



Flashpoint: New SECURE Safe Harbor 401(k) Plan Rules: You Can Do the Safe Harbor Nonelective Hokey Pokey!

In brand new Notice 2020-86, issued on December 9, 2020, the IRS provides some additional guidance on the post-SECURE safe harbor 401(k) plan rules. One of the items addressed in the Notice demonstrates the IRS's holiday season generosity! As this can help employers for the 2020 plan year end, we thought it was important to bring it to your attention right away.

We have been asked many times in recent months whether an employer that suspended its 401(k) safe harbor contributions during 2020 could use the late safe harbor nonelective adoption rules of SECURE to retroactively reinstate the safe harbor before year end. As this is not addressed in SECURE, we recommended that our clients take a conservative view of the rules and not engage in this practice.

In Notice 2020-86, Q&A-8 of Part IV, the IRS shows its more lenient side. The Q&A asks: if a plan sponsor reduced or suspended its safe harbor nonelective contribution mid-year, can the employer then amend its plan retroactively at year end to re-initiate a safe harbor nonelective contribution for the full year (thereby preserving both the safe harbor and the top heavy waiver for the year)? The IRS responded that the answer is yes! "The retroactive plan amendment rules," the Notice observes, "are not conditioned on whether a prior plan amendment reduced or suspended nonelective contributions during the year." As a result, the IRS does not impose such a requirement.

Of course, one of the consequences of the IRS waiting until now to issue this notice is that, if the plan sponsor wants to retroactively re-adopt a safe harbor nonelective contribution for the 2020 calendar year, we are within 30 days of the year end so the nonelective contribution must be 4% for 2020.

Remember, however, that the SECURE-amended Internal Revenue Code (the "Code") prohibits the retroactive safe harbor amendment for a plan that had matching contributions anytime during the plan year. Therefore, this "hokey pokey" process of going out and then back into the safe harbor for the year is available only if the plan originally provided (and is reinstating) safe harbor nonelective contributions.

Also, keep in mind that, if the amendment to retroactively add a nonelective safe harbor is adopted for a plan year after the tax return due date for such year has passed, the safe harbor contribution is not deductible for the affected year (i.e., it was contributed too late). The contribution may be deducted for the year in which it is deposited, subject to the deduction limits for such year under Code section 404.

Other Safe Harbor Notice Information

The Notice also addressed the question of when any safe harbor notice is required for nonelective contribution plans. In particular, a plan that offers a traditional ACP safe harbor matching contribution (in addition to the 3% safe harbor nonelective contribution) must provide the safe harbor notice. On the other hand, a QACA that uses the safe harbor nonelective contribution to meet the ADP safe harbor does not need to provide the safe harbor notice, even if it has an ACP safe harbor match.

Example: Generous Gifts Company sponsors a traditional safe harbor nonelective 401(k) plan with no other contributions. No notice is required.

Example: Generous Gifts amends its plan to add a discretionary matching contribution that matches deferrals up to 6% of compensation, does not exceed 4% of compensation in amount, and does not increase the rate of match as the rate of deferrals increases. This match qualifies as a safe harbor and is exempt from ACP testing. To take advantage of this provision, Generous Gifts must provide a safe harbor notice before the beginning of the year.

Example: Giving Tree Nursery sponsors a safe harbor nonelective QACA 401(k) plan with a discretionary matching provision. No safe harbor notice is required.

If the plan sponsor wants to preserve the right to suspend contributions during the year, it must give employees a notice about the potential suspension (i.e., a “maybe not” notice), even if a full safe harbor notice is not required. The maybe not notice for 2021 can be given as a standalone notice as late as January 31, 2021.

QACA Increases and Amendment Timing

SECURE changed the maximum automatic deferral percentage for a QACA from 10% to 15% for years following the “initial period.” If the plan contains a QACA provision, determining whether the plan needs to be amended to comply with the SECURE change depends on how the maximum automatic escalation provision has been worded in the plan.

- If the plan provision simply references the maximum escalation percentage in the Code, and the plan sponsor wants to provide for the increase up to 15% after the initial period, no amendment is needed. The reference to the Code takes care of it. However, if the employer wants to limit the automatic increase to something lower than 15%, this limit will need to be specified in the plan.
- If the plan provision specifies the maximum percentage (rather than incorporating this by reference to the law), and the plan sponsor wants to use a different maximum percentage for its automatic escalation provision, the plan will need to be amended to reflect the new maximum rate.

Sponsors have until the end of the 2022 plan year to adopt this amendment, along with the other SECURE-related changes.

Mid-Year Change Provisions

The Notice calls attention to the fact that existing regulations to sections 401(k) and 401(m) have not yet been updated for SECURE. In particular, the Notice advises when the regulations have ceased to apply ... and when they have not.


The “maybe” notice rules do not apply for plan years beginning after 2019, with one exception. If a plan wants to leave open the possibility of using the ACP safe harbor for matching contributions, but not commit to the 3% nonelective ADP safe harbor contribution, the employer can still give a maybe notice, but with a slight twist. The employer will need to give the supplemental notice when it decides to commit to the safe harbor, and it will also be subject to the new retroactive adoption rules. So, if the safe harbor provision is added either during the plan year, but 30 or fewer days before the year end, or after the end of the year, the safe harbor contribution must increase to 4% for that year. (The amendment may provide an automatic reduction of that percentage back to 3% for the second and later plan years.)

PPP Registration

The DOL issued final regulations for pooled plan providers (PPPs) under the new pooled employer plan (PEP) rules of SECURE. The final regulations improved on the proposal in two significant ways. First, it eliminated the need to register before the PPP begins marketing its services. The DOL recognized that some marketing efforts are needed just to test the viability of a PEP being formed and that requiring PPP registration before that process could begin was premature. Under the final rule, a potential PPP must complete its initial registration under the EFAST program no later than 30 days before it begins operating as a PPP.

The second valuable provision of the final regulations was to provide a transition rule that delays the registration deadline for PPPs that begin operations in January. In particular, the regulations permit the initial registration to take place up until January 31, 2021, even if the PPP begins operating as such earlier in that month.

The substance of the registration is substantially the same as under the proposal. The public can now search for registered PPPs on the EFAST system if you're looking for something fun to do over the holidays.



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