

Revisiting the Rules for Suspension or Reduction of Safe Harbor Contributions to a 401(k) Plan

In response to the COVID-19 crisis, sponsors of safe harbor 401(k) plans should be reminded that the safe harbor contributions (either nonelective or matching) can be suspended or reduced for the remainder of the current plan year. Safe harbor contributions which are suspended or reduced are not required to be restored.

To qualify for this relief, the sponsor must satisfy either one of the following options.

OPTION 1: The safe harbor notice that was provided at the beginning of the year must include a statement to the effect that the sponsor may amend the plan during the year to suspend or reduce the safe harbor contribution. The statement in the notice must also provide that the reduction or suspension will not apply until at least 30 days after eligible employees are provided the notice of suspension or reduction.

OPTION 2: The employer may suspend or reduce the safe harbor contribution if it determines it is operating at an "economic loss". Economic loss is not defined. Presumably this means that expenses exceed income on the sponsor's financial statements for the year to date. Additionally, the economic loss test is applied taking into account all related employers that would be required to be aggregated for coverage testing purposes (e.g., members of the control group).

Assuming that one of the options described above would be satisfied, the procedures to implement a suspension or reduction include the following.

1. An amendment to the plan is necessary implement the suspension or reduction. The effective date of the amendment cannot earlier than 30 days after the employees are provided the supplemental notice (see item 2 below) and no earlier than the date that the amendment is adopted. For example, the employer maintains a calendar year 401(k) safe harbor plan. The employer provides the supplemental notice notifying the employees that the safe harbor contributions will be suspended on March 27th. The earliest date that the amendment may be effective would be April 27th, and only if the amendment is adopted by April 27th. If the amendment is adopted after April 27th, the amendment cannot be effective until the adoption date of the amendment.

The amendment must also include provisions for testing the plan under the ADP and ACP test for the entire plan year using the current year testing method. This is true even if the plan was using a matching method and reduced the match to a level which would otherwise satisfy the nonelective contribution safe harbor.

2. A supplemental notice must be provided to all eligible employees (not just those make deferrals). The notice must explain the consequences of the amendment, the procedures by which participants can make changes to their deferral election and the effective date of the amendment.

3. The sponsor must fund the safe harbor contributions through the effective date of the amendment, in accordance with the terms of the plan.

If you have questions, please contact Bodman attorney Dave Walters at **(248) 743-6052** or dwalters@bodmanlaw.com