



ARE YOU DEPOSITING RETIREMENT SAVINGS PLAN ASSETS ON TIME?

THE U.S. DEPARTMENT OF LABOR HAS PROPOSED A NEW RULE THAT MAY IMPACT YOUR PLAN AND PROVIDES GUIDANCE ON AN IMPORTANT ISSUE.

Late deposits of retirement savings plan contributions are one of the most common mistakes plan sponsors make. You need to know the rules so you can keep your plan in compliance.

Why It Matters.

Retirement savings plan contributions represent your employees' savings for their retirement. When plan sponsors fail to timely deposit payroll deferrals into the plan's trust account, employees are deprived of the opportunity to receive investment returns on their money. Each day of delay represents a day of lost investment returns for plan participants.

What Does "Late" Mean?

Current regulations require that amounts withheld by an employer from a participant's wages for contribution to a retirement savings plan are considered to be plan assets on the "earliest date that they can reasonably be segregated from the employer's general assets, but in no event later than ... the 15th business day of the month following the month in which the participant contributions are withheld or received by the employer." In other words, once these amounts are considered to be "plan assets," they need to be in the plan's account being put to work for participants; "plan assets" should not be in the employer's business accounts.

Under the current regulations, the DOL does not use a single deadline for everyone. Rather, the DOL analyzes each employer and its payroll capabilities individually to determine when that employer should reasonably have been able to segregate plan assets and deposit them into the plan's trust account. In other words, if you typically get your payroll done within 3 days after the end of a payroll period, the DOL probably expects you to deposit plan assets on that 3rd day or perhaps the 4th day. If instead you deposited plan assets on the 10th day, the DOL would likely deem the deposit to be either 6 or 7 days late. Stated another way, you should expect the DOL to take the position that you are able to segregate and deposit plan assets on the same schedule that you are able to segregate and deposit withholdings for FICA and federal and state income tax.

But I Thought We Had 15 Days!

In the past, employers have focused too much on the “15 day” reference, and this is simply not the right way to read the regulations. Rather, the most important words are “earliest date that they can reasonably be segregated . . .”

Historically, some plan sponsors and plan service providers have attempted to minimize the amount of the lost earnings calculation by simply taking the position that any deposits made prior to the 15th day of the following month are not late. However, in recent years, the DOL has made it increasingly clear that they believe very few employers could reasonably take the position that it takes them 15+ days to segregate and deposit plan assets. Rather, we consider the DOL’s position to be that if you think it reasonably takes you more than 5-7 days to process payroll and deposit plan assets, you should expect the DOL to disagree unless you have special circumstances.

Proposed Safe Harbor Provides Greater Clarity for Smaller Plans.

On February 29, 2008, the DOL published a proposed rule under ERISA which would create a safe harbor deposit period for smaller plans. Under the proposed rule, for plans with fewer than 100 participants, participant contributions will be deemed to be timely made if they have been deposited to the plan’s trust account no later than the 7th business day following the day on which such amount would otherwise have been payable to the participant in cash.

Note that as proposed, this rule is not a requirement, but a safe harbor. Compliance with a safe harbor means that the action is deemed to satisfy the applicable regulatory requirement; in this case, compliance with the safe harbor means that eligible plan sponsors will be deemed to have timely made plan asset deposits. But while compliance is not required, safe harbors often create a strong presumption that most plan sponsors should be able to comply. Plan sponsors acting contrary to this safe harbor should expect to be able to explain why their circumstances require more time than provided by the safe harbor.

Also note that as a proposed rule, this rule is not yet the governing law. However, most proposed rules become final rules in a form substantially similar to the proposed rule, and it is a common practice to comply with the terms of a proposed rule in an effort to minimize liability. Additionally, the proposed rule states that the DOL will not assert ERISA violations with respect to plan sponsors complying with the proposed rule pending its final language and effective date.

Guidance for Larger Plans?

The DOL’s discussion of this proposed rule for smaller plans also includes some commentary which reflects their position on the deposit timing practices of larger plans. Specifically, the DOL noted that their data indicated that “smaller plans typically need more time than larger plans to segregate participant contributions from their general assets.”

Accordingly, plans with 100 or more participants, or which are hovering just below the 100 participant level, should take a close look at their deposit timing practices to ensure that participant contributions are deposited in the plan’s trust account on the “earliest date that they can reasonably be segregated.” It is also safe to assume that the expectation for most larger plans is that they can effect plan asset deposits earlier than the 7th day after payday.

What Happens If We're Late?

If an employer fails to timely deposit plan assets into the plan's trust account, the employer will owe an excise tax payable to the IRS, and will also be required to fund into participants' individual plan accounts additional funds to compensate for the "lost earnings" they would have earned during the period of time their funds were not invested and working for them. In other words, if for a given payroll an employer was deemed to be 5 days late depositing plan assets, that employer will need to fund into participants' individual accounts an amount calculated to approximate the lost earnings the participant would have earned had the funds been timely deposited and invested for those 5 days. The required calculations use interest rates mandated by the IRS to compute the lost earnings. As if that's not enough, there are also additional filing obligations which will generate additional administration fees, as well as the fact that the occurrence of late deposits increases the likelihood of a DOL or IRS audit of a plan.

But Who's Going to Know?

Please note that each year when a Form 5500 is filed for your plan, you are required to disclose whether any plan asset deposits were late. If you answer "no" when deposits were actually late, and your plan is ever audited, you will likely face significant penalties, potentially including the disqualification of your plan.

So What Do I Do About It?

Each employer should take a fresh look at their payroll practices to determine if retirement savings plan deposits might be deemed "late" by the DOL.

Although the proposed rule is not yet final, plans with fewer than 100 participants should comply with the 7-business-day guidance as soon as possible. If you can do it faster, all the better -- your employees will have their money working for them earlier.

Plans with 100 or more participants need to focus on the language from the current regulations ("earliest date that they can reasonably be segregated") and take heed of the DOL's commentary that indicates a general position that larger plans should be effecting deposits quicker than smaller plans.

Our advice to all plan sponsors is that there's no good reason to delay the deposit of plan contributions. If you can cut a paycheck to the employee on payday, why can't you cut another check to the plan at the same time? Get in the habit of making these deposits right away -- your employees will thank you.

In considering the impact of this information on the timing of your plan asset deposits, please remember that depending on the time of day which we receive your payroll files, and the time of day the plan asset deposits are cleared into the plan trust account, it typically takes 1 or 2 business days after the deposits have been made for us to effect investment of participant funds. Additionally, if your payroll file as received by us contains inaccuracies or errors which impede our ability to process the contribution transactions, it is likely that more time will be required to effect investment of participant funds.

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