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U.S. Department of Labor Publishes Final Regulations Regarding Participant Contributions

By: Jeremy M. Pelphrey and Linda Russano Morra
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Attorneys

- Alex M. Brucker
- Linda Russano Morra
- Michael L. Cotter
- Meredith J. Sesser
- Cathryn B. Sportsman
- Jeremy M. Pelphrey

T: (310) 475-7540

F: (310) 470-4806

W: www.pensionlawyers.com

On January 14, 2010, the U.S. Department of Labor, Employee Benefit Security Administration (DOL) published final regulations that establish a *safe harbor* period during which amounts that an employer has received from employees or withheld from wages for contributions to certain employee benefit plans will not constitute “plan assets” for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the related prohibited transaction provisions of the Internal Revenue Code of 1986, as amended (Code).

In 1988, the DOL issued its initial rules defining when certain monies that a participant pays to, or has withheld by, an employer for contribution to an employee benefit plan are “plan assets” for purposes of ERISA and the Code. The rule provided that assets of a plan included amounts that a participant pays to an employer, or amounts that a participant has withheld from his or her wages by an employer, for contributions to a plan, as of the *earliest date* on which such contributions can reasonably be segregated from the employer’s general assets, but in no event *exceed* 90 days from the date on which such amounts are received or withheld by the employer.

In 1996, the DOL amended its initial rules to establish an outer limit of the 15th business day of the month following the month in which participant contributions

are received by the employer or the 15th business day of the month following the month in which such amounts would otherwise have been payable to the participant in cash. The general rule providing that amounts paid to or withheld by an employer become plan assets on the *earliest date* on which they can reasonably be segregated from the employer’s general assets did not change. If participant contributions were not timely deposited in the employee benefit plan, the employer could be subject to fiduciary liability under ERISA for any losses or interest on such amounts during the period of the delay.

Following the 1988 and 1996 rules, the DOL had been inundated with questions from employers and various employee benefit plan professionals seeking clarification, specifically as to how soon the employer must forward participant contributions to the plan in order to avoid fiduciary liability.

In response, the DOL in 2008 proposed a “safe harbor” rule in which employers with plans that have fewer than 100 participants would be considered to have *timely* deposited (under the *earliest date* requirement) the participant contributions if such contributions are deposited in the employee benefit plan within 7 business days.

The DOL, in the final regulation, has now adopted the 7 day safe harbor rule for em-

ployee benefit plans that have fewer than 100 participants, effective immediately.

The DOL further noted that due to insufficient records, it could not extend the safe harbor rule to employee benefit plans with 100 or greater participants. Thus, the 1988 and 1996 rules continue to apply to plans with 100 or greater participants. In other words, there is no safe harbor for employee benefit plans with 100 or more participants.

The final regulation also adopts the current DOL position that the timing of when contributions become *plan assets* also applies to participant loan repayments.

The DOL, in the final regulation, retained the special rule for a SIMPLE plan that involves SIMPLE IRAs, under which the maximum period for depositing contributions is 30 calendar days after the end of the month in which the employees would otherwise have received the amounts in cash.

It should be noted, however, that if participant contributions are not timely deposited in the employee benefit plan within the safe harbor period, the employer continues to be subject to fiduciary liability under ERISA for any losses or interest on such amounts during the period of the delay. Such period begins on the *earliest date* on which contributions can reasonably be segregated from the employer's general assets, without regard to the safe harbor period.

29 CFR 2510

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