Q 2:233 In determining whether an HCE receives a rate of match that is not greater than the rate of match of any NHCE, are NHCEs, who terminate during the plan year and who, therefore, do not receive an allocation of matching contribution under the terms of the plan, taken into account?

Yes. Any NHCE who is an eligible employee but who does not receive a matching allocation because of the operation of a last-day requirement and/or the 1,000-hours-of-service requirement must be taken into account in determining whether an HCE would receive a greater rate of match than any eligible NHCE. A 401(k) plan with either or both of these requirements for entitlement to a matching contribution allocation will not satisfy the ACP safe harbor.

Q 2:234 May an employer make additional contributions to a safe harbor 401(k) plan?

Yes. An employer that provides a safe harbor matching contribution could, for example, also make a profit sharing contribution to the safe harbor 401(k) plan.

Q 2:235 May an employer stop safe harbor matching contributions during the plan year?

A 401(k) plan using a safe harbor match formula can be amended during the plan year to reduce or eliminate matching contributions. Employees must be notified beforehand of the amendment and be given an opportunity to change their deferral elections. The amendment cannot be effective earlier than the date the plan is amended and 30 days after the notice is given. The employer makes the safe harbor match contributions through the effective date of the amendment. ADP and ACP testing, using the current year method (see chapter 13), will apply to all elective and matching contributions (including the safe harbor matching contributions) made during the plan year. [Treas. Reg. §§ 1.401(k)-3(g), 1.401(m)-3(h)] It should be noted that suspending safe harbor contributions (whether match or nonelective as explained in Q 2:236) may result in the employer having to make minimum contributions on behalf of non-key employees if the 401(k) plan is top heavy for the plan year in which the suspension occurs.

Q 2:236 May an employer stop safe harbor nonelective contributions during the plan year?

Yes. Proposed regulations issued in early 2009 permit the suspension of safe harbor nonelective contributions during the plan year. In addition to meeting the requirements set forth in Q 2:235, the employer must have sustained a substantial business hardship comparable to that described in Code Section 412(c). [Prop. Treas. Reg. §§ 1.401(g)-3(g)(1)(ii), 1.401(m)-3(h)(1)(ii)] dollars of plan assets are invested in the money market fund. The estimated annual cost of substandard performance for that option is \$20,000 (2% × \$1,000,000).

Q 4:56 How do most plan sponsors allocate plan costs?

According to the Hewitt Associates Survey titled *Trends and Experience in 401(k) Plans, 2009,* fees are paid as shown in Table 4-2.

The trend is toward shifting the operational costs of a 401(k) plan from the plan sponsor to the plan. As these costs are shifted to the plan, the plan participants will be affected, as any expenses will reduce the earnings credited to their account. The plan sponsor should be aware of what types of expenses can be shifted to the plan, in keeping with ERISA and the DOL's position (see Qs 4:48–4:61).

Table 4-2. Allocation of Plan Expenses

	Percentage of Plans		
Plan Expenses	*Participant/ Plan Pays*	*Employer Pays*	*Shared Expense*
Audit fees	31	66	3
Internal administrative staff compensation	6	91	3
Employee communication	32	55	13
Investment education:			
• Seminars/workshops	31	56	13
• Financial helpline	53	39	8
• Investment advisory services	52	39	9
Investment consulting fees	38	56	6
Legal/design fees	18	74	8
Trustee/custodial fees	51	40	9
Loan administration fees	85	12	3
QDRO administrative fees	53	42	5

Q 4:57 How does ERISA treat the use of plan assets to pay administrative expenses?

ERISA expressly permits plan assets to be used to defray administrative expenses. [ERISA §§ 403, ERISA §§ 404, 29 U.S.C. §§ 1103, 1104 (1974)] The payment of reasonable administrative expenses from plan assets is an exception to the prohibited transaction rules. The DOL recently issued proposed regulations regarding the conditions for taking advantage of the prohibited transaction exemption. [ERISA § 408(b)(2), 29 U.S.C. § 1108(b)(2) (1974); DOL Prop. Reg. § 2550.408b-2]

Q 4:58 What is the DOL's position on the use of plan assets to pay administrative expenses?

The DOL issued a letter in 1987 to Mr. Kirk F. Maldonado, discussing what types of expenses may be appropriate charges against plan assets. [PWBA Information Ltr. Mar. 2, 1987] The letter establishes the general principle that payments cannot be made for the employer's benefit or to pay expenses that the employer could reasonably be expected to pay. The DOL opined that expenses related to settlor functions would not be appropriate charges against plan assets. This general principle was reconfirmed in DOL Advisory Opinion Letters 97-03A and 2001-01A.

Q 4:59 What are settlor expenses that cannot be charged to a plan?

The DOL considers certain services provided in conjunction with the establishment, termination, or design of plans to be settlor functions. The DOL has identified the following items as settlor functions which cannot be paid from plan assets:

- Cost of a feasibility or plan design study for a 401(k) plan
- Costs to establish a plan
- Cost of plan amendments that are not required to maintain a plan's tax qualified status
- Fees related to an economic analysis of whether or not to terminate the plan
- Fees for union negotiations concerning plan design and operation
- Fees for disclosure of information that is not plan related, even if included in a document that also contains plan information
- Fees to determine the impact of plan events on an employer's financial statements
- IRS or DOL penalties
- Union negotiations
- Expenses related to plan mergers or spin-offs

[Employee Benefits Security Administration, Guidance on Settlor Plan Expenses; DOL Adv. Op. 2001-01A, 97-03A]

Q 4:60 What plan expenses can be paid out of plan assets?

The DOL has identified the following items that can be paid from plan assets:

- Fees incurred to amend a plan if the amendment is required to maintain a plan's tax qualified status or to comply with Title I of ERISA
- Fees incurred to implement a change in plan operation resulting from an amendment, regardless of the purpose of the amendment (i.e., maintain tax qualification or other reason)
- Fees for routine nondiscrimination testing

- Fees related to obtaining an IRS determination letter
- Fees related to the disclosure of plan information
- Fees for outsourced plan administration
- Expenses for implementing a plan termination
- Premium payments for an ERISA bond or fiduciary liability insurance if the insurance permits full recourse against a fiduciary who violates his or her fiduciary duties
- Plan administration expenses, including recordkeeping, claims processing, investment management, nondiscrimination testing, and government filings

All expenses and the charges to be reimbursed must be reasonable in amount and necessary for the operation of the plan.

[Employee Benefits Security Administration, Guidance on Settlor Plan Expenses; DOL Adv. Op. 2001-01A, 97-03A; 29 C.F.R. § 2509.75-5]

Q 4:61 How should expenses be allocated in a plan?

Once it is determined that an expense may be properly charged to the 401(k) plan, it must then be determined how to allocate the cost to participants. Generally, all appropriate expenses are combined with plan earnings, gains, and losses, resulting in a net gain to be prorated among all participants. However, certain expenses may be directly attributable to an individual participant and should be properly charged to that participant alone.

The DOL has issued guidance regarding the allocation of expenses in a plan. The DOL's position is that plan sponsors have a great deal of discretion regarding how to allocate expenses within the framework of selecting methods that are prudent, are consistent with the requirement to act solely in the interests of participants, and do not constitute a prohibited transaction. A variety of allocation methods may be used, including per capita allocations, utilization allocations, and allocations based on specified categories (e.g., charging terminated participant accounts for administrative expenses without charging active employees for those expenses). [DOL Field Assist. Bull. 2003-3].

Q 4:62 What types of expenses may be charged directly to a plan participant?

The DOL has issued guidance on this question. Expenses may be allocated to participant accounts as long as the method used is prudent, is consistent with the requirement to act solely in the interests of participants, does not constitute a prohibited transaction, and is disclosed in the plan document and in the summary plan description (SPD). Examples of expenses that can be charged to individual accounts consistent with these standards are:

- Hardship withdrawal fees
- Loan fees

- Distribution processing fees
- Fees to calculate benefits under different distribution options
- Investment-related fees in participant-directed accounts
- Administrative fees for separated participants
- QDRO or qualified medical child support order (QMCSO) processing fees

The DOL rescinded its earlier position, in Advisory Opinion 94-32A, that QDRO processing fees could not be charged to participant accounts. [DOL Field Assist. Bull. 2003-3]

Q 4:63 Can a plan sponsor charge fees to the accounts of ex-employees that it is not charging to the accounts of active employees?

Many employers do not want to have the expense for maintaining terminated participant accounts borne either by the company or by remaining participants. They may, for example, want the plan's recordkeeping expenses paid by the company but then charge terminated participants' accounts for their individual portion of the expense. The concern in doing so in the past was a potential violation of Treasury Regulations Section 1.411(a)–11(c)(2), which prohibits employers from imposing any significant detriment to a participant's right to keep his or her benefits in the plan.

In Field Assistance Bulletin 2003-3, the DOL took the position that it was not an ERISA violation for an employer to impose fees on ex-employees that it did not impose on active employees as long as the fees were reasonable and of a type normally payable by a plan. In 2004, the IRS also supported this right by stating that the imposition of administrative fees was not a significant detriment as long as the allocation method was reasonable (e.g., allocated pro rata) and did not discriminate in favor of highly compensated employees. [Rev. Rul. 2004-10, 2004-8 I.R.B. 484]

Q 4:64 Can an employer reimburse a plan for expenses paid by the plan?

Any reimbursement by an employer of expenses that were previously paid by a plan will be considered an additional contribution subject to both the aggregate deductible limit and the individual limits on allocations (see chapter 9). [Priv. Ltr. Ruls. 9124034, 9124035, 9124036, 9124037]

Q 4:65 Under what circumstances must an employer break out settlor fees from other fees when they are combined in a single charge?

When the employer is clearly combining an objective unrelated to the administration of the plan with one that is, the non-plan related portion of the expenses must be identified or cannot be paid from plan assets. For example, if