

Fireside Chat - #8 – Questions

1. A participant terminated employment in 2019, and is now requesting a distribution from the 401k plan as a qualified individual for CRD favorable tax and early withdrawal penalty treatment. The plan does not intend to adopt a CARES amendment, as this is already an allowable distributable event, due to termination of employment. Does the plan do the mandatory 20% withholding if the participant requests a direct lump sum?

Notice 2020-50 says: “An employer is permitted to choose whether, and to what extent, to treat distributions under its plans as coronavirus-related distributions (as well as whether, and to what extent, to apply coronavirus-related plan loan rules described in section 5 of this notice). . . . Further, the employer (or plan administrator) is permitted to develop any reasonable procedures for identifying which distributions are treated as coronavirus-related distributions under its retirement plans.”

So, the plan is not required to permit CRDs. In that case, I think the plan would be ok if it chose to ignore the CRD rules altogether, and do 20% withholding on eligible rollover distributions (other than 2020 RMDs from defined contribution plans).

2. If you stop the safe harbor contribution under Notice 2020-52 do you still get a free pass on top heavy?

No. A midyear suspension or reduction of NHCE ADP safe harbor contributions causes the plan to lose safe harbor status, and therefore to lose the top heavy exemption. 2020-50 does not change this result.

3. In the definition of a QI, does "lay off" mean termination of employment with no chance of return or is it contemplating only temporary lay-offs with possibility of return? Thank you!

Neither the statute nor the Notice defines the term. Given that you can be a QI if you've lost hours, I suspect the distinction you draw really doesn't matter. A lay off under either definition, related to COVID-19 would make someone a QI.

4. What needs to be provided to plan sponsors regarding this change (2020-52 Notice)?

Do you need to tell plan sponsors in general about revised rules for suspending safe harbor 401(k) plans? No.

5. Work share programs are becoming more popular. If an employer cuts a full time employee down to 24 or 30 hours per week but the missing hours are paid

through work share, do those work share hours count for plan purposes? Is it correct the compensation for the plan would only be the amount paid by the sponsor?

State law and situations may differ. My starting point is that the plan credits the employee with the hours actually worked and the salary actually paid. Payments made through unemployment insurance would not be treated as compensation paid by the employer and therefore are not hours for which the employee is paid or entitled to payment for which service is credited.

6. If a plan doesn't offer CRDs and a participant will instead take a hardship under the disaster declaration for COVID-19, what documentation is required to prove the hardship need?

The IRS has not commented on this issue, other than to say “it is expected that plan administrators will be flexible in interpreting plan terms requiring documentation relating to the hardship when processing hardship distribution requests during the difficult circumstances following a disaster.”

7. Notice 2020-52 Do you think the 30 notice relief for suspension would also apply to a SH plan that wants to terminate (due to a business hardship). Would a terminated plan have to give a 30 day notice before it can terminate?

A safe harbor 401(k) plan can terminate midyear without giving a 30-day notice if the employer is experiencing substantial business hardship.

8. Mentioned in the last We Cares was that if recontributing a distribution to a plan either from being a RMD or CRD, it needs to agree to the amount originally distributed. How do you handle stock that was transferred from an IRA in Jan. 2020 as an RMD "in-kind" and the stock value has subsequently changed?

My point was that if the plan distributed cash, one could not recontribute the amount of that cash plus earnings. If the plan distributed property, I see nothing that prevent recontribution of that property.

9. When you say that HCE safe harbor contributions are not safe harbor contributions for suspension purposes, does this mean that safe harbor contributions do not need to be funded for HCEs if the plan is amended to remove the safe harbor contributions mid-year, even if the plan does not exclude HCEs from safe harbor contributions?

No. The anti-cutback protects HCEs as well as NHCEs. The HCE contributions must be funded through the date of suspension.

10. What about plans that have a flexible safe harbor. Never committed in notice that they were going to make it. Client started making contribution in January and then stopped in March due to COVID. Is a notice required?

The plan already says it is ADP tested. So there is no need for an amendment to that effect. Allocate the contributions appropriately under the nonelective contribution provisions of the plan outside of the safe harbor.

11. Can you stop making SH contributions for some HCEs, but not other HCEs, without blowing the safe harbor?

Yes. As suggested earlier, your document needs to be amended to conform to what you do, and the anti-cutback rule protects contributions earned before the amendment.

12. What if you want to suspend the SH for the HCE's beyond 08/31/2020?

The 8/31/2020 date does not impact the rule that HCE contributions are not ADP safe harbor contributions. In other words, in 2022 you can do a midyear suspension of safe harbor contributions to HCEs without adversely impacting the safe harbor status of the plan.

13. What if the plan document provides a safe harbor contribution to ALL eligible employees? Wouldn't you still need to amend the document to eliminate the SH contribution to HCE's?

Yes. But doing so won't cause you to lose safe harbor status.

14. So, to be clear, if suspending safe harbor nonelective contributions for everyone, that can be done immediately before 8/31/2020 with no advance notice, but if suspending for HCEs only, that requires advance notice?

Kind of. The IRS is allowing suspension of SHNEC for all, with the loss of safe harbor status, but requiring that the notice be given no later than 8/31/2020. The IRS is allowing midyear suspension of HCE contributions, without losing safe harbor status, but requiring a notice to the affected employees as soon as practical under Notice 2016-16.

15. If the HCEs contributions are not viewed as safe harbor contributions do non-key HCE need to get a top heavy contribution if the plan is top heavy?

Ilene and I have discussed this and we agree that Notice 2020-52 does not adversely impact the ability of a safe harbor plan to qualify for the top heavy exemptions for plans that “consist solely” of safe harbor contributions. That doesn’t say the IRS won’t come out with an unfavorable ruling later.

16. Late deposits and Covid-19 - do you think IRS will provide some relief for 2020 late deposits due to Covid-19 disruptions?

The DOL has provided a little relief. Disaster Relief Notice 2020-01 states: “The Department recognizes that some employers and service providers may not be able to forward participant payments and withholdings to employee pension benefit plans within prescribed timeframes during the period beginning on March 1, 2020, and ending on the 60th day following the announced end of the National Emergency. In such instances, the Department will not – solely on the basis of a failure attributable to the COVID-19 outbreak – take enforcement action with respect to a temporary delay in forwarding such payments or contributions to the plan. Employers and service providers must act reasonably, prudently, and in the interest of employees to comply as soon as administratively practicable under the circumstances.”

17. Are the Safe Harbor suspensions covered under the notice only for the current year?

The rules relating to suspensions limited to HCEs have no expiration date. The relief from having to satisfy the normal qualification requirements (maybe not notice or economic loss) and the relief from provide a supplemental notice when suspending a safe harbor nonelective plan are limited to suspensions taking place by August 31, 2020.

18. If the plan suspends the safe harbor match prior to 8/31/2020, how will that affect testing? Does the plan keep the SH status?

If the plan suspends either safe harbor nonelective or safe harbor match for NHCEs, the plan will lose safe harbor status. That’s true this year. That’s true next year. This has not changed.

19. The notice 2020-52 gets the plan out of ADP Testing, any relief for TH?

This Notice does not get the plan out of ADP testing. Complying with the safe harbor for the full year gets the plan out of ADP testing. The notice does not provide top heavy relief.

20. Do you know where we may be able to obtain a template of a Safe Harbor Match Suspension Participant Notice?

My first suggestion is to check with your document vendor. April 9, FIS posted an updated version of that notice on its [Other Resources page](#).

21. Under special suspension - what are the ADP/ACP testing requirements?

If you suspend NHCE ADP safe harbor contributions, you must pass ADP/ACP for the full year using current year testing.

22. If you stopped your SH because you had no to stop business and then can you start up the SH again and make up contributions missed?

If you did a midyear suspension, you must pass ADP/ACP for the full year using current year testing. There is no provision to restore safe harbor status (although the IRS might possibly allow you to restart a safe harbor nonelective midyear – but don't count on it).

23. If the plan suspends the SH contribution for 2020 between March and August, the plan is now subject to testing and top heavy requirements for 2020, is that correct? It does not appear that relief from testing and top heavy is provided.

Correct! Go to the head of the class!

24. If participant died in 2019 does non-spouse beneficiary have to complete rollover to inherited IRA in 2020? Re: slide 39 this webcast

We have no guidance on this.

25. Does Notice 2020-52 provide any relief for the 2019 Safe Harbor contribution that employers may not have the funds to make at this going?

No

26. If we know a participant is going to take a cash distribution and it's a pretty small amount, do we still have to calculate an RMD or is it ok to just pay out the entire amount at once?

You still must calculate. There is no de minimis amount.

27. If you suspend the match for HCE's only, are you still subject to top heavy for 2020?

No. So long as you retain safe harbor status, you should retain top heavy exemption.

28. The RMD rules being discussed is for DC Plans? I think that the rules are slightly different for DB Plans on the DCY and payment timing.

Our discussion was indeed limited to defined contribution plans, because those are the plans that receive the benefit of the payment holiday.

29. Under the CARES Act, can you continue to pay an RMD in 2020 to a terminated participant who has been receiving their annual RMDs since 2013, however the plan does not allow for partial distributions to terminated participants.

That's a matter of the wording of the plan document. My suggestion is if it is at all unclear, you should address the issue in the CARES amendment. For example, the CARES amendment could include a clause such as this: "A Participant or Beneficiary receiving payment of 2020 RMDs or 2020 Extended RMDs pursuant to this amendment may receive them in any method (including installments or partial distributions) which would have been permitted under the terms of the Plan if the amounts would have been RMDs but for the enactment of Code §401(a)(9)(I)."

30. Can they explain what happens if a company does NOT want to adopt any CARES provisions and therefore keeping the RMD provisions as before?

That depends on the terms of the plan. If the plan incorporates 401(a)(9) by reference, then CARES automatically suspended RMD distributions for 2020. If the plan spells out the RMD requires, then the plan must make the RMDs notwithstanding CARES.

31. For 2020 RMDs, would it be appropriate to still provide participants with an option to waive the 20% fed withholding, or does it need to be automatically waived?

For 2020 RMDs, 20% withholding does not apply. A plan should apply the rules that would normally apply to RMDs, which generally means a default rate of 10%, although the participant has the option to ask for more or less (or waive it altogether). The plan needs to provide a 3405 notice.

32. When a plan suspends their Safe Harbor contributions per 2020-52, does this mean they can only suspend the contributions due between 03/13/2020 and 08/31/2020, or does this apply for the whole year and the date range is just the timeframe in which you need to adopt the suspension?

The suspension is effective no sooner than the day it is adopted. For example, suppose an employer signs an amendment suspending contributions effective August 1, 2020. Participants are entitled to receive the promised safe harbor contributions from January 1 to July 31, 2020. Moreover, the plan is subject to ADP testing for the full year, using current year testing.

33. If you start the year with a SH match, suspend it you cannot start it back up again BUT if you then decide to do a SH NE - up until the due date of your return, I can see where you may not get an ACP Safe Harbor but you are satisfying the ADP SH rules. Why would you feel that is not allowed?

Code §401(k)(12)(F)(ii), as amended by SECURE, says that you cannot use the late election of safe harbor nonelective if "at any time during the plan year" the plan was subject to the safe harbor match.

34. Do you think participants need to be given an option to receive a 2020 RMD or can you just assume that are not done unless requested by the participant?

If you don't tell a participant about an election, then they don't have an election. Of course you need to tell them.

35. Back to the SHNE suspension. From all articles I have read, the suspension applies only to the HCEs and not NHCEs?

Is there a question that goes with that answer? If you suspend ADP safe harbor contributions for HCEs, but not NHCEs, you do not lose safe harbor status. If you keep ADP safe harbor contributions in place, but suspend or reduce contributions that are not ADP safe harbor contributions, whether or not they are ACP safe harbor contributions, it appears that you do not lose the ADP safe harbor.

36. 401(k) Plan using safe harbor non-elective contribution with the "maybe not" notice for 2020. The Employer can decide not to be safe harbor for the entire 2020 year, as long as the amendment is adopted immediately upon making their decision?

True. They must give the supplemental notice no later than August 31. The suspension cannot be effective earlier than the date the amendment is signed. Therefore, the employees are entitled to the safe harbor nonelective contribution computed to the date of the amendment.

37. If a participant wants an RMD done this year is this allowed in a DC Plan?

That will depend on the terms of your CARES amendment. If you use the IRS model, then the participant will have a choice.

38. Confusion on Slide 24: should the 'After SECURE Act' bullet indicate that 70.5 non-owner retirees are NOT waived?

Here is what the slide said about things that are waived

- ▶ RMDs to be paid in 2020
 - ▶ Includes 2019 RMDs with April 1, 2020, RBD that weren't paid in 2019
- ▶ 2020 RMDs for participants with April 1, 2021 RBD
 - ▶ After SECURE Act, this is limited to non-owners born before July 1, 1949, who retired in 2020
- ▶ Notice 2020-51 calls these "2020 RMDs"

As stated earlier in the program, the only persons who will have an RBD of April 1, 2021 are nonowners born before July 1, 1949, who retire in 2020. The 2020 DCY RMDs for those few individuals with April 1, 2021 RBDs is waived. So, CARES waives defined contribution and IRA RMDs to be paid in or paid for 2020.

39. Will the ADP/ACP testing be required if a the Notice had the "maybe not" language OR the employer is operating at an economic loss and they elected to suspend Safe Harbor contributions or do the normal rules still apply for those plans that meet these requirements?

I'm not sure what you're calling the "normal rules." The rules that are in the regulations are that if you suspend ADP safe harbor contributions midyear, you must pass ADP (and ACP if applicable) testing for the full year using current year testing. There is nothing that gets you out of that result.

In most years, you must either be operating at a loss or give the maybe not notice to be eligible to suspend. The IRS is waiving those conditions if the amendment is signed between March 31 and August 31, 2020. But the IRS is not changing the consequence of the suspension: Loss of safe harbor status.

40. What if both choices were in effect? That is, if getting monthly RMD installments then default was to continue to distribute, but if just annually then default is not to distribute (unless participant elects otherwise in either case)?

Can you draft an amendment to say that? Yes. It is not the IRS model, but you can certainly take that approach if you wish. You can structure whatever defaults you like so long as the participant has an election.

41. An RMD was made from a Qualified Retirement Plan in February 2020 and the participant would like to have the funds put back into the account. Should 2 1099-R's be issued, one for the RMD and another for the rollover back into the plan.

The rollover to the plan would not generate a 1099-R. There would be a 1099-R for the distribution. It is up to the participant on his or her return to show that the amount is not taxable because it was rolled over.

42. If the owner of an IRA took out an RMD distribution in 2020, then subsequently passed away. Can the beneficiary pay back the RMD back into the individual's IRA?

The IRS did not address this.

43. What if a participant retired and took a rollover this year without having an RMD issued first? Is that considered giving the participant to choose whether or not to take the RMD?

The participant took the distribution. It seems to me the issue is likely moot.

44. If your 2020 RMD due April 1, 2021 is extended until December 31, 2021, then why do you need one at all due to the SECURE act where after 12/31/2019 age 70 1/2 is extended to age 72?

CARES doesn't change RBDs. It waives RMDs. Your 2020 DCY RMD is waived. It is not extended. It is waived. The 2021 DCY RMD, due December 31, is payable as it would normally be. SECURE doesn't waive RMDs. It changes RBDs.

45. If plan permits rollover but restricts rollovers from terminated employees. Does the plan need a current amendment or could an administrative policy be written to say that only 2020 RMDs can roll back into the plan.

That will depend on plan terms.

46. To confirm a RMD from an IRA taken at the beginning of 2020 if choose to roll back must be placed back into the same IRA which it was taken from, correct?

That's what Notice 2020-51 says.

47. Can a company apply for a second loan to cover owner and/or employees who were not included in 1st PPP loan?

I'm not sure. They should check with their lender.

48. DB is a deferral of contributions not a waiver?

CARES deferred the due date of 2020 minimum funding contributions. It did not waive those contributions.

49. Please confirm that DB RMDs that were required to be taken by 4/1/2020 had the deadline extended to 7/15/2020.

Confirmed. Notice 2020-23.

50. Can you please confirm that if we suspend RMD's from qualified plans we are required to reach out to each impacted participant and advise them that they can still request a partial distribution from the plan?

It would be limited to participants eligible to receive an RMD. Whether you need to do so is a function of your CARES amendment. If the amendment gives participants a choice, both of us think you need to notify the participant of the existence of the choice. Ilene (persuasively) warned about the potential for a benefits, rights, and features problem if participants are not informed of their options.

51. If you are suspending all HCE contributions in a SH plan, is the plan required to amend the document?

If the document as written requires the contributions for the HCEs, then to suspend those contributions you must amend the plan. Otherwise, you have an operational failure.

52. When does that RMD amendment need to be signed?

For most employers it must be signed by the last day of the first plan year beginning in 2022. For a calendar year plan, that would be December 31, 2022.

53. For 2021, since an employer does not have to provide a safe harbor non-elective notice, can they amend mid-year to suspend the safe harbor if they are not operating at an economic loss. Previously they needed a "maybe not" notice.

The IRS has not yet addressed the impact of SECURE on the suspension requirements. I would be cautious about that approach until we receive guidance.

54. I thought Notice 2020-52 is giving a free ride on testing and top heavy for SH plans for 2020 if adopted before August 31? You stated that they will still be subject to top-heavy?

No. If you suspend you are still subject to ADP/ACP testing for the full year using current year testing. And that means the plan loses the benefit of the top heavy exemption.

55. Do you think the IRS position with regard to the anti-cutback rule is a reasonable interpretation of the regulations, which provide an exception to the

anticutback rule for changes in the cashout threshold? [Treas. Reg. §1.411(d)-4(b)(2)(v)]

I think you're comparing apples and oranges. The RMD rules are even close to the rules discussed in that regulation. But more important, it isn't what I think that counts. It's what the IRS thinks that matters. And the IRS was quite explicit in Notice 2020-51 that the anticutback protects a participant's right to receive an RMD (or to defer receipt) unless and until the document is amended (and even then, only if the document gives the participant the choice). I would be very reluctant to advise a client to disregard that clear statement.

As a side note, speaking as someone who's written about 403(b) and 457(b) plans, it's important to observe that 457(b) plans are not subject to the anticutback rule at all, and 403(b) plans are subject to the rule only if the plan is subject to ERISA. For that matter, governmental and nonelecting church qualified plans are also exempt from the anticutback rule. Therefore, these plans can amend as they choose with regard to 2020 RMDs without affording participants a choice in the matter.