

A New Safe Harbor for the Timely Deposit of Employee Contributions

➤ Background

On February 29, 2008, the Department of Labor (DOL) issued proposed regulations establishing a safe harbor for the timely deposit of employee contributions to small retirement, health and welfare plans. Pursuant to amended regulations issued in 1996, plan sponsors were required to deposit deferrals into the plan as of the earliest date on which such contributions can reasonably be segregated from the employer's assets, but in no event to exceed the 15th business day of the month following the month in which the participant's contribution are received by the employer.

Frequently, the DOL referenced the shortest period of time in which the employer had segregated the assets in the past and applied that as the standard for timeliness of all deposits. This approach resulted in different standards being applied by DOL agents, resulting in inconsistent enforcement. When a deferral deposit is determined to be late, the plan funds are considered to be commingled with employer funds resulting in a prohibited transaction. Consequently, the employer is required not only to make up lost earnings; they must also pay excise taxes for the breach of the "amount involved."

➤ Proposed Regulations

The proposed regulations are intended to provide small plan sponsors with a clear safe harbor to ensure compliance with the deposit standards. Under the proposed safe harbor, participant contributions to a pension or welfare benefit plan with fewer than 100 participants at the beginning of the plan year will be treated as complying with the regulations **"if the contributions are deposited no later than the 7th business day following the day on which the amounts would have been payable to the participant in cash or following the day on which such amount is received by the employer."** As a safe harbor, contribution deposits satisfying the requirements of the proposed regulation will be treated as having been made timely even if such contributions could clearly have been segregated from employer assets more rapidly.

Eligibility for this rule is based strictly on the 100-participant threshold as of the beginning of the plan year and not on whether the plan is a large plan/small plan filer of the Form 5500 under ERISA Section 104(a).

Although the regulation becomes effective on the date of publication of the final regulations, the DOL states that in the interim it will not assert a violation of ERISA if a plan satisfies the proposed safe harbor.

➤ Comments

EIP recommends to those employers contributing sooner than the safe harbor regulation to maintain their deposit schedule. Additionally, **all employers** must deposit within these guidelines or risk additional taxes, deposits, and plan expenses.