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Commco Comments

Timely Information Updates for Employers and Retirement Plan Sponsors

DOL Finalizes New Contribution Rule

On January 14, 2010, the Department of Labor (DOL) published final regulations providing a safe harbor timing rule (the "New Contribution Rule") for the deposit of participant contributions and loan repayments to small plans that are subject to ERISA regulation. "Small plans" are plans with fewer than 100 participants as of the first day of the plan year. No safe harbor is provided for larger plans.

General Employee Contribution Deposit Timing Rule

Under ERISA's general timing rule, employers must deposit employee pre-tax and post-tax contributions and loan repayments to qualified defined benefit, defined contribution, and 403(b) plans as of the earliest date they can reasonably be segregated from the employer's general assets. The latest permissible deadline for making these deposits is:

- The 15th business day of the month following the month in which the employer received the contributions (for amounts paid to the employer by a participant or beneficiary), or
- The 15th business day of the month following the month in which the participant would have received the amounts in cash (for amounts withheld from pay).

This is not a safe harbor deadline. Depending on the employer's specific facts and circumstances, the DOL may expect deposits to be made much sooner than this rule might suggest.

Safe Harbor Deposit Timing Rule

In February 2008, the DOL proposed a safe harbor timing standard for small plans. The final rules adopt this safe harbor, effective January 14, 2010. However, they do not extend the safe harbor period to larger plans or apply it individually to small employers that participate in multiple employer or multiemployer plans, as had been requested by some commentators.

Under the safe harbor rule, contributions are deemed to be made timely if they are deposited to the plan no later than:

- The seventh business day following the day on which the employer received the contributions (for amounts paid to the employer by a participant or beneficiary), or
- The seventh business day following the day on which the participant would have received the amounts in cash (for amounts withheld from pay).

Contributions do not have to be allocated to specific participants or their investment accounts by this deadline.

Failures to Make Timely Deposits

The DOL notes that when an employer fails to make timely deposits of employee

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According to the New Contribution Rule, how many participants constitute a "small" plan?

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contributions or loan repayments, the losses and interest on the late contributions required under the Voluntary Fiduciary Correction Program must be calculated from the date those amounts could reasonably have been segregated from the employer's general assets, not from the safe harbor seven-day deadline. For example, if the segregation date for an employer that sponsors a small plan was reasonably expected to be the third business day following a pay date, that is the date from which losses and interest must be calculated, not the safe harbor seventh business day.

Application of the Safe Harbor Rule

Small plans are not required to satisfy the safe harbor timing rule. If an employer cannot reasonably segregate employee contributions and loan repayments from its general assets in this seven day timeframe, the general rule still applies. The difference is that if the safe harbor timing deadline is met, DOL auditors should not challenge the timing, while the application of the general rule is still open to challenge by auditors.

Sources: The Prudential Insurance Company of America and The Commerce Company

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