

Webinar Questions – January 6, 2021 – SECURE-ly Safe Harbor; Cares Update

1. If SH Non Elective allows for an additional discretionary match, is a SH notice required?
Not if the match is to be ACP tested. The only reason you need a notice is if you want to use the ACP safe harbor, which you can do with a discretionary match if it is within the limits of the ACP safe harbor.
2. So there doesn't really seem that the Notice has gone away - right?
That's kind of a matter of opinion and circumstances. It has gone away for QACAs. It has not gone away if you have a SH NEC and want to preserve your ability to have a safe-harbor-for-ACP-purposes matching contribution. It has gone away if you don't have any matching contributions. But, as we said, the main value is that removing the notice requirement allows an employer to allow for retroactive amendment to add SH NEC.
3. For a participant who was already receiving RMDs prior to CARES Act (age 70 1/2 in 2018), participant dies in 2020, estate is beneficiary, no RMD issued for 2020, to calculate RMD for 2021, the RMD payable to an estate uses the single life table factor determined using the participant's age in the year of death, reduced by 1 for subsequent years. Do we use the participant's factor based on his age in 2020 (year of death), reduced by 1 because we are now in the next year? Or do we use the participant's age in 2020 not reduced by 1 or the participant's age in 2021 (first year of RMD to estate) because there was no 2020 RMD? *Sorry, this is outside the scope of this presentation. Please use the "ASK" feature in ERISApedia or review our speeches on the CARES Act from 2020.*
4. If electing a 4% SH NEC to address 2020 ADP test failure, does the amendment to add this SH provision apply retroactively to just 2020, or does it apply to 2021 as well?
It depends on how you write your amendment. You could say, "4% for this year, and then ADP/ACP tested for 2021" or "4% for this year, then 3% NEC for 2021 and thereafter" or even something else ...
5. Are there any problems with just continuing to provide the SH notice to all SHNEC plans? Just to catch all the "if this, then you need to" scenarios.
No, and I believe many people are doing this. The only concern I would have is if the information in the notice was incorrect and someone relied upon it to their detriment. The Courts have indicated that communications about benefits are fiduciary acts ... but that's a little far afield.
6. Please confirm/expand: A non-safe harbor plan subject to ADP but uses the ACP safe harbor provisions...notice or not?
Can't be done. You need an ADP safe harbor to be eligible for an ACP safe harbor. Well, to be more exact, you have to make an ADP safe harbor contribution and give the ADP safe harbor notice to be eligible for an ACP safe harbor. See IRC 401(m)(12)(A) and Treas. Reg. 1.401(m)-3(a).
7. If SH plan is restated for Cycle 3 mid-year, with no other changes, is an updated SH notice required? The notice seems vague enough that one wouldn't be, but I'd like to get your opinion.
I believe that the IRS has historically taken the position that, if there is no change to the provisions discussed in the SH notice, then the amendment (or, in your question, the restatement) does not give rise to a new notice requirement.
8. So if a plan is 3% SH NE and there is no match in the plan. Then you do not need to give a SH notice since you don't need the ACP test to pass since there is no ACP test?

That is correct.

9. If a plan suspends SH match mid-year, are they able to re-institute mid-year, and retroactively "true up" the suspension period in order to retain SH provisions for the entire year?
No. Once you suspend a match, you're done for the year. You cannot add a match after the year begins and you cannot add a SHNE provision if the plan was ever a safe harbor match or QACA match during the year.
10. Did the additional safe harbor correction methods for missed deferral opportunities sunset 12/31/20? (no QNEC or 25% QNEC with 45-day notice)
Really good question. It appears so, unless the IRS acts to extend. As of right now, the sun is down for failures that occurred after 12/31/2020 (Rev Proc 2019-19 says: "(d) Sunset of safe harbor correction method. The safe harbor correction method described in this section .05(8) of this appendix is available for plans only with respect to failures that begin on or before December 31, 2020. (d) Sunset of safe harbor correction method. The safe harbor correction method described in this section .05(8) of this appendix is available for plans only with respect to failures that begin on or before December 31, 2020.")
11. Did the recent Cares Act signed end of 2020, extend the Covid distribution options beyond 12/30/2020?
No.
12. If we decide to give a "maybe" safe harbor notice by 1/31 does the plan have to be amended?
The extension to 1/31 for the notice is for "maybe not" notices only, i.e., the notice that says that you start the plan year with a safe harbor plan but may suspend or reduce the safe harbor contribution during the year. Nonetheless, if you don't do a maybe notice, you may institute the ADP SHNE anytime up to the end of the following plan year. HOWEVER, if you do not provide the "maybe" notice before the plan year begins, you cannot take advantage of the ACP safe harbor with regard to a match. So, you will need to run the ACP test for any match.
13. The special deadline for the Maybe Not notice - if the plan is not already setup as a Maybe plan for the 3% non-elective - do we amend the plan today for the 2021 plan year and provide a new SH notice for 2021 with the 'Maybe' notation?
I'm so confused. If you are already set up as a "Maybe" plan, that means that you have instituted a plan that is ADP tested, and you have retained the ability to add the SHNE contribution for that plan year. You don't need a "Maybe Not" notice, as that applies to a plan that is a SH plan and permits you to suspend the SH during the year. The two notices are mutually exclusive.
14. Can you go from tested to safe harbor 3% then back to tested?
So, you start with an ADP tested plan and you adopt a SH during the year. The only way to return to a "tested" plan would be if you suspend the SH during the year, which requires either than you gave a Maybe Not notice before the year began (which you wouldn't have done, because you weren't a SH plan at the beginning of the year) or if you are operating at a loss for the year. So, if that 2nd possibility applies, I guess you could go in and out again. Please let us know if this actually ever happens.
15. Does the 4% SHNE apply from 5/1/2020 in your earlier example or the whole year? This is the example where SHNE was suspended and then reinstated after the end of 2020.
If you adopt the SHNE during the year, it is effective for the entire year. Suppose you start the 2020 calendar plan year with a 3% SHNE and suspended the contribution May 31, 2020. Now in

2021, you retroactively add back the SHNE for 2021. It would be at the 4% and that rate would apply from January 1, 2020.

16. Would the restarting of a SHNE provision also be allowed if the stoppage was due to an employer having stopped their SHNE contribution due to spinning out of a PEO plan?
I'm a little confused. Just spinning out of a PEO or a MEP is not a justification for suspending the SHNE contribution. So, if there wasn't a maybe not notice or the operation of the plan sponsor at a loss, the suspension of the SHNE wasn't permitted. Of course, if this was done between March 13 and August 31, 2020 under Notice 2020-52, no notice or economic loss was required and you are okay. So, we will assume that is the case. If you suspended the SHNE contribution during 2020, Notice 2020-86 permits you to restart the SH retroactively for the full 2020 year anytime up to the last day of the following plan year (12/31/2021 for a calendar year).
17. If a plan had a safe harbor non-elective option and reduced it mid-year to a percentage that is still considered a safe harbor amount (reduced from 22% to 5%) would they still be able to be SH for 2020 or do they have to reinstate the original SH amount?
If the plan had a 22% SHNE and reduced it midyear to 5%, that would be a midyear suspension or reduction that would take the plan out of safe harbor status. The employer could reinstate midyear under the new rules, leaving the 5% contribution intact. There is no legal requirement to return it to 22%. (That said, participants are, of course, entitled to the full 22% which accrued prior to the effective date of the reduction.)
18. Can you implement a PS plan for 2020 in 2021 with a SHNE 4%
No. A SH plan must be in place for at least 3 months during the relevant year. But, I have to ask: since you cannot do salary deferrals until the plan is adopted, why do you need a SH retroactively to 2020 – i.e., if there was no plan in 2020, how could you have deferrals? And, without deferrals, there's no need for a SH. Please see the [Ferenczy Flashpoint article](#) we posted explaining our reasoning in full.
19. If you had a 3% SHNEC for all and suspended during 2020, can you reinstate in 2021 for 2020 for 4% for only NHCEs? So 3% for HCEs through suspension date and 4% to all NHCEs for the entire year?
Yes. The reinstatement is independent of the prior SH, and the IRS said in Notice 2020-52 that contributions for HCEs are not SH contributions and can be eliminated anytime (subject to anticutback rules).
20. So, therefore, no amended tax return is possible?
The contribution deadline for deduction purposes is the due date of the tax return, plus valid extensions. Suppose the due date of the 2020 return is April 15. The employer files the return early on March 10. The employer can amend the plan to add the SHNE and make the contribution by April 15, and then file a (timely) amended return, deducting the contribution. But if the contribution is not made by April 15 (barring an extension), the contribution is not deductible in 2020. The contribution would instead be deductible in the year made, rather than the year to which it applied.
21. Forgive me. I've confused myself. If the plan had SHM at any time during the year, but had stopped it, can you or can't you add SHNE after the fact? The 3% or the 4% option?
You cannot institute a SHNE after the beginning of the year if you ever had a safe harbor match (either traditional or QACA). (BTW, that's okay ... I confuse myself all the time.)

22. If you adopt it after the 30 days after the tax return, and an employee is no longer working in this year, their 415 limit is zero since their compensation is zero this year, but safe harbor requires the contribution. How do you reconcile this?
- I can't. But there's an interesting EPCRS trick. Suppose the plan year in question is the 2020 plan year, and the return due date is March 15, 2021. That is the deduction deadline, and the annual addition deadline is April 14, 2021 (30 days later). The employer decides to amend to add the SHNE in July 2021, and makes the contribution for all current employees (deducting the contribution in 2021). Now, we reach 2022 and the contribution is still pending for the terminated employees. You have an operational failure to make the safe harbor contribution. EPCRS §6.02(4)(b) says that the corrective contribution is an annual addition for 2020, and now there is no longer a 415 failure. Patience is rewarded. Having said all that, however, you might want to consider helping the client plan to adopt the SHNE before the tax return due date including extensions. Can you retroactively amend into SHNEC for 2020 and not amend the Plan to be Safe Harbor going forward? Basically adopt retroactively each year if you need it? If we are reviewing plans for 2020 now, and they want to retro amend to Safe harbor for 2020, I've already passed my notice date for 2021. What do I do at that point?*
- So long as your amendment says that, you should be good. Note, however, that since you are no longer obligated to give advance notice for a SHNE plan, you can institute the plan now for 2020 and have it also apply for 2021 – there's no "late notice" issue for 2021 unless you want to take advantage of an ACP SH match (in which case, you are too late).*
23. What if the document is written for maybe notice to say that plan is only SH if notice is distributed?
- You have to follow your plan's terms. But you could amend the plan for SECURE and have it comply with the new SECURE rules for late adoption. Remember, there is no operational failure so long as the SECURE amendment is timely.*
24. For a brand new 401k SH Non elective plan is the deadline to adopt still 90 days before the EOY
- Yes. To have a SH plan, you need to have the plan in place for 3 months.*
25. If you have a ADP 3% SH and a discretionary match. If you want the discretionary match to be ACP SH if you do one, but you usually never do one, should you give the maybe notice? But if you are not going to use it after all, can you skip the supplemental notice?
- If you want to take advantage of the ACP SH, you need to give SH notice. (It's not a maybe notice, because you have a SHNE plan; it's just a notice.) If you don't give notice, you need to ACP test any match.*
26. Do I need to give a Maybe Not notice each year? If yes, can I put that notice in my SPD and avoid annual notice?
- You have to give the Maybe Notice only if you want the ability to suspend contributions without having an economic loss. The standalone maybe not notice must comply with all of the safe harbor notice conditions, other than content, which means it must be given annually a reasonable time before the beginning of the year. So, you cannot put it into your SPD and have it be effective unless you provide the SPD with the notice at least 30 days before each plan year. That seems like it's worse than just giving the notice.*
27. Plan is built to satisfy both ADP and ACP safe harbor. Plan uses 3% SHNE (NOT maybe). No additional contributions (disc match) are made - just deferrals and SHNE. Is a notice due? If the

SHNE IS a maybe, does that change the answer? *No. The only reason to give notice in a SHNE plan is to preserve the ability to have a matching contribution be an ACP safe harbor contribution.*

28. Is there a flow chart of all these options? *Nice idea. See the table on the last page.*
29. Re Retroactive SHNE Adoption. Can an employer who is already making a non-safe harbor 3% or 4% non-elective contribution (pay basis, no last day requirement) make a timely retroactive amendment to switch it to a safe harbor non-elective for the plan year?
I would think that it could, but not if the contribution has already been deposited to a regular PS account – the rules for safe harbor contributions are the same as for QNECs and they need to be QNECs at the time that they are allocated. See 1.401(k)-6 under the definition of a QNEC. If the contribution were fully vested and subject to 401(k) distribution restrictions, however (so that it qualified as a QNEC at the time contributed), then it could.
30. What is your definition of the Classic SH Contribution? Thank you.
We mean a SH plan that is not a QACA – i.e., the 401(k)(12)-type safe harbor.
31. Just to verify, if a SH Match plan eliminated match in the middle of 2020, and ended up having an okay year, they cannot reinstitute the SH Match and get the benefit of no ADP/ACP testing?
Yes. That is correct.
32. If we are adding QACA SH NEC after the end of the year, how does it affect the ability /requirement for auto-enroll? The deferrals would not be available. How would it be a QACA if deferrals don't follow the auto-enroll rules?
Ah. The answer is you already had to have automatic enrollment provisions which conformed to QACA rules in place already. In that case all you are doing is adding the 3% nonelective (fully vested immediately or within 2 years). But, you're right: you couldn't add the automatic deferrals retroactively.
33. If plan document says the safe harbor is also ACP safe harbor, do I need to provide a notice even if employer not making a match for the year?
If it is a QACA with a 3% NE, then no, you do not need a notice. If it is a classic safe harbor, yes, you need the notice if you want to avail yourself of the ACP safe harbor, even with a discretionary match.
34. Can we set up new calendar year 401(k) with Safe-Harbor NEC past October 1?
No. Please see the [Ferenczy Flashpoint article](#) we posted explaining our reasoning in full.
35. Fact pattern: plan sponsor determined based upon layoffs in March and April 2020 that they would have triggered a partial plan termination and therefore started 100% vesting impacted participants as they processed distributions. Question: What happens if they do not trigger a partial plan termination under CCA 2021?
We both think you should amend the plan to conform to what you did operationally.
36. Do furloughed employees count as terminated for purposes of the partial term relief?
“Furlough” is not a term of art. As stated in the recently published 8th edition of Who’s the Employer: “More recently, in the coronavirus pandemic, practitioners have had trouble distinguishing between a furlough and a true separation. The lack of a bright line has been difficult. The author suggests looking at what an employer does when an employee terminates employment: (1) The employee returns keys, parking decals, ID, etc. (2) The employer cancels the employee’s company email and computer access. (3) The employer stops paying for the employee’s health insurance (or offers COBRA coverage). (4) The employee packs his or her

belongings and is escorted out of the premises. Obviously, the answer will differ from company to company, but these factors can help differentiate between an unpaid leave of absence, or furlough, and complete termination."

37. If you start the 2021 plan year with a classic SH with basic match, then suspend the match, can you come back in before the end of the 2021 year and do a late adoption 3% non-elective option to satisfy ADP safe harbor but still test the match in ACP? Or are they out of luck for the 2021 plan year for any safe harbor protection and must test the deferrals too?

The suspension of the match forfeits both the ADP safe harbor and the ACP safe harbor. If the plan had ADP safe harbor matching contributions at any time during the year, it's over. There is no ability to return to ADP or ACP safe harbor status for that year.

38. Is there any expectation that CRD or loan relief may be available for participants again in 2021?

None, but tomorrow is another day.

39. What are the odds the March 31, 2021 date will be extended for partial plan terminations as it seems unlikely that all will be vaccinated by then so everything won't be "back to normal" by then either?

With a new Congress and a new President, anything is possible, but I wouldn't hold my breath.

40. can we go through an example for 2020 and 2021 to show how this calculation works - Partial Term

Company had 30 active participants on March 31, 2020. If they have at least 24 active participants on March 31, 2021, then a partial termination has not taken place for 2020 or 2021 as a result of COVID. If they have fewer than 23 active participants on March 31, 2021, then very possibly a partial termination has taken place. The existence of a partial termination as a result of employment termination is always a matter of facts and circumstances, although there is a presumption that if at least 20% of participants terminate during an "applicable period" as a result of an employer-initiated severance, there is a partial termination. [Rev. Rul. 2007-43] COVID-19 separations would be treated as employer-initiated, as explained in the next answer.

41. In determining "terminated employees" are participants who left voluntarily counted in the 20%? And what if you provided distributions?

For determining a partial termination, Rev Rul. 2007-43 says: "Employer-initiated severance from employment generally includes any severance from employment other than a severance that is on account of death, disability, or retirement on or after normal retirement age. An employee's severance from employment is employer-initiated even if caused by an event outside of the employer's control, such as severance due to depressed economic conditions. In certain situations, the employer may be able to verify that an employee's severance was not employer-initiated. A claim that a severance from employment was purely voluntary can be supported through items such as information from personnel files, employee statements, and other corporate records." So, leaving voluntarily might not be an employer-initiated severance, but the employer needs to be prepared to prove it, and to show it wasn't a case of "rats deserting a sinking ship."

42. So if, during 2020, the plan was amended to accelerate vesting to 100% for affected participants and some affected participants didn't take a distribution, the plan cannot now be amended to change the vesting schedule back as that would violate anti-cutback rule, correct?

True.

43. Can one in 2020 adopt a regular calendar year 401(k) plan in November, Have HCE's defer in November & December (plus presumably NHCE'S), then in 2021 adopt a 4% Safe Harbor amendment allowing HCE's to keep their deferrals up to \$19,500? Thanks.
44. *No. Please see the [Ferenczy Flashpoint article](#) we posted explaining our reasoning in full.*
45. Will this the Qualified Disaster Distributions be self-certifying like CRD or will plan sponsor need to approve?
While I do not anticipate formal guidance on for this legislation, self-certification would seem to be appropriate.
46. To be clear, did the special disaster relief have to be for a disaster that occurred in calendar 2020 (not 2021), and did it have to be a FEMA declared disaster, or would say, one person's individual house fire qualify?
We are talking about major presidentially declared FEMA disasters qualifying for individual assistance. A simple house fire will not qualify.
47. Will the plan qualify as a QACA if we don't increase the limit to 15%?
Absolutely yes. Remember, the majority of QACAs don't reach the 10% limit in effect before SECURE.
48. Can you suspend SHM mid-year (providing match through 30 day notice), and then later adopt SHNEC (providing SHNEC for full year comp)?
No. Code §401(k)(12)(F)(ii).
49. If a plan is a SHNE 3% for part of year and then suspends. Reinstitute end of December with 4%. Would it be 4% for entire year, or 3% for beginning of year?
4% for the whole year.
50. Can we discuss loan re-amortization for suspended loan payments? Re-start regular payments on 01/01/2021 and re-am the year after payment suspensions or re-am all effective 01/01/2021?
These is outside the scope of this program. We discussed this in our June 24 webcast which is available on the ERISApedia webcast page. Alternatively, you can use the ASK the Author feature if you are an ERISApedia subscriber. (And if you aren't, you should be!)
51. Does sunset rule apply only for auto enroll plans or for all plans that were allowed to avoid QNEC for missed deferrals if caught within 3 months?
This is only for the special rule for automatic enrollment plans. Neither the 3-month rule nor the 2-year rule is changed.
52. If a company adopts a new 2020 plan during 2021, can the 2021 plan year be safe harbor if 2020 plan adopted mid-year?
Any complete plan year can be safe harbor if the various safe harbor conditions are followed.
53. My document vendor told me there was nothing to amend if a client flip-flopped SHNE year to year. Seems to me that if the AA indicated the plan was SHNE and the client decided not to be SHNE, then the check box in the AA should be amended to indicate the plan is not SHNE.
We cannot comment on a specific document.
54. For 2020 calendar plan year, if we decide by November 30, 2021, do we do 3% or 4% NEC?
3%.
55. Can a non-safe harbor plan amend a calendar year plan today (so effective 1/1/21) to add a Maybe Non-elective SH and get the notice out prior to January 31? Does plan get ACP SH for current discretionary match if implemented?

No. I assume the plan was an ADP-tested 401(k) plan for 2020. The safe harbor notice (regular or contingent) had to be given a reasonable time before the beginning of the plan year. The January 31 special rule is only for standalone "maybe not" notices.

56. If 2020 was supposed to be 1st year of RMD, so now 2021 is 1st year, do you have until April 1st, 2022 to take it?

This is outside the scope of this webcast. Please see our July 8 webcast available on the ERISApedia webcast page. Alternatively, you can use the ASK the Author feature if you are an ERISApedia subscriber. (And if you aren't, you should be!)

57. if the plan is written to provide (in addition to ADP SH be it M or 3% NE) a discretionary Match that further provides if a Match is contributed it will be a limited to matching up to 6% deferrals, 4% of pay so as to conform to ACP SHM, does the employer have to provide the Notice by 12/1 for a given year or is the Notice not necessary.

Give the notice. The notice must be provided a reasonable time before the beginning of the year if (a) you want to use a matching contribution to satisfy the ADP safe harbor, or (b) you want to avail yourself of the ACP safe harbor (other than in a QACA), including for a discretionary match.

58. Hardship for COVID disaster is still available - can that be self-certified too?

The IRS has not provided guidance or commentary on the issue. This is outside the scope of this webcast but was addressed in the WE CARES series of webcasts.

59. Any thoughts on employees that were not terminated, but were no longer getting paid or receiving benefits in 2020 . . . no way these employees reached 501 hours let alone 1000 hours. Some ERs considering these employees furloughed, others putting the employees on a leave of absence. Any rumblings on guidance being provided re relief on hours for eligibility or vesting. Guessing not, but doesn't hurt to ask. Thanks

No rumbles.

Do you need a safe harbor notice in the following situations?

Plan type	ADP safe harbor contribution	Are there matching contributions?	Does employer want ACP safe harbor?	Must give notice
EACA				Yes
Non-EACA ADP-Tested				No
Classic SH	Nonelective	No	N/A	No
Classic SH	Nonelective	Yes	No	No
Classic SH	Nonelective	Yes	Yes	Yes
Classic SH	Basic match	Yes		Yes
Classic SH	Enhanced match	Yes		Yes
QACA	Nonelective	No	N/A	No
QACA	Nonelective	Yes	No	No
QACA	Nonelective	Yes	Yes	No
QACA	Basic match	Yes		Yes
QACA	Enhanced match	Yes		Yes

“Classic SH” means an ADP safe harbor plan other than a QACA.

SIMPLE 401(k) plans always require a notice.

SECURE Act changes are highlighted in red.

A 403(b) plan never needs the ADP safe harbor. The only safe harbor that concerns a 403(b) plan is the ACP safe harbor, for which a notice is always required before the beginning of the plan year.