



The Ferenczy Flash

FROM THE LAW OFFICES OF Ilene H. Ferenczy, LLC

The Latest Word in Employee Benefits . . .

SALARY DEFERRALS DEPOSITED WITHIN 7 BUSINESS DAYS ARE OKAY, SAYS DOL

The Department of Labor (DOL) has proposed a new "safe harbor" for deposit of employee contributions to small pension and health and welfare plans. Employee contributions in this context include **salary deferrals** to a 401(k) plan or employee payments to a health or welfare plan. A "small" plan is one that has fewer than 100 participants.

The general rule – which has been around for quite a while – is that employee contributions must be deposited to the plan as soon as they can reasonably be segregated from the employer's general assets. However, in no event can a deposit of these amounts to a 401(k) plan be later than the 15th business day of the month following the month when the employee contributions are withheld from the employee's pay. For health and welfare plans, the "outside date" for contributions is 90 days after the withholding of the contributions by the employer. **These rules have not changed.**

However, what constitutes "as soon as they can reasonably be segregated"? Historically, DOL auditors commonly looked at the quickest action taken by an employer in making deposits to the plan, and have used that as the standard by which to judge the timeliness of all such plan deposits. This has led to significant confusion on the part of companies, as well as inconsistent enforcement. If a payment is considered "late," the employer must make up lost interest to the plan, and may be liable for excise taxes. In extreme situations, the employer may be considered to have breached its fiduciary duty to the plan.

In response to requests by various groups (including the Government Affairs Committee of the American Society of Pension Professionals and Actuaries, of which both Ilene and Gina of our Firm are members), the DOL has announced a proposed safe harbor of **7 business days** following withholding of employee contributions from the employees' paychecks. A "safe harbor" means that the DOL will not assert a claim that a deposit within this time period is late, even if historic deposits were made more quickly by the company. This provides a level of certainty and relief to plan sponsors.

While this proposed rule is for smaller plans only, the DOL also announced that it is considering the application of this rule, or a similar rule, for large plans. The DOL has requested public comments on this issue.

If you have any questions on this release, please contact us.

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