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ALERT: Department of Labor (DOL) takes tougher stance on employers making timely contributions to retirement plans; additional retirement plan updates

Employers are now under stricter deadlines from the Department of Labor (DOL) on how quickly they must deposit retirement contributions deducted from an employee's paycheck into the retirement plan. If deposits are not considered to be made "in a timely manner," the employer ("plan sponsor") could be penalized, fined or face additional filing requirements to correct the violation.

The new guidelines for small and large plans are as follows:

Small plans (fewer than 100 plan participants): Deposits made within seven business days after the funds are deducted from the employee's paycheck are considered timely. Deposits made outside the seven-business-day window may be considered late.

Large plans (100 or more plan participants): No specific number of days, but the DOL offers guidance on the factors they consider in determining whether a deposit has been made in a timely manner. Those factors include:

1. Consistency of when deposits are made. If an employer consistently deposits deferrals within three days, the DOL could conclude that anything beyond three days is late.
2. Earliest date the employer actually made deposits. If you deposited deferrals sporadically between 2-10 days, the DOL could take the stance that deposits made after two days are considered late.
3. The DOL is also considering when payroll taxes are remitted, using that timeframe as a guide as to when they believe a plan sponsor should be able to remit deferrals.

Previously, the only guideline on timeliness was regulatory language stating, "*the earliest date on which such contributions could reasonably be segregated from the employer's general assets, but in no event later than the 15th business day of the month following the month of deferral.*" However, what constitutes "earliest date" has been the topic of considerable debate.

While the newest guidance remains somewhat vague, we recommend that plan sponsors:

- Review their processes.
- Discuss the DOL's additional expectations with company personnel involved with payroll processing and remitting of contributions.
- Update processes as needed so that retirement plan contributions can be consistently made either at the time of or prior to payroll taxes being remitted.

Contract employees

A retirement plan operational defect commonly noted by the DOL is in how contract (temporary) employees are treated in lease-to-hire arrangements. In these types of arrangements, the question has been whether the time as a contract employee counts toward eligibility and vesting. While most plan documents exclude leased employees as a class of employees, in the lease-to-hire arrangements, the time spent as a leased employee counts toward both eligibility in the plan and vesting. Failure to recognize these service periods results in non-compliance with the plan document and can lead to fines, penalties and in extreme situations, loss of tax-exempt status.

Plan amendments and updated determination letters

Maintaining an up-to-date plan document and determination letter regarding the plan's tax-exempt status is an important step in carrying out fiduciary responsibility. As changes are made in laws and regulations, a check-up is important to make sure your plan has the proper amendments and a current determination letter. If it has been a while since your plan document has been reviewed, now may be the time to have a check-up.

If you have questions about any aspect of your retirement plan audit or recordkeeping, please contact Mark Schmelzle for audit questions and Brad Bechtel for recordkeeping/plan design questions at (316) 267-7231 or mark.schmelzle@aghlc.com or brad.bechtels@aghlc.com.

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