



One Minute Memo®

IRS Issues Proposed Regulations For Suspension or Reduction of Safe Harbor Non-Elective Contributions

On May 18, 2009, the IRS issued proposed regulations that provide much-needed guidance for employers that sponsor 401(k) plans with safe harbor non-elective contribution features (e.g., a minimum 3% company non-elective contribution that is fully vested at all times). The proposed regulations permit such an employer that incurs a substantial business hardship to suspend or reduce the safe harbor non-elective contributions. Such a change may now be made during a plan year in lieu of terminating the plan. The proposed regulations are generally consistent with final IRS regulations that permit an employer to suspend or reduce safe harbor matching contributions.

Under the proposed regulations, an employer can suspend or reduce safe harbor non-elective contributions mid-year only if it has incurred a substantial business hardship. The factors taken into account include (but are not limited to) the following:

- 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 concerned are depressed or declining
- Whether it is reasonable to expect that the plan will be continued only if the safe harbor contributions are suspended or reduced

Similar to the IRS regulations for the suspension or reduction of safe harbor matching contributions, the plan must also comply with the following requirements:

- All eligible employees must be provided a supplemental safe harbor notice of the reduction or suspension of the company contributions
- The reduction or suspension of safe harbor non-elective contributions is effective no earlier than the later of thirty (30) days after eligible employees are provided the supplemental notice and the date the amendment is adopted
- Eligible employees are given a reasonable opportunity (including a reasonable period after receipt of the supplemental safe harbor notice) prior to the reduction or suspension to change their deferral elections for pre-tax contributions

- The plan is amended to provide that the ADP and ACP tests will be satisfied for the entire plan year in which the reduction or suspension occurs, using the current year testing method
- The plan provides the safe harbor non-elective contributions for compensation paid through the effective date of the amendment
- If the plan would otherwise be top-heavy and was relying on the safe harbor to be exempt from the top-heavy rules, it will need to meet the minimum contribution and other top-heavy requirements

For employers who wish to suspend or reduce their safe harbor non-elective contributions, the proposed regulations are effective for plan amendments adopted after May 18, 2009, and may be relied on pending the issuance of final regulations. If more onerous guidance is issued in the future, the IRS has indicated that it will not apply the more restrictive rules retroactively.

For more information, please contact the Seyfarth attorney with whom you work, or any Employee Benefits attorney on our website (www.seyfarth.com/EmployeeBenefits).



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