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Guidelines for 401(k) Contribution Deposit Timing

Introduction

The timing for deposit of employee 401(k) payroll deductions continues to be on the Department of Labor's (DOL) agenda for tightening up the acceptable time frame for deposit into participants' accounts. DOL's enforcement efforts have been focused on the requirement that funds be deposited within a reasonable time period following *each pay date*. When 401(k) deposits are made late, they are deemed to be "interest-free loans to the employer," which are prohibited transactions and subject to excise tax liability. Additionally, the employer is required to make up for lost investment earnings to each of the affected participants. Pollard is recommending that lost earnings be calculated and deposited on all late deposits as a matter of standard procedure.

Safe Harbor Guidance for Plans with Less Than 100 Participants

On January 14, 2010, the DOL published final regulations on the safe harbor deadline for depositing 401(k) contributions for small employers (plans with less than 100 participants). The safe harbor regulations are intended to provide small employers with a clear time-frame to ensure compliance with the deposit standards. *Such plans will be considered to be compliant if 401(k) payroll deductions are deposited by the 7th business day following the date of withholding, unless an earlier deposit timeframe has routinely been followed.*

Guidance for Plans with More Than 100 Participants

For large employers (plans with more than 100 participants) 401(k) payroll deductions must be deposited *as soon as reasonably possible* following the date of withholding. *There is no safe harbor guidance for large plans, but 401(k) payroll deductions are generally considered compliant if deposited by the 3rd business day following the pay date.*

A plan that fails to comply with these guidelines will not automatically violate the regulations. However, the employer will have the burden of proof to demonstrate that deposits were made as soon as reasonably possible.

In summary, we are recommending that the best way to comply with the current regulation is to routinely submit all 401(k) employee withholdings to the plan's investment provider(s) within a fixed number of days following each pay date without exceeding the guidelines above. Finally, if you are still remitting contributions to the plan by mail, the mailing time must be considered in meeting the deadline. You may want to consider changing your procedures to online submission with automatic debit to avoid this type of delay.