Timely remittance of employee contributions in defined contribution retirement plans

Introduction

When a plan provides for deductions from employees' paychecks as a means of contributing to a defined contribution retirement plan (e.g., a 401(k) plan), the employer is required to follow certain rules for depositing their contributions and loan repayments (if the plan permits loans) in a timely manner.

The AICPA Employee Benefit Plan Audit Quality Center (EBPAQC) has developed this primer to provide Center members with a general understanding of the DOL's rules and regulations regarding the remittance of employee contributions and loan repayments in defined contribution retirement plans. This primer addresses DOL rules for remittance of employee contributions and loan repayments, plan management's responsibilities for ensuring timely remittances, the auditor's responsibilities, consequences for failure to timely remit employee contributions and loan repayments, and other helpful resources.

Note: This tool uses the term *management* to include the plan administrator as described in the DOL's Rules and Regulations for Reporting and Disclosure under ERISA, as well as other members of management.

DOL rules for remittance of employee contributions and loan repayments

DOL regulation 2510.3-102, *Definition of "plan assets" – participant contributions*, requires that an employer segregate defined contribution retirement plan employee contributions and loan repayments from its general assets *as soon as administratively feasible* [emphasis added], but in no event later than the 15th business day following the end of the month in which amounts are contributed by employees or withheld from their wages. It is important to note that 15 business days following the end of the month is *not* a safe harbor for depositing deferrals; rather, that these rules set the maximum deadline if that amount of time is the earliest that is reasonably required to be able to separate the plan assets from the employer's corporate assets.

The general rule as interpreted by both the DOL and the courts has been that if the employer was able to segregate other payroll-related items from general assets (most notably tax withholding payment amounts) at an earlier date, so too must 401(k) participant contributions be segregated. DOL regulation 2510.3-102 provides a 7-business-day safe harbor rule for employee contributions to plans with fewer than 100 eligible participants (or small plan filers); this safe harbor does *not* apply to plans that require an audit under ERISA. In general, the DOL would expect plans requiring an audit to segregate contributions sooner than 7-business-days.

Plan management's responsibilities for ensuring timely remittance

Timely remittance of all contributions is considered a fiduciary responsibility. As noted in DOL's publication, *Meeting Your Fiduciary Responsibilities,* the plan must designate a fiduciary, typically the trustee, to make sure that contributions due to the plan are remitted timely.

Plan management should monitor the timeliness of their employee remittances. Effective remittance monitoring can be achieved by establishing a remittance policy that includes regularly reconciling plan contributions per the trust statement to the payroll records. These duties should be assigned to competent individuals that can perform these reconciliations on an ongoing basis. The EBPAQC client tool, *Analyzing timeliness of remittances*, is a customizable template that plan management can utilize to perform this monitoring procedure. Depending upon the reporting capabilities of the plan's custodian or recordkeeper, these amounts should be reconciled after each pay date as part of internal control procedures. It is not sufficient to reconcile to confirmations only, rather, these amounts should be reconciled to the trust statement. This allows for plan management to detect and self-correct delinquent participant contributions prior to them being discovered during the audit, which may otherwise lead to delays in report issuance.

Most instances of late remittances will be considered a prohibited transaction. As such, if a company is able to segregate plan employee contributions from its general assets within 3 business days, failure to do so in that timeframe may be considered a late remittance. For example, when a payroll administrator in a larger organization's payroll department takes a vacation and the contributions are remitted later than 3 business days, it likely should be considered a prohibited transaction as the company should be able to prepare in advance and avoid the late remittance.

When evaluating the timeliness of employee remittances there may be situations—both foreseeable and unforeseeable—that, depending on the facts and circumstances, may not be considered prohibited transactions. In such events, plan management should maintain detailed records (including supporting documentation) along with an explanation of the event.

Because the determination of whether a delinquent contribution has resulted in a prohibited transaction is based on the facts and circumstances that caused the delay, delinquent employee contributions and loan repayments need to be investigated. Plan management may need to consult with its ERISA legal counsel to determine whether certain deposits should be considered prohibited transactions.

The DOL's *FAQs about Reporting Delinquent Participant Contributions on the Form 5500* provides information about reporting delinquent participant contributions on the Form 5500. Additionally, the IRS 401(k) Plan Fix-It Guide is a helpful resource.

Auditor responsibilities

AU-C 703, *Forming an Opinion and Reporting on Financial Statements of Employee Benefit Plans Subject to ERISA*, addresses the auditor's responsibility to evaluate whether failures to timely remit participant contributions and loan repayments have been properly reported on Form 5500, Schedule H and the *Supplemental Schedule of Delinquent Participant Contributions,* as well as the auditor's responsibilities when such transactions have not been properly reported.

The AICPA Employee Benefit Plans Audit and Accounting Guide (EBP Guide) provides example procedures the auditor should consider in evaluating the timeliness of remittances, taking into consideration the risk to the plan under audit. Auditors may wish to recommend that plan management consult with their ERISA legal counsel to determine if certain deposits are late and are prohibited transactions.

Consequences for failure to timely remit employee contributions and loan repayments

As noted above, when failure to timely remit participant deferral contributions and loan repayments to the plan are considered to be prohibited transactions, they must be reported on Form 5500, Schedule H, line 4a, and included on the *Supplemental Schedule of Delinquent Participant Contributions*. Additional disclosures may also be required in accordance with the Form 5500 instructions. ERISA legal counsel, recordkeepers, or third-party administrators can assist plan management with corrective actions.

Under ERISA section 502(c)(2), the DOL may assess a daily penalty against plan management that fails or refuses to comply with the annual reporting requirements, including failure to timely remit participant contributions. In addition, prohibited transactions may trigger civil monetary penalties under ERISA section 502(i) and tax liability under IRC section 4975.

Failure to properly report delinquent employee contributions in the Form 5500 can lead to reporting compliance enforcement action. If the delinquent contributions are not properly disclosed on Schedule H, Item 4a, the filing may be rejected (for deficiencies in the Form 5500 filing), and if not corrected, the plan administrator can be assessed a monetary civil penalty of $100, per day, from the date the filing was originally due. In addition, if the auditor's report does not mention the missing delinquent contribution schedule (or the auditor does not modify the opinion for the missing supplemental information), the filing may be rejected for deficiencies in the auditor's report, and if not corrected, the plan administrator can be assessed a monetary civil penalty of $150, per day, from the date the filing was originally due. These penalties are not mutually exclusive and can be assessed, in tandem, for a deficient filing.

The DOL Voluntary Fiduciary Correction Program (VFCP) offers plan management a means of self-correcting prohibited transactions, including delinquent participant contributions. The program includes specific transactions and their acceptable means of correction, eligibility requirements, and application procedures.

Additional resources

DOL regulation 2510.3-102, *Definition of "plan assets" – participant contributions*, is located at https://www.govinfo.gov/content/pkg/CFR-2016-title29-vol9/pdf/CFR-2016-title29-vol9-sec2510-3-102.pdf.

The DOL's publication, *Meeting Your Fiduciary Responsibilities,* can be found at https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/meeting-your-fiduciary-responsibilities.pdf.

EBPAQC primer, *Employee Benefit Plans – Parties in Interest and Prohibited Transactions*, is linked here https://www.aicpa.org/content/dam/aicpa/interestareas/employeebenefitplanauditquality/resources/ebpaqcprimers/downloadabledocuments/ebpaqc-pii-prohibited-transactions-primer.pdf?contentType=secured.