401(k) Plan Sponsor Duties: Timeliness of 401(k) Participant Deposits

Today's 401(k) plan sponsors are subject to an array of what often seem complex fiduciary responsibilities with respect to carrying out their duties to plan participants and beneficiaries. However, meeting these duties need not be difficult, and for some functions, there are specific rules to help guide the employer.

For example, the Department of Labor, (DOL), has guidance to help clarify regulations regarding the timeliness for depositing participant payroll deductions that represent contributions or loan payments to the plan.

What are the Rules?

Employers must deposit participant contributions (pre-tax/Roth 401(k) deferrals, and loan payments) to the plan's trust account on the earliest day they can reasonably be segregated from general corporate assets. For plans with fewer than 100 participants, a deposit is considered timely if it's made within 7 business days after the date the contributions would have been otherwise payable in cash. For larger plans (100 participants or more), the determination of whether a deposit is timely is based on facts and circumstances, but generally is stated as no later than the 15th business day of the month following the month when deferrals were withheld. Note that this is not meant that an employer can wait until the 15th day of the following month to make a deposit. Rather, it is the absolute latest time, if that amount of time is the earliest that is reasonably required to be able to separate the plan assets from the employer's corporate assets. The general rule as interpreted by both the DOL and the courts has been that if the employer was able to segregate other payroll-related items from corporate assets (most notably tax withholding payment amounts) at an earlier date, so too must 401(k) participant contributions be segregated.

What Does "Deposited" Mean?

"Deposited" means received by the plan's trust, not when the check was cut or remitted. It's not enough to simply mail or remit deferrals by the 7th day; the plan sponsor must reasonably factor in the necessary time for deferrals to reach the trust or investor.

If you have fewer than 100 participants, and have been depositing employee contributions later than by the 7th business day, please review your deposit process and determine how you can satisfy the 7 business day rule. Remember also, if your payrolls are frequent, for example biweekly, it is not considered timely to hold employee contributions and make one deposit for multiple payrolls. Failure to do so may result in penalties to the plan sponsor.

Late Deposit of Participant Deferrals: What happens now?

Avoiding late contribution deposits is the best course of action. But what happens if it's determined a late contribution has occurred? Keep in mind, the annual IRS Form 5500 requires that the plan sponsor indicate whether or not contributions were made late. Therefore it's never a good idea to disregard instances of late contributions in hopes they go unnoticed.

If you determine a late contribution has occurred, take the necessary steps to correct the mistake as soon as possible.

- Deposit the late contribution ASAP
- Provide for an additional contribution to make participants whole for any missed investment earnings, (if a client, contact us at Kushner & Company to determine the amount required)
- Review your procedures and make adjustments to ensure a repeat of late contributions doesn't reoccur
- Take advantage of the voluntary correction programs offered by the DOL and the IRS.

Staying the Course

Making timely deposits of participant deferrals is an important part of the plan sponsor's fiduciary responsibilities. If you set procedures in place for this process and review them periodically, you can meet the "7-day rule" for the timely remittance of participant deposits if you are a small employer, or the "as soon as reasonably possible" if you are a larger employer.

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