<u>401(k) Safe Harbor Rules</u>

Updated 1-2019

1) Safe harbor contributions can be used to
   a) Satisfy the ADP test (Actual Deferral Percentage test);
   b) Satisfy the ACP test (Actual Contribution Percentage test); or
   c) Satisfy both the ADP and the ACP tests.

2) <u>The employer can choose either, or both, of two safe harbor contribution options (either a nonelective contribution or a matching contribution). The contribution *must* apply to all eligible non-HCEs (non-Highly Compensated Employees) and may be allocated to HCEs as well, but that is not required.</u>

   a) To satisfy the <u>**ADP**</u> test, the employer can choose to either:
      i) **Contribute at least 3% of compensation for each eligible non-HCE,** regardless of the employee's elective deferral, or
      ii) **Make a matching contribution equal to no less than**
      100% of the first 3% of employee deferrals, plus
      50% of the next 2% of employee deferrals

      <u>And</u> the matching <u>rate</u> for HCEs (Highly Compensated Employees) must not be any higher than that for NHCEs (Non-HCEs) at <u>any</u> rate of deferral. The rate of match can be <u>greater</u> than the minimum required. The rate of match cannot increase as the deferral rate increases.

   b) To satisfy the <u>**ACP**</u> test, the employer can choose to either:
      i) **Contribute at least 3% of compensation for each eligible non-HCE**, totally ignoring elective deferrals, <u>***or***</u>
      ii) **Make a matching contribution equal to no less than**
      100% of the first 3% of employee deferrals, plus
      50% of the next 2% of employee deferrals.

      <u>And</u> ignore all participant deferrals exceeding 6% of compensation when calculating the match.
      <u>And</u> the matching rate must not increase as the deferral rate increases.
      <u>And</u> the matching rate for HCEs must not be any higher than that for NHCEs at any rate of deferral.

   Consequently, in order to satisfy the ACP test, the contribution must be designed so that it already satisfies the ADP safe harbor.

3) Employer can decide, on an annual basis, which safe harbor to use. There is no minimum number of years that the safe harbor must be used.

4) If the plan matches (for example), 100% of the first 7% of employee contributions, then the plan satisfies the ADP safe harbor, but <u>not</u> the ACP safe harbor (because deferrals greater than 6% are being matched).

5) If a plan uses one of the safe harbor contributions, the plan does not lose its safe harbor status with an *additional*, *discretionary* matching contribution, as long as the match does not exceed 4% of compensation.

6) If using either type of safe harbor, there is a written notice requirement.
    a) Must notify employees 30 - 90 days prior to the beginning of each safe harbor plan year.

7) If 401(k) provisions are being added to a profit sharing plan for the first time, and the Employer wishes to utilize safe harbor rules immediately, then
    a) Employees must have the option to contribute for at least the last three months of the first plan year for which 401(k) provisions apply; and
    b) Employees must be given at least 30 days notice prior to this three-month period.

8) The employer contribution required under either safe harbor must be **fully vested** (but additional non-safe-harbor contributions may be subject to a vesting schedule).

9) The plan cannot require either end-of-year employment or a minimum number of hours of service in order to receive the safe harbor contribution.

10) All Employer contributions used to satisfy the safe harbor rules are subject to withdrawal restrictions--- i.e., they can only be withdrawn at termination of employment, age 59-1/2, or hardship.

11) A safe harbor plan is deemed to be non-top-heavy if certain conditions are satisfied.
    a) If the plan consists solely of the safe harbor contribution and deferrals, the plan is deemed to be non-top-heavy.
    b) If the plan consists of the safe harbor contribution, deferrals and a discretionary match that meets the ACP safe harbor rules, the plan is deemed to be non-top-heavy.
    c) If any other contributions or forfeitures are allocated, the top-heavy test applies.

12) The safe-harbor adds an element of certainty:
    a) The employee knows the minimum employer contribution before the plan year begins.
    b) The employer knows it will not be required to pass the ADP and/or ACP tests.
    c) The employer knows it won't be bothered with any refunds to HCEs.

13) The nonelective 3% safe-harbor can do "triple duty"
    a) to satisfy the ADP test
    b) to provide the top-heavy minimum
    c) to count in all 401(a)(4) tests.

    However, the safe harbor contribution must be ignored for purposes of determining if the plan meets the "permitted disparity" rules of Code Section 401(l).

14) A plan is not required to cover employees who have not met the minimum age (21) and service (one year) requirements of the statute. However, some employers permit such employees to make 401(k) elective deferrals. The employer can choose to have safe-harbor apply only to those meeting the statutory requirement, and perform separate ADP and ACP tests to those not meeting the statutory requirement.

15) There is no safe harbor for after-tax (non-Roth) deferrals. These are subject to the ACP test.

16) **What should the employer do?** The answer depends on the following:

a) Estimate which costs more ---
the fully vested 3% contribution for all NHCEs, or
the fully vested safe-harbor match that can cost as much 4%.
b) If already contributing a top-heavy minimum, the only additional cost is
fully vesting a contribution of 3% for all NHCEs.

17) In the past, a QNEC (Qualified Non-Elective Contribution) could not be used to determine the ranking of benefit accrual rates for the general test. However, the 3% contribution here can be used to eliminate the ADP and/or ACP test and can be used in the 401(a)(4) tests.

18) In a plan covering an HCE at the 2019 Compensation cap, using the safe harbor **matching contribution** means the HCE can be guaranteed minimum annual additions of
$19,000 in elective deferrals, plus
$11,200 in match (4% of $280,000)
regardless of what the NHCEs defer.

Consequently, the remaining annual additions are $56,000 - $19,000 - $11,200 = $25,800
which equals 9.2% of compensation for someone at the $280,000 compensation cap, which, using permitted disparity on the additional profit sharing contribution, equals 6.22% of $280,000 plus
5.7% of the excess of $280,000 over $132,900.

Minimum contribution to lower paid NHCEs would be 4% + 9.3% = 13.3% of pay for those employees deferring at least 5% of pay.

19) In a plan covering an HCE at the 2019 Compensation cap, using the safe harbor **nonelective contribution** means the HCE can be guaranteed minimum annual additions of $19,000 in elective deferrals, plus $8,400 in safe-harbor contributions from the company (3% of $280,000), regardless of what the NHCEs defer.

Consequently, the remaining annual additions are $56,000 - $19,000 - $8,400 = $28,600
which equals 10.21% of compensation for someone at the $280,000 compensation cap, which, using permitted disparity on the additional profit sharing contribution, equals 7.22% of $280,000 plus
5.7% of the excess of $280,000 over $132,900.
Minimum contribution to lower paid NHCEs would be 3% + 7.22% = 10.22% of pay whether the employee defers or not.

SAFE HARBOR CONTRIBUTIONS

	ADVANTAGES		DISADVANTAGES
1	Can be structured so there is no need to run the ADP test or ACP test.	1	Must be fully vested.
2	No need to make refunds to HCEs and calculate interest on those refunds. Big advantage for non-calendar year plans.	2	Match may be higher than plan's current matching formula.
3	No excise tax for late refunds.	3	Must give advance notice and commit to it for a year. (Although there are rules for discontinuing safe harbor contributions in the middle of the plan year.)
4	Safe harbor contribution can be used to satisfy a) ADP/ACP test b) Top-heavy minimum, <u>and</u> c) Other nondiscrimination tests	4	Cannot require a minimum number of hours or end-of-year employment in order for a participant to receive.
5	HCEs know they can defer full $19,000 for a 3% NHCE cost.	5	Not allowed to count the safe harbor for purposes of determining whether the plan satisfies Code Section 401(l), regarding permitted disparity.
6	Can be used in <u>addition</u> to permitted disparity.	6	Plan must have a 12-month plan year, except for the first year, which must be at least three months long.
7	Expense for the 3% nonelective version is very predictable.	7	Once notice is given to employees, they must have at least 30 days to decide whether to make or change the withholding election. This rule will apply <u>every</u> year for all <u>participants.</u>
8	Can be used as safe harbor for <u>ACP</u> test in 403(b) plans.	8	Contribution formula for safe harbor must be determined before beginning of year – it cannot be described in the document as a "discretionary" formula to be determined later.
9	Compared to SIMPLE (IRA), the 401(k) safe harbor is less likely to be subject to creditors in some states.	9	Withdrawal restrictions on the safe harbor contribution.
10	If using the matching version, the employer can choose to match <u>more</u> than dollar for dollar.		