



August 13, 2007

RE: Department of Labor Policy Regarding Late Contributions and the Correction of Late Deposits

To all Plan Sponsors:

This letter is to inform plan sponsors of governmental action that concerns section 401(k) plans. As part of a 401(k) plan, employees defer a portion of their compensation of their paycheck. You, as the employer, withhold that amount and deposit it in to the trust of the plan.

The law limits the time an employer can take to deposit amounts withheld from participants' paychecks that reflect 401(k) deferrals or loan repayments. Regulations issued by the United States Department of Labor ("DOL") provide the amounts must be transferred to the trust of the plan by the:

...earliest date on which such contributions could reasonably be segregated from the employer's general assets (the "general rule"), but in no event later than the 15th business day of the month following the month in which the contributions would otherwise have been payable to the participant (the "maximum period").

Many employers rely on the maximum period as the deadline for deposit. To comply, these employers remit one payment each month by the 15th business day of the following month. However, DOL audits over the past year have indicated that the DOL believes that the maximum period is not applicable for most employers. The DOL has stated in investigations and audits that the date an employer could reasonably segregate assets is much sooner, in most cases within days of the payroll date. In many cases, the DOL has determined that 401(k) contributions should be contributed to the trust within five to seven days of the payroll date.

The DOL's position is just that, the DOL's position. The point is that employers should not simply rely on the 15-days after the end of the month rule. Rather, employers should be prepared to defend the date 401(k) contributions are deposited as the earliest date such amounts could reasonably be segregated from the employer's assets. There is no hard and fast rule. The deadline is determined based on specific facts and circumstances.

Late deposits are considered prohibited transactions and an employer must take steps to undo the prohibited transaction. Specifically, an employer must deposit the deferrals adjusted to reflect any earnings that would have been credited had the amounts been deposited in a timely manner. Lost earnings must be calculated using the guidelines of the Voluntary Fiduciary Correction Program of the DOL. Please note that if the DOL discovers the violation on audit, and the correction was not complete according to the guidelines of the program, a civil penalty may also be assessed on any additional amount required to fully correct the violation.



**Correction of Late Deposits under the
Voluntary Fiduciary Correction Program**

(This abridgement of the rules under the program has been modified to appropriately fit the clientele of Dyatech)

Once an employer has determined that employee contributions have been deposited late, the following steps should be taken to correct this prohibited transaction.

First, establish how the rate of return used for calculating lost earnings is determined.

The rate of return to use is the highest of:

- The rate of return for each individual participant account. For administrative convenience, the employer may use the highest rate of return of any plan investment option as the rate of return for each individual participant account.
- Restoration of profits. This is the amount earned by the fiduciary on the use of the monies that should have been forwarded to the plan for the duration of the delinquency.
- Internal Revenue Code §6621(a)(2) rate. The VFCP uses the underpayment rate as the rate of return that must be examined. This rate is published quarterly and can found on the internet.

From, here the employer should follow the illustration below as a step by step guide.

ABC Company sponsors a 401(k) plan and pays its employees and withholds the contributions on a bi-weekly basis. The plan provides for participant direction of investments in any combination of four investment options. Employee contributions totaling \$10,000 were deposited for several pay periods. Participants may change their investment allocations on a daily basis. It is determined that the employer is able to segregate the contributions on the second business day following pay day. The following table reflects ABC's remittance of participant contributions:

Table A

Month of Contribution (Calendar Year 2004)	Reasonably Segregable Date	Actual Date Forwarded	Difference	Days from Date Forwarded to Correction Date
January 15 th	January 20 th	January 27 th	7 Days	111
January 30 th	February 3 rd	February 23 rd	20 Days	69
February 13 th	February 18 th	February 27 th	9 Days	48
February 29 th	March 2 nd	March 26 th	24 Days	4

For the months in which contributions were forwarded after the reasonably segregable date, the employer has determined:

Table B

Month of Contribution	Reasonably Segregable Date	Actual Date Forwarded	Option 1 ROR	Option 2 ROR	Option 3 ROR	Option 4 ROR
January 15 th	January 20 th	January 27 th	4%	6%	10%	5%
January 30 th	February 3 rd	February 23 rd	4%	4%	9%	7%
February 13 th	February 18 th	February 27 th	3%	6%	13%	12%
February 29 th	March 2 nd	March 26 th	4%	5%	9%	20%
ROR for Period		2/2 – 3/26	4%	5%	10%	11%



The last row of Table B reflects the return for each option from the first reasonably segregable date (1/20) through the last actual date forwarded (3/26)

The employer must determine each participant's allocation during each period and the associated rates of return. This calculation will result in the participant's rate of return for the period, which will then be multiplied by the participant's contribution amount multiplied by the days delinquent divided by 366 days (2004 is a leap year).

Participant	Contribution	Option 1	Option 2	Option 3	Option 3
A	\$300	25%	25%	25%	25%
B	\$200	50%	50%	0%	0%
C	\$200	100%	0%	0%	0%

The employer must determine each participant's rate of return by taking the sum of each option's allocation percentage multiplied by that option's rate of return. Similarly, the rates of return are calculated for the participants and compared to the IRC §6621(a)(2) rate, shown as follows. For administrative convenience, the employer may decide to use the highest rate of return for the entire period.

Participant	Actual Participant ROR	IRC §6621(a)(2) Rate	Calculation Rate
A	6.25%	4%	6.25%
B	5%	4%	5%
C	4%	4%	4%

The employer must calculate lost earnings by multiplying the calculation rate by the number of days delinquent, divided by 366. That number is multiplied by the dollar amount of the participant's allocations.

Participant	Lost Earnings for Pay Period 1/15/04
A	$(0.0625 * 7 \text{ days}) / 366 \text{ days} = 0.0012$ $(0.0012) * (\$300) = \$0.36 = \text{lost earnings}$
B	$(0.05 * 7 \text{ days}) / 366 \text{ days} = 0.00096$ $(0.00096) * (\$200) = \$0.19 = \text{lost earnings}$
C	$(0.04 * 7 \text{ days}) / 366 \text{ days} = 0.00077$ $(0.00077) * (\$200) = \$0.15 = \text{lost earnings}$

Total lost earnings for this period = \$0.70

Remember, this calculation must be made for each period that deferrals were deposited late.

Note that full correction requires that ABC pay an additional amount representing the earnings on lost earnings. The participant's rate of return for this period is determined in the same way as illustrated above. For simplicity we will not show the calculation again and will assume an 8% rate of return during this period for Participant A. Shown as follows:

Participant A $(0.08 * 111 \text{ days}) / 366 \text{ days} = 0.0243$
 $(0.0243) * (\$0.36) = \$0.01 = \text{earnings on earnings}$

For help correcting late deposits of employee contributions, please contact Dyatech's Compliance Department at:

Dyatech Compliance Department

1-866-651-4222 x233

Compliance@Dyatech.com