

**MEMO# 32570**

July 2, 2020

# **IRS Provides Guidance on Mid-Year Reductions and Suspensions of Employer Contributions in Safe Harbor 401(k) Plans, Including Relief Due to COVID-19**

[32570]

July 2, 2020 TO: ICI Members

Pension Committee

Pension Operations Advisory Committee SUBJECTS: Pension

Tax RE: IRS Provides Guidance on Mid-Year Reductions and Suspensions of Employer Contributions in Safe Harbor 401(k) Plans, Including Relief Due to COVID-19

IRS recently issued Notice 2020-52,[\[1\]](#) addressing employers' ability to reduce or suspend employer contributions that are required under safe harbor plans—defined contribution plans using one of the design-based safe harbors for satisfying the nondiscrimination tests of Internal Revenue Code ("Code") sections 401(k) and 401(m).

In the Notice, IRS acknowledges that "many employers are facing unexpected challenges" caused by the COVID-19 pandemic, and that as a result, some employers have communicated to IRS their "need to reduce or suspend contributions under their safe harbor plans in order to satisfy payroll and other operating costs."

The Notice provides (1) a clarification regarding the requirements for safe harbor plans who opt to reduce only the employer contributions made to the accounts of highly compensated employees, and (2) temporary relief for the reduction or suspension of safe harbor contributions, providing employers with more flexibility during the COVID-19 pandemic. These provisions apply on similar terms to 403(b) plans that apply the section 401(m) safe harbor rules.

## **Current Rules**

The safe harbor rules in Code sections 401(k) and 401(m) allow employers sponsoring 401(k) plans to avoid the numerical non-discrimination (ADP and ACP) tests for a plan year if the plan provides during the year for employer matching or nonelective contributions meeting certain requirements. The plan must send a safe harbor notice prior to the start of

the plan year.[\[2\]](#)

Under current IRS regulations, a safe harbor plan can adopt a mid-year plan amendment to reduce or suspend the employer contributions required under the safe harbor, only if:[\[3\]](#)

- the plan is also amended to provide that the ADP test will be satisfied for the entire plan year in which the reduction or suspension occurs;
- the employer either (1) is operating at an economic loss for the plan year, or (2) has included in the plan's safe harbor notice for the plan year a statement that the plan may be amended during the plan year to reduce or suspend safe harbor contributions and that the reduction or suspension will not apply earlier than 30 days after all eligible employees are provided notice of the reduction or suspension;
- the reduction or suspension of safe harbor contributions is effective no earlier than the later of (1) the date the amendment is adopted or (2) 30 days after eligible employees are provided the supplemental notice; and
- eligible employees are given a reasonable opportunity prior to the reduction or suspension of safe harbor contributions to change their elections.

### **Clarification Regarding Reducing Employer Contributions to Highly Compensated Employees**

One option that employers may consider for reducing plan costs is to reduce the employer contributions made on behalf of highly compensated employees (HCEs). The Notice confirms that such a mid-year change that reduces only contributions made on behalf of HCEs is permitted and the plan will not be required to meet the conditions for safe harbor contribution reductions or suspensions described above (*i.e.*, the requirements of Treasury regulation section 1.401(k)-3(g)).[\[4\]](#)

If a plan makes a mid-year change to reduce contributions for HCEs only, the plan must provide an updated safe harbor notice and an election opportunity to HCEs to whom the mid-year change applies.[\[5\]](#)

### **Temporary Relief Regarding Reducing or Suspending Employer Contributions Required in Safe Harbor Plans.**

To assist employers during the COVID-19 pandemic, the Notice also provides temporary relief for safe harbor plans that adopt an amendment between March 13, 2020 and August 31, 2020, to reduce or suspend safe harbor employer contributions.

First, a plan that adopts an amendment to reduce or suspend safe harbor matching contributions or safe harbor nonelective contributions will not be treated as failing to satisfy the requirement that the employer either:

1. is operating at an economic loss for the plan year, or
2. has included in the plan's safe harbor notice for the plan year a statement that (a) the plan may be amended during the plan year to reduce or suspend the safe harbor contributions and (b) the reduction or suspension will not apply until at least 30 days after all eligible employees are provided notice of the reduction or suspension.

Second, with respect to a reduction or suspension of nonelective contributions only,[\[6\]](#) the plan will not be treated as failing to satisfy the safe harbor notice requirements merely

because a supplemental notice is not provided to eligible employees at least 30 days before the reduction or suspension of safe harbor nonelective contributions is effective, provided that

1. the supplemental notice is provided to eligible employees no later than August 31, 2020, and
2. the plan amendment that reduces or suspends safe harbor nonelective contributions is adopted no later than the effective date of the reduction or suspension of safe harbor nonelective contributions.

Shannon Salinas  
Assistant General Counsel - Retirement Policy

#### endnotes

[1] Notice 2020-52 is available at <https://www.irs.gov/pub/irs-drop/n-20-52.pdf>.

[2] Note that the SECURE Act eliminated the safe harbor notice requirement for 401(k) safe harbor plans using nonelective contributions. See ICI Memorandum No. 32118, dated December 20, 2019, available at [https://www.ici.org/my\\_ici/memorandum/memo32118](https://www.ici.org/my_ici/memorandum/memo32118).

[3] See Treasury regulation section 1.401(k)-3(g). For a description of the Treasury regulations that permit mid-year suspension or reduction of safe harbor contributions, see ICI Memorandum No. 27714, dated November 22, 2013, available at [https://www.ici.org/my\\_ici/memorandum/memo27714](https://www.ici.org/my_ici/memorandum/memo27714).

[4] This treatment is due to the fact that contributions made on behalf of HCEs are not contributions required under the safe harbor, according to the definition of “safe harbor contributions.”

[5] If a mid-year change affects required safe harbor notice content, then a new notice describing the change and its effective date must be provided to each employee that is entitled to receive the safe harbor notice. These employees must also be given a reasonable opportunity to change their contribution election before the effective date of the change (or in certain limited cases, as soon as practicable after the date the updated notice is provided to the employee). See ICI Memorandum No. 29696, dated February 11, 2016, available at [https://www.ici.org/my\\_ici/memorandum/memo29696](https://www.ici.org/my_ici/memorandum/memo29696), describing IRS [Notice 2016-16](#).

[6] The Notice does not extend this relief for a mid-year reduction or suspension of safe harbor matching contributions because matching contribution levels communicated to employees directly affect employee decisions regarding contributions.

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