-year change because it was not explicitly permitted by existing IRS guidance. Notice 2020-52 provides important relief to this latter group of employers and now generally permits them to take the actions they were previously blocked from taking.

If you have any questions regarding the above or want to amend your safe harbor 401(k) plan to suspend safe harbor contributions for HCEs and/or NHCEs, please contact these attorneys for more information: [Edward C. Hammond](#), [Brad Oxford](#), [Luke D. Bailey](#), [James R. Olson](#), and [Charles M. Russman](#).