



ATTORNEYS AT LAW

ADVISORY BULLETIN – January 15, 2010

NEW SAFE HARBOR DEADLINE FOR DEPOSITING PARTICIPANT CONTRIBUTIONS FOR SMALL RETIREMENT AND GROUP MEDICAL/WELFARE PLANS

Effective January 14, 2010, the U.S. Department of Labor (“DOL”) adopted a final revised regulation which creates a seven (7) day safe harbor period for depositing participant contributions and loan repayments to small retirement and welfare benefit plans with less than 100 participants.

DOL regulations provide that employers of all sizes must transmit employee contributions to qualified retirement plans (typically 401(k) plans) as soon as they can reasonably be segregated from the employer’s general assets, but no later than the 15th business day of the month following the month in which contributions are received or withheld by the employer. The latest date for forwarding participant contributions to health plans is 90 days from the date on which such amounts are received or withheld by the employer. The DOL has consistently taken the position that “as soon as they can be reasonably segregated” was the standard and had taken enforcement action against employers that were waiting two or three weeks to deposit participant contributions. The DOL’s interpretation, which required an employer-by-employer analysis of the ability to segregate contributions, left employers uncertain as to how soon they must forward contributions to the plan.

The amendment to these regulations creates a safe harbor period for deposit of participant contributions (or loan repayments) to a retirement or welfare benefit plan with less than 100 participants at the beginning of the plan year. Employers will be deemed to comply with the segregation requirement if participant contributions or loan repayments are deposited with the plan within seven (7) business days of receipt or withholding by the employer. The final regulation should give employers increased certainty about whether they have satisfied the segregation requirement. Deposits outside of the 7 business day period may still be timely if an employer can establish that it could not reasonably segregate the contributions earlier, but it may be increasingly difficult to convince the DOL that deposits outside of this safe harbor period are timely.

For now, the DOL has not expanded the safe harbor to plans with 100 or more participants.

Please contact either Ken Johnson [(336) 271-5264] or David Bury [(336) 271-5266] if you have any questions concerning this final regulation.

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