

Practical Information Regarding...

Timely Deposit of Employee Contributions

Department of Labor Simplifies 401(k) deposit rules for smaller 401(k) Plans

The U.S. Department of Labor (DOL) has simplified its requirements for when withheld employee 401(k) contributions and loan payments must be deposited to the 401(k) plan. Effective February 2008 for plans with less than 100 participants, the DOL allows up to 7 business days following each payday.

For plan sponsors with plans that have less than 100 participants (eligible employees, regardless of whether or not they are currently making 401(k) contributions), as long as the deposits are made within 7 business days, the DOL will consider the deposits to be timely.

Plans with 100 or more participants must still follow old rules

The DOL is accepting comments on this new rule and specifically whether it should apply to larger plans. We are hopeful that this will eventually be the uniform rule for all 401(k) plans. For now, however, larger plans must still deposit based on the DOL's old "as soon as administratively feasible" rule (described below).

Background

After several years of inconsistent enforcement actions, the U.S. Department of Labor (DOL) has finally provided clear guidance on when plan sponsors must deposit their employees' withheld 401(k) contributions and loan payments to their 401(k) plans.

The U.S. Department of Labor (DOL) has always required Plan Sponsors to deposit employee 401(k) contributions and participant loan payments to the plan *as soon as administratively feasible* but not later than the 15th business date of the month following the month in which they were withheld. In practice the DOL has always enforced the *as soon as administratively feasible* rule. However there was no uniform interpretation of how many days would satisfy the *as soon as administratively feasible* rule. Different DOL auditors enforced different dates.

In February 2008 the DOL released a proposed regulation defining *as soon as administratively feasible* as 7 business days following each payday. Plan sponsors may rely on this proposed regulation pending final approval of the regulation. The proposed regulation applies only to small plans, those with fewer than 100 participants as of the first day of the plan year. Large plans with more than 100 participants should make deposits of employee 401(k) contributions as soon as feasible, we recommend doing so at the same time the payroll tax deposits are due, unless there are other factors that would warrant a longer period of time that could be justified to the DOL.

Summary

For now, for plans with less than 100 participants, withheld employee 401(k) contributions and participant loan payments should consistently be deposited within 7 business days of each payday to avoid penalties.

Large plans with 100 or more participants should deposit 401(k) contributions and loan payments as soon as administratively feasible, ideally when payroll taxes are due, and in NO case later than 15 business days after the end of the month.

Late deposits must be reported annually on Form 5500 under penalty of perjury, and the DOL requires make up earnings and penalties paid on late deposits.

THE PENSION GROUP, INC.

23046 Avenida De La Carlota, Suite 500, Laguna Hills, CA 92653

Phone (949) 768-4015 | Fax (949) 600-7666 | Web pensions.com

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