

Late Deposit of 401(k) Contributions

U.S. Department of Labor Regulations Section 2510.3-102 requires all employers who maintain 401(k) plans to deposit their employees' contributions no later than 15 business days following the month in which the contributions were either withheld from employees' paychecks or received by the employer in any other form of payment. Note that this date is an outside deadline, not a "safe harbor." This is because 401(k) contributions must be deposited by an employer as soon as reasonably practicable in any event. The Department of Labor also regards the date of deposit as the date of receipt of contributions on behalf of the plan.

If the employer fails to meet the above deadline, the contributions in question will be deemed to have become "plan assets." Because it is a violation of ERISA for an employer to have custody of plan assets, plan fiduciaries will have committed various breaches of fiduciary duty (failure to maintain plan assets in trust, allowing plan assets to inure to the benefit of the employer, self-dealing in plan assets, and failure to act for the exclusive purpose of providing benefits to plan participants and beneficiaries).

Late deposit of 401(k) contributions also constitutes a "prohibited transaction." A prohibited transaction is subject to a ten percent excise tax, which is administered by the Internal Revenue Service. This tax is to be voluntarily reported and paid by an employer on IRS Form 5330 (Return of Excise Taxes Related to Employee Benefit Plan). The excise tax is assessed on the amount involved in the prohibited transaction and, in the case of late deposit of 401(k) contributions, the amount involved is deemed to be the interest or other amount contributed to participant accounts by the employer as compensation for the late deposit.

The Department of Labor typically requests an employer to "correct" a late contribution of 401(k) contributions by making an additional contribution to the accounts of affected employees to compensate them for lost earnings. On audit, the Department of Labor typically requests interest paid at a short term "T Bill" rate, and will usually listen to an argument that the actual investments of the plan in question would have realized earnings at a lesser rate of interest.

Section 501(l) of ERISA requires a fiduciary to pay a penalty equal to 20 percent of the amount recovered by the Department of Labor for fiduciary breaches, either by settlement or in court proceedings. This penalty can be waived by the Department of Labor, and is unlikely to be assessed unless the late deposit of 401(k) contributions is discovered by the Department of Labor on audit.

Andrew S. Williams
Aronberg Goldgehn Davis & Garmisa
One IBM Plaza, Suite 3000
Chicago, Illinois 60611
312/755-3145
awilliams@agdglaw.com