



Legal Alert: DOL's Final Participant Contribution Regulation

1/14/2010

On January 14, 2010, the U.S. Department of Labor (DOL) published a final regulation concerning the "safe harbor" period within which participant contributions to pension or welfare plans must be remitted by the employer to a trust or insurer. The final regulation substantially adopts the rule that was proposed by the DOL in February of 2008.

For over twenty years, the regulations have provided that participant contributions – *i.e.*, either amounts contributed by a participant or amounts withheld by an employer from the participant's pay for contribution to a plan – become "plan assets" (and therefore have to be held by the plan's trustee, or applied under an insurance contract) as of "the earliest date on which such contributions can reasonably be segregated from the employer's general assets." Limiting this subjective standard, the regulation originally imposed an outside limit, requiring that in any event, the contributions would become plan assets after 90 days. Along with certain other changes, that outside limit was modified for pension plans in 1996 so that the latest date by which participant contributions under a pension plan (but not a welfare plan) could be deposited was the 15th business day of the month following the month in which the amounts are (i) received by the employer (in the case of amounts that are contributed by a participant) or (ii) would otherwise have been received by the participant (in the case of amounts that are withheld by an employer). (In the case of a SIMPLE plan with SIMPLE IRAs, the limit was changed to the 30th calendar day of the following month.)

Then, in 2008, the DOL proposed to add a "safe harbor" under which small plans (less than 100 participants as of the beginning of a plan year) – both pension and welfare – would be deemed to satisfy the general rule if participant contributions were deposited within 7 business days. The general rule, and the limitations for plans other than small pension or welfare plans, would remain unchanged. The proposal did make one additional change, however – it would subject plan loan repayments to the same standards as are applied to participant contributions.

After numerous comments, the DOL determined that the proposal should be finalized essentially as proposed. So the applicable time periods are now as follows:

A. Except as modified below, participant contributions and loan repayments become plan assets as of "the earliest date on which such contributions or repayments can reasonably be segregated from the employer's general assets."

B. In the case of a plan with fewer than 100 participants (as of the beginning of the plan year), amounts remitted within 7 business days after receipt or withholding by the employer are deemed to have been deposited with the plan as of "the earliest date on which such contributions or repayments can reasonably be segregated from the employer's general assets."

C. The time referred to in A above, will not be later than

i. in the case of a pension plan, the 15th business day of the month following the month in which the contributions or loan repayments are received or withheld by the employer;

ii. in the case of a welfare plan, 90 days from the date on which the amounts are received or withheld by the employer; and

iii. the 30th calendar day following the month in which the amounts are withheld by the employer, in the case of a SIMPLE plan.

D. As under existing regulations, the maximum time period for a pension plan for a given month may be extended for up to 10 days under certain limited circumstances.

If you have any questions regarding this Alert, or would like additional details concerning the final regulation or other matters concerning your participant contribution arrangements, you can contact the author of this Alert, Jeffrey Ashendorf, 212-453-5926, jashendorf@fordharrison.com, or any member of Ford & Harrison's Employee Benefits practice group.