NEW SECURE ACT GUIDANCE FOR SAFE HARBOR PLANS

Hodgson Russ Employee Benefits Newsletter
December 30, 2020

Attorneys

Peter Bradley
Michael Flanagan
Richard Kaiser
Ryan Murphy
Amy Walters

Practices & Industries

Employee Benefits

The IRS published a series of questions and answers in recently issued Notice 2020-86 intended to assist small businesses and other employers that maintain safe harbor 401(k) and 403(b) plans comply with certain rule changes made by the SECURE Act. The Notice has been made available until the IRS is able to develop more comprehensive regulations. The rule changes addressed by the Notice are:

- The increase from 10 percent to 15 percent of the maximum automatic elective deferral under a qualified automatic enrollment safe harbor plan or "QACA";
- The elimination of certain safe harbor notice requirements for plans that provide safe harbor nonelective contributions;
- The new provisions allowing for retroactive adoption of safe harbor status.

15% Deferral Maximum for Automatic Enrollment Safe Harbor Plans

- QACA safe harbor plans are *not* required to increase to 15% the maximum qualified percentage of compensation used to determine automatic elective contributions – the increase is optional. The qualified percentage under a QACA safe harbor plan maybe any percentage of compensation determined under the plan, as long as the percentage is applied uniformly, does not exceed 15 percent (or 10 percent during the initial period of automatic elective contributions), and satisfies certain minimum percentage requirements specified in the Internal Revenue Code (the "Code").
- A QACA safe harbor plan that incorporates the maximum qualified percentage by reference to the Code will not fail to operate in accordance with its terms if it continues to apply the maximum qualified percentage of 10 percent (instead of the new maximum of 15 percent). But a timely SECURE Act amendment that explicitly and retroactively provides that the plan's maximum qualified percentage is and has been 10 percent must be adopted. The SECURE Act amendment deadline generally is the last day of the 2022 plan year.

Elimination of Certain Safe Harbor Notice Requirements

- The SECURE Act eliminated the safe harbor notice requirement for traditional safe harbor ADP plans that rely on nonelective contributions to satisfy either ADP safe harbor. But the Notice clarifies that the SECURE Act did *not* eliminate

the safe harbor notice requirements for a traditional safe harbor ACP plan that satisfies the safe harbor nonelective contribution requirements. So:

- If a traditional safe harbor plan satisfies the safe harbor *nonelective* contribution requirements, but also provides nonsafe harbor matching contributions that are *not* required to satisfy the actual contribution percentage (ACP) test, then the plan still must satisfy the safe harbor notice requirements. The result, however, is different for a QACA safe harbor plan in this situation – the QACA safe harbor plan would not be required to satisfy the safe harbor notice requirements.
- And, if a traditional safe harbor plan satisfies the safe harbor *nonelective* contribution requirements, but also provides nonsafe harbor matching contributions that *are* required to satisfy the ACP test, then the plan need not satisfy the safe harbor notice requirements.

- The SECURE Act does not change any other requirements that may apply to a plan that satisfies the safe harbor nonelective contribution requirements applicable to a traditional or QACA safe harbor plan.
- Mid-Year Amendment/Suspension Rules
  - If a plan does not provide a safe harbor notice for a plan year beginning after 2019 because safe harbor notice requirements no longer apply to the plan, but the employer nevertheless provides a notice that (i) includes a statement that the plan may be amended mid-year to reduce or suspend safe harbor nonelective contributions, and (ii) otherwise satisfies the requirements for a safe harbor notice, the plan will not fail to satisfy the requirement that the statement regarding the possible mid-year reduction or suspension of safe harbor nonelective contributions be included in a safe harbor notice. Solely for the first plan year beginning after 2020, the notice is considered timely if given to each eligible employee by the later of 30 days before the beginning of the plan year or January 31, 2021.
  - If an employer amends a traditional or QACA safe harbor plan to reduce or suspend the plan's safe harbor nonelective contributions during a plan year, but later amends the plan to readopt the safe harbor nonelective contributions for the entirety of the plan year, then as long as the subsequent amendment is adopted at least 30 days before the plan year closes the plan will not be required to satisfy the ADP or ACP test (as applicable) for the plan year or be subject to the top-heavy rules for the plan year.

<u>Retroactive Adoption of Safe Harbor Status</u>

- Effective for plan years beginning after 2019, a plan generally may be amended during a plan year to adopt a safe harbor design for the plan year using safe harbor *nonelective* contributions if the plan is retroactively amended at least 30 days before the plan year closes – notably, the guidance was published after the 30-day deadline for the calendar year 2020 plan year has passed which limits a calendar year plan's options in 2020. However, a retroactive amendment may be adopted as late as the last day for distributing excess contributions for the plan year, but only if the amount of the nonelective contribution the employer is required to make under the arrangement for the plan year with respect to any eligible employee is an amount equal to at least *four* percent of the employee's compensation.

- Note that because the SECURE Act did not eliminate the safe harbor notice requirements for a traditional ACP safe harbor plan that satisfies the safe harbor nonelective contribution requirements (see discussion above), the new retroactive adoption rules, in that case, do not supersede the current regulations – that safe harbor plan remains subject to the pre-SECURE Act safe harbor notice requirements.
- If a plan is retroactively amended to adopt safe harbor nonelective contributions of at least four percent of compensation for a plan year, and if the safe harbor nonelective contributions are contributed to the plan *after* the tax filing deadline for the prior taxable year (including extensions) but before the deadline for distributing excess contributions for the plan year, the safe harbor nonelective contributions will *not* be deductible for the prior taxable year – they still must be contributed by the tax filing deadline to be deductible.

Notice 2020-86 applies on similar terms to 403(b) plans that apply the ACP safe harbor rules.

The Treasury Department and the IRS have invited comments on the guidance in Notice 2020-86 – those comments must be submitted in writing on or before February 8, 2021.

While Notice 2020-86 does not make for particularly light reading, for employers with plans that might be looking to retroactively adopt or readopt safe harbor features for the 2020 plan year, or might looking to implement safe harbor features for the upcoming 2021 plan year, it provides valuable guidance on the notice requirements and amendment deadlines.