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Late Deposits by Employers of Employees' 401(k) Salary Deferral Monies

Employers are required to remit elective deferrals which are deducted from employees' paychecks into the 401(k) plan trust as soon as administratively possible. Failure to do so is a violation of the trust requirements under ERISA. It is a breach of the employer's fiduciary duties if employees' salary deferrals and/or loan repayments are not transmitted at the time they become plan assets.

Under rules (DOL - CFR 2510.3-102) applicable to Internal Revenue Code ("Code") section 401(k) retirement plans, employers sponsoring a 401(k) retirement plan are **required to deposit employee salary deferrals and/or loan repayment as of the earliest date on which such amounts can reasonably be segregated from the employer's general assets**. In most cases, the salary deferral amounts can be segregated within a few days of the date the employee's paycheck is issued by the employer, at the latest. In many cases, deferral amounts can be segregated on the same day as the payroll check is issued or electronically deposited in an employee bank account.

Other rules provide that in no event may salary deferrals and/or loan repayments be deposited later than the 15th business day of the month following the month in which such amounts would otherwise have been payable to the participant employee in cash.

Mistakenly, many employers have **misinterpreted** this rule, believing that it provides a "safe harbor" which allows the employer to delay deposit of employee deferrals until the 15th business day of the following month, regardless of whether amounts can be segregated on an earlier date. This is **NOT** a safe harbor. It establishes a **maximum** deadline for depositing employer deferred contributions to the retirement plan. In other words, employers believe **wrongfully** that they can "use employees' monies, however temporarily, for overhead and other employer business expenses, and make the deposit to employees' accounts whenever they choose." **This is an incorrect interpretation of the rules governing the disposition of employee deferred monies.**

Here is a more appropriate interpretation of the rules: if the employer could have segregated the deferrals from the company's general assets within three business days, the maximum time period to transmit the deferrals would be three business days. When conducting plan audits, the Department of Labor has used the time period required to transmit income tax withholding as a standard. The Department of Labor now has a new guideline. **Small employers typically only have a few days following each payroll before the deferrals become plan assets. If a small employer deposits salary deferral contributions by the 7th business day following the withholding date, the DOL will consider the deposit to be timely and the small employer will not be subject to sanctions for late deposits.**

Employers should implement payroll procedures to ensure that employee salary deferrals are deposited timely to the plan trust. Failure to deposit salary deferrals on a timely basis constitutes a **prohibited transaction subject to excise tax under section 4975 of the Code, payable by the employer with the filing of Form 5330. In addition to the payment of tax, the employer must correct the transaction. Correction requires the restoration of lost income resulting from the late deposit of amounts to the trust. Delaying the deposit of salary deferrals until after 12 months following the end of the plan year could result in plan disqualification.**

Regardless of how frequently you pay your employees, deferrals must be transmitted to the trust on a timely basis for each payroll despite the inconvenience.

The Department of Labor has an ongoing enforcement initiative regarding 401(k) deferral contributions. On Schedule I and Schedule H of Form 5500, the schedule asks whether the employer failed to remit all salary deferral contributions on a timely basis. Answering "Yes" will cause the DOL to issue a letter requesting the employer to file under the Voluntary Fiduciary Correction Program or the DOL may audit the plan. In the past, the DOL has subpoenaed the records of service providers in order to determine which plan sponsors are out of compliance with the regulations.

The employer should review current office practices to determine whether 401(k) deferrals and loan repayments (if any) are being transmitted to the trust under these very restrictive guidelines. If deferrals have not been remitted on a timely basis, please contact Lea Ann Nunley, Vice President of Retirement Plan Services, at 918/747-5585.