

DEPARTMENT OF LABOR FINALIZES PLAN ASSET RULE FOR SMALL PLANS

Effective January 14, 2010, employers that sponsor pension and welfare plans with fewer than 100 participants may take up to seven (7) business days to deposit employee contributions to plan accounts.

An employer is required to deposit funds received or withheld from employee wages as contributions to certain benefit plans into the benefit plans on the earliest date on which the contributions can reasonably be segregated from the employer's general assets. The Department of Labor's (DOL) Employee Benefits Security Administration, which is responsible for the enforcement of this issue, has taken a very aggressive position that "as soon as reasonably segregated" means, in some cases, one to two business days. The Employee Benefits Security Administration, acknowledged that there has been uncertainty as to how soon an employer must deposit employee contributions to the benefit plans in order to avoid the requirements associated with holding plan assets. To this end, the final rule creates a safe harbor to "provide greater clarity in remitting participant contributions to small pension and welfare plans in a timely manner," states Assistant Secretary of Labor Phyllis C. Borzi.

Under this safe harbor rule, employers with pension or welfare benefit plans with fewer than 100 participants will be considered to have made a timely deposit to the plan if the participant contributions are deposited within seven business days of withholding. During the seven business day safe harbor, contributions will not be considered plan assets for purposes of Title I of the Employee Retirement Income Security Act or the associated tax code prohibited transaction provisions. Rather, contributions will be considered deposited when placed in an account of the plan regardless of whether the amounts have been allocated to specific participants or participant investments. Where an employer does not make timely contributions, "losses and interest must be calculated from the actual date on which such contributions and/or payments could reasonably have been segregated . . . not the end of the safe harbor period."



New York

Seven Times Square
New York, NY 10036
+1.212.209.4800
+1.212.209.4801 [fax]

Boston

One Financial Center
Boston, MA 02111
+1.617.856.8200
+1.617.856.8201 [fax]

Washington, DC

601 Thirteenth Street NW,
Suite 600
Washington, DC 20005
+1.202.347.2222
+1.202.347.4242 [fax]

Hartford

City Place I
185 Asylum Street
Hartford, CT 06103
+1.860.509.6500
+1.860.509.6501 [fax]

Providence

121 South Main Street
Providence, RI 02903
+1.401.276.2600
+1.401.276.2601 [fax]

London

8 Clifford Street
London, W1S 2LQ
United Kingdom
+44.20.7851.6000
+44.20.7851.6100 [fax]

Dublin

Alexandra House
The Sweepstakes
Ballsbridge, Dublin 4
Ireland
+353.1.664.1738
+353.1.664.1838 [fax]

www.brownrudnick.com

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This seven business day safe harbor is also applicable to plan participant loan repayments.

While the DOL final plan asset rules are applicable to welfare plans, they do not overturn ERISA Technical Release 92-01, which provides that contributions to welfare plans become plan assets as of the earliest date they reasonably are able to be segregated from the employer's general assets, but in no event later than 90 days from receipt by the employer. ERISA Technical Release 92-01 further provides that the DOL will not assert a violation because of the failure to hold participant contributions to a Section 125 cafeteria plan in trust. This non-enforcement policy also is applicable to any other contributory welfare plan as to which participant contributions are applied to the payment of premiums used in whole or in part for the purchase of insurance to provide benefits.

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For further information on this topic, please contact your Brown Rudnick attorney or one of the following attorneys:

James L. Hauser
+1.617.856.8130
jhauser@brownrudnick.com

Rebecca F. Alperin
+1.617.856.8318
ralperin@brownrudnick.com