

**KELLY, HANNAFORD & BATTLES P.A.**

ANTHONY R. BATTLES  
JULE M. HANNAFORD IV  
A. DAVID KELLY  
THEODORE K. RICE  
SONJA LEMMER MARTENS  
HOLLY A. FISTLER

---

MARK D. MEYER  
OF COUNSEL

ATTORNEYS AT LAW  
900 BAKER BUILDING  
706 SECOND AVENUE SOUTH  
MINNEAPOLIS, MINNESOTA 55402  
TELEPHONE (612) 341-0881  
FACSIMILE (612) 341-1041  
KHBLAW.COM

WRITER'S DIRECT DIAL:  
612/455-6084  
TRice@KHBlaw.com

January 15, 2010

**Re: DOL Finalizes 7-Day Safe Harbor for Participant Contributions to Small Plans**

Dear Clients and Other Friends:

Yesterday, the Department of Labor published regulations in the Federal Register that finalized the previously proposed 7-business day ("7-day") safe harbor for employers to deposit participant contributions to small retirement plans (including 401(k) plans) or welfare benefit plans. "Small plans" are those with fewer than 100 participants at the beginning of the plan year. (See <http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=23466>.)

Delinquent contributions to 401(k) plans have been a key focus of DOL enforcement efforts in recent years. The DOL also asserts that a vast majority of applications under its Voluntary Fiduciary Correction Program involve delinquent 401(k) contributions. Employers and 401(k) practitioners have asked the DOL to provide a safe harbor for the timing of such contributions so as to avoid difficulties upon DOL examination.

The final regulations adopt the safe harbor rules proposed by the DOL in February 2008. The safe harbor is effective as of January 14, 2010, the date of publication in the Federal Register. These safe harbor rules provide that 401(k) participant contributions will be considered to have been deposited with a plan in a timely fashion when such contributions are deposited within 7 business days after the date they are withheld from pay. This safe harbor should help encourage employers sponsoring small plans to deposit participant contributions within the safe harbor period. By making these contributions within the 7-day deadline, employers can avoid the risk of DOL scrutiny later over whether the contributions could have been deposited sooner.

The 7-day safe harbor applies to participant loan repayments and after-tax contributions as well as 401(k) deferrals. It also applies to employee welfare plan contributions that are made to a trust. SIMPLE IRAs and SEPs may also take advantage of this safe harbor rule.

The DOL considered commentators' requests to extend this safe harbor to large plans but decided large plans must still comply with the general rule. The general rule provides that plan assets include participant contributions as of the earliest date on which such contributions can reasonably be segregated from the employer's general assets. For pension plans, including 401(k) plans, the outer limit for participant contributions to be deposited to the plan cannot extend beyond the 15<sup>th</sup> business day of the month following the month in which the participant contributions are received or withheld by the employer. For welfare benefit plans, the outer limit for deposit of employee contributions to a trust cannot extend beyond 90 days from the date such amounts are received or withheld by the employer.

Though a number of commentators on the proposed rule had asked the DOL to extend the time period, the DOL rejected these requests and asserted that 7 business days would allow most employers with small plans to take advantage of the safe harbor.

The DOL clarified that the 7-day safe harbor is to be applied on a deposit-by-deposit basis. Therefore, missing the safe harbor for a certain deposit only affects the applicability of the safe harbor to that deposit and does not prevent the safe harbor from applying to any other deposit to the plan. If the safe harbor is missed with respect to a certain deposit, then the general rule (as soon as segregated from employer assets) applies to that deposit.

Some commentators suggested that the 7-day safe harbor should also be applied to “small employers” (not just to “small plans”) that contribute to multiple employer plans or multiemployer plans. The DOL rejected this suggestion on the basis that the multiemployer issue was addressed in Field Assistance Bulletin (“FAB”) 2003-2 (May 7, 2003). That FAB provides that time frames established in collective bargaining, employer participation and similar agreements may be taken into account for purposes of determining the time frames required to deposit participant contributions to multiemployer defined contribution plans. Any such time frames cannot, however, extend beyond the maximum period established in the DOL plan asset regulations. (See [http://www.dol.gov/ebsa/regs/fab\\_2003-2.html](http://www.dol.gov/ebsa/regs/fab_2003-2.html)) For some reason, the DOL did not address the comments with respect to multiple employer plans even though the DOL noted that commentators had suggested that the safe harbor should apply to both multiemployer plan and multiple employer situations.

Please contact us if you have any questions about the DOL’s final 7-day safe harbor for small plans or other contribution timing rules.

Sincerely,

Theodore K. Rice

TKR/bz