

Relief for Safe Harbor 401(K) Plans

This FYI discusses new relief available for businesses facing economic hardships. As background, regular 401(k) plans must comply with nondiscrimination tests that limit highly compensated employee contributions. Safe harbor plans generally promise a fixed contribution (or fixed match) in exchange for relief from nondiscrimination testing. Under existing rules, a safe harbor match may be eliminated prospectively with notice given 30 days in advance to eligible employees. The plan is then no longer a safe harbor plan and must meet the nondiscrimination testing for the entire year.

Under the new rules, if a business has a 401(k) plan with safe harbor nonelective contributions, the plan may be able to reduce or suspend the safe harbor contribution if the employer has a substantial business hardship. As with the match elimination or reduction, there is a 30 day notice requirement. The relief only applies prospectively.

A substantial business hardship includes evaluation of issues such as whether the employer is operating at an economic loss, whether there is substantial unemployment or underemployment in the trade or business and in the industry concerned, whether the sales and profits of the industry are depressed or declining, and whether it is reasonable to expect that the plan will be continued only if the reduction or suspension is made.

If hardship amendments are desired, an employer first should evaluate the effect of top-heavy rules that also may require minimum contributions.

What should employers do?

Check with counsel to determine if the employer meets the definition of substantial business hardship.

- Check with counsel regarding the effect of top-heavy rules and compensation and contribution limits before a decision to amend the plan is made.
- If hardship requirements are met, a plan amendment is required and 30 day notice must be provided. Employees must be allowed a reasonable opportunity to change their plan elections.
- Discrimination testing may be required if the suspension or reduction is made.

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