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When Must Employee Contributions Be Deposited?

New DOL Regulations – Deferral Deposit Deadlines

The Old Rules

Employee deferrals (and loan repayment contributions) become plan assets on the "earliest date" an employer can reasonably segregate them from their general assets. If the deposit to the trust has not occurred by that date, the employer has engaged in a prohibited transaction.

The Department of Labor (DOL) requires that the "earliest date" cannot be later than the 15th business day of the month following the month in which such amounts could have been paid to the employees in cash. The term "earliest date" has been open to a wide variety of interpretations.

The New Rules

On February 29, 2008, the DOL issued proposed regulations for small plans (under 100 participants at the beginning of the plan year). They now define a "safe harbor" timeframe for depositing participant contributions. The proposed regulation states that deposits made no later than the seventh business day following the date the payment would have been payable to the participant in cash are now treated as having automatically been deposited timely, even if the contribution could have been segregated from employer assets earlier.

This regulation is not effective until the final regulation is published, but until then, the DOL indicates that plan sponsors may rely on this proposed regulation for compliance *(Federal Register page 11074, Vol. 73, No. 41, February 29, 2008 Proposed Rules)*.

How to Avoid Extra DOL Scrutiny

Does your plan have fewer than 100 Participants at the beginning of the Plan Year?

- If yes, deposit all employee contributions within seven business days after being withheld. The DOL cannot question the timeliness of any such deposits.
- If no, the old rules still apply – deposit all employee contributions as soon as possible after being withheld.

403(b) Plans – New Written Plan Now Required

January 1, 2009 marks the adoption deadline by which all 403(b) plans must adopt a written plan which complies with the recent Final 403(b) Regulations *(per Revenue Procedure 2007-71)*. There are exceptions for union plans and certain church plans. Some 403(b) Plan Sponsors have decided to wait for additional guidance from the IRS before taking action. However, Robert Architect, of the Internal Revenue Service, stated recently, "Those waiting for additional guidance from the IRS dealing with 403(b) model plan language or information sharing agreements shouldn't hold their breath."

Mr. Architect indicated that his IRS division is currently working on a pre-approved document program for 403(b) plans, similar to the pre-approved defined contribution program. This program is not scheduled to be released until well after the January 1, 2009 amendment deadline.

We are currently reviewing our 403(b) language and expect to have written plan language available for adoption as early as August. If you sponsor a 403(b) plan, we will send you a personal letter to fully explain the amendment process.

401(k) and Profit Sharing Plans – Document Restatements Required

April 30, 2010 marks the adoption deadline by which all defined contribution plans using pre-approved documents must adopt a fully restated EGTRRA plan document. Most 401(k) plans and profit sharing plans fall into this category. There are different deadlines for ESOPs, non-electing church plans, multiemployer and certain multiple employer plans. The IRS has indicated that these pre-approved plans must be restated again every six years. If you sponsor a defined contribution plan, we will send you a personal letter to fully explain the restatement process. We are preparing now for this restatement process which will begin this summer.