



New Time Deadlines Apply for Depositing Participant Contributions

The Department of Labor recently announced that participant contributions, for **small** plans, must be deposited with the plan **within 7 business days** from when the contributions are deducted from the participant's wages. This DOL pronouncement was made in proposed changes to the "plan asset" regulations at 29 CFR Part 2510.3-102.

What does the DOL consider to be a small plan? A small plan is a pension or welfare benefit plan with fewer than 100 participants. As such, if you are an employer with fewer than 100 participants in your plan, you **MUST** deposit with the plan any deductions that have been made from your employees' wages within seven (7) business days.

For 401(k) plans, this includes not only the employees' elective deferral contributions that are deducted from the employee's wages, but also any **loan repayments** that are deducted from wages and made to the plan.

Why is this timing of making employee contributions to a plan important? It is an important issue because it is the date on which such monies are determined to be "plan assets." If, therefore, the contributions are considered to be plan assets on the 8th day after deduction from the employee's wages, then the contribution may not remain in the employer's general accounts on that day. Otherwise, the employer will have impermissibly utilized "plan assets" and will have committed a prohibited transaction under both ERISA and the Internal Revenue Code. Such a prohibited transaction can subject the employer to significant penalties and to contentions of a breach of fiduciary duty.

So what about **large** plans? Large plans are NOT included in the DOL's 7-day safe harbor. Instead, large plans remain subject to the general rule that amounts withheld by an employer "become plan assets on the earliest date on which they can **reasonably be segregated** from the employer's general assets.

Do large plans then have more or less time than the 7-day safe harbor afforded small plans?

The DOL provides some guidance as to its position to this question in the preamble to the proposed regulations. First, the DOL states that "**smaller plans** typically need **more**

time than larger plans to segregate participant contributions from their general assets.” This statement indicates that while seven business days may be a safe harbor for small plans, it should NOT be considered a safe harbor for large plans. Second, the DOL gives an example in the proposed regulations as to a time frame that will satisfy the “reasonably be segregated” rule. The DOL uses as its example a national corporation with 600 participants in its 401(k) plan. The corporation uses an outside payroll processing service to pay employee wages and to process deductions from the employer’s several payroll centers. The DOL states that this employer has reasonably deposited participant contributions to the 401(k) plan when the deposit to the plan’s investment firm is made within **three (3) business days** after paychecks are issued and deductions are made.

The DOL is seeking comments to the proposed regulation to determine whether a safe harbor is necessary for larger plans. Do not be surprised if this time frame is shorter than the time frame afforded smaller plans.

What about employee contributions to health plans? The DOL states that many health plans will not be affected by its safe harbor regulation because many health plans are not required to deposit employee contributions into a **trust fund**. But, beware - - if your health plan utilizes a trust fund, the 7-day safe harbor will apply to small plans, and large health plans may be affected by the same guidelines that are discussed above.

One final, and cautionary, note -- the DOL states in the proposed regulations that it “devotes significant enforcement resources to cases involving delinquent employee contributions.” So, employers beware. If you are a small employer, deductions from wages for employee contributions must be deposited with the plan within 7 days; for large employers, the DOL may mandate a shorter time frame.