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Helpful Web Links

Department of Labor
www.dol.gov/

Taking the Mystery Out of
Retirement Planning
www.dol.gov/ebsa/publications/nearretirement.html

Internal Revenue Service
www.irs.gov/

DOL Releases Final Regulations on Timely Remittance of Employee Contributions

OPN Highlights

Action Required: Employers should be made aware of these final regulations.

- Small plans (those with fewer than 100 participants) now have a new, safe harbor protection.
- The new protection pertains to the timing allowed for employers to separate plan contributions from employer assets.
- ERISA generally requires that plan contributions be separated from employer assets by the earliest reasonable date.
- Under the safe harbor, plan contributions by small employers are deemed to satisfy the ERISA requirement if they are deposited into the plan within 7 business days of the date they are withheld from participant paychecks.

On January 13, 2010 the Department of Labor (DOL) released final regulations defining when employee contributions become plan assets under the Employee Retirement Income Security Act (ERISA). The regulations retain the existing general remittance deadline and provide for a safe harbor deadline for small plans. The final regulations are essentially the same as the proposed regulations with some clarifications added.

Existing General Remittance

Deadline Retained – The existing general remittance deadline is retained and continues to apply to plans with 100 or more participants at the beginning of the plan year. The existing ERISA regulations provide that participant contributions and loan repayments become plan assets as of the earliest date such contributions can reasonably become segregated from the employer's general assets, but in no event later than the 15th business day of the month following the month in which such amounts would have otherwise been payable to the participant in cash. Once they are considered to be plan assets, contributions must be held in trust (with certain exceptions) to avoid a potential prohibited transaction.

The "earliest date" means the earliest date each employer can segregate the contributions based on their own internal processes and procedures. Many plan sponsors have incorrectly interpreted the existing guidance by ignoring the "earliest date" standard and assuming that the applicable deadline for depositing contributions was always the 15th business day of the following month (even if such deposits could reasonably be segregated sooner). When deposits are late, a potential prohibited transaction occurs due to the



fact that plan funds are considered “commingled” with employer assets. This could mean the payment of excise taxes and lost earnings by the employer.

Safe Harbor Option for Small Plans - The safe harbor option under the regulations applies to participant contributions to a pension plan with fewer than 100 participants at the beginning of the plan year. Under the safe harbor, contributions for such plans will be treated as having been made “on the earliest date on which such contributions can reasonably be segregated from the employer’s general assets” **if such amounts are deposited into the plan no later than the 7th business day following the day on which such amounts would otherwise have been payable to the participant in cash** (i.e., 7 business days following the date such amounts are deducted from the employee’s pay). Amounts are considered to be “deposited” when they are placed in an account of the plan regardless of whether they are allocated to specific participants or investments of such participants.

Safe harbor option applies to participant loan repayments - The 7 business day safe harbor for remittance of participant contributions also applies to remittances of participant loan repayments that are made to plans with less than 100 participants.

No safe harbor for large plans – Despite the confusion regarding the deadline for segregating plan assets the DOL feels it does not have sufficient data at this time to evaluate whether there is a need for a safe harbor for large plans. Hence the general remittance rule described above continues to be the only option for these plans.

Clarifications

Safe harbor is optional – Small plans may use the 7 business day safe harbor period or the existing general remittance deadline (as described on page 1) to meet the ERISA requirement to segregate employee contributions from the employer’s general account as of the earliest date they can reasonably be segregated. However, if the employer fails to meet the safe harbor or the general rule then additional losses and interest must be calculated from the actual date the contributions

could reasonably have been segregated from the employer’s general assets and not from the end of the safe harbor period.

Safe harbor applies on a deposit-by-deposit basis – If the employer fails to comply with the safe harbor for one deposit the safe harbor may still be applied to all other contribution and loan repayment remittances for the year.

Multiple Employer and Multiemployer Plans – The final regulations apply the 7 business day safe harbor option to these plans in the same manner as it applies to a single employer plan.

Effective Date – These final regulations are effective January 14, 2010. However, the proposed regulations stated that the DOL will not assert a violation of ERISA based on the “earliest date” for plans that apply the 7 business day safe harbor based on those regulations which were released on February 28, 2008.

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