Considerations for Employer Retirement Plan Contributions during Coronavirus

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Ongoing economic and market conditions are hitting both employers and employees hard, taking a heavy toll on available finances. While hopeful signs of recovery are starting to appear, there remains a good deal of uncertainty as to both the timing and pace of renewed economic growth. In the meantime, many retirement plan sponsors must regrettably consider making adjustments to employer plan contributions.

Whether temporary or longer-term, contribution changes should be carefully evaluated, weighing both existing regulatory and statutory requirements, the CARES Act, and other relief measures. Retirement plans are subject to a variety of stringent rules, depending on the type of plan and the associated Federal, state, and local laws and provisions in play. No matter the employer or plan type, there are important considerations for plan sponsors to keep in mind as they consider changes to contribution levels – or discontinuing them entirely for a time. Particularly for public plans, local, state, or Federal law may *require* contributions, further limiting the options.

Reductions also have a very direct effect on the retirement savings rate of employees, particularly at a time when many may already be experiencing coronavirus-related medical costs, loss of income, or related economic stress. While changes may be necessary or pragmatic, they also carry certain longer-term costs in employee dissatisfaction and regard for the employer. Ill will created amongst plan participants may diminish the value of direct contribution savings and hurt retention of talented employees down the road.

"Fixed" vs. "Discretionary"

Defined contribution retirement plan documents generally provide for employer contributions in either a fixed or discretionary formula. Discretionary provisions allow for inherent flexibility in adjusting the contribution formula without any need to amend the plan document and without a requirement to notify affected employees in advance (though proactive notification is still strongly recommended). This discretionary approach allows the contribution to be reduced or eliminated quickly, providing quicker results for employers facing budget shortfalls.

Fixed contributions, by contrast, are specifically defined within plan language, requiring the employer to enact a plan amendment – or even enact a change in code/law – before implementing the adjustment. A careful review of your plan document and/or any governing statutes is necessary to determine which type of contributions are in place and whether they can legally be amended. Keep in mind that many plan providers charge a fee for executing an amendment to a plan, and there is also likely a significant timeframe involved to carry out the amendment and notify employees in advance of the change.

Note also that a match or non-elective contribution formula commonly might have been consistently *applied*, even for many years, but that does not automatically mean it is based on a fixed formula. The underlying provisions might still allow for discretionary application. Collectively bargained and similarly negotiated benefits or promises to employees are also part of any evaluation. As costly legal challenges can result if not resolved ahead of any change, consulting your ERISA or benefits counsel before taking action is highly encouraged.

For plans that have enacted them, Safe Harbor contribution provisions have further unique limitations. Safe Harbor contributions typically cannot be discontinued mid-plan year unless the employer can qualify for certain exceptions. In the current economy, demonstrating an immediate status of operating at an economic loss would qualify. Nonetheless, bear in mind that it would still generally require at least 30 days' advance notice to employees before ending contributions. Safe Harbor "wait-and-see" provisions, allowing the employer to end or not make contributions for any given plan year, are less common, but are built to allow greater flexibility. The arrangement must have been in place ahead of the plan year to be available, however, so it cannot be added retroactively.

The Setting Every Community Up for Retirement Enhancement (SECURE) Act, passed by Congress late in 2019, provided additional options for suspending or reducing certain contributions. Employers utilizing a non-elective (or profit sharing)

Safe Harbor formula were granted additional flexibility in suspending contributions and sending the related notice requirements. Since these provisions are new for 2020 plan years and beyond, we anticipate further guidance from the Department of Labor and IRS. Obtaining advice from qualified counsel can help navigate the availability (or not) to your plan.

Missed or Delayed Contributions and Nondiscrimination Testing

Whether facing immediate or anticipated budget shortfalls, remember that existing rules for timely remittance of contributions to the plan's trust are still in place. It may be tempting to delay or postpone funding contributions in favor of other obligations and expenses, but that approach can carry significant penalties up to and including tax disqualification of the plan if not maintained. Continue to appropriately send employee and employer payroll contributions, including loan payments, on the same schedule as typical. Not doing so can easily cost dramatically more in the long run.

Employer contribution changes may also affect nondiscrimination testing compliance for the plan year. Your plan's recordkeeper or third-party administrator can help evaluate any proposed changes that may affect your compliance testing status.

Freezing or Terminating

A more extreme consideration might be discontinuing the plan altogether. While outside the scope of this overview, it is worth noting that plan termination or freezing carries specific notice and regulatory requirements that are both complex and costly if not appropriately met. We highly recommend engaging your qualified plan counsel to help evaluate your circumstances if these options are being considered.

The ongoing COVID-19 pandemic and related shutdowns continue to test employers and individuals, and it is reasonable to expect more uncertainty in the months to come. At the same time, challenging markets provide ample opportunity for retirement savers and plan sponsors with a long-term focus to not only endure, but to enhance their position in the long run. Keeping a "big picture" focus can provide needed context to this and any economic climate.

Author Bio

Troy is a Vice President and Consultant at Innovest Portfolio Solutions. He focuses primarily on guiding retirement plan sponsors and institutional investors in execution of their fiduciary, compliance and operational responsibilities. He is part of Innovest's Retirement Plan Practice Group, a specialized team that identifies best practices and implements process improvements to maximize efficiencies for retirement plan clients. Troy has earned a Qualified 401(k) Administrator (QKA) credential from the American Society of Pension Professionals and Actuaries (ASPPA) and an Accredited Pension Administrator (APA) designation from the National Institute of Pension Administrators (NIPA).

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