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Deposit Deadline Safe Harbor For Small Plans

The Topic

The timing requirement for 401(k) deposits has been a hot topic for many years now. In 29 CFR 2510.3-102, the Department of Labor (DOL) indicates that the deadline to deposit amounts withheld from employee wages (i.e., 401(k) pre-tax, 401(k) Roth, and/or loan repayments) is *“the earliest date on which such amounts could reasonably be 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 the participant contributions were withheld or received by the Employer.”*

The Issue

This previous definition has long been left open to interpretation by Plan Sponsors. In the past, many Plan Sponsors who deposited their employee withholdings any time before the *15th business day of the month following the month in which the participant contributions were withheld or received by the Employer* felt they were in compliance with the regulations. In actuality, the DOL heavily focuses on *the earliest date on which such amounts could reasonably be segregated from the Employer’s general assets* which in most cases is earlier than the timeframe mentioned in 29 CFR 2510.3-102. Still, this can vary by Employer and thus result in inconsistent implementation.

The Consequences

Making timely deposits is a Fiduciary responsibility. Late contributions are considered to be improperly comingled with an Employer’s general funds and result in a prohibited transaction. To correct this, the Employer must make up earnings that the employee contributions may have accumulated had they been deposited on time, as well as pay an accompanying excise tax. Employers should keep their Third Party Administrator abreast of any possible delinquent contributions so that the corrections are handled properly.

The Solution

On January 13, 2010, the DOL finalized a safe harbor deposit deadline for “small” plans stating that contributions to the plan will be considered timely if deposited by **no later than the 7th business day following the pay date.** A small plan is considered to be that which had fewer than 100 participants at the beginning of the given year. Although failing to follow the safe harbor deadlines does not necessarily violate any regulations, an Employer may be required (upon audit) to demonstrate that all deposits were made as soon as administratively feasible for their particular company and/or industry. Depositing contributions within the new safe harbor guidelines automatically satisfies the timeliness requirement and eliminates the conjecture and interpretation of the previous guidelines.

Please contact our office if you wish to discuss this information in more detail. This publication is intended for general information purposes only and does not and is not intended to constitute legal advice. This is not meant to be an all-inclusive summary of the deposit requirements of all ERISA plan contributions, but merely a highlight of significant features. The reader must consult with legal counsel to determine how laws or decisions discussed herein apply to the reader's specific circumstances.

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