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IRS Relaxes Some Requirements for Midyear Changes to Safe Harbor Plans

Qualified 401(k) and 403(b) retirement plans that are designed with certain minimum matching or nonelective contribution formulas are deemed to pass annual ADP and ACP nondiscrimination testing requirements applicable to those plans. These "safe harbor plans" generally must have the contribution structures adopted before the plan year begins and be maintained in place for an entire plan year to receive the annual testing waiver. However, in some circumstances, usually requiring advance notice, safe harbor plans may be amended midyear to change certain aspects of the plan, including the matching or nonelective contribution formulas.

Current IRS regulations allow safe harbor plans to be amended midyear to reduce or eliminate the safe harbor contributions under the following conditions:

1. The employer is operating at an economic loss for the plan year; or
2. The employer includes in the annual safe harbor notice a reservation of rights provision alerting participants that the plan may be amended during the plan year to reduce or suspend the safe harbor matching or nonelective contribution, and that the participants will be given at least 30 days advance notice before the reduction or suspension becomes effective.

In the wake of the economic hardships employers are facing due to the COVID-19 pandemic, the IRS has issued Notice 2020-52, which provides relief to sponsors of safe harbor plans that are not operating at an economic loss and did not provide the reservation of rights in the annual safe harbor notice for the 2020 plan year. Employers sponsoring these plans may nevertheless amend their plans between March 13, 2020, and August 31, 2020, to reduce or suspend the safe harbor matching or nonelective contribution if the other requirements for making a midyear reduction or suspension of the safe harbor contribution formula are met. These requirements are:

1. Employers must adopt an amendment no later than the date the reduction or suspension is effective (and no later than August 31, 2020, if relying on the eligibility relief in Notice 2020-52 described above); and
2. All eligible employees must be provided a supplemental safe harbor notice:
    a. In the case of safe harbor matching contributions, at least 30 days before the reduction or suspension of the matching contribution becomes effective; or
    b. In the case of safe harbor nonelective contributions, no later than August 31, 2020.

Notice 2020-52 also provides an important clarification that if an sponsor of a safe harbor plan wants to reduce or suspend safe harbor contributions only to highly compensated employees ("HCEs"), notice is still required to all affected HCEs. To be a safe harbor plan, the regulations only require that the safe harbor contributions be made to non-highly compensated employees ("NHCEs"). Technically, these contributions made to HCEs are not safe harbor contributions. However, as Notice 2020-52 makes clear, any amendment to the contribution formula would be a midyear change to a safe harbor plan that affects required safe harbor notice content for which a notice and election opportunity is required under IRS Notice 2016-16.

Accordingly, an updated safe harbor notice and an election opportunity meeting the requirements of Notice 2016-16 still must be provided to affected HCEs, even if the reduction or suspension only applies to HCEs. The IRS notes, however, that the guidance in Notice 2016-16 does not address the impact of the Setting Every Community Up for Retirement Enhancement Act of 2019 (the "SECURE Act"), which eliminated the annual safe harbor notice requirement for plans that utilize nonelective safe harbor contributions. Notice 2020-52 does not state, however, that no notice is required for reductions or suspensions of nonelective contributions to only HCEs.