Details of the SECURE Act: Rules Related to Safe Harbor Plans

RETIREMENT MANAGEMENT SERVICES, LLC
905 Lily Creek Road Louisville, KY 40243

1/14/2020

SECURE Act: Rules Related to Safe Harbor Plans

Annemarie Keehn, ERPA, QPA, QKA

In late December of 2019 President Trump signed into law a budget bill to fund the government for the remainder of the fiscal year. Included as an addition to the bill was the SECURE Act (Setting Every Community Up for Retirement Enhancement Act of 2019). The intent of the Act is to amend the Internal Revenue Code of 1986 to encourage retirement savings.

Section 103 of the Act amends the Internal Revenue Code regarding the deadline for an employer to elect safe harbor status and eliminates the requirement for a safe harbor nonelective notice.

Employers that make a safe harbor contribution to their 401(k) plan in order to satisfy certain nondiscrimination tests have historically been required to amend the plan document to add the safe harbor contribution before the beginning of the plan year. There are exceptions which allow for the election to be made mid-year for the first year of the plan's existence or the first year in which 401(k) deferrals are added to an existing profit sharing plan. The safe harbor contribution may be made in the form of a nonelective contribution equal to at least 3% of compensation, which is allocated to participants regardless of whether or not they contribute some of their own pay to the plan, OR in the form of an employer matching contribution that matches a prescribed level of employee deferrals.

Under the SECURE Act, employers will be given additional flexibility on the timing for electing a safe harbor nonelective contribution. Since a safe harbor nonelective contribution is not contingent on employee elective deferrals, amending the plan late in the plan year - or even in the following plan year – to retroactively add the safe harbor contribution does not adversely impact employees. However, the new rules do not provide for any delayed amendment for a safe harbor matching contribution. If the plan intends to satisfy testing by making a safe harbor match, the plan must typically still be amended before the beginning of the plan year. This ensures that employees are aware of the match before it becomes effective, and will have time to adjust their 401(k) deferral elections accordingly in order to take advantage of the match.

The new rules provide that:

- An employer may amend a plan to provide for a safe harbor nonelective contribution of at least 3% of compensation at any time before the 30th day before the close of the plan year. This means that a calendar year plan will have until December 1st to elect to make a 3% nonelective safe harbor contribution for the current year.

- An employer may amend a plan to provide for a safe harbor nonelective contribution of at least 4% of compensation at any time before the last day by which the employer could distribute any excess contributions for the plan year, which is generally the last day of the plan year following the plan year for which the contribution applies. This means, for example, that a 2020 calendar year plan may be amended as late as December 31, 2021 to make a safe harbor nonelective contribution for the 2020 plan year, *as long as the employer is willing to make a 4% contribution, rather than a 3% contribution*.

- Adding the safe harbor nonelective contribution after the beginning of the plan year only allows the plan to satisfy the ADP test. If the employer also makes a matching contribution, the match will still be subject to ACP testing for the year.

- Employers who use an Automatic Contribution Arrangement (ACA), whereby employees are automatically enrolled in the plan unless they opt out, may also take advantage of the additional time noted above to amend for an employer safe harbor nonelective contribution. Plans that utilize an ACA in combination with a safe harbor contribution are referred to as Qualified Automatic Contribution Arrangements (QACAs). A QACA plan is exempt from certain testing as long as employees are automatically enrolled at percentages that meet specific guidelines and the employer provides a safe harbor matching or nonelective contribution that meets certain requirements. Under the SECURE Act, if employees have been automatically enrolled during the year at default levels that meet QACA requirements, then the plan will have additional time to amend to add a safe harbor nonelective contribution for the plan year and effectively convert the plan from an ACA to a QACA. However, this additional flexibility in the timing requirement for the amendment is only allowed if the employer is adding a safe harbor nonelective contribution, not a safe harbor matching contribution. For more information on automatic enrollment plan designs, see our article: Automatic Enrollment Plan Designs.

NEW NOTICE RULES: Under current rules, any plan which provides for a safe harbor contribution, whether it is a safe harbor nonelective contribution or a safe harbor matching contribution, must give a notice to employees that describes the safe harbor contribution and contains other information about the plan. The notice is required to be provided within a

reasonable time prior to the beginning of the plan year - typically between 30 and 90 days, with limited exceptions. Under the SECURE Act, plans that provide for a safe harbor nonelective contribution or a QACA that uses a safe harbor nonelective contribution are no longer required to give a notice. NOTE: There is a special condition to this notice elimination. The notice is no longer required *as long as* the safe harbor nonelective contribution is only being used to satisfy the ADP test. If the plan provides for a matching contribution subject to ACP testing and the safe harbor nonelective contribution is being used to satisfy both the ADP test and the ACP test, then the notice IS still required to be given to participants each year.

As mentioned at the beginning of the article, plans now have the ability to add a safe harbor nonelective provision to a plan mid-year. This additional flexibility will effectively render the "maybe" or "contingent" safe harbor notice unnecessary. Employers who were using this type of safe harbor which required them to provide a notice before the plan year began (the "maybe" or "contingent" notice), and then again later in the year (the "supplemental" notice) if they did actually choose to make the contribution, will no longer need to provide two notices for the year.

Also, it is important to note that QACA plans ARE still required to provide a notice about the automatic contribution arrangement.

Finally, the notice requirement for a safe harbor matching contribution has not been eliminated. A notice is still required for plans that use a safe harbor matching contribution.

EFFECTIVE DATE: These rules apply for plan years beginning after December 31, 2019.

These new rules will give employers much needed flexibility in making plan design changes. Employers that would have been required to issue refunds or provide a large QNEC (Qualified Nonelective Contribution) in order to pass a failing ADP test will now have the ability to choose to retroactively adopt a safe harbor nonelective contribution and be exempt from testing.