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## COVID-19: Reducing or Suspending Employer Contributions to 401(k) Plans Mid-Year

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In times of economic uncertainty, employers who typically make 401(k) matching or profit-sharing contributions often choose to reduce or suspend those contributions to conserve cash and save jobs. Figuring out whether and when in the year such changes can take effect and the steps necessary to make those changes, including whether a plan amendment or advance notice will be required, depends on the contribution type and whether the contribution is a safe harbor contribution, otherwise required by the plan document, or discretionary. Because those are plan-specific features, employers should consult with their plan's third-party administrator and ERISA counsel for definitive guidance.

The safe harbor rules allow employers to make a specific, mandatory contribution to each plan participant that is immediately 100% vested. Following these rules keeps the plan from having to pass certain 401(k) nondiscrimination tests that would otherwise apply. There are two ways to satisfy the safe harbor rules. One is to make a profit-sharing (or "nonelective") contribution of at least 3% of pay. The other way is to make a sufficiently large matching contribution. Where the safe harbor contribution is a matching contribution, participants are required to receive a safe harbor notice at least 30 days prior to start of each plan year. Sometimes this notice allows an employer to choose whether to make the safe harbor contribution and, where it does, the presence of this "maybe" language will determine whether matching contributions can be stopped mid-year absent the employer operating at an economic loss as explained below.

Sometimes plans that are not safe harbor plans nevertheless provide that a nonelective or matching contribution is "fixed" or required to be made. Alternatively, and more commonly, non-safe harbor plans may provide that any employer contributions are discretionary.

Once you confirm the type of contribution(s) called for under your specific plan, you may use the following chart to determine whether, when, and how those contributions may be reduced or suspended.

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Contribution Type	Can we reduce or suspend employer contributions mid-year?	Is a plan amendment required?	Do we have to give advance notice to employees of the change? <sup>1</sup>
Safe Harbor Matching Contribution or Safe Harbor Nonelective Contribution	Yes, if: <ul style="list-style-type: none"> <li>You're operating at an economic loss for the plan year; or</li> <li>For any reason, if a statement that the plan may be amended during the plan year to reduce or suspend safe harbor contributions (a "maybe" statement) was included in the plan's safe harbor notice.</li> </ul>	Yes. And the amendment must provide that the plan will pass ADP testing (and, if applicable, the ACP test) for the entire plan year, using the current-year testing method.  <i>When can the change take effect?</i> No earlier than the later of the date the amendment is adopted or 30 days after eligible employees are provided notice of the change.	Yes. All eligible employees must be provided notice and given a reasonable period of time prior to the reduction or suspension to change their elective contributions.  Note: For plan years beginning after December 31, 2019, the SECURE Act eliminated the requirement that an employer who makes nonelective safe harbor contributions must distribute an annual safe harbor notice. The IRS has not yet issued guidance on how this will impact an employer's ability to suspend or reduce nonelective safe harbor contributions.
Non-Safe Harbor <i>Required</i> Nonelective Contributions and/or Non-Safe Harbor <i>Required</i> Matching Contributions	Yes. That can be done prospectively in all cases, so that all participants receive the contribution for the period prior to the effective date of the change.  <i>Can we eliminate the "required" contribution altogether?</i> Possibly, but only if the plan conditions receipt of a contribution on a participant working 1,000 hours in the plan year and/or being employed on the last day of the plan year. Where that is the case, it is possible to eliminate the contribution for the entire year for anyone who has not yet satisfied those conditions. Note: (1) if your plan waives those requirements for participants who have died, become disabled or retired before the effective date of the change, those participants will still be entitled to a contribution for the period prior to the effective date of the change and (2) it is never possible to take back matching contributions that have already been made. <sup>2</sup>	Yes.  <i>When should we adopt the amendment?</i> Generally as soon as possible to ensure contributions are reduced or stopped to the maximum extent possible but in all cases prior to year-end.	Generally, no, but you'll still want to adequately communicate the change to plan participants.  Exception: If your plan also provides for safe harbor contributions and the mid-year change affects required content in the plan's safe harbor notice, then advance notice may be required.
Discretionary Matching and/or Discretionary Nonelective Contributions	Yes. Same as for Non-Safe Harbor Required Nonelective or Non-Safe Harbor Required Matching Contribution above.	No.	Same as for Non-Safe Harbor Required Nonelective or Non-Safe Harbor Required Matching Contributions above.

<sup>1</sup> A plan amendment that makes a material change to the plan must be communicated in a summary of material modifications ("SMM") if the summary plan description ("SPD") is not reissued to describe the change. An SMM or updated SPD must be provided within 210 days *after* the end of the plan year in which the change is adopted. This means if you adopt an amendment to the plan in 2020, an SMM or updated SPD must be distributed by July 29, 2021 although it is generally preferable to provide the SMM or updated SPD as soon as possible.

<sup>2</sup> In our experience, many plans make discretionary matching contributions to eligible participants with each elective deferral without any last day or hours requirements such that changes to matching contributions can only be made prospectively. As a result, generally the sooner an amendment to discretionary matching contributions is adopted, the greater the potential savings.

If you have any questions related to this alert, please do not hesitate to contact your regular Smith Anderson lawyer or any other member of our firm. Additionally, please visit and bookmark our firm's **Coronavirus (COVID-19) Business Resource Center** which is continuously updated with useful materials and resources related to COVID-19. This tool has been made available to ensure that our clients and the broader business community stay informed on key issues that may impact their operations and to navigate the related business and legal issues during these challenging times.