Brownstein Hyatt Farber Schreck

Employee Benefits News

June 30, 2020

Oh What A Relief It Is (Not): IRS Guidance on Midyear Amendments of Safe Harbor 401(k) Plans

Employers facing significant economic disruption as a result of COVID-19 can save money for their operational cash flow by reducing or eliminating employer contributions to their 401(k) plans. However, ceasing employer contributions in safe harbor 401(k) plans involves some planning due to the 30-day advance employee notice requirement and midyear amendment restrictions. The IRS now has issued guidance in **Notice 2020-52** (the "Notice") that provides some *limited* temporary relief to these midyear amendment restrictions and notice requirements to allow employers to more easily reduce or cease employer contributions in their safe harbor 401(k) plans. The guidance also applies to 403(b) plans. ***Brownstein Comment:*** Unfortunately, as described below, this guidance is more helpful to safe harbor nonelective contribution plans than it is to safe harbor matching contribution plans.

Temporary Relief for Midyear Reductions or Suspensions of Safe Harbor Nonelective Contributions

A plan that provides safe harbor nonelective contributions will not be treated as failing to meet the safe harbor midyear amendment requirements under Code §§ 401(k) and 401(m) if:

- Between March 13, 2020, and August 31, 2020, the employer adopts a plan amendment to reduce or cease the employer's safe harbor nonelective contributions, AND
- The adoption date is not later than the effective date of the employer contribution reduction or cessation, AND
- The employer distributes a supplement safe harbor notice to eligible employees no later than August 31, 2020.

Brownstein Comment: While this relief is helpful, we believe plans more commonly provide safe harbor matching contributions. For these plans, this guidance isn't as helpful as explained below.

Temporary Relief for Midyear Reductions or Suspensions of Safe Harbor Matching Contributions

A plan that provides safe harbor matching contributions will not be treated as failing to meet the safe harbor midyear amendment requirements under Code §§ 401(k) and 401(m) if:

- Between March 13, 2020, and August 31, 2020, the employer adopts a plan amendment to reduce or cease the employer's safe harbor matching contributions contributions, AND
- The adoption date is not later than the effective date of the employer contribution reduction or cessation, AND

- The required annual safe harbor notice contained statements about the right to amend the plan midyear to reduce or suspend the safe harbor and any such reduction or suspension would not apply until at least 30 days after notice, AND
- The employer distributes a supplement notice to eligible employees at least 30 days in advance of the effective date of the matching contribution reduction or cessation.

Brownstein Comment: Sadly, it appears that the IRS could not find a way to interpret the law to avoid requiring the advance notice of the midyear change in safe harbor matching contributions. As a result, this guidance is only somewhat helpful for employers that sponsor safe harbor matching contribution plans.

Reducing Contributions Made to Highly Compensated Employees

The Notice clarifies that contributions made on behalf of highly compensated employees ("HCEs") are not treated as 401(k) safe harbor contributions. However, a plan amendment to cease employer contribution allocations to HCEs would be inconsistent with the safe harbor plan's annual notice to participants. As a result, the IRS now requires that when a safe harbor plan is amended midyear to reduce or eliminate the employer contribution allocations to HCEs:

- An updated safe harbor notice must be distributed to the HCEs affected by a midyear plan amendment AND
- The affected HCEs must be afforded an opportunity to change their elective deferral elections.

Brownstein Comment: In accordance with Section III.C of IRS **Notice 2016-16**, the updated notice should be distributed "within a reasonable period before the effective date of the change." This timing requirement is deemed satisfied if the updated notice is distributed at least 30 days (and not more than 90 days) before the effective date of the plan amendment. If it is not practicable for the updated safe harbor notice to be provided to the affected HCEs before the effective date of the change, the notice is treated as provided timely if it is provided as soon as practicable, but not later than 30 days after the date the change is adopted.

How We Can Help

Please contact one of us or your regular Brownstein attorney for answers to your questions about how this new guidance affects the administration of your company's safe harbor 401(k) plan, and for assistance in plan amendments and developing related communications to your employees.

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