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LEGAL ALERT

January 14, 2010

DOL Finalizes Safe Harbor for Timely Remittance of Participant Contributions to Small Plans

Effective January 14, 2010, the U.S. Department of Labor (DOL) finalized an ERISA regulation establishing an optional safe harbor period during which participant contributions can be remitted, without becoming "plan assets" in the interim, to employee benefit plans with fewer than 100 participants. The regulation is intended to clarify when such contributions have been timely made to the plan, which in turn relieves plan sponsors of the civil legal obligations attached to holding "plan assets" from (i) the payroll date or other date of receipt to (ii) the date of remittance to the plan. The safe harbor is part of DOL's ongoing campaign to reduce persistent delinquencies in employee contributions to plans.

With the addition of the optional safe harbor and the commentary in the preamble to the final regulation, the participant contribution regulation (which was originally adopted in 1988 and previously amended in 1997) operates as follows:

Scope of regulation	Applies to amounts (other than union dues) paid to the employer by a participant or beneficiary, or withheld by the employer from a participant's wages, for contribution to a plan, including ▪ Elective contributions, by salary reduction or otherwise, to 401(k) plans, SIMPLE IRAs and salary reduction SEPs; and ▪ Participant loan repayments.	
General rule	Participant contributions must be contributed to the plan by the earliest date on which they can be segregated from the employer's general assets.	**But not later than:**
		SIMPLE retirement accounts: 30th calendar day following the month in which the participant contributions otherwise would have been paid in cash.
		Other retirement plans: 15th business day of the month following the month in which the participant contribution is received by the employer (for amounts paid by a participant or beneficiary) or otherwise payable to the participant in cash (for payroll withholdings); a special rule allows a 10-day extension in certain circumstances.
		Welfare plans: 90 days after the date on which the participant contribution is received by the employer (for amounts paid by a participant or beneficiary) or otherwise payable to the participant in cash (for payroll withholdings).
Optional safe harbor	Applies to participant contributions to a plan with fewer than 100 participants at the beginning of the plan year that are deposited with the plan not later than the 7th business day after the participant contribution is received by the employer (for amounts paid by a participant or beneficiary) or otherwise payable to the participant in cash (for payroll withholdings). ▪ Applies on a deposit-by-deposit basis	

Date contribution is treated as made to the plan	The date when participant contributions are placed in an account of the plan, even if they have not yet been allocated to specific participants or investments.
Effect of regulation	Only applies for civil purposes; may not be relied on in criminal prosecutions.

The regulation was adopted substantially on the terms proposed, with only minor refinements. In response to public comments, DOL clarified that:

- The regulation did not affect its prior guidance on the application of the ERISA trust requirement to cafeteria and certain other plans; and
- For plans within its scope, the optional safe harbor is not the exclusive means of satisfying the general rule of the regulation.

DOL declined, however, to:

- Lengthen the safe harbor period to more than 7 days;
- Extend the safe harbor to larger plans, including multi-employer or multiple employer plans; or
- Defer the effective date of the regulation (since it primarily creates an optional safe harbor).

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If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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