



Safe Harbor 401(k) Plans: More Mid-Year Flexibility

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Final Treasury regulations released on 11/14/13 harmonize the rules for mid-year changes to safe harbor nonelective and matching contributions.

1. Employers will be able to reduce or suspend *both* nonelective and matching safe harbor contributions mid-year if the employer is "operating at an economic loss". This new standard means that the employer no longer needs to document the health of its industry, or to prove that reduced contributions are needed so that the plan can continue. (The matching contribution provision is new and has a prospective effective date of 1/1/15.)

- Under earlier guidance (2009 proposed regs), safe harbor employer *nonelective* contributions could only be suspended or reduced mid-year if the employer experienced a substantial business hardship. This standard required extensive documentation by the employer.
- Previously, mid-year changes to safe harbor employer *matching* contributions were not permitted under the business hardship standard.

2. Alternatively, mid-year changes to both nonelective and matching safe harbor contributions will be permitted *without regard to the employer's financial condition* if two notice conditions are met: (1) the annual safe harbor notice that is sent to participants before the beginning of the plan year discloses the possibility of a mid-year change, and (2) a 30-day notice is provided before the suspension/reduction happens.



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Earlier guidance (2004 final regs) permitted mid-year changes to safe harbor employer *matching* contributions under this standard, but it did not allow mid-year changes to *nonelective* contributions absent a showing of substantial business hardship.

We recommend modifying your safe harbor notice template, to note that a mid-year reduction or suspension might occur. That way, employers would automatically preserve the right to make mid-year changes.

Of course, if there is a mid-year reduction or suspension, the plan would have to satisfy the ADP/ACP tests for the applicable plan year using the current year testing method.

In addition, the final regulations explicitly note that Treasury has authorized the IRS to issue additional guidance, expanding flexibility to address special circumstances (such as corporate transactions). We are optimistic that the IRS will further liberalize these rules with regard to M&A situations.

FOR MORE INFORMATION

Contact the Ivins, Phillips & Barker

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