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## Department of Labor Proposes Safe Harbor for Small Plans for Remitting Participant Contributions into a 401(k) Plan

Under existing DOL regulations on when participant 401(k) contributions become plan assets, the general rule is that amounts paid to or withheld by an employer become plan assets on the earliest date on which they can “reasonably” be segregated from the employer’s general assets (the “General Rule”), but in no event can the transfer occur after the 15<sup>th</sup> business day of the month following the month in which amounts would otherwise have been payable to the participant.

Since the promulgation of these regulations, the DOL has been asked to review this guidance. In response, the DOL recently proposed a safe harbor under which participant contributions to a 401(k) or welfare plan with fewer than 100 participants at the beginning of the plan year will be treated as satisfying the General Rule if participant contributions are deposited not later than the seventh business day following the day in which such amounts would otherwise have been paid to the employee in cash.

In the preamble to the proposed regulations, the DOL indicated that it was unclear if plans with 100 or more participants had the same need for a safe harbor period. However, the DOL did state that the final regulations would include a safe haven for larger plans, if comments provided sufficient information and data to evaluate the current contribution practice of such employers, and the DOL concluded that there was a net benefit to a safe harbor. The proposed rule would apply as well to the repayment of plan loans.

While the proposed safe harbor would be effective when the proposed regulations are published in final form in the Federal Register, the DOL indicated it would not assess any violation of ERISA based upon the General Rule, so long as participant contributions or loan repayments to a plan with fewer than 100 participants are transferred to the plan in accordance with the seven day safe harbor.

In our experience, the most frequent ERISA violation is failure to remit contributions to a 401(k) plan in a timely fashion. Even though the penalties for the violations may be nominal, it can be an administrative headache to correct them. If you have any questions with respect to either the General Rule or the proposed DOL safe harbor for small 401(k) plans, please call the undersigned.

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