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DOL Finalizes Small Plan Contribution Safe Harbor Rules

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Effective January 14, 2010, the Department of Labor has finalized its rules regarding a number of issues around the timing of employee contributions to small employer plans (both retirement and welfare). With the new Final Regulations, in order to meet the optional safe harbor, employee contributions and plan loan repayments must be made to the plan by no later than the seventh (7th) business day following the time the employee could have otherwise received cash. Thus, for example, if the employees' 401(k) contribution could have been received in cash on payday on February 1, 2010, then in order to receive the benefits of the safe harbor the contribution would have to be deposited into the 401(k) plan and trust by no later than February 9, 2010, seven business days after the pay date. This optional safe harbor only applies to "small" plans with fewer than 100 participants. Plans with 100 or more participants are not allowed to use the safe harbor.

As under the Proposed Regulations, the Final Regulations require that all plans deposit employee contributions to both retirement and welfare plans as soon as the money can be segregated from the employer's assets, but no later than the 15th business day of the following month. Many employers mistakenly believed that the rule meant they could wait until the *later* of those two events, but in fact it always meant the *earlier* of the two. The DOL had conducted numerous audits of both small and large plans and found widespread noncompliance, particularly among small plans. Thus, it proposed a safe harbor enabling small employers to optionally elect a safe harbor where it could deposit employee contributions by the *later* of the time the employee contributions could be reasonably segregated from the employer's general assets or the seventh business day following the day the employee was entitled to receive the money. It should be noted that this an optional safe harbor. If the employer cannot reasonably segregate employee contributions from its general assets prior to the seventh business day, then it must make its deposit by the *earlier* of the time the funds can be segregated or the 15th business day of the following month.

Lastly, note too that the Final Regulations retain the new rule from the Proposed Regulations that in order to take advantage of the optional

safe harbor, plan loan repayments must also be made on the same schedule as employee contributions.

If you are a client of Kushner & Company, we had already adopted the new rules when they were first introduced under the Proposed Regulations.

What to Do Now

1. If you are a small plan (less than 100 participants), make sure your payroll vendor (if payroll is done externally) or your internal payroll department is aware of the new Final Regulations, and make all employee contributions and plan loan repayments by no later than the seventh business day if you wish to utilize the optional safe harbor.
2. If you are a large plan (100 or more participants) or a small plan electing not to utilize the optional safe harbor, make sure that payroll deposits all employee contributions and plan loan repayments by the *earlier* of the date those contributions and/or loan repayments can be segregated from employer assets or the 15th business day of the following month.

Penalties for noncompliance are severe, and do not depend upon an audit by the IRS or DOL. One of the questions on the required IRS Form 5500 each year is whether deposits and plan loan repayments were made on a timely basis. Answer the question in the negative and you can almost be assured of a subsequent audit.

As always, if you have questions please contact your Employee Benefit Specialist at Kushner & Company.

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