



# Employee Benefits Law Action Memo

February 2010

Electronic Dispatch

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## DOL FINALIZES SEVEN-DAY SAFE HARBOR REGULATIONS FOR CONTRIBUTIONS TO SMALL PLANS

The United States Department of Labor (“DOL”) recently finalized regulations (effective January 14, 2010) that establish a seven-day safe harbor for making timely deposits of participant contributions and plan loan repayments (collectively, “Contributions”) to small pension and welfare plans (generally, plans with less than 100 participants). If an employer deposits Contributions by the seventh business day following the date such amounts are either received by the employer or withheld from a participant’s wages, the employer will be deemed to have remitted Contributions to such plan on the earliest date such amounts can reasonably be segregated from the employer’s general assets.

### Background

In accordance with the DOL’s participant contribution regulation, employers generally are required to transfer or deposit Contributions into ERISA-covered plans (or into the trust or insurance arrangement for the plans) by the “earliest date” on which such Contributions can reasonably be segregated from the employer’s general assets. Although not safe harbors, in no event can this date be any later than the following maximum periods:

- for pension plans – the 15<sup>th</sup> business day following the date on which Contributions are received by the employer, or the date such Contributions would otherwise be made payable to the participant in cash;
- for SIMPLE IRAs – the 30<sup>th</sup> calendar day following the month in which Contributions would otherwise have been payable to the participant in cash; and
- for welfare benefit plans – the 90<sup>th</sup> day following the date on which Contributions are received by the employer, or the date such Contributions would otherwise be made payable to the participant in cash.

Untimely deposits of plan Contributions can be extremely costly for employers, as non-compliance can result in fiduciary liability under ERISA, as well as subject the employer to excise taxes on the amounts involved.<sup>1</sup> The DOL has frequently taken the position that deposits made on or near the last day of the applicable maximum period are untimely for purposes of complying with the participant contribution regulation. To illustrate the confusion that these issues have caused employers, the DOL stated that close to 90 percent of applications under the DOL’s Voluntary Fiduciary Correction Program involve delinquent Contribution violations.

### Seven-Day Safe Harbor Regulations

For the reasons stated above, the DOL wanted to provide employers with a higher degree of compliance certainty with respect to the timely deposit of Contributions. Thus, in 2008, the DOL issued proposed regulations that would establish a seven-day safe harbor for small pension and welfare plans. In the case of small pension and welfare plans, the DOL will deem Contributions to have been deposited timely if the Contributions are deposited in the appropriate plan account no later than the seventh business day following the date the Contribution amount is received by the employer, or the date the Contribution amount is otherwise payable to a participant in cash. The safe harbor is not available, however, for large plans (generally, plans with 100 or more participants).

In the final regulations (effective January 14, 2010), the DOL clarifies several issues raised in comments to the 2008 proposed regulations, including those listed below.

- The safe harbor is also applicable to SIMPLE IRAs and SARSEPs.
- To satisfy the safe harbor requirement, Contribution amounts must be *deposited* into plan accounts, but need not be allocated among individual participant accounts by the seventh business day.

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- The safe harbor is available on a “deposit-by-deposit” basis. Thus, an employer’s failure to meet the safe harbor requirements for any deposit of Contribution amounts to a plan will not make the safe harbor unavailable for the employer’s next deposit.
- The final regulations do not affect DOL Technical Release 90-21, which excepts certain welfare benefit plans (e.g., cafeteria plans) from the ERISA requirement that plan assets must be held in trust.
- The safe harbor is not the exclusive means by which employers may comply with the regulations, so long as Contributions are deposited by the “earliest date” on which such Contributions could reasonably be segregated from the employer’s general assets. It should be noted, however, the DOL will still calculate losses and interest on late Contributions from the “earliest date,” not the end of the safe harbor period.

### Action

Employers that maintain small pension or welfare benefit plans should evaluate their current remittance procedures to determine whether consistently depositing plan Contributions within the seven-business-day safe harbor is administratively feasible. By establishing procedures that ensure compliance with the safe harbor requirements, employers will reduce the potential for untimely Contributions and the adverse consequences related to untimely Contributions.

If you have any questions about this memorandum, please contact Susie Dahline in our Syracuse office (315-218-8227, [sdahline@bsk.com](mailto:sdahline@bsk.com)) or any of the other members of our Employee Benefits and Executive Compensation Practice Group listed below.

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