



# CORONAVIRUS | COVID 19

## *IMPORTANT INFORMATION*

### REDUCING OR SUSPENDING EMPLOYER CONTRIBUTIONS TO A RETIREMENT PLAN

With the COVID-19-related economic/business disruption, we are receiving lots of questions and calls regarding an employer's ability to reduce or suspend employer-provided contributions on a mid-year basis (i.e., during a plan year). **We've provided general information below, which would also apply to adopters of a multiple employer plan.** Depending upon the specific terms of your plan documents and participant disclosures/communications and other facts and circumstances, different approaches may be advised.

### NON-SAFE HARBOR RETIREMENT PLANS

For retirement plans that are not "safe harbor" plans, employers generally have significant flexibility to reduce or suspend matching or nonelective (i.e., non-matching) contributions.

#### **Discretionary Employer Contributions**

If employer contributions are entirely discretionary, contributions may be reduced or suspended at any time and a plan amendment may not be necessary. There is no requirement to provide advance notice to participants; however, the reduction or suspension should be adequately communicated to participants.

#### **Fixed Employer Contributions**

Fixed employer contributions are contributions that the plan document requires an employer to provide. A typical plan provision may state "The Employer **will** make a matching contribution equal to 50% of a Participant's elective contributions..." or "The Employer **will** make a nonelective contribution equal to 3% of Compensation..."

Generally, plans that are not safe harbor plans that have a fixed employer contribution (and that are not safe harbor plans) can be amended mid-year to reduce or suspend the fixed contribution on a prospective basis. Participants will be entitled to any contributions earned under the terms of the plan prior to the amendment. Advance notice to participants is not required; however, participants should be provided with appropriate communications as soon as possible describing the reduction or suspension of employer contributions.



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### SAFE HARBOR PLANS-MATCHING AND NONELECTIVE CONTRIBUTIONS

An employer may reduce or suspend its safe harbor contribution during a plan year, but only if

- (i) the employer includes in its annual safe harbor notice delivered to employees a statement that the plan may be amended in the upcoming year to reduce or suspend safe harbor contributions, or
- (ii) the employer is operating at an “economic loss” (generally, the employer would need to demonstrate that its expenses exceed income for the year).

*Most safe harbor notices have been updated to include a reservation of rights to reduce or suspend safe harbor contributions, but check to make sure so that it's not necessary to rely on an “economic loss.”*

Eligible employees must receive a supplemental advance notice of the reduction or suspension and must have a reasonable opportunity to change their deferral election before the suspension or reduction occurs.

The plan must be amended to reflect the reduction or suspension. The suspension or reduction cannot be effective until 30 days after the supplemental notice is distributed to participants or the date of the plan amendment, if later.

Once the safe harbor contribution is reduced or suspended, the safe harbor contribution must be funded from the period beginning at the start of the plan year through the date the suspension or reduction becomes effective (generally, 30 days after the date the supplemental notice is distributed to participants).

#### **Testing Required**

If a safe harbor contribution is reduced or suspended during the plan year, the plan will be subject to ADP and ACP nondiscrimination testing for the full plan year, using the current year testing method. If the ADP or ACP nondiscrimination tests are not satisfied, refunds may have to be made to participants who are considered “highly compensated employees” under the Internal Revenue Code (“Code”).



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### **Look out for Top-Heavy**

If safe harbor contributions are discontinued, the employer may be required to make a top-heavy minimum contribution at the end of the plan year. This contribution could be as much as 3% of wages for all eligible participants who are not “key employees” (as described in the Code). It is strongly advised that an employer’s top-heavy status be reviewed prior to reducing or suspending the safe harbor contribution, as the top-heavy minimum may be more expensive than the cost of the safe harbor contributions.

### **Reinstatement of Safe Harbor**

If an employer eliminates safe harbor contributions during a plan year, flexibility provided under the SECURE Act (enacted in December, 2019) makes it possible for the employer to reinstate the safe harbor during the year (or even after the plan year-end) if the employer agrees to provide the safe harbor nonelective contribution.

### **ADDITIONAL GUIDANCE/RELIEF?**

Keep in mind that the situation is fluid and additional guidance or relief may be provided. For example, the American Retirement Association is calling on the Treasury Department to provide additional relief for plan sponsors, including relief with respect to the reduction or suspension of safe harbor contributions and the application of the top-heavy rules.

*The information provided above is for general information and not intended to be legal advice.*

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