

January 22, 2010

TCRS 2010-01: Department of Labor Final Rule on Definition of Plan Assets – Participant Contributions

On January 14, 2010, the Department of Labor (DOL) published a final rule that establishes a safe harbor period by which amounts that a small employer has received from participants (including beneficiaries) or withheld from wages for contribution to certain pension plans and welfare benefit plans will become plan assets for purposes of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and the related prohibited transaction provisions of the Internal Revenue Code of 1986, as amended. A small employer is an employer sponsoring a plan with fewer than 100 participants (determined at the beginning of the plan year).

Background

Since 1988, the DOL's general rule has been that participant contributions become plan assets on the earliest date the contributions can reasonably be segregated from the employer's general assets, but no later than 90 days from the date of the employer's receipt or withholding of the contributions. A DOL amendment in 1996 changed the maximum period for pension plans to the 15th business day of the month following the month in which the contributions are received or withheld by the employer.

In the course of the DOL's investigations of 401(k) and other contributory plans, it became clear that many employers and their advisers were still uncertain as to how soon they must forward participant contribution amounts in order to meet the "earliest date" part of the general rule. On February 29, 2008, the DOL published a proposed 7-business day safe harbor rule that was intended to provide a higher degree of certainty with respect to the "earliest date" part of the general rule. The DOL has now finalized the 2008 proposed safe harbor rule, with a few minor clarifying changes.

Final Safe Harbor Rule

Under the final safe harbor rule, participant contributions to a pension plan or welfare benefit plan of a small employer will be treated as timely deposited if made to the plan no later than the 7th business day following the day on which the contribution is received by the employer or withheld from the participant's wages. If the safe harbor rule is satisfied, contributions are treated as timely deposited even though the contributions could have been segregated from the employer's general assets sooner than 7 business days. A contribution will be considered deposited into the plan when placed in an account under the plan without regard to whether the contribution has been allocated to specific investments of such participant.

Participant Contributions Impacted By Final Safe Harbor Rule

- After-tax contributions
- Deferrals
- Loan repayments

What the Final Safe Harbor Rule Means for Employers and Participants

- The safe harbor is available only to small employers and it is optional. This means a small employer may still be in compliance with the DOL's deposit requirements if it meets the general rule. Therefore, it is up to such an employer to decide whether the benefits from the certainty of compliance afforded by the safe harbor would justify the cost of compliance.
- The safe harbor will provide a means for a small employer to assure itself that it is not holding plan assets, without having to determine if it is meeting the "earliest date" requirement.

- The safe harbor is available on a deposit-by-deposit basis. The failure to satisfy the safe harbor for any deposit of participant contributions will not result in the safe harbor not being available for other deposits of participant contributions to the plan.
- The DOL clarified that the general rule applies to loan repayments regardless of plan size; and the final safe harbor rule applies to loan repayments under only a plan of a small employer.
- The DOL clarified that when an employer fails to remit participant contributions or loan repayments in accordance with the general rule, losses and interest on such late contributions must be calculated from the actual date on which such contributions and/or repayments could reasonably have been segregated from the employer's general assets, not the end of the safe harbor period.
- The DOL did not change the rule under SIMPLE plans that involve SIMPLE IRAs with respect to the maximum period for depositing participant contributions. This rule continues to be 30 calendar days after the end of the month in which the employees would have received the amounts in cash. For welfare benefit plans, the maximum period for depositing participant contributions continues to be 90 days from the date of receipt or withholding by the employer.
- The DOL clarified that the safe harbor rule applies to multi-employer and multiple employer plans in the same manner as single employer plans. The DOL further clarified that the 7-business day safe harbor rule is not available to large plans (plans with 100 or more participants).
- For employers, compliance with the safe harbor may reduce disputes over whether or not it is in compliance with the general rule. It may also allow easier oversight of remittance practices and may serve to reduce any existing variations in employer remittance periods.
- Plan participants and beneficiaries may derive an additional benefit in the form of increased investment earnings resulting from the earlier crediting of contributions to their accounts.
- Some small employers who choose to adopt the safe harbor may incur one-time costs to alter their remittance practices to conform to the safe harbor. There may also be ongoing administrative costs resulting from quicker and possibly more frequent remittances. The DOL's analysis reveals that these costs will likely be small and that the benefit derived by employers, participants and beneficiaries alike would justify the costs.

Effective Date Of Final Safe Harbor Rule

The final safe harbor rule is effective January 14, 2010.

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