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# TEMPORARY Safe Harbor 401(k) Plan Mid-Year Amendment Relief

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By: Jennifer R.M.C. Watson

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## EXECUTIVE SUMMARY

Internal Revenue Service (“IRS”) Notice 2020-52 provides clarification that mid-year changes to reduce or suspend safe harbor 401(k) plan contributions to highly compensated employees (“HCEs”) is permissible provided the HCEs are given a supplemental safe harbor notice 30 days in advance and the HCEs have an opportunity to change their contributions.

In addition, employers may now reduce or suspend 401(k) safe harbor matching or nonelective contributions if the 401(k) plan is amended to reduce or suspend such contributions on or by August 31, 2020. Thirty day advance supplemental safe harbor notice of the mid-year change is not required for reductions or suspensions of nonelective contributions as long as it is provided to all eligible employees by August 31, 2020. However, the 30 day advance supplemental safe harbor notice of the mid-year change is required for reductions or suspensions of matching contributions, along with providing employees the option to change their elections.

Typically, a safe harbor 401(k) plan cannot be amended mid-year except in certain circumstances under the internal revenue code (“Code”) and IRS Notice 2016-16. If an impermissible amendment is made, the plan will not satisfy the requirements of the Code and lose its safe harbor status. Notice 2016-16 provides guidance on mid-year amendments to safe harbor plans, including conditions for reducing or suspending safe harbor contributions. One of the main conditions for mid-year amendments to safe harbor 401(k) plans is 30 days advance notice to all eligible employees of the amendments and permitting employees to change their elections during this time.

To help alleviate the negative business impact that employers are having due to COVID-19, the IRS released Notice 2020-52 to provide employers with more flexibility.

## I. MID-YEAR CHANGES FOR ONLY HCES

Notice 2020-52 clarifies that any amendment or change that reduces or suspends contributions made to only HCEs are not “safe harbor” contributions as “safe harbor” contributions are meant to benefit non-HCEs. Prior to this guidance, it was thought that reduction to safe harbor contributions to only HCEs would cause a 401(k)

plan to lose safe harbor status. Thus, contributions to HCEs can be reduced or suspended at any time. However, to satisfy the notice and election provisions of the Code, the impacted HCEs must be given 30 days advance notice of the change and an opportunity to change their elections.

## II. MID-YEAR AMENDMENTS APPLICABLE TO ALL PARTICIPANTS

Under the Code and IRS Notice 2016-16, changes to safe harbor plans mid-year to reduce or suspend safe harbor matching and nonelective contributions to non-HCEs can only occur if the employer meets (“Required Conditions”):

1. is operating at an economic loss for the plan year; or
2. included in the 401(k) plans safe harbor notice a statement that “the employer may suspend or reduce the current year’s safe harbor matching or nonelective contributions and the suspension or reduction will not apply earlier than 30 days after all eligible employees are provided notice of the suspension or reduction” (“Statement”).

The IRS is providing temporary relief to permit employers to amend their safe harbor 401(k) plans to reduce safe harbor matching and nonelective contributions between March 13, 2020 and August 31, 2020. Employers that amend their 401(k) plans by August 31, 2020 do not need to satisfy the Required Conditions.

Employers that amend their 401(k) plans to reduce nonelective safe harbor contributions do not need to give the required 30 days advance notice of the amendment to all eligible employees, provided the notice is sent to all eligible employees by August 31, 2020 and employees can thereafter change their elections.

Employers that amend their 401(k) plans to reduce matching safe harbor contributions must still give the required 30 days advance notice of the amendment and permit changes to employee’s elections during this time.

If you have a safe harbor 401(k) plan and are considering reductions in matching or nonelective contributions, now maybe the best time to make an amendment to your 401(k) plan during the temporary relief period. Amending a 401(k) plan can take time, depending upon the third party service provider you are using for your 401(k) plan. Thus, a decision should be made soon to process the amendment during the temporary relief period.

Please contact Jennifer R. Watson or Frank J. Del Barto if you have questions regarding mid-year amendments to 401(k) plans.