SOLUTIONS LAW PRESS

HR & BENEFITS UPDATE

New Labor Department Rule Establishes 7 Day Deadline To Deliver Employee Contributions To Employee Benefit Plans

February 11, 2010

By Cynthia Marcotte Stamer

Regulations published by the Department of Labor today (January 14, 2010) offer employers the opportunity to know their deposit of employee contributions and other amounts withheld from wages or otherwise received from employees with a pension, profit-sharing, health, or other welfare benefit plan is timely for purposes of the fiduciary responsibility requirements of the Employee Retirement Income Security Act ("ERISA") and the prohibited transaction rules of the Internal Revenue Code (the "Code") by depositing those amounts with the plan within the seven day period specified in a new safe harbor included in the Regulations.

Certainty about the timeliness of these deposits is important, as mishandling of these employee contributions, participant loan repayments or other employee benefit plan assets frequently triggers judgments, fines and penalties against companies that sponsor employee benefit plans as well as owners, board members, or other members of management. See ***Mishandling Employee Benefit Obligations Creates Big Liabilities For Distressed Businesses & Their Leaders*****.** Consequently, businesses sponsoring employee benefit programs and owners, officers, directors or other members of management with authority over or responsibility for the handling or application of amounts withheld or collected from employees as employee contributions or plan loans should make arrangements for these amounts to be properly handled and timely deposited with the appropriate employee benefit plan in accordance with these new plan asset regulations.

Title I of ERISA generally requires that employee benefit "plan assets" be held in trust, prudently handled and invested, used for the exclusive benefit of the plan and its participants, and otherwise used and administered in accordance with ERISA's fiduciary responsibility rules. Meanwhile, the use of "plan assets" of certain employee benefit plans in a manner prohibited by the Code's prohibited transaction rules also may trigger excise taxes and other penalties.

For purposes of both ERISA and the Code, Labor Department Regulation § 2510.3-102, specifies that amounts (other than union dues) that an employer withholds from wages or otherwise collects from employees as employee contributions or loan repayments to an employee benefit plan generally become plan assets subject to these fiduciary responsibility rules "as of the earliest date on which such contributions or repayments can reasonably be segregated from the employer's general assets." Since employers, business owners, members of management can risk exposure to damages, administrative penalties and/or excise taxes, knowing when amounts collected from employees are considered plan assets is a critical first step to managing these risks.

Unfortunately, the subjectivity of this standard leaves room for much uncertainty and debate about the precise deadline by which employee contributions, plan loans and other amounts from employees must be received by the plan. The subjectivity inherent in this standard leaves many employers uncertain about the adequacy of their compliance efforts and frequently fuels debate among plans, debtors, creditors, regulators or others about the when amounts earmarked to be withheld from employee wages cease to be assets of the debtor employer and become plan assets.

To mitigate debate and uncertainty about the timing of these events, Labor Department Regulation § 2510.3-102 as published in final form today includes a new "safe harbor" rule for plans with fewer than 100 participants at the beginning of the plan year. Under the safe harbor, employee contributions, plan loans and other amounts withheld from wages or received from employees for payment to an employee benefit plan are treated as treated timely paid to the plan if deposited with the plan not later than the 7th business day following the day on which such amount is received by the employer (in the case of amounts that a participant or beneficiary pays to an employer), or the 7th business day following the day on which such amount would otherwise have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages). While this safe harbor assures employers and others that withhold from wages or receive employee contributions or participant loan payments owing to less than 100 participant plans that their deposit will be considered timely if received by the plan within seven days, the plan asset regulations leave open that deposit with the plan more than 7 after receipt might still be considered timely deposit with the plan under certain circumstance.

Where deposit with the plan is not made within the seven-day period established by the safe harbor, the plan asset rules continue to leave room for great subjectivity in the determination of the deadline for deposit. In addition to the seven-day safe harbor, the plan asset regulations clearly establish bright-line deadlines after which the deposit of employee contribution or plan loan amounts always will be considered untimely. Thus, the plan asset rules provide that the deadline for depositing employee contributions and plan loans with the plan in no event ever extends beyond the applicable of the following dates (the "Latest Date")

- For pension plans, the 15th business day of the month following the month in which the employee contribution or participant loan repayment amounts are withheld or received by the employer;
- With respect to a SIMPLE plan that involves SIMPLE IRAs the 30th calendar day following the month in which the participant contribution amounts would otherwise have been payable to the participant in cash; and
- For health and other welfare benefit plans, 90 days from the date on which the employee contribution is withheld or received by the employer.

In all other instances, the plan asset regulations leave open to uncertainty and debate when and if an employer's deposit of employee contributions and plan loans more than seven-days after payroll deduction or receipt but before the Latest Date will qualify as timely for purposes of ERISA Title I or the Code's prohibited transaction provisions.

Companies and owners, officers and directors of businesses that harm plans by failing to ensure that these amounts are timely deposited into an employee benefit plan or otherwise are involved in the mishandling of these funds frequently become subject to prosecution, damage awards, civil penalties and excise taxes. To mitigate potential exposure to these risks, businesses and leaders of businesses that withhold from wages or collect employee contributions or plan loan payments from employees should make arrangements to ensure that these amounts timely are deposited with the appropriate plans and otherwise handled appropriately in accordance with ERISA and the Code.

If your business or employee benefit plan needs assistance evaluating or responding to these or other employee benefit, or other employment, workplace health and safety, corporate ethics and compliance or other concerns or claims, please contact the author of this article, Curran Tomko Tarski LLP Labor & Employment Practice Group Chair Cynthia Marcotte Stamer.

Chair of the American Bar Association RPTE Employee Benefits & Other Compensation Group, a representative to the ABA Joint Committee on Employee Benefits Council, past Chair of the ABA Health Law Section Managed Care & Insurance Interest Group and Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization, Ms. Stamer has advised and represented employers, employee benefit plans, plan fiduciaries and administrators and others on these and other labor and employment, compensation, employee benefit and other personnel and staffing matters for more than 22 years. She is experienced with assisting employers, plans and fiduciaries, insurers, administrators, and others to design and administer employee benefit plans and employment practices cost-effectively in accordance with these and other applicable federal regulations as well as well as advising and defending employers and others against tax, employee benefit, labor and employment, and other related audits, investigations and litigation, charges, audits, claims and investigations by the IRS, Department of Labor and other federal and state regulators. Ms. Stamer also speaks and writes extensively on these and other related matters. For additional information about Ms. Stamer and her experience or to access other publications by Ms. Stamer see **here** or contact Ms. Stamer directly. For additional information about the experience and services of Ms. Stamer and other members of the Curran Tomko Tarksi LLP team, see **here**.

Other Information & Resources

We hope that this information is useful to you. If you or someone else you know would like to receive future updates about developments on these and other concerns, please be sure that we have your current contact information – including your preferred e-mail – by creating or updating your profile **here** or e-mailing this information **here** or registering to participate in the distribution of our Solutions Law Press HR & Benefits Update distributions **here**. Some other recent updates that may be of interested include the following, which you can access by clicking on the article title:

- **Labor Department Final H-2A Certification Procedures Tighten Requirements For Employment Of Temporary Agricultural Employment Of Workers**
- **New Group Health Plan Excise Tax Self-Assessment & Reporting Obligations If When Group Health Plans Violate COBRA, HIPAA, GINA, Mental Health Parity or Other Group Health Plan Mandates**
- **Inapplicability of HIPAA Privacy To Disability Insurer Not License To Impose Unreasonable Claims Requirements**
- **New Mental Health Parity Regulations Require Health Plan Review & Updates**
- **Health Plans & Employers Can Expect Pressure To Pay For Childhood Obesity Counseling From New American Academy of Pediatrics Report**
- **Homeland Security Updates List of Nations Whose Nationals Are Eligible for H-2A or H-2B Visas**
- **Certain Workforce Reductions Trigger Plant Closing Notice & Other Obligations**
- **Newly Extended COBRA Subsidy Rules Require Employers, Administrators Send Required Notices & Update Health Plan Documents & Procedures Quickly**

- Rising Enforcement and Changing Rules Require Prompt Review & Update of Health Plan Privacy & Data Security Policies & Procedures
- Mishandling Employee Benefit Obligations Creates Big Liabilities For Distressed Businesses & Their Business Leaders
- DOL Plans To Tighten Employment Protections For Disabled Veterans & Other Disabled Employees Signals Need For Businesses To Tighten Defenses
- Employee Benefit Plan Sponsors & Fiduciaries Urged To Review Bonding, Credentials of Staff & Service Providers Under ERISA
- Added IRS Guidance For Correcting Employment Tax Overpayments Released
- Labor Department To Expand Employee Benefits, Wage & Hour, OSHA & Other Reporting & Disclosure Requirements & To Implement Other New Employee Benefit Regulations
- Preventive HR Strategies to Minimize Post Holiday Celebration Legal Hangovers
- IRS Publishes Table For Determining Qualified Plan Covered Compensation for Purposes of Code § 401(l)(5)(E)
- PBGC Expands Pension Benefit Protection For Military Service Members As Justice Department Files 22nd USERRA Military Leave Lawsuit Against An Employer Since January
- Rising Defined Benefit Plan Underfunding & Changing Rules Create New Obligations & Risks For Business
- Justice Department Suit against MasTec Advanced Technologies For Violating Army Reserve Member's Rights Highlights Expanding Employer Military Leave Risks & Liabilities
- Employer H1N1 Virus Risk Management Requires Employer Care To Manage Virus Risks Without Violating Employment Discrimination or Other Laws
- New GINA Genetic Information Based Employment Discrimination & Confidentiality Mandates Take Effect
- Businesses Cautioned To Strengthen Investigation & Employment Practices To Minimize Potential Exposure To Retaliation Claims In Light Of Recent Supreme Court Retaliation Decision
- OFCCP To Apply Special Procedures, Heightened Scrutiny To Equal Employment Practices of Government Contractors, Subcontractors On ARRA Funded Projects
- EEOC Prepares To Broaden "Disability" Definition Under ADA Regulations
- Tighten Employment, Ethics & Internal Controls Policies & Practices To Minimize DOJ & Other Antitrust Exposures
- "Disability" Definition Not Retroactive, Employer Action Needed To Manage Post 1/1/2009 Risks