

Authored by Carolyn E. Daniels

April 14, 2008

DOL PROPOSES SAFE HARBOR FOR DEPOSIT OF SMALL PLAN CONTRIBUTIONS AND A CLARIFICATION FOR ALL PLANS

Safe Harbor for Small Plans

On February 29, 2008, the Department of Labor (DOL) published proposed regulations that provide a seven business day safe harbor for the deposit of contributions to small welfare and pension plans. A small plan (a plan with fewer than 100 participants on the first day of the plan year) that deposits contributions not later than the seventh business day after the contributions are received by the employer or withheld from the paycheck will be deemed to have satisfied the requirement for timely deposits.

Sponsors of small plans that have been depositing contributions later than the safe harbor period should review their procedures and work with their record keepers to determine whether it is possible to deposit contributions within the safe harbor period.

Background

The DOL previously issued regulations that provide that employee contributions become plan assets and must be deposited in a trust as of the earliest date on which the contributions can reasonably be segregated from the employer's general assets but no later than:

- **Pension plans** (such as 401(k) plans and 403(b) plans subject to ERISA): the 15th business day of the month following the month in which they are received by the employer or withheld from the employee's paycheck.
- **Welfare plans:** 90 days from the date they are received by the employer or withheld from the employee's paycheck.

The DOL has made it clear that the maximum time periods are not safe harbors. Many employers are uncertain as to when they must deposit contributions. However, in light of the new rules discussed above and the DOL's request for comments, it is likely that the maximum time periods will have limited applicability.

Clarification of Application to Loan Deposits

The proposed regulations also amend the general rule to make it clear that the timely deposit requirement also applies to plan loan repayments. Although the existing regulations do not specifically refer to loan repayments, the DOL stated in Advisory Opinion 2002-02A that the same principles apply to the time for deposit of loan repayments. The proposed regulations also apply the seven business day safe harbor rule to the deposit of loan repayments to small plans. Administrators of large plans must deposit loan repayments within the time required by the general rule and have no safe harbor.

Effective Date

The safe harbor will become effective on the date the final regulations are published in The Federal Register. However, the DOL will not assert an Employee Retirement Income Security Act (ERISA) violation prior to the effective date of the regulations so long as a small plan deposits contributions and loan repayments within the safe harbor period.

HRO CONTACTS

Christine M. Daly
Partner
christine.daly@hro.com
303-866-0486

Carolyn E. Daniels
Partner
carolyn.daniels@hro.com
303-866-0391

Irene F. Gallagher
Partner
irene.gallagher@hro.com
303-866-0503

Jonathan A. Marks
Partner
jonathan.marks@hro.com
303-866-0377

David T. Mitzner
Partner
david.mitzner@hro.com
303-866-0217

Edwin G. Schuck, Jr.
Partner
ed.schuck@hro.com
213-572-4337

Sheldon H. Smith
Partner
sheldon.smith@hro.com
303-866-0490

Carolyn Cox
Special Counsel
carolyn.cox@hro.com
801-323-3225

Kevin L. Burch
Associate
kevin.burch@hro.com
303-866-0544

Kelly C. Young
Associate
kelly.young@hro.com
303-866-0323



Holme Roberts & Owen LLP
Attorneys at Law

Request for Comments – Safe Harbor for Larger Plans?

In the preamble, the DOL has requested comments, including whether the DOL should create a safe harbor for large plans. The DOL has requested information, including whether there is a need for a safe harbor for large plans, the size of the plans for which there is a perceived need, and the time periods in which large plan sponsors deposit contributions.

This article is a periodic publication of Holme Roberts & Owen LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances, nor is it intended to address specific disclosure or compliance issues that may arise in particular circumstances or provide an exhaustive discussion of the topics discussed herein. The contents are intended for general informational purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. For further information regarding the topics described herein, please contact any of the individuals listed on the right side of page one.