

When Do You *Really* Have to Deposit Employee Deferrals?



The rules governing the deposit of 401(k) deferrals are found in the Department of Labor (DOL) ERISA regulations. Those results state that deferrals must put in the plan on the earliest date on which the contributions can reasonably be segregated from the employer's general assets, but in no event later than the 15th business day of the month following the month in which the deferrals were withheld.

NOTHING COULD BE FURTHER FROM THE TRUTH!



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Because of the 15-day outer deadline, many employers assume that is the rule. Unfortunately, this is not true. In fact, DOL enforcement activity focuses on what the deferrals could reasonably have been put in the trust – which is typically within five days of the withholding...and long before the 15th business day of the following month.

A good indicator of when the contributions could have been deposited is to look at the actual deposit history. For example, an employer has a bi-monthly payroll and makes the deposit of the deferrals from the month-end payroll within 10 days after the end of the month.

Absent special circumstances, it is probably improper to hold the mid-month payroll and make the deposit at the same time. This is true even though it is administratively convenient. Moreover, if on some occasions the deposit is made within five days and at other times more than five days, and there is no compelling reason for the longer periods, the DOL would likely take the position that the later deposits violated ERISA.

Because the determination of when contributions can reasonably be deposited

is based on the facts of each case, it is difficult to give a uniform answer for when deposits must be made. Having said that, based on our experiences in handling more than 100 of these cases, it is rare that an employer can prove to a DOL investigator that the deposit of the elective

deferrals was properly delayed for more than 10 days. Accordingly, if the 401(k) deferrals are not being deposited in the plan within 10 days, your company may be violating ERISA's fiduciary and prohibited transaction rules. (As a word of caution, there have been cases where the DOL asserted that all of the

deposits could have been made within five days.)

There are serious consequences for violation of the deposit rule. Failure to timely deposit 401(k) contributions is both a prohibited transaction and a fiduciary breach. It is treated as either a prohibited loan from the plan to the company or as an illegal taking of plan assets. As a result, your company should ensure that procedures are in place for the timely deposit of 401(k) deferrals.

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For more information on retirement planning, contact Arthur P. Colamarino, Vice President, Alpern Rosenthal Financial Services LLC, at 412.281.3416 or at acolamarino@alpern.com.