



Qualified Retirement Plan  
Consulting & Administration Services

## **February 2009 Newsletter**

As the economy continues to experience problems, sponsors of 401(k) retirement plans have been contacting us to curtail or eliminate their employer contributions. In some cases, the employer contribution is a Profit Sharing arrangement. In others it is a Matching formula. There are many employers that have utilized a Safe Harbor Contribution to avoid the discrimination testing that accompanies employee salary reduction contributions. This newsletter will discuss reducing or eliminating the Profit Sharing, Matching and Safe Harbor Contributions.

### **Profit Sharing Contributions**

Most Profit Sharing plans that we have drafted have a fully discretionary language built into the plan, such that a contribution requires an act by the sponsors governing body. A plan sponsor can simply chose not to declare a contribution for the year. No notices are required and no amendments are necessary.

There is a catch if the plan has become Top Heavy (60% or more of the plan assets belong to the owners or key employees) and the owner or other Key Employees have already made salary reduction contributions for the year. In that case, although a sponsor may opt to forego any Profit Sharing Contributions, there will be a Top Heavy Minimum Contribution requirement that could be as much as 3% of pay to the Non-Key Employees. This Top Heavy Contribution could be made after the plan year end, but before the filing of the sponsor's tax return plus extensions.

There is a possibility that your Plan has a defined Profit Sharing Contribution formula. You do have the option of amending your Plan to reduce

or eliminate that prescribed contribution but only on a prospective basis. Amounts that have accrued up until the time of any amendment will still have to be contributed to the Plan. Participants will have to be notified of this change to Plan provisions.

### **Matching Contributions**

The Matching arrangement is defined in the plan document and may take many forms.

Some plans have a discretionary Match that is determined annually. In such a case, it is very similar to a Profit Sharing arrangement, where the plan sponsor can simply chose not to provide a Match for the Plan Year.

Another popular option is a discretionary Match that is funded on a payroll basis as the plan year progresses. Although the plan document does not set the formula in stone, the participants are aware of the formula being used and how it applies to them. How to get out of that? Simple - Provide notification to your participants that the Match will be changed, reduced, or eliminated as of some date in the future (30 days is a benchmark) and be sure your participants have an opportunity to make changes to their Salary Deferral elections as a result of the change in the Match.

In other plans, the Match is fixed in the plan document. Whether it is funded as the Plan Year goes on, or once at Plan Year end, it is still possible to reduce your contribution requirement even after the Plan Year has begun. This option will require a plan amendment and notification to participants. A sponsor may not eliminate a Match that has accrued up until the time of the amendment and so there will likely be funding obligations to meet for the Plan Year, but an amendment can reduce or eliminate future Matching Contribution obligations.

### **Safe Harbor Contributions**

A Safe Harbor Plan provides substantial benefits to Highly Compensated Employees by allowing them to maximize their 401k Salary Deferrals to the plan without risk of return due to failed discrimination testing. There are two types of employer Safe Harbor Contributions. One is a matching

arrangement and the other is a non-elective contribution. Both require the contribution to be fully and immediately vested. Should the plan be top heavy, both types of safe harbor allocations count towards the required top heavy contribution, and often satisfy a significant amount, if not all of this funding obligation.

The Matching Contribution is specific and requires a Match equal to 100% of the first 3% of pay deferred and 50% of the next 2% of pay deferred. So to maximize, a participant would contribute 5% of pay to get a 4% of pay match. A plan sponsor could amend that Plan to eliminate the Safe Harbor Match during the plan year and would have to provide notice to participants. The notice should be given 30 days in advance of the reduction and participants should be given a reasonable opportunity after receipt of the notice to change their salary reduction elections.

The second type of Safe Harbor Contribution is a non-elective contribution. Here, the sponsor contributes 3% of pay for every eligible participant, irrespective of that participant's ability or willingness to make a salary reduction contribution. If the Plan does not yet provide for this Safe Harbor Contribution AND the Plan Sponsor has distributed a notice 30 days prior to the first day of the Plan Year, stating that they "May" make the 3% contribution, the sponsor can elect to take a "wait and see" approach by. Should the 3% Safe harbor be an attractive and attainable contribution, the sponsor must amend the plan at least 30 days prior to the last day of the Plan Year to provide for such contribution, and provide a supplemental notice to Participants. If the plan is top heavy and Key Employees have contributed salary reduction amounts to the plan, the plan sponsor may still be on the hook to contribute the 3% to the plan for that plan year.

Many safe harbor plans have the Safe Harbor non-elective contribution amount of 3% stated in the document. Once the safe harbor notice is given (at least 30 days prior to the beginning of the plan year), it must remain in effect for the entire 12 month plan year. At this time, the only effective way to remove it would be to terminate the plan. We do know that there are national organizations that represent the Qualified Retirement Plan community who are actively working with the Department of Labor and the IRS for relief to plan sponsors for this type of Safe Harbor arrangements.

You can be sure that we will notify you as soon as possible should another option become available.

If you are having problems meeting your safe harbor allocation or your matching allocation or have questions about any of the information in this newsletter, please contact your Pension Works administrator to discuss the issue.