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BENEFITS & COMPENSATION UPDATE

By: Norman J. Misher and Ariel B. Woldar

Temporary Relief for 401(k) Safe Harbor Plans - IRS Notice 2020-52

The IRS recently provided temporary relief for 401(k) safe harbor plans where the plan sponsor needs to suspend or reduce safe harbor contributions in the middle of 2020 as a result of the COVID-19 pandemic (the "Safe Harbor Relief Notice").

Current Safe Harbor Rules for Mid-Year Changes

A safe harbor plan is a type of 401(k) plan which is considered to automatically comply with the 401(k) nondiscrimination tests by making safe harbor nonelective or matching contributions to eligible plan participants. Safe harbor plans must provide participants with an annual safe harbor notice which outlines the contributions to be made for the plan year. Mid-year changes to reduce or suspend safe harbor contributions are permitted only if (i) the plan sponsor is operating at an economic loss for the plan year or (ii) the plan's safe harbor notice included a statement that the plan may be amended upon 30 days' notice to take such action. In addition, participants must be provided with a reasonable opportunity to change their elections before any such reduction or suspension may be implemented.

COVID-19 Relief for Suspension or Reduction of Safe Harbor Contributions

The COVID-19 pandemic has created uncertainty for plan sponsors who may be unable to make annual contributions and cannot meet the requirements of the mid-year change rules. In response, the Safe Harbor Relief Notice allows plan sponsors to make a mid-year change if:

- A plan amendment to reduce or suspend safe harbor nonelective and/or matching contributions is adopted between March 13, 2020 and August 31, 2020; and
- A timely safe harbor notice is provided to participants as follows:
 - For matching contributions, the safe harbor notice continues to be required to be provided at least 30 days prior to implementation of the reduction or suspension of the contribution. Further, the reduction or suspension may not be implemented before the plan amendment is adopted and participants are provided with 30 days' advanced notice.

- For nonelective contributions, the safe harbor notice informing participants of the reduction or suspension of safe harbor contributions may be provided no later than August 31, 2020, without regard to the 30 day advance notice requirement. The plan amendment to reduce or suspend safe harbor nonelective contributions must be adopted no later than the effective date for such reduction or suspension.

Once safe harbor contributions are suspended or reduced mid-year, plan sponsors must then comply with the 401(k) nondiscrimination test for the year, using the current year testing method.

COVID-19 Clarification for Highly Compensated Employees

Certain plan sponsors have inquired whether they can reduce safe harbor contributions to their safe harbor plan solely on behalf of highly compensated employees ("HCEs") without triggering the mid-year change rules. The Safe Harbor Relief Notice clarifies that the mid-year change rules do not apply for HCEs; however, plan sponsors are still required to timely provide an updated safe harbor notice and an opportunity for the affected HCEs to change their election.

This update is not intended to provide legal advice with respect to any particular situation, and no legal or business decision should be based solely on its content.

If you have any questions about this update, please contact:

Norman J. Misher	212-903-8733	nmisher@rhtax.com
Allen J. Erreich	212-903-8769	aerreich@rhtax.com
Judy M. Hensley	212-903-8737	jhensley@rhtax.com
Charles C. Shulman	212-903-8687	cshulman@rhtax.com
Chase B. Steinlauf	212-903-8736	csteinlauf@rhtax.com
Ariel B. Woldar	212-903-8718	awoldar@rhtax.com

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