



Employee Benefits **ALERT** FEBRUARY 23, 2010

DOL Adopts Safe Harbor for Small Plans on Remitting Participant Contributions

Background

A common question among plan sponsors is when participant contributions (i.e., amounts that a participant or beneficiary pays to an employer or amounts that a participant has withheld from his or her wages by an employer for contribution to certain employee benefit plans) must be deposited into a plan to avoid penalty? Unfortunately, prior regulations adopted an ambiguous “general rule” which provides that participant contributions must be deposited on the earliest date on which they can reasonably be segregated from the employer’s general assets. This general rule does not provide employers and plan advisers with much certainty in resolving this question.

In response to continued requests, the U.S. Department of Labor (“DOL”) published final regulations in January intending to clarify when participant contributions will be considered to have been timely remitted to the plan. The general rule remains the same, but the following provisions of the final regulations do provide additional guidance for employers regarding the application of the general rule.

Safe Harbor for Small Plans

The final regulations create a safe harbor for pension and welfare benefit plans with fewer than 100 participants at the beginning of the plan year. The final regulations outline the following details of the safe harbor:

- The general rule is deemed to be satisfied when contributions are deposited with the plan no later than the 7th business day following the day on which such amount is received by the employer or would otherwise have been payable to the participant in cash.
- Participant contributions will be considered deposited when placed in an account of the plan, without regard to whether the contributed amounts have been allocated to specific participants or investments of such participants.
- The safe harbor is available on a deposit-by-deposit basis. The failure to satisfy the safe harbor for any deposit to a plan will not result in the unavailability of the safe harbor for any other deposit to the plan.

- The safe harbor provisions are applicable to participant contributions to any plan, including SIMPLE IRAs or a salary reduction SEP, that has fewer than 100 participants at the beginning of the year.
- The safe harbor is not the exclusive means to satisfy the general rule.
- Losses and interest resulting from the failure to deposit participant contributions in accordance with the general rule will be calculated from the actual date on which such contributions could reasonably have been segregated from the employer’s general assets, not the end of the safe harbor period.

Additional Guidance

The following is a summary of other key provisions in the final regulations that answer some of the common questions associated with remitting participant contributions.

Loan Repayments: Amounts paid by a participant or beneficiary or withheld by an employer from a participant’s wages for purposes of repaying a participant’s loan are subject to the general rule, and the availability of the safe harbor is extended to loan repayments to plans with fewer than 100 participants.

Maximum Time Periods: The final regulations clarify that the maximum time periods provided in prior regulations, which establish the latest date participant contributions may be treated as other than plan assets, are simply an outer limit, not a safe harbor. Therefore, participant contributions deposited prior to the maximum time period do not satisfy the general rule unless the deposit is also determined to have occurred on the earliest date the contributions could reasonably be segregated from the general assets. With the exception of SIMPLE plans that involve SIMPLE IRAs, the maximum time period for pension plans is no later than the 15th business day of the month following the month in which the amount was received by the employer or would otherwise have been payable to the employee in cash. For welfare plans, the maximum period is 90 days from the date of receipt or withholding.

Multiemployer and Multiple Employer Plans: Multiemployer and multiple employer plans continue to be subject to the general rule, and the availability of the safe harbor is based on the size of the plan, not the size of the participating employer.

Effective Date: January 14, 2010

Penalties for Non-Compliance

A failure to timely remit participant contributions may constitute a breach of fiduciary duty and/or create a prohibited transaction exposing employers and plan fiduciaries to various penalties, including investment losses and interest and excise taxes.

Going Forward

Complying with the safe harbor ensures compliance with the general rule on timely remitting participant contributions and the avoidance of potential DOL audit failures. Therefore, McAfee & Taft recommends that employers with small plans review and evaluate current remittance practices with their plan administrator to determine what adjustments might enable them to satisfy the safe harbor if they are not already doing so. For those employers not eligible for the safe harbor, a similar review and evaluation is recommended to ensure that inefficiencies in remittance are minimized to gain greater certainty that the general rule is being satisfied.

For additional information please contact any member of McAfee & Taft's Employee Benefits Practice Group.

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