



## **Notice 2016-16: New Rules Regarding Mid-Year Safe Harbor Amendments**

One of the largest open questions relating to 401(k) safe harbor plans has been when and for what purposes could a 401(k) safe harbor plan be amended mid-year. Up until now, IRS previously gave clear written guidance in only four cases beyond the suspension/removal of safe harbor features mid-year.

On January 29, 2016, the IRS released [Notice 2016-16](#) which provides much needed guidance on this issue and greatly expands the circumstances in which a 401(k) safe harbor plan can be amended mid-year. Significantly, the IRS now generally states that as long as certain requirements are met, almost all mid-year changes are allowed. In the notice, the IRS specifically defines a mid-year change as either (1) a change that is effective on a day other than the first day of a plan year or (2) a change that is effective on the first day of the plan year but is adopted on a date later than the first day of the plan year (a retroactive amendment).

This new guidance does not affect the prior guidance related to reduction or suspension of safe harbor contributions mid-year; mid-year plan terminations; mid-year adoption of safe harbor provisions for a new 401(k) plan; or changes related to a change in the plan year. Additionally, all other amendment requirements, e.g., anti-cutback restrictions under Code section 411(d)(6), anti-abuse provisions under Treas. Reg. section 1.401(k)-1(b)(3), are still applicable.

### **Changes Not Allowed**

In Notice 2016-16, the IRS prohibits three specific mid-year amendments.

1. A change to the type of safe harbor plan e.g., changing a traditional safe harbor plan to a QACA plan. This still leaves the ability to add an auto-enrollment feature (ACA or EACA) to a traditional safe harbor plan mid-year.
2. A change to the eligibility requirements that would result in fewer employees being eligible for the safe harbor contribution. This does not preclude a change that would allow more employees to be eligible to receive safe harbor contributions.
3. Increasing the number of years required for vesting under a QACA plan.

### **Changes Allowed - Limited Circumstances**

The IRS also specifically states that the following mid-year amendments are only permitted if very specific requirements are met, otherwise they are prohibited:

1. A change that would add or modify a matching contribution formula to increase the matching amount including adding a discretionary matching contribution.
2. A change to the definition of compensation used to determine matching contributions if the change increases the matching amount.



The matching formula or compensation definition used for matching contributions can be amended mid-year only if (1) it is effective at least three months before the end of the plan year; (2) the change is effective the first day of the plan year; and (3) an updated safe harbor notice is given and the participants are given the opportunity to change their deferral elections.

## **New Mid-Year Amendment Notice Requirements**

In general, aside from the changes mentioned above and established prior guidance, a 401(k) safe harbor plan can now be amended mid-year. There are two requirements that must be met to allow for the mid-year change (1) The participants must be given an updated safe harbor notice that describes the changes and when they will be effective and (2) the participants must be given an opportunity to change their deferral elections or after-tax contribution election before the effective date of the change.

**Who must receive the notice:** The notice must be provided to participants who are required to receive an annual safe harbor notice.

**When must the notice be distributed:** The notice must be given a reasonable amount of time before the effective date of the mid-year change. The reasonable time frame determination is made looking at all facts and circumstances but is deemed satisfied if provided at least 30 and no more than 90 days before the effective date. For certain changes it may not be practicably possible to provide the notice before the effective date, e.g., changes that are retroactive to the first day of the plan year, in those instances the notice must be provided as soon as practicably possible but in no case later than 30 days after the change is adopted.

**Who must receive the election opportunity:** The election opportunity must be provided to all employees who are required to receive the updated notice.

**When must the new election period be granted:** The participants must be given a reasonable timeframe in which to make their election changes. This time frame must be at least 30 days long and should take place before the effective date of the change. For certain changes it may not be practicably possible to provide the election opportunity before the effective date, e.g., changes that are retroactive to the first day of the plan year, in those instances the election opportunity must be provided as soon as practicably possible after receipt of the updated notice but in no case later than 30 days after the change is adopted.

## **How do I know if I can amend my safe harbor plan under the new rules?**

We have designed an easy to use flow chart that breaks down the new rules to help you determine if the mid-year amendment would be allowed under the new rules. The flow chart can be found [here](#).