

SECURE Act Update: IRS Issues Guidance with Respect to Safe Harbor Plans

On December 9, 2020, the Internal Revenue Service (“IRS”) issued Notice 2020-86 which provides guidance relating to certain changes to the safe harbor rules that apply to 401(k) plans made by the Setting Every Community Up for Retirement Enhancement Act of 2019 (the “SECURE Act”). The IRS Notice interprets the SECURE Act’s provisions to apply to some, but not all, aspects of the rules regarding safe harbor plans, limiting the applicability of the recent liberalizations to the safe harbor rules.

Background

The IRS Notice identifies the following four types of safe harbor plans:

ADP Safe Harbor Plans (relating to pre-tax and Roth contributions)	ACP Safe Harbor Plans (relating to matching contributions)
Traditional safe harbor 401(k) plans ¹	Traditional safe harbor 401(m) plans ³
Qualified automatic contribution arrangement (QACA) safe harbor 401(k) plans ²	QACA safe harbor 401(m) plans ⁴

Prior to the SECURE Act, generally, all of these safe harbor plan designs required that a safe harbor notice be provided to each eligible participant within a reasonable period of time before the year for which safe harbor status is elected. As discussed in our prior alert, available [here](#), the SECURE Act liberalized the ability for 401(k) plan sponsors to elect safe harbor status mid-year as well as some of the notice requirements so long as the safe harbor status was based on non-elective employer contributions, rather than matching contributions, and certain timing and other requirements were met.

Safe Harbor Notice Requirements

IRS Notice 2020-86 confirms that the SECURE Act eliminated the notice requirement for traditional safe harbor 401(k) plans and QACA safe harbor 401(k) plans, in each instance, that satisfy the ADP safe harbor by utilizing a safe harbor non-elective employer contribution formula. However, the IRS clarified that the SECURE Act generally did not change

¹ Traditional safe harbor 401(k) plans are plans which are exempt from ADP testing either through safe harbor non-elective contributions or safe harbor matching contributions (provided other requirements are also met).

² QACA safe harbor 401(k) plans are plans which are exempt from ADP testing by meeting the requirements to be a “qualified automatic contribution arrangement” (which generally involves automatically enrolling eligible employees in the plan with an initial deferral election of at least 3% of covered compensation, and that increases in later years) and providing for either specified safe harbor non-elective contributions or safe harbor matching contributions (provided other requirements are also met). The SECURE Act increased the permitted level of automatic employee pre-tax contributions under QACA safe harbor 401(k) plans after the first year of such contributions to 15% of covered compensation.

³ Traditional safe harbor 401(m) plans are plans which are exempt from ACP testing either through safe harbor non-elective contributions or safe harbor matching contributions (provided other requirements are also met).

⁴ QACA safe harbor 401(m) plans are plans which are exempt from ACP testing by generally meeting the same requirements as a QACA safe harbor 401(k) plan (provided certain additional requirements are also met).

the notice requirements for traditional safe harbor 401(m) plans. Accordingly, for matching contributions to be not subject to ACP testing, a timely safe harbor notice is still required for those plans even where safe harbor status is obtained through non-elective employer contributions of at least 3% of safe harbor compensation.

With respect to QACA safe harbor 401(m) plans, the IRS further noted that, unlike the traditional safe harbor 401(m) plan, the requirements of a QACA safe harbor 401(m) plan is described simply by a statutory cross reference to the requirements that apply to a QACA safe harbor 401(k) plan under Code Section 401(k)(13)(B). As a result, a QACA safe harbor 401(m) plan that utilizes the safe harbor non-elective contribution would be exempt from the safe harbor notice requirements in the same way a QACA safe harbor 401(k) plan that utilizes the safe harbor non-elective contribution would be exempt from those requirements.

Based on Notice 2020-86, the following tables summarize which safe harbor plans are exempt from the requirement to provide a safe harbor notice prior to the start of the plan year.

ADP Safe Harbor 401(k) Plans		
Safe Harbor Notice Required? (Yes/No)		
	Safe harbor non-elective contribution	Safe harbor matching contribution
Traditional Safe Harbor	No	Yes
QACA Safe Harbor	No	Yes

ACP Safe Harbor 401(k) Plans		
Safe Harbor Notice Required? (Yes/No)		
	Safe harbor non-elective contribution	Safe harbor matching contribution
Traditional Safe Harbor	Yes	Yes
QACA Safe Harbor	No	Yes

By way of a practical example, this means that if a 401(k) plan attained safe harbor status through the safe harbor 3% non-elective contribution, but also provided for matching contributions (that are intended to fall within the 6% of compensation limit that would not disqualify a plan from the ACP safe harbor), then no safe harbor notice would be required in order to be treated as an ADP/401(k) safe harbor plan, but a safe harbor notice generally would still need to be provided before the beginning of the plan year to meet the ACP/401(m) safe harbor rules.

Mid-Year Reduction or Suspension of Safe Harbor Non-Elective Contributions

In addition, the IRS Notice also states that notwithstanding that certain safe harbor plans (described in the tables above, that utilize the safe harbor non-elective contribution) are not required to provide a safe harbor notice before the start of the plan year, if the plan wanted to reduce or suspend safe harbor non-elective contributions mid-year, the plan must still follow the pre-SECURE Act rules under the regulations, which require (among other things) that a statement that the safe harbor contributions may be suspended or reduced be included in a notice that would meet the requirements of a safe harbor notice provided before the start of the plan year.

In other words, for plans that want to have the ability to reduce or suspend safe harbor contributions mid-year and still maintain safe harbor status following such a reduction or suspension, a notice that is the equivalent of a safe harbor notice must be provided before the beginning of the plan year. For eligible plans that elected safe harbor status for 2021 without a safe harbor notice delivered at least 30 days prior to the start of the plan year (as permitted by the SECURE Act), IRS Notice 2020-86 provides a one-time window of relief permitting plans to issue to eligible participants the required notice (that is the equivalent of a safe harbor notice) describing the mid-year reduction or suspension of contributions **by January 31, 2021**.⁵

⁵ Although this particular Q/A 7 in IRS Notice 2020-86 is specifically addressing the requirement of advance notice of a reduction or suspension of safe harbor contributions, the actual relief provided by the IRS appears to be broader, as it appears to be applicable to safe harbor notice timing requirements generally under Treas. Reg. §1.401(k)-3(d)(3) and §1.401(m)-3(e) (*i.e.*, including for purposes of electing ACP / 401(m) safe harbor status).

The IRS Notice also clarifies that any prior mid-year reduction or suspension of safe harbor contributions will not impact the plan's ability to adopt under the new SECURE Act rules (*e.g.*, using a 3%, in certain instances 4%, safe harbor non-elective contribution) a safe harbor design retroactive to the beginning of the year.

Retroactive Amendments

Prior to the SECURE Act, the regulations applicable to 401(k) and 401(m) plans generally permitted plans to be amended no later than 30 days before the end of the plan year to retroactively adopt a safe harbor plan design based on the safe harbor non-elective contribution, but only if certain contingent and follow up notice requirements were met.⁶

As discussed in our prior alert, the SECURE Act now permits traditional safe harbor 401(k) plans and QACA safe harbor 401(k) plans (and, by extension, QACA safe harbor 401(m) plans) the ability to obtain safe harbor status through an amendment adopted no later than 30 days before the end of the plan year providing for 3% non-elective employer contributions, or to take action to obtain safe harbor status by the end of the following plan year if a 4% non-elective contribution is made, in each instance, without having to provide any of those contingent or follow up notices before the start of the year.⁷ However, traditional safe harbor 401(m) plans do not benefit from the changes made by the SECURE Act and must continue to follow the retroactive amendment requirements set forth in the regulations (*i.e.*, Treas. Reg. §1.401(m)-3(g)) or, if the retroactive amendment requirements cannot be met (*e.g.*, because a contingent notice was not provided before the start of the plan year) otherwise take action to amend the plan to elect ACP / 401(m) safe harbor status before the start of the plan year (generally at least 30 days before the start of the plan year so the safe harbor notice requirements under Code Section 401(m)(11)(A)(ii) can be met).

In addition, IRS Notice 2020-86 also provided a welcome clarification that the approximately three-year remedial amendment period under Section 601 of the SECURE Act (which provides that amendments made to any plan pursuant to any amendment made by the SECURE Act generally may be adopted on or before the last day of the first plan year beginning on or after January 1, 2022) will also apply to plan amendments to adopt safe harbor status under the new SECURE Act rules. In effect, plans will have until the later of (x) the applicable plan amendment deadlines set forth in Code Section 401(k)(12)(F) (for traditional safe harbor 401(k) plans) and Code Section 401(k)(13)(F) (for QACA safe harbor 401(k) plans and, by extension, QACA safe harbor 401(m) plans) and (y) the remedial amendment period under Section 601 of the SECURE Act to approve amendments to elect safe harbor status.⁸

⁶ The contingent and follow up notice rules generally require (i) a safe harbor notice provided before the start of the plan year that specifies that the plan may be amended during the plan year to include a safe harbor non-elective employer contribution and (ii) if the plan is amended, a follow up notice sent no later than 30 days before the end of the plan year informing participants that safe harbor non-elective employer contributions will be made and that, according, the plan would obtain safe harbor status.

⁷ We note that this special timing rule does not apply to plans that provided for safe harbor matching contributions at any time during the plan year for which the retroactive amendment is intended.

⁸ We note that IRS Notice 2020-86 apparently contains two potentially contrary statements regarding the applicability of the remedial amendment period of Section 601 of the SECURE Act (*i.e.*, Q/As 10 and 11 contain an unqualified statement that the for plan years beginning after December 31, 2019, the amendment rules under Sections 401(k)(12)(F) and 401(k)(13)(F) will apply, while Q/A 13 indicates that the remedial amendment rules under Section 601 of the SECURE Act will apply). In addition, there appear to be unanswered questions (including as to which year Code Section 415 annual addition limits would relate) where the remedial amendment period under Section 601 of the SECURE Act is utilized, for example, in 2022 to elect safe harbor status retroactive to 2020.

The tables below summarize which retroactive amendment rules the different types of safe harbor plans must follow for plan years beginning after December 31, 2019.

ADP Safe Harbor 401(k) Plans Applicable Retroactive Amendment Rules		
	Safe harbor non-elective contribution	Safe harbor matching contribution
Traditional Safe Harbor	SECURE Act	§1.401(k)-3(f)
QACA Safe Harbor	SECURE Act	§1.401(k)-3(f)

ACP Safe Harbor 401(m) Plans Applicable Retroactive Amendment Rules		
	Safe harbor non-elective contribution	Safe harbor matching contribution
Traditional Safe Harbor	§1.401(m)-3(g)	§1.401(m)-3(g)
QACA Safe Harbor	SECURE Act	§1.401(m)-3(g)

* As used in the tables above, "SECURE Act" refers to the end of the later of (x) the new retroactive amendment deadlines in Code Section 401(k)(12)(F) and 401(k)(13)(F), or (y) the remedial amendment period under Section 601 of the SECURE Act (generally ending at the end of the first plan year beginning at or after January 1, 2022).

Next Steps

- Plan sponsors that have elected safe harbor status under the new SECURE Act rules either retroactive to the 2020 plan year or for the upcoming 2021 plan year, to the extent they intend to rely on the safe harbor non-elective contribution to satisfy both the ADP / 401(k) safe harbor and ACP / 401(m) safe harbor, should make certain that they have, or will, provide a safe harbor notice generally by the later of (x) 30 days before the start of the plan year commencing in 2021 or (y) January 31, 2021, in order for ACP / 401(m) safe harbor status to apply for purposes of matching contributions.
- In addition, in situations where there may be a potential mid-year reduction or suspension of safe harbor non-elective contributions (as they relate to both ADP / 401(k) and ACP / 401(m) safe harbor status), plan sponsors should also take note that the notice requirements describing potential mid-year reductions or suspensions of safe harbor contributions are still required to be provided (generally before the start of the plan year).
- The guidance in IRS Notice 2020-86 also applies to Section 403(b) plans that apply the ACP / 401(m) safe harbor rules.

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