

February 2016

IRS Issues Notice on Midyear Changes to Safe Harbor Plans and Safe Harbor Notices

On January 29, 2016, the Internal Revenue Service (IRS) released [Notice 2016-16](#), which provides, effective immediately, significant relief with respect to the ability of a plan sponsor to make midyear changes to a safe harbor plan under Sections 401(k) and 401(m) of the Internal Revenue Code.

A 401(k) plan that meets IRS requirements for a safe harbor plan does not have to perform actual deferral percentage nondiscrimination testing (401(k) testing) and, in some cases, actual contribution percentage nondiscrimination testing (401(m) testing). Safe harbor plan sponsors are required to provide employees with a safe harbor notice setting forth specific information about the plan, including an explanation of how contributions will be allocated. This safe harbor notice must be provided to each new employee and also must be provided to all eligible employees 30 to 90 days prior to the beginning of each plan year.

Based on prior guidance issued by the IRS, there have been significant concerns with midyear plan amendments to safe harbor plans except in several situations specifically permitted by the IRS. Notice 2016-16 permits a plan sponsor to amend a safe harbor 401(k) plan during a plan year if certain conditions are met:

- The updated safe harbor notice is provided to applicable employees at least 30 and not more than 90 days before the effective date of the change. In cases where it is not practicable for the updated notice to be provided before the effective date of the change (for example, in the case of a midyear increase in matching contributions that are retroactive for the entire plan year), the notice must be provided no later than 30 days after the date the change is adopted.
- Affected employees are given a 30-day period before the effective date of the midyear change to change their deferral election. In cases where it is not practicable for the election opportunity to be provided before the effective date of the change, affected employees must be given the opportunity to change their deferral election as soon as practicable after the date the updated notice is provided to them but no later than 30 days after the date the change is adopted.

Notice 2016-16 prohibits certain midyear changes to a safe harbor plan:

- An increase in the service requirement for vesting in safe harbor contributions.
- A reduction in the number or an otherwise narrowing of the group of employees eligible to receive a safe harbor contribution.

- A change in the type of safe harbor plan.
- The addition of discretionary matching contributions or the modification or addition of the matching contribution formula or the definition of compensation used in determining matching contributions if the change increases the amount of matching contributions. This prohibition does not apply, however, if, at least three months prior to the end of the plan year, the change is adopted, the updated safe harbor notice and election opportunity are provided, and the change is made retroactively for the entire plan year.

This new guidance is also applicable to Section 403(b) plans that apply the Section 401(m) safe harbor rules.

If you would like assistance in evaluating any proposed changes to your safe harbor plan and the impact of this guidance on such changes, please contact any of the following lawyers in Robinson+Cole's [Employee Benefits and Compensation Group](#) listed below:

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