New Proposed Regulations Permit Suspension of 401(k) Plan Safe Harbor Contributions

Articles

05.28.2009

Under proposed regulations released on May 18, 2009, employers suffering a "substantial business hardship" may reduce or suspend nonelective employer contributions to a safe harbor 401(k) plan in the middle of a plan year. Under previously existing law, safe harbor matching contributions could be reduced or suspended during a plan year provided certain conditions were met, but the only way an employer could stop making safe harbor nonelective contributions mid-year was to terminate the plan.

New Contribution Suspension Rules

The proposed regulations permit an employer that suffers a substantial business hardship to amend its plan to reduce or suspend safe harbor nonelective employer contributions during the year if all of the following requirements are met:

- Employees are given a notice, at least 30 days in advance of the effective date of the amendment, that explains the reduction or suspension of safe harbor contributions, the consequences of the reduction, the effective date, and the procedures for changing elective deferrals;
- Employees are given a reasonable opportunity after receiving the notice to change their elections;
- A plan amendment is adopted before the effective date of the change and provides for both the suspension of contributions and for meeting the ADP test (and ACP test if applicable) for the year using the "current year testing method;"
- The safe harbor contribution is made with respect to compensation paid up to the effective date of the amendment; and
- The annual plan compensation limit is prorated for the period prior to the effective date of the amendment.

Whether an employer has suffered a substantial business hardship is determined based on all relevant factors under a separate Internal Revenue Code provision. Factors taken into account include whether:

- The employer is operating at an economic loss;
- There is substantial unemployment or underemployment in the trade or business and in the industry concerned; and
- The sales and profits of the industry concerned are depressed or declining.

A plan that reduces or suspends safe harbor nonelective contributions will be subject to the rules for top-heavy plans.

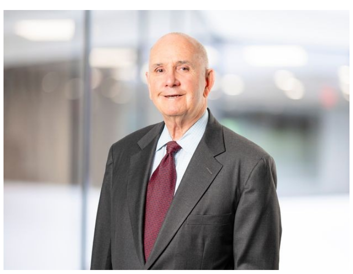
Implementing a Suspension or Reduction

These rules apply to amendments adopted after May 18, 2009. If you wish to suspend or reduce nonelective safe harbor contributions during a plan year, please contact Nancy Wasch (215) 246-3106 or Gerry Rigby (215) 246-3160 in our Employee Benefits Plan Practice Group.

DISCLAIMER: This client advisory is for general information purposes only. It does not constitute legal advice, and may not be used and relied upon as a substitute for legal advice regarding a specific legal issue or problem. Advice should be obtained from a qualified attorney licensed to practice in the jurisdiction where that advice is sought.

Printer Friendly Version

Related People



L. Gerald Rigby

Of Counsel

grigby@archerlaw.com

215.279.9684