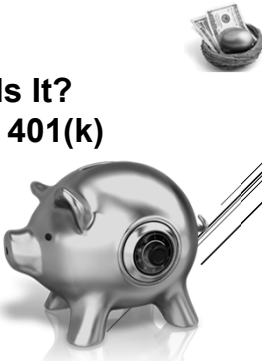


**Safe and SECURE, or Is It?
Exploring Safe Harbor 401(k)
Plans**


S. Derrin Watson, JD, APM
Ilene Ferenczy, JD, APA, CPC



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- ▶ Joanne Pecina
- ▶ Maureen Pesek
- ▶ Tim McCutcheon



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Ilene Ferenczy
S. Derrin Watson

Your Presenters Today

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SECURE
CHANGES
TO SAFE
HARBOR
PLANS

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SECURE Amendment Deadline



- ▶ Amendments not required until last day of first plan year beginning in 2022
 - ▶ Governmental plans can wait until 2024
- ▶ Applies to mandatory and discretionary amendments
- ▶ Amendment must be retroactively effective and conform to plan operations
- ▶ Terminating plans should amend for SECURE prior to termination

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Example: Safe Harbor Notice



- ▶ Employer has safe harbor nonelective 401(k) plans
- ▶ Plan document requires all safe harbor 401(k) plans to provide safe harbor notice before beginning of plan year
- ▶ Employer doesn't give safe harbor notice before 2021 plan year
- ▶ Not an operational failure so long as:
 - ▶ Employer amends for SECURE by end of 2022 plan year
 - ▶ Amendment retroactively effective
 - ▶ Amendment conforms to plan operations

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But ... There Are Several Open Issues



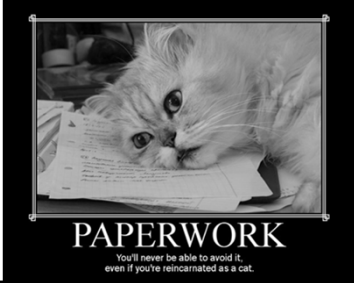
- ▶ IRS hasn't released guidance on safe harbor 401(k) issues
 - ▶ There are a lot of implications that aren't immediately obvious
- ▶ In the absence of guidance, safest position is to be conservative
 - ▶ Don't assume that the IRS will do what you consider logical and reasonable
 - ▶ Consider letting your client make the choice between conservative and aggressive

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SAFE HARBOR NOTICE




- ACP safe harbor
- Midyear suspensions
- Midyear plan amendments




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How to Sail into the ADP Safe Harbor




- ▶ Provide a 3% nonelective contribution
 - ▶ No need for notice
 - ▶ Satisfy plan year requirement
- ▶ Safe harbor match
 - ▶ Give a safe harbor notice
 - ▶ Satisfy plan year requirement
 - ▶ Give matching contribution
 - ▶ Basic match
 - ▶ QACA basic match
 - ▶ Enhanced match




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How to Sail into the ACP Safe Harbor




- ▶ Provide safe harbor notice
- ▶ Satisfy plan year requirement
- ▶ Make ADP safe harbor contribution
 - ▶ Match
 - ▶ Nonelective
- ▶ All matching formulas satisfy safe harbor restrictions
 - ▶ No climbing match
 - ▶ No HCE has higher rate of match than any NHCE at same levels of deferrals
 - ▶ Can't match deferrals > 6% of comp
 - ▶ Discretionary match can't exceed 4% of comp
- ▶ ACP safe harbor match can have vesting schedule




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<h2>WHY HAVE A SAFE HARBOR NOTICE FOR A NONELECTIVE PLAN?</h2>	<ol style="list-style-type: none"> 1. Plan wants ACP safe harbor <ul style="list-style-type: none"> ▶ Could use maybe notice <ul style="list-style-type: none"> ▶ Doesn't commit you to safe harbor nonelective ▶ Forces current year testing
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<h3>Requirements to Suspend Safe Harbor Contributions</h3> <ul style="list-style-type: none"> ▶ Applies to any suspension or reduction of safe harbor contributions ▶ Qualification: Either: <ul style="list-style-type: none"> ▶ Operate at economic loss ▶ Gave "maybe not" notice as part of safe harbor notice ▶ Requirements <ul style="list-style-type: none"> ▶ Give 30 days advance notice ▶ Allow all participants to change deferral elections ▶ Execute amendment <ul style="list-style-type: none"> ▶ Can't be effective retroactively ▶ Can't be effective sooner than 30 days after notice ▶ Fund safe harbor contributions through effective date of amendment ▶ Pass ADP/ACP for full year using current year testing 	
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<h3>Will IRS Dispose of Maybe Not Notice/Suspension Notice for Nonelective Plans?</h3> <ul style="list-style-type: none"> ▶ They didn't in Notice 2020-52 <ul style="list-style-type: none"> ▶ But they gave short-term window to suspend without maybe notice ▶ Window closed August 31 ▶ Waived <i>advance</i> 30-day notice requirement for safe harbor nonelective <ul style="list-style-type: none"> ▶ But required notice by August 31 ▶ Notice 2020-52 acknowledged that they weren't taking into account SECURE provisions ▶ Conservative position: Assume the rules still apply 	
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WHY HAVE A SAFE HARBOR NOTICE FOR A NONELECTIVE PLAN?



1. Plan wants ACP safe harbor
 - ▶ Could use maybe notice
 - ▶ Doesn't commit you to safe harbor nonelective
 - ▶ Forces current year testing
2. Give "maybe not" notice to facilitate midyear suspension



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Midyear Safe Harbor Plan Amendments


- ▶ Notice 2016-16 permits most midyear safe harbor 401(k) amendments
- ▶ But if the amendment affects required safe harbor notice content:
 - ▶ Plan must provide "updated safe harbor notice"
 - ▶ Plan must give reasonable (30-day) opportunity to change deferral election

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Required Safe Harbor Notice Content

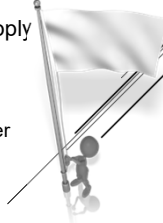
- ▶ Safe harbor contributions
- ▶ Any other plan contributions
- ▶ The type and amount of compensation that may be deferred
- ▶ How to make deferral elections
 - ▶ Includes any administrative requirements that apply to the elections
- ▶ Distribution provisions
- ▶ Vesting provisions
- ▶ Contact information
- ▶ QACA automatic deferral and investment provisions



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Will IRS Waive Notice 2016-16 Notice Requirement for Safe Harbor Nonelective Plans?

- ▶ They haven't yet
- ▶ Notice 2020-52 required it
- ▶ Conservative position: Assume the rules still apply
 - ▶ Even if you didn't give a notice before start of year
- ▶ Consider giving a notice and calling it an SMM
 - ▶ Because you'll have to give the SMM sooner or later



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RETROACTIVE ADDITION OF SAFE HARBOR 401(K) FEATURE



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Safe Harbor Plan Year Requirement in Regs

- ▶ General rule in regulations:
 - ▶ Plan provisions that satisfy safe harbor are adopted before beginning of plan year
 - ▶ Exception: Maybe notice
 - ▶ Provisions remain in effect entire 12-month plan year
 - ▶ Exceptions
 - ▶ Initial plan year
 - ▶ Change of plan year
 - ▶ Plan termination
 - ▶ Midyear suspension/reduction



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Initial Plan Year



- ▶ Newly established plan (or addition of 401(k) feature to profit-sharing plan) can have less than 12 months if:
 - ▶ Plan year is at least 3 months long
 - ▶ Or ASAP after employer established
 - ▶ Plan is not "a successor plan"
 - ▶ At least 50% of employees eligible to defer were eligible under another 401(k) plan maintained by the employer in the prior year

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Why the Three-Month Rule?



1. It guarantees that the safe harbor employer contributions will apply for at least a quarter of the year; and
2. It guarantees that the NHCEs will have at least three months during which they may save for their own retirement with the convenience of payroll deduction.

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New SECURE Act Rule



- ▶ ADP-tested plan can be amended after start of year to convert to safe harbor nonelective
- ▶ Minimum contribution depends on amendment timing
 - ▶ 3% nonelective
 - ▶ Any time before 30th day before close of plan year
 - ▶ Deadline: November 30 for calendar year plan
 - ▶ 4% nonelective
 - ▶ Deadline: 12 months after end of plan year
- ▶ Exception: Doesn't apply if "at any time during the plan year" the plan provided for ADP safe harbor match

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Thoughts about Retroactive Amendment

- ▶ The deadlines are absolute
 - ▶ Don't wait for SECURE amendment
- ▶ Can make it effective for just one plan year
 - ▶ Return to ADP-tested for following year
- ▶ Can be effective on permanent basis
 - ▶ Will want to have 4% contribution change to 3% going forward



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So, What Does This Change?

- ▶ New rule changes requirement that safe harbor provisions be in place before beginning of plan year
- ▶ New rule does not change requirement that safe harbor provisions be in effect for entire 12-month plan year
 - ▶ Subject to the regulatory exceptions
 - ▶ Cannot amend plan in November to provide safe harbor nonelective contribution just for the last two months



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So, Can We Now Adopt a New Safe Harbor 401(k) Plan with very Short Plan Year?

- ▶ The retroactive *amendment* provision does not authorize retroactive *adoption*
- ▶ 3-month rule is still in place
- ▶ If existing employer wants to adopt calendar year safe harbor nonelective 401(k) plan effective December 1, you can say:
 - ▶ Wait until January 1 (you can do ADP-tested for December)
 - ▶ We can have a plan year ending November 30, 2021
 - ▶ And then have short year for December 2021, converting to calendar in 2022
 - ▶ You can have a short year 12/1/20 to 2/28/21 and another from 3/1/21 to 12/31/21



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What About Return to Safe Harbor Following Suspension?



- ▶ Example 1:
 - ▶ Employer started 2020 with safe harbor match
 - ▶ Employer validly suspended safe harbor match April 30
 - ▶ Gave notice
 - ▶ Funded match through April 30
 - ▶ Employer wants to amend now to convert to safe harbor nonelective
 - ▶ Can't do it: Statute very clear
- ▶ Example 2:
 - ▶ Same facts except started with safe harbor nonelective
 - ▶ Regulations say plan must pass ADP test if suspend
 - ▶ Conservative position: Cannot retroactively return during 2020

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NEW QACA LIMIT



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QACA Automatic Deferrals Before SECURE



▶ Automatic deferral for participant whose first automatic deferral in calendar year QACA is January 15, 2020 paycheck:

Plan Year	Minimum Percentage	Maximum Percentage
Initial period: 2020, 2021	3%	10%
2022	4%	10%
2023	5%	10%
2024 and later	6%	10%

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QACA Automatic Deferrals After SECURE



► Automatic deferral for participant whose first automatic deferral in calendar year QACA is January 15, 2020 paycheck:

Plan Year	Minimum Percentage	Maximum Percentage
Initial period: 2020, 2021	3%	10%
2022	4%	15%
2023	5%	15%
2024 and later	6%	15%

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Considerations



- If plan percentage set at 6%, new rules don't matter
- If plan has automatic deferral but isn't a QACA, new rules don't matter
- If QACA increases automatic deferral 1% per year up to 10% do you want it to increase to 15%?
 - Should be conscious decision, not inadvertent result of SECURE amendment
- Remember, ACP safe harbor won't apply if plan considers deferrals over 6% of compensation in computing match
 - SECURE Act 2 may change that for some QACAs

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Contact Information



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For Further Study

Joanne Pecina will demonstrate how to find more information on today's topic from the ERISApedia.com resources.



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