Flashpoint: IRS Still Cares Suspension or Reduction of Safe Harbor Contributions for 2020

In Notice 2020-52 (the "Notice"), issued on June 29, 2020, the IRS continues providing relief for employers during the COVID pandemic. In particular, the Notice permits employers to suspend or reduce safe harbor contributions in 401(k) and 403(b) plans after March 13, 2020, for the balance of the year, regardless of whether the employer is suffering an economic loss or gave a "maybe not" notice at the beginning of the year. In addition, for safe harbor nonelective contribution plans, rather than providing the revised safe harbor notice at least 30 days before the effective date of the suspension/reduction, the notice must be provided by August 31, 2020.

However, this relief is time-limited: to take advantage of these special rules, **the amendment to the plan suspending or reducing the safe harbor contributions must be adopted by August 31, 2020**.

(If you would like more detail on Notice 2020-52, join Ilene and Derrin for a free "Fireside Chat" webcast through ERISApedia on Thursday, July 8 at 2 p.m. Sign up at ERISApedia.com.)

The Details

The Normal Rules

Customarily, once a safe harbor provision is adopted for a 401(k) plan, it must be in effect for the entire plan year. There are two exceptions to this rule that permit mid-year suspension or reduction of the safe harbor contribution. The first applies if the employer is operating at an economic loss for the plan year. The second exception applies if the notice that the employer is required to give at least 30 days before the plan year beginning (the "safe harbor notice") includes a statement (often referred to colloquially as a "maybe not notice") that the employer may suspend or reduce the safe harbor contribution during the year upon providing employees with a revised notice. Under either circumstance, a supplemental notice of suspension must be provided to all participants at least 30 days in advance of when the suspension is effective. In addition, the plan is required to pass the normal nondiscrimination testing (ADP/ACP Tests) on a current-year basis in lieu of relying on the safe harbor provision for the year.

The Setting Every Community Up for Retirement Enhancement Act ("SECURE") modified the above rules to eliminate the required safe harbor notice for a plan that provides a safe harbor nonelective contribution; plans with a safe harbor matching contribution retained the obligation of advance notice. It is not yet clear whether the elimination of the notice requirement also avoids the supplemental notice requirement for nonelective contribution plans, although the IRS's position in this Notice seems to indicate that it does not.

What Notice 2020-52 Does

The Notice clarifies one aspect of the reduction/suspension of safe harbor contributions and gives relief for employers who cannot confirm that they are operating at an economic loss and also failed to provide the "maybe not notice" before the year began.

The Clarification: Suspending Safe Harbor Contributions for HCEs

The Internal Revenue Code does not require that safe harbor contributions be provided to highly compensated employee (HCEs). Accordingly, the IRS clarified in the Notice that the reduction/suspension of safe harbor contributions to HCEs does not modify the safe harbor status of the plan. Nonetheless, the safe harbor notice provided before the year began would have stated that HCEs were eligible for the safe harbor contribution. Notice 2016-16, which governs mid-year changes in 401(k) safe harbor plans, requires the employer to provide employees with a revised safe harbor notice as soon as practicable, but not more than 30 days after the change is effective. The Notice clarifies that such a revised notice must be provided only to affected HCEs. This clarification is not limited to 2020 or to COVID-related circumstances; it is an interpretation of the normal safe harbor contribution rules.

The Notice specifies in a footnote that it does not address whether a supplemental safe harbor notice is needed if the plan provides for safe harbor nonelective contributions (due to the SECURE Act change eliminating the initial notice requirement for such plans).

The Relief: No Loss or Maybe Notice Required

The Notice permits an employer to suspend or reduce the safe harbor by amending the plan between March 13, 2020, and August 31, 2020, even if the employer is not operating at an economic loss for the plan year, and even if no "maybe not notice" was provided before the year began.

To qualify for the relief of the Notice, three things must take place:

1. The plan amendment must be adopted by not later than the date on which the reduction/suspension is effective;
2. Employee notice:
    a. If the plan is a safe harbor matching contribution plan, a revised safe harbor notice reflecting the reduction/suspension must be provided to the plan participants 30 days prior to the effective date of the reduction/suspension;
    b. If the plan is a safe harbor nonelective contribution plan, notice of the suspension/reduction must be provided to the participants by not later than August 31, 2020; and
3. The plan must pass ADP and, if applicable, ACP testing for the plan year on a current-year basis.

Last but not least, if an employer *did* provide a "maybe not" notice, this relief would also permit the employer to delay the provision of the supplemental notice to August 31, 2020, for safe harbor nonelective plans.

What's with the Retroactive Date?

By virtue of the fact that the Notice permits an amendment adopted between March 13, 2020, and August 31, 2020, to take advantage of the relief, it appears that preemptive actions taken by an employer in advance of this Notice may now be blessed. In particular, employers who expected to operate at a loss and amended the plan after the COVID pandemic began on that basis, should not be concerned if they end up with better economic performance than expected for the plan year.

And One More Thing …

Some employers who, early in the process, took steps to suspend contributions have found that their financial circumstances are better than expected, and have regretted the quick decision. Several advisors have considered using the SECURE Act ability to adopt a safe harbor plan during or even after the plan year to reinstate the safe harbor. See our prior FlashPoint for more information about this provision.

It is clear from the guidance in existence that, if this is permissible, it can only be done if the employer originally had a nonelective contribution safe harbor and if the "new" provision is also a nonelective safe harbor. However, nothing from the IRS – including the Notice – has specifically addressed whether this is permitted.

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