

Must We Provide Notice Before Discontinuing Matching Contributions Under Our 401(k) Plan?

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QUESTION: Our company sponsors a 401(k) plan and currently matches participants' elective deferrals. Due to financial difficulties, however, management has decided not to make matching contributions next year. Do we need to provide advance notice to participants?

ANSWER: The answer depends on your plan's design and, in certain circumstances, past practice in providing advance notice. As explained in more detail below, your plan's terms determine whether matching contributions are required or discretionary, and those terms must be disclosed to participants in the plan's summary plan description (SPD). Any changes in the plan's terms must be made by following the plan's amendment procedures and disclosing the changes to participants in a summary of material modifications (SMM) or a revised SPD. Finally, safe harbor matching contributions have specific notice requirements in addition to the SPD or SMM requirements.

- **Required Matching Contributions.** Required matching contributions are stated in the plan document as either a specified percentage or dollar amount to be made each year. (This is also referred to as a fixed matching formula.) To change or discontinue required matching contributions, you must amend the plan document and disclose the change to participants either in an SMM or a revised SPD. While the timeframe for issuing an SMM following a plan amendment is quite long (210 days after the end of the plan year in which the amendment is adopted), it would be advisable to provide an advance notice that the required matching contributions are being discontinued, either in an SMM or a separate notice—both for employee relations and to avoid possible fiduciary breach claims under ERISA's broad fiduciary responsibility provisions.
- **Discretionary Matching Contributions.** If matching contributions are discretionary, the plan sponsor may vary the amount of matching contributions from year to year, without amending the plan document. Typically, the plan's terms and the SPD would state that the sponsor may, but is not required to, provide matching contributions. In this situation (assuming you have not communicated a matching amount to participants), no advance notice of discontinuing the contributions would be required. But if discretionary matching contributions have been made on a regular basis, it might be advisable from an employee relations standpoint to provide advance written notice that this practice is changing. This would be especially true if the practice has been to determine and announce the amount of the discretionary matching contribution before the beginning of the year.
- **Safe Harbor Matching Contributions.** Safe harbor matching contributions are required contributions provided under a safe harbor plan—that is, a plan designed to satisfy 401(k) nondiscrimination requirements without performing the annual actual deferral percentage (ADP) or actual contribution percentage (ACP) test. The plan sponsor is required to provide an annual advance notice of the safe harbor design, including, among other things, a description of the matching contributions used to satisfy the safe harbor. The safe harbor matching contributions must be set forth in the plan document; therefore, discontinuing them (and, consequently, the safe harbor) requires a plan amendment and an SMM or revised SPD. Although the annual advance safe harbor notice would not apply to a plan that is

discontinuing the safe harbor for the coming year, we think for the reasons mentioned above that it would be prudent to provide the required SMM (or a separate notice) in advance of the change.

For more information, see EBIA's 401(k) Plans manual at Sections IX.B ("Matching Contributions"), XXII.J ("Safe Harbor Notices to Eligible Employees"), and XXVII.D ("Procedures for Amending or Terminating a Plan").

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