



News & Types: Employment, Labor & Benefits Update

The Department of Labor is Reviewing Your 401(k) Form 5500 and Encouraging Voluntary Correction

1/18/2019

By: Frank J. Del Barto

Practices: Employment, Labor & Benefits

EXECUTIVE

SUMMARY

401(k) plan sponsors are receiving letters from the U.S. Department of Labor's ("DOL") Employee Benefits Security Administration ("EBSA") informing them that a prior year's Form 5500 for their 401(k) plan was reviewed. Based on these reviews, EBSA is sending letters to plan sponsors informing that *"it appears that the Plan sponsor failed to remit (\$xxx,xxx.00) in participant contributions and/or loan repayments to the Plan within the time period described in Department of Labor Regulation 29 CFR 2510.3-102."* In addition, these letters summarize the plan asset regulations, note that the failure to remit or the untimely remittance of contributions or loan repayments violates several ERISA provisions, and provide information regarding the DOL's Voluntary Fiduciary Correction Program ("VFCP"). Because self-correction is a relatively painless process and because a "No Action" letter is provided to the 401(k) plan sponsor, we recommend that clients accept the DOL's "invitation to correct" under VFCP in order to prevent the DOL from considering alternative enforcement measures.

Background: The failure to timely deposit 401(k) contributions and loan repayments is a breach of fiduciary duty. In accordance with the Department of Labor regulations, the assets of a 401(k) plan include the amounts that an employee or beneficiary pays to an employer, or amounts that an employee has withheld from his/her wages by their employer for either contribution to a 401(k) plan, or for repayment of a 401(k) plan loan. These employee contributions (elective deferrals, catch-up, Roth) and loan repayments generally become assets of the 401(k) plan as of the earliest date that such contributions or repayments can be reasonably 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 amounts otherwise would have payable to the employee.

Misunderstanding: Many 401(k) plan sponsors mistakenly believe that the "15th business day" is the deadline to deposit employee contributions and loan repayments to the plan. However, as the "invitation to correct" letter states, "the 15th business day is not a safe harbor and is included in the regulation only as an outside limit of the time that may be considered for segregation of assets." In contrast to the "15th business day," most plan sponsors must focus on the "earliest date that such contributions or repayments can be reasonably

segregated from the employer's general assets." Due to the sophisticated payroll and accounting systems that most plan sponsors utilize today, the "earliest date" will be different for each plan sponsor, but is likely a matter of days.

However, for 401(k) plans with fewer than 100 participants at the beginning of a plan year, there is a safe harbor. For these plans, contributions or participant loan repayments shall be deemed to be segregated from the employer's general assets on the earliest date possible if they are deposited into the 401(k) plan no later than the 7th business day following the day the amounts are received or withheld, even if they could have been deposited earlier.

Action Steps: As previously stated, if a client or friend of the firm receives an "invitation to correct" letter, we recommend submitting a VFCP application. Under VFCP, plan sponsors submit a relatively simple application to the appropriate EBSA regional office demonstrating that the violation was self-corrected, including the restoration of lost earnings. To simplify the calculation of lost earnings, EBSA makes an earnings calculator available. If the application and correction are accepted, the DOL will issue a "No Action" letter that informs the plan sponsor that EBSA will not take any civil enforcement action against the plan sponsor, will not recommend that the Solicitor of Labor initiate legal action against the plan sponsor, and will not impose a civil penalty on the amount repaid to the plan. Generally, to prevent the DOL from considering alternative enforcement measures, plan sponsors have 60 days from receipt of the "invitation to correct" letter to submit a VFCP application.