



Pension Analyst

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DOL publishes participant contribution timing rules for small plans and clarifies trustee role for late transmittal of contributions

Earlier this year, the Department of Labor (DOL) proposed rules providing a safe harbor period for employers of small plans to transfer payroll deduction employee contributions and transmit loan repayments to their plans. The proposed rules affect employee pre-tax and post-tax contributions made to qualified defined contribution plans and ERISA 403(b) plans. The rules also apply to contributory defined benefit plans. They do not apply to governmental plans, to church plans that do not elect to be covered by ERISA, or to non-ERISA 403(b) plans.

Background

In 1996, the DOL published guidance regarding when employers must deposit employee contributions to pension plans. This guidance provided a general rule – that contributions are required as of the latest date they can reasonably be segregated from the employer's general assets – and an outer limit, the latest date contributions could be made and possibly be considered timely. However, the 1996 regulations did not provide a safe harbor rule. As a result, many employers remain uncertain about the DOL timing requirements and whether a particular contribution might be considered timely. In fact, close to 90% of the Voluntary Fiduciary Correction Program applications received by the DOL have involved delinquent participant contributions. In an attempt to clarify these rules, the DOL has proposed a safe harbor rule for small plans.

Safe harbor for transmittal of payroll deduction employee contributions

The safe harbor transmittal applies only to plans with *fewer than* 100 participants as of the first day of the plan year ("small plans"). It does not apply to plans with 100 or more participants ("[large plans](#)").

The safe harbor provides that contributions will be deemed timely under ERISA if they are deposited:

- To the plan no later than the seventh business day following the day the amount would have been payable to the participant in cash; and
- To a plan account by this deadline. Contributions do not need to be allocated to specific participants or among participants' specific investments by this deadline.

Safe harbor for transmittal of plan loan repayments

In general, the DOL concluded that the same principles should apply to the transmittal of plan loan repayments. As a result, the DOL extended the application of the general rule to plan loan repayments, regardless of plan size. Accordingly, the new safe harbor applies to loan repayments made to small plans:

- Repayments made by payroll deduction will be deemed timely under ERISA if deposited to the plan no later than the seventh business day following the day the amount would have been payable to the participant in cash;
- Repayments made in other forms (e.g., by check) will be deemed timely if deposited to the plan no later than the seventh business day following the day on which the employer receives the payment; and
- Repayments must be deposited to a plan account by this deadline but do not need to be allocated to specific participant accounts by the deadline.

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Large plans

Large plans remain subject to the outer limit rule that employee contributions and plan loan repayments be deposited to the plan no later than the 15th business day of the month following the month in which the amounts would otherwise have been payable in cash to the employee or were received by the employer. However, this is not a “safe harbor” and many DOL audits have required more rapid deposits.

Future guidance

The DOL has not yet been convinced that large plans need a similar deposit timing safe harbor period. However, if commentators provide information and data that supports the creation of a safe harbor for large plans, the DOL is willing to provide one when it publishes final rules.

Late transmittal of contributions

Participant contributions and loan repayments that are not transmitted to the plan within the required timeframes are delinquent. Employer contributions are delinquent when they are due and owed to the plan under the documents governing the plan but have not been transmitted to the plan in a timely manner. In a number of pension plan investigations, the DOL has discovered trust agreements that relieve the financial institutions serving as trustee of responsibility to collect delinquent contributions or that are silent or ambiguous on the matter.

In [Field Assistance Bulletin 2008-01](#), the DOL discusses the role of the trustee in the collection of delinquent employer and employee contributions. It confirms that both discretionary and directed trustees are generally responsible for collecting contributions. However, a named fiduciary with the authority to appoint the plan's trustee may assume this responsibility or assign this responsibility to an investment manager. If a plan has two or more trustees, the duty may be assigned to a single trustee.

If a particular trustee is not responsible for monitoring and collecting contributions under the terms of the trust agreement, that trustee (including a directed trustee) is required to take appropriate steps to correct a situation where it knows that no party has assumed the responsibility for the collection and monitoring of contributions and delinquent contributions remain uncollected. Appropriate steps may include:

- Advising the named fiduciary or the DOL of the breach;
- Reporting the breach to other fiduciaries of the plan;
- Directly taking actions to enforce the contribution requirements on behalf of the plan;
- Seeking an amendment of the relevant trust documents; or
- Seeking a court order mandating a proper allocation of fiduciary responsibility over contributions.

Effective date

The safe harbor rules are proposed to become effective on the date the final regulations are published. However, in the interim, small plans may rely on the safe harbor rule and will be treated as being in compliance with the general contribution timing rules if employee contributions and loan repayments are transmitted to the plan within the seven-day safe harbor period.

If you have questions about the application of these rules to your plan, please contact your Prudential Retirement representative.



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