

DOL Publishes Final Participant Contributions Regulation

January 14, 2010

On January 14, the U.S. Department of Labor (DOL) published a final regulation on when participant contributions—amounts an employer has received from its employees or withheld from wages for contribution to an employee benefit plan—become “plan assets” subject to ERISA.

Since 1996, the general rule has been that participant contributions become plan assets on the earliest date on which the contributions can reasonably be segregated from the employer’s general assets, subject to certain maximum time periods. For pension plans, the maximum time period is no later than the 15th business day of the month following the month in which the amount was received by the employer or would otherwise have been payable to the employee in cash. For welfare plans, the maximum period is 90 days from the date of receipt or withholding. If contributions are not timely deposited, then the employer can be subject to fiduciary liability under ERISA for any losses or interest on those amounts over the period of the delay.

The problem DOL has encountered in reviewing compliance with this general rule is that it is not always clear when is the “earliest date” on which the segregation of contributions is possible. In February 2008, DOL proposed to create a “safe harbor” to provide a higher degree of certainty. Under the proposed safe harbor, employers with plans that have fewer than 100 participants (“small” plans) would be considered to have been timely under the “earliest date” requirement if the contributions are deposited within seven business days.

DOL has now adopted this seven-business-day safe harbor rule, effective immediately. The rule applies for all “small” plans, both pension and welfare benefit plans.

DOL rejected comments requesting a longer safe harbor period, taking the position that any problems in meeting the seven-business-day safe harbor could be accommodated under the “facts and circumstances general rule” that looks to the earliest date on which the contributions can reasonably be segregated. DOL also rejected comments asking it to extend the safe harbor to contributions to “large” plans, i.e., those with 100 or more participants, on the basis of an insufficient record. DOL further declined to create special rules for multiemployer and multiple employer plans.

The final regulation also adopts DOL's previously-stated position that the general rule on when contributions become plan assets applies to participant loan repayments. The seven-business-day safe harbor for small plans applies as well.

DOL retained without change a special rule for a SIMPLE plan that involves SIMPLE IRAs, under which the maximum period for depositing contributions is 30 calendar days after the end of the month in which the employees would otherwise have received the amounts in cash. In addition, DOL clarified that Technical Release 92-01, which provides an exception for cafeteria plans from the general rule that ERISA plan assets must be held in trust, is not affected by this final regulation.

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact any of the Morgan Lewis attorneys listed below:

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