

NOTICE OF TIMELY 401(K) CONTRIBUTIONS

The Department of Labor (DOL) Regulations

The DOL has finalized regulations establishing a *safe harbor* for small employer plans to timely deposit elective deferrals. If the employer deposits the withheld amounts in the trust within 7 business days, the regulations deem the employer has satisfied the requirement. A small plan is defined as a plan with fewer than 100 participants at the beginning of the plan year.

The DOL clarifies the safe harbor rules apply separately to each payroll.

The safe harbor regulation is optional. If an employer makes a deposit after the safe harbor date, the employer may be able to show that the deposit was made as soon as practical and therefore timely.

The general rule is still - contributions to the plan must be made “as of the earliest date on which such contributions can reasonably be segregated from the employer’s general assets.” “In no event shall the date occur later than the 15th business day of the month following the month in which the participant contribution amounts are received by the employer.”

If the employer fails to satisfy the general rule, the employer must calculate losses and interest on the late contribution(s) from the actual date the contributions reasonably could have been segregated, not from the safe harbor period.

ERISA/Criminal Law:

Failure to comply with this regulation may subject the employer to liability under ERISA for failure to hold plan assets in trust. An Employer who retains plan assets commingled with its general assets would be considered a fiduciary under ERISA. Such fiduciary would be personally liable to the plan for lost earnings on participant contributions. Generally applicable State criminal laws may also apply since they are not preempted by ERISA.