

## Mid-Year Safe Harbor Plan Changes

IRS guidance will now accommodate more mid-year changes in 401(k) safe harbor plans as long as specified notices are provided to participants and election opportunities are offered when making the change. Certain mid-year changes continue to be prohibited — a change to vesting service, certain changes to reduce the group eligible to receive safe harbor contributions, changes in the type of safe harbor, and certain changes to matching contribution rates.

### Background

Like most qualified retirement plans, 401(k) plans are generally subject to tests that prove the allocations provided under the plan are not impermissibly weighted in favor of highly compensated employees (HCEs). Over time, design-based safe harbor options have been added to the qualification requirements that allow these plans to avoid calculation-intensive annual tests and the possibility of having to make and report refunds to HCEs if the tests are not satisfied. IRS regulations specify conditions that must be met to use the safe harbors, including a requirement that the conditions for meeting the safe harbor be set and communicated to eligible employees a reasonable period in advance of the start of the plan year. In addition, certain plan provisions must remain in effect for a 12-month plan year unless an exception applies such as a short plan year or certain hardship situations.

Plan sponsors have asked whether mid-year changes are indeed prohibited when changing provisions that do not affect “required safe harbor notice content,” that is, information that the regulations require in the safe harbor notice. Or, if changes — such as improving benefits — would violate the safe harbor rules.

### More Changes Now Permitted

In [Notice 2016-16](#), the IRS has expanded the situations in which mid-year changes are permitted. In general, a mid-year change is permitted if it does not involve the required safe harbor notice content or, if it does change that content, an updated safe harbor notice describing the mid-year change and its effective date is provided to each applicable employee within a reasonable period prior to the change. In addition, affected employees must be given a reasonable opportunity to make or change their elective deferral election.

The guidance applies to plans that use the 401(k) design safe harbors as well as plans that use 401(m) safe harbors for matching contributions — including 403(b) plans.

**Comment.** The guidance does not affect any of the changes subject to specific requirements in the current regulations such as an amendment to suspend or reduce safe harbor contributions and change to non-safe harbor status.

### Notice Timing

The deadline for providing an updated safe harbor notice describing the mid-year change is based on facts and circumstances, but is deemed satisfied if provided at least 30 days (and not more than 90 days) before the effective date of the change. If that timing is not practicable, the notice is treated as provided timely if provided as soon as practicable, but no later than 30 days after the date the change is adopted. For example, it would not be practical to provide notice 30 days in advance in the case of a mid-year change to increase matching contributions retroactively for the entire plan year. An updated safe harbor notice is not required if the required information about the mid-year change and its effective date was included with the annual safe harbor notice provided before the beginning of the plan year.

### Election Opportunity

Each employee required to be provided an updated safe harbor notice must also be given a reasonable opportunity to change their cash or deferred election (and/or any after-tax employee contribution election). A 30-day election period in advance of the effective date of the change is deemed reasonable for this purpose. If it is not practicable to offer the election opportunity before the effective date of the change, a 30-day election period that begins as soon as practicable after the date the updated notice is provided but not later than 30 days after the change is adopted is deemed reasonable. As with the notice requirement, an example would be the case of a mid-year change to increase matching contributions retroactively for the entire plan year.

**Comment.** For plans that permit deferral changes at any time, the requirement to give affected employees a reasonable opportunity to make or change their elective deferral election is presumably satisfied. If deferral election changes are limited, a mid-year change will create new opportunities that will need to be reflected in plan provisions.

### No Notice or Election Needed if not in Notice

The IRS guidance makes clear that mid-year changes can be made without giving an additional safe harbor notice or new election opportunities for changes to information that is not required safe harbor notice content, even if that information is provided in the plan's safe harbor notice. For example, notice and election opportunity would not need to be provided to change plan rules about quarterly versus monthly entry dates or arbitration of disputes because these issues are not required in the annual safe harbor notice.

### Prohibited Changes

Absent a change mandated by a law change or court decision, certain changes are not permitted. These include mid-year changes to:

- Increase the number of years of service required to be vested in the participant's safe harbor contribution account under a QACA safe harbor



- Reduce the number or otherwise narrow the group of employees eligible to receive safe harbor contributions — except for employees who are not already eligible for safe harbor contributions as of the date the change
- The type of safe harbor plan, for example, a change from a traditional § 401(k) safe harbor plan to a QACA 401(k) safe harbor plan (however the addition of an automatic enrollment feature to a traditional safe harbor plan is permitted)
- Increase a formula used to determine matching contributions (including a relevant change in the definition of compensation), or to permit discretionary matching contributions (does not apply if, at least three months prior to the end of the plan year, the change is adopted, the updated safe harbor notice and election opportunity are provided, and the change is made retroactive for the entire plan year)

## Effective Date and Comments

The guidance is effective for changes made on and after January 29, 2016. IRS asks that comments on additional guidance that is needed be submitted by April 28, 2016. In particular, IRS is interested in comments on the need for guidance for mergers and acquisitions and for plans that include an eligible automatic contribution arrangement.

## In Closing

This is a welcome change from a paradigm that only allowed changes specifically permitted by IRS to one where all are permitted unless specifically prohibited.

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