

eBenefits Alert: Relief for Certain Safe Harbor Nonelective Contribution Plans

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On May 18, 2009, the IRS issued proposed regulations that offer an alternative to plan termination for certain safe harbor plans that provide safe harbor nonelective contributions. Until such date, the only way to end nonelective safe harbor contributions was to terminate the plan. Under the proposed regulations, an employer that suffers a "substantial business hardship" can now amend its plan to reduce or suspend the plan's safe harbor nonelective contributions, provided the following requirements are met:

1. The plan must be amended prior to the end of the plan year.
2. The plan must be amended to provide that the ADP/ACP tests will be satisfied for the entire year in which the safe harbor contributions are suspended or reduced.
3. Employees must be notified of the reduction or suspension, its consequences, procedures for changing elections, and the effective date of the change.
4. The effective date of the reduction or suspension must be at least 30 days following the date employees are notified of the change and at least 30 days following the date the plan amendment reducing or suspending contributions is adopted.
5. Employees must be given a reasonable opportunity to change their deferral elections prior to the effective date of the reduction or suspension.
6. The plan must satisfy the safe harbor nonelective contribution requirement with respect to safe harbor compensation paid through the effective date of the suspension or reduction.
7. The 401(a)(17) compensation limit must be prorated for the period beginning with the first day of the plan year and ending on the date of the reduction or suspension.

The requirements for suspension and reduction of safe harbor nonelective contributions generally parallel the requirements for suspension and reduction of safe harbor matching contributions. The main distinction is that safe harbor nonelective contributions can only be reduced or suspended if the employer suffers a "substantial business hardship." The factors taken into account when determining "substantial business hardship" include:

- Whether the employer is operating at a loss
- Whether there is substantial unemployment in the employer's industry



- Whether the sales and profits of the industry are depressed or declining
- Whether it is reasonable to expect the plan to continue after the reduction or suspension

The proposed regulations apply to any plan amendments adopted after May 18, 2009 and plans may rely on the proposed regulations until final regulations are issued. The proposed regulations do not provide relief from the top-heavy rules. Thus, a top-heavy plan that is amended to reduce or suspend nonelective safe harbor contributions will still be obligated to make the three percent minimum top-heavy contribution.

If you have any questions regarding the new proposed regulations or would like assistance in amending your safe harbor plan, please contact a member of the Gray Plant Mooty Employee Benefits and Executive Compensation practice group.

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