

The SECURE Act, which became law in December 2019, made significant changes to rules related to safe harbor nonelective contributions, generally reducing the administrative burden associated with this type of plan design and providing employers with greater flexibility. Although these changes are effective for plan years beginning after December 31, 2019, the IRS has not provided guidance or updated the applicable regulations. As a result, plan sponsors may want to wait until guidance has been issued before making certain changes to their plans.

Caution: *The law changes discussed below have no impact on plans that provide for safe harbor matching contributions. There were no changes made to the rules applicable for these plans.*

What changes were made?

- The annual participant notice requirement was eliminated for plans that provide for safe harbor nonelective contributions.
- Employers now have the option of adding a 3% safe harbor nonelective contribution (used to satisfy the ADP test) up to 30 days before year-end without providing the advance “maybe” or follow-up notice.
- Additionally, employer now have the option of adding a 4% safe harbor nonelective contribution after the 30-day deadline but on or before the deadline for correcting ADP testing failures (the last day of the following plan year) so that the ADP test is deemed satisfied.

If the plan provides for additional matching contributions intended to satisfy the ACP safe harbor requirements, do they still need to provide the annual safe harbor notice?

Yes, if the plan is designed so that any matching contributions (fixed or discretionary) will satisfy the requirements to be exempt from the ACP test, the safe harbor notice would still be required.

If an employer makes a permissible change to an existing safe harbor nonelective contribution plan mid-year, do they need to provide an updated safe harbor notice?

It does not appear so, provided the plan doesn't also provide for matching contributions intended to satisfy the ACP safe harbor requirements. Presumably, this also means that participants will not be required to be provided the opportunity to make changes to their deferral elections prior to the change, but the IRS has not yet provided updated guidance on this point.

Can an employer remove their current safe harbor nonelective provision and take a “wait and see” approach?

It appears so, absent future IRS guidance to the contrary. While the new law specifically prohibits a plan that provided for safe harbor matching contributions at any time during the plan year from adopting a safe harbor nonelective contribution retroactively for that same year, it makes no such distinction with respect to plans that provided safe harbor nonelective contributions for a portion of the plan year.

Can an employer remove their current safe harbor nonelective provision and take a “wait and see” approach (continued)?

Keep in mind, the plan would still need to meet the regulatory requirements to reduce or suspend the safe harbor nonelective contribution mid-year, and again, the IRS has not yet updated the regulations. Presumably, however, the pre-plan year notice (regarding the employer’s right to reserve the ability to reduce or suspend safe harbor contributions mid-year) and the 30-day advance (mid-year) notice would not be required (since the general notice requirement was eliminated), nor would participants be required to be provided the opportunity to make changes to their deferral elections prior to the change.

The plan sponsor would still need make the safe harbor nonelective contribution through the effective date of the amendment, and the plan would also need to be amended to provide that the ADP and ACP tests would be satisfied for the plan year using the current year testing method. We anticipate additional guidance from the IRS on this issue. Hopefully, it will come sooner rather than later.

How does the new 4% safe harbor nonelective contribution work?

Under the new rules a traditional 401(k) can be amended after the 30-day deadline but any time on or before the last day of the following plan year to provide for a 4% safe harbor nonelective contribution so that the ADP test is deemed to be satisfied. Essentially, this change allows any traditional 401(k) plan to be a “maybe” safe harbor plan, without any participant notice requirements.

This affords plan sponsors much greater flexibility, giving them the ability to amend the plan after the ADP test has been performed so they can weigh the cost of the 4% safe harbor contribution against the refunds that would otherwise be issued to the plan’s highly compensated employees.

Does a plan that adopts a 4% safe harbor nonelective contribution retroactively for the prior year have to make a 4% safe harbor nonelective contribution for the current year?

No, the safe harbor contribution would only be required for the prior year. The employer could still take a “wait and see” approach for the current year.

Were there any other changes to safe harbor plans?

Yes. The SECURE Act increased the maximum default deferral rate from 10% to 15% for QACA safe harbor plans.

How can I learn more?

If you would like to learn more about the new rules, please contact us.