

THE BENEFIT BULLETIN

FAST FACTS ABOUT RETIREMENT PLANS

The following article contains general plan facts and is intended for informational purposes only. To ensure that your plan contains specific provisions outlined in this and future articles, please contact your third party administrator or plan ERISA attorney.

Proposed Seven Day Safe Harbor for Salary Deferral Deposits

The Internal Revenue Service (IRS) and Department of Labor (DOL) impose requirements concerning the timely depositing of Employee Salary Deferrals in a 401(k) retirement plan. In summary, when a salary deferral is deducted from an employee's paycheck, the employer *must* transmit the deferral contribution "as soon as possible" to the plan trust. While the DOL has made efforts to clarify this deadline, employers and plan administrators still struggle when trying to determine when contributions and payments must be made to the plan in order to avoid the requirements associated with holding plan assets.

To provide more certainty, the DOL has recently proposed a "safe harbor" deadline for depositing deferral contributions to the plan. Under the proposed regulations, the DOL will consider contributions withheld from a participant's compensation to be in compliance with the general rule if they are deposited to the plan no later than the 7th business day following the date of the withholding. These proposed regulations are effective for small plans (those with fewer than 100 participants at the beginning of the plan year). No proposed regulations have been released for large plans (those with 100 or more participants at the beginning of the plan year). This safe harbor deadline applies to the depositing of deferral contributions to the plan, not to the allocation of amounts to participant's accounts.

The 7th business day following the date of the withholding is the proposed "absolute deadline." However, the DOL emphasizes repeatedly that "as soon as possible" is the actual standard. If contributions can reasonably be segregated from general company assets prior to this time limit, the employer should deposit the deferrals in the plan account (trust account) at such earlier time. This is strongly recommended because, ultimately, the determination of "as soon as possible" for an employer may be decided based on the facts and circumstances of that particular employer. Relevant factors might include, without limitation: (1) payroll frequency, (2) time of remittance of FICA taxes after payroll withholding, and (3) the pattern of deposit timing by the employer over a period of time. Therefore, to avoid possible penalties an employer should deposit all employee contributions on the same day the deferrals are withheld from payroll.

Failure to comply with the safe harbor will not automatically cause a plan to violate the plan asset regulations. However, the employer would still be responsible for proving that all participant contributions were deposited as soon as reasonably possible, and not later than the maximum deadline.

If the proposed regulations are made final, the effective date of the safe harbor will likely occur on the date that the final regulations are published by the DOL. However, the proposed regulations indicate that in the meantime, the DOL will not assert a violation of the regulations if a small plan is in compliance with the proposed safe harbor. Therefore, an employer may take advantage of the proposed safe harbor now.

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