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MEMORANDUM

TO: Employee Benefits Clients of Williams Parker

FROM: Carol L. Myers & Edward Kim

RE: 2013 - New Rules for Mid-Year Changes to 401(k) Safe Harbor Plans

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New Rules for Mid-Year Changes to 401(k) Safe Harbor Contributions. The IRS has recently updated the rules for reducing or suspending 401(k) safe harbor contributions during a year (i.e., anytime after the first day of the plan year). The new (updated) IRS requirements apply to both safe harbor matching contributions and safe harbor nonelective contributions. The new rules are found at Treas. Reg. 1.401(k)-3(g).

To change plan mandated 401(k) safe harbor contributions mid- year, the following requirements apply:

1. Each eligible participant must be given a supplemental notice alerting him/her that the 401(k) safe harbor contributions will be reduced (or suspended entirely).
   a. The notice must be delivered at least 30 days before the contribution reduction.
   b. The notice must specify the date that the contribution change will take effect.
   c. The notice must describe the procedure to make changes to 401(k) deferral elections.
2. The plan must be amended to reflect the reduction or suspension of the safe harbor contribution (whether match or nonelective).
   a. The amendment must be adopted before the effective date of the contribution reduction.
3. Each eligible participant must have a reasonable opportunity after receiving the notice to make changes to his/her 401(k) deferral elections.
4. The plan must be subject to ADP and ACP testing for the entire year.
5. The employer must demonstrate that it is operating at an economic loss.
   a. For safe harbor matching contributions – this is a new requirement. It takes effect for plan years that start on or after January 1, 2015.
   b. For safe harbor nonelective contributions – this modifies the prior rule which required that the employer demonstrate a substantial financial hardship.

Notice Exception to Economic Loss Requirement. The demonstration of economic loss can be avoided if the annual safe harbor notice for the plan includes language informing participants that the employer may reduce or eliminate the safe harbor contribution during the year with 30 days advance notice.

- This is new for both types of safe harbor plans. It essentially allows both types to issue a “maybe” notice.
- This “maybe” language must be included in the annual safe harbor notice that is delivered at least 30 days before the beginning of the plan year (no later than December 2 for a calendar year plan).
  - Although the IRS has not addressed this subject, it is likely too late to use this exception for 2014 calendar year safe harbor 401(k) plans

Conclusion

We will continue to monitor these developments. If you have any questions or concerns regarding compliance with the safe harbor 401(k) plan rules and how it relates to your plans, please contact Carol L. Myers, Esq. at (941) 893-4001 or Edward K. Kim, Esq. at (941) 536-2034.

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