

STEPHEN H. ROSEN & ASSOCIATES, INC.

Actuarial Consulting & Retirement Planning

QUALIFIED RETIREMENT PLAN DEADLINE FOR DEPOSITING PARTICIPANT CONTRIBUTIONS AND LOAN REPAYMENTS, INCLUDING THE FINAL 7-DAY SAFE HARBOR RULE

What are the deposit rules for participant contributions?

When pension or welfare plan participant contributions are withheld from a participant's pay by an employer (e.g. employee deferrals and/or loan repayments) they become plan assets and need to be deposited to the plan so they are no longer considered to be in the control of the employer. The Department of Labor (DOL) dictates (in [29 CFR 2510.3-102](#)) that the deadline to deposit the withheld assets is the *earliest date on which such amounts could reasonably be segregated from the employer's general assets* ("general deadline") but in no event later than the 15th business day of the month following the month in which the participant contributions were withheld or received by the employer ("outside deadline" for retirement plans).

What is the safe harbor deposit deadline?

On February 29, 2008, the DOL issued a proposed rule for "small" plans giving those plan's sponsors (employers) a 7-day safe harbor deadline for depositing participant contributions and loan repayments withheld from a participant's compensation. On January 13, 2010, the DOL announced that the rule has been finalized and is effective as of January 14, 2010.

The DOL will consider contributions deposited to the plan (i.e. to the trust or account holding the plan's assets) to be in compliance with the "general deadline" if deposited *by no later than the 7th business day following the date of the withholding*, even if the employer could have deposited the contributions earlier.

Example: XYZ Company, Inc. maintains a 401(k) plan with 30 participants. XYZ has biweekly payroll dates. With respect to its February 5, 2010, payroll, XYZ deposits the elective deferrals to the plan's trust account on February 12, 2010 (5 business days following withholding). With respect to its February 19, 2010, payroll, XYZ deposits the elective deferrals on March 5, 2010 (10 business days following withholding). The deposit of the elective deferrals withheld on February 5th is within the safe harbor period while the deposit of the February 19th elective deferrals is not.

For participant payments (e.g. loan repayments) made to an employer, the safe harbor is met if deposited *by no later than the 7th business day following the date of the receipt by the employer*.

Why did the DOL issue the safe harbor rule?

The DOL has made several attempts, since the first set of regulations were established in 1988, to clarify the "general deadline" yet employers continue to struggle with determining the date by which they need to deposit contributions to the plan. Many employers ignore the "earliest date" rule and believe they are in full compliance as long as they deposit the contributions by the "outside deadline". In actuality, the DOL strongly enforces the requirement that withheld funds be consistently deposited *within the shortest time period possible*. However, because that can differ by employer, this approach has resulted in inconsistent enforcement. To provide more certainty and greater protection for employee contributions, the DOL issued the rule establishing the safe harbor deadline. Also, per a recent press release, according to Phyllis C. Borzi, assistant secretary of labor for the department's Employee Benefits Security Administration (EBSA), "We estimate participant accounts could grow by \$19 to \$44 million as a result of these rules."

89 North Haddon Avenue ■ Haddonfield, NJ 08033
856.795.6834 TEL ■ 856.795.5514 FAX

www.shrosen.com

A wholly owned subsidiary of National Investment Managers Inc.

For which plans does this safe harbor deadline apply?

The DOL's general deposit rules apply to all pension and welfare plans, but the safe harbor deposit deadline only applies to "small" plans. For this purpose, the DOL defines a "small" plan as a plan with fewer than 100 participants at the beginning of the plan year. (NOTE: This is regardless of whether the employer filed as a small or large plan on their most recent Form 5500.) *Even though the DOL did not expand this safe harbor to large plans, we highly recommend that large plan administrators continue to review their deposit procedures to ensure that they are in compliance with DOL requirements.*

What are the consequences for not following the DOL's general deposit guidelines?

When a deferral or loan repayment deposit is determined to be late, the plan's funds are considered to be commingled (mixed in) with the employer's general funds. This is not permitted and results in a prohibited transaction and the employer is considered to have breached its fiduciary responsibility. The employer must then make up for any earnings that participants may have lost while their withheld funds were not held under the plan and the employer must also pay an excise tax (penalty tax) on the amount involved in the breach.

What are the consequences for not following the DOL's safe harbor deposit deadline?

A plan that fails to comply with the safe harbor deadline (which is available on a deposit-by-deposit basis) does not automatically violate the plan asset regulations. However, upon investigation, the DOL will challenge any deposits or payments made beyond the safe harbor period and the employer will have the burden of demonstrating that it deposited the participant contributions as soon as reasonably possible.

Making deposits within the safe harbor deadline eliminates the guesswork of determining if the deposits are late or not.

What should I (the employer) do if I have deposited participant contributions and/or loan repayments late (whether maintaining a "small" plan or a "large" plan)?

Please be sure to report to us that you had delinquent contributions and/or loan repayments when you submit your annual census data. Or, let us know during the year as soon as you realize that a delinquency has occurred.

In either case, in addition to preparing Form 5500 accurately to report the late deposits, for an additional hourly fee we can also help by:

- Calculating any lost earnings due to participants
- Calculating the applicable employer excise tax
- Assisting you with utilizing the DOL's [Voluntary Fiduciary Correction Program \(VFCP\)](#), which includes submitting an application to the EBSA to document the corrections and possibly receive relief from paying the excise tax and/or incurring certain civil enforcement action against you by the DOL
- Preparing Form 5330 to report and pay the employer excise tax to the IRS, if you choose not to apply for relief and/or if you don't qualify for relief

For further information, please feel free to contact your Client Manager here at Stephen H. Rosen & Associates, Inc.

This material was created to provide an overview of the subject(s) covered and is not intended to be comprehensive. It is provided for informational purposes only and is not intended to provide specific legal, tax, or other professional advice. The services of an appropriate professional should be sought regarding your individual situation. Although care has been taken in preparing this material and presenting it accurately, Stephen H. Rosen & Associates, Inc. disclaims any express or implied warranty as to the accuracy of the material contained herein and any liability with respect to it.