**RETROACTIVE SAFE HARBOR 401(K) AMENDMENT**

**Instructions**

FIS has developed a good-faith amendment that may be used to convert an ADP-tested 401(k) plan to a safe harbor nonelective plan for a single year, pursuant to section 103 of the SECURE Act. The effect of this amendment is limited to a single plan year. After that year is over, the plan will revert to ADP-tested status. The amendment cannot be used:

* To retroactively adopt a plan satisfying the ADP safe harbor by a matching contribution,
* To convert a plan that was a safe harbor match plan (at any time during the plan year) to a safe harbor nonelective plan, or
* To add a safe harbor feature to a new 401(k) plan with an initial plan year of less than three months

**Is it mandatory to adopt this amendment?**

No. This is an optional provision.

**What plans can adopt this amendment?**

This amendment is available only for 401(k) plans. Inasmuch as 403(b) plans do not perform the ADP test, and the ACP safe harbor is available only if the employer provides a safe harbor notice, the amendment is limited to 401(k) plans.

**When must plans be amended?**

Under Code §401(k)(12)(F), the employer can adopt this amendment at any time during the plan year or up to 12 months after the end of the plan year. However, the timing of the amendment is important. If the employer signs the amendment 31 days or more before the end of the plan year (no later than December 1 for a calendar year plan), the employer can satisfy the ADP safe harbor with the normal 3% safe harbor nonelective contribution (“SHNEC”). If the employer adopts the amendment within the last 30 days of the plan year, or in the following year, the SHNEC must be at least 4%.

**Can I modify my adoption agreement to achieve the same effect?**

Yes, With the SECURE amendment (to be issued at a later date) an employer can use a standard FIS adoption agreement (or IDP document) to retroactively convert an ADP-tested plan to a safe harbor nonelective plan. (The deadline to adopt the SECURE amendment is the last day of the 2022 plan year.) Some employers may wish to do this to avail themselves of more robust options in the adoption agreement, or if the employer wishes to stay with safe harbor status for future plan years. However, the adoption agreement or the IDP are not readily adaptable to the situation where the safe harbor conversion is in effect for a single year.

**Can I adopt this Amendment on behalf of all of my employer clients?**

No. This amendment is designed to be adopted individually by employers.

**Can I modify the Amendment?**

Yes. **This Amendment is not an IRS model amendment and has not been reviewed by the IRS.** This Amendment is intended to be a good‑faith amendment. Because this is a single year amendment, we may not add it to the Relius document system.

**Does the employer need to provide a safe harbor notice in connection with this amendment?**

No. A safe harbor notice is not needed for a 401(k) plan that satisfies the ADP safe harbor with a SHNEC. It is needed for a safe harbor match plan or a plan that wants to use the ACP safe harbor, but there is no way to retroactively opt into the ACP safe harbor without giving the safe harbor notice before the beginning of the year. However, the plan administrator will need to provide participants with a summary of material modifications no more than 270 days after the close of the year the amendment is adopted.

**How do I complete the amendment?**

* Complete the identifying information in Section 2.1.
* Enter the plan year in Section 3.1.
* In Section 3.2, identify when the employer is signing the amendment. The selection here dictates the minimum amount of the SHNEC.
* Enter the SHNEC percentage in Section 3.3. The percentage must be at least 4% if the employer selects 3.2(b), and otherwise must be at least 3%.
* If you wish to use total compensation to compute the SHNEC, leave Section 3.4 blank. Otherwise, select categories of compensation you will exclude in determining the amount of the SHEC. Each of the exclusions in Section 3.4 is a safe harbor (so the plan will not need to perform the compensation ratio test).
* If you leave Section 3.5 blank, then all participants eligible to defer will receive the SHNEC. Section 3.5 allows you to select categories of participants who will not receive the SHNEC. If you select 3.5(c) to exclude OEE participants (participants with less than a year of service or who have not attained age 21) from receiving the SHNEC, the plan will not qualify for the top-heavy exemption for plans that consist solely of safe harbor funds.
* The employer should sign and date the amendment.

**Are other documents available?**

In addition to the Amendment, we have provided a sample Adopting Resolution (for an employer to evidence adoption of the Amendment, if applicable), and a sample Summary of Material Modifications (SMM) (if applicable). We have not provided a unanimous written consent or other form to actually adopt the amendment, because this will vary depending on local law and on the structure of the employer.