Are Participant Contributions Remitted Quickly Enough?

Proposed Safe Harbor for Small Plans and Implications for Large Plans

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Participant contributions to certain ERISA plans must be deposited with the plan on the earliest date on which they can reasonably be segregated from the employer's general assets. The Department of Labor (DOL) has proposed a "safe harbor" for plans with fewer than 100 participants at the beginning of the plan year (small plans) to provide certainty of compliance with this rule.

If participant contributions to a small plan are deposited with the plan by the seventh business day following the date of receipt or withholding, the contributions are treated as made in a timely manner – even if the employer could have deposited the contributions more quickly. The proposed safe harbor applies to participant and beneficiary contributions to small retirement plans (such as 401(k) plans) and to small welfare plans (such as group health plans) that are required to comply with ERISA's trust requirements. It also applies to participant loan repayments to small plans. Small plans may now rely on the safe harbor, even though the regulations have not been finalized.

No safe harbor has been proposed for plans that have 100 or more participants at the beginning of the plan year. However, the DOL states that smaller plans "typically need more time than larger plans to segregate participant contributions from their general assets." This suggests that if a safe harbor were proposed for large plans, it would require payment to the large plan in fewer than seven business days from the date of receipt or withholding.

There has been no change to the outside limit by which participant contributions and loan repayments must be deposited with a plan:

- For most ERISA retirement plans, the 15th business day of the month following the month in which the amounts are received or withheld by the employer; and
- For welfare plans that are subject to ERISA's trust requirements, 90 days from the date on which the amounts are received or withheld by the employer.

Comment: Given the safe harbor for small plans and the DOL suggestion that large plans can reasonably segregate and remit contributions in fewer than seven business days, these outside limits have little relevance.

If participant contributions and loan repayments are not paid to the plan in a timely manner, there is a "prohibited transaction." The prohibited transaction may be cured by paying the delinquent contributions and loan repayments, with applicable earnings, to the plan, complying with the other requirements of DOL's Voluntary Fiduciary Correction Program, and paying the applicable excise tax (unless an exemption applies).

If you have any questions regarding the timeliness of contributions or making a filing under the DOL's program, please contact us.

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