



LATE EMPLOYEE DEPOSITS AND INVITATIONS FROM THE DOL

Most people who administer 401(k) plans are aware that there is a deadline for depositing money withheld from employee paychecks into the plan's trust fund. For over a decade, the U. S. Department of Labor ("DOL") has had rules in place governing the timing for depositing these monies. The DOL has made a point of publicizing their enforcement activities in this area so that the public can rest assured that employers are depositing funds timely because it is their fiduciary duty and because they should not borrow money that belongs to the plan.

The *timing* of employee contribution deposits was addressed in the April 2008 Newsletter. The Newsletter did not address the consequences of being late with one or more deposits. If an employer is late on one or several deposits, prompt corrective action is in order. The employer is well advised to not wait for someone to complain and then face a DOL auditor. Normally three actions must be taken: (1) the money must be paid into the plan's trust fund, (2) suitable interest must be calculated on each late deposit, paid to the plan, and credited to each participant's account, plus (3) an excise tax equal to 15% of the *interest* on the late deposit must be calculated and paid to the government with a form 5330 filing.

In addition to the above three actions, when completing Form 5500 Annual Report, it must be disclosed that a deposit or deposits were made late during the reporting year. The Annual Report is sent to the DOL and the information is shared with the IRS and the PBGC. Based on reports from several unrelated sources, the DOL has been sending a substantial number of form letters to employers who acknowledged late deposits in their 5500 filing. The letters point out the late deposits and invite the employer to enter into the DOL's Voluntary Fiduciary Correction Program (VFCP). This has caused consternation for a number of employers.

If you or someone you advise receives an "invitation" from the DOL, the first thing to do is make sure that the employer has carried out the three steps mentioned above. If it has not, the three steps should be taken promptly. The DOL invitation carries with it a waiver of the 15% excise tax. However, this is normally a very small amount, while a VFCP filing would involve substantial effort and expense due to very detailed filing requirements. Faced with these facts, most employers politely decline the DOL invitation, explaining that they have already corrected the problem. The VFCP can be a useful program for various sorts of fiduciary violations, but depositing employee contributions late is generally not one of them.

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NEW DEVELOPMENTS: WORKER, RETIREE, AND EMPLOYER RECOVERY ACT OF 2008

Significant retirement legislation was passed during the December lame duck session of Congress. Originally billed as a technical corrections measure for the 2006 Pension Protection Act, the 2008 Act also addresses retirement plan measures considered appropriate for the weakening economy.

As we hinted last month, 1). Business owners and terminated non-owners over 70 ½ will not have to receive minimum taxable distributions from their qualified defined contribution plans (such as profit sharing and 401(k)) for 2009 and 2). Everyone over 70 ½ may opt not to receive a minimum required 2009 (*not 2008*) distribution from their IRA.

- Some temporary relief is also provided to employers that must fund their defined benefit plans in accordance with the new stricter rules set out in the Pension Protection Act.
- Also, the new law permits single sum cash out payments from under funded pension plans when the benefit is worth less than \$5,000, or a lower threshold specified by the plan.
- Finally, “technical corrections” includes the *requirement* that plans permit non-spouse rollovers in the same manner afforded other eligible rollovers for plan years beginning in 2010.

Please call NRS with any questions you may have! We can help!

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