KRAVITZ
LOUIS KRAVITZ & ASSOCIATES INC

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# 401(k) Contribution and Loan Payment Deposit Guidelines

Department of Labor regulations require that **401(k) contributions and participant loan payments be deposited as soon as *reasonable* following "payday".** In no event may 401(k) contributions and loan payments be deposited later than the 15th *business* day of the month following the month in which payday occurs.

**The "15 business days" period is <u>not</u> a *safe-harbor,* but an *outside limit*.** That is, unless an employer can demonstrate otherwise, holding 401(k) contributions and loan payments in its general assets for up to 15 business days after the end of the month is *unreasonable*!

## Examples

The following examples illustrate how the regulations work:

<u>*Example 1*</u>*:* Employer X is a medium-sized firm with only one location. X uses an outside payroll processing service to handle its semi-monthly payroll. The April 15, 2002 payday is a Monday; X's payroll service provides X with a list of 401(k) contributions on Tuesday, April 16; and X has the ability to issue a consolidated check to the 401(k) trust by Wednesday, April 17.

In this case, 401(k) contributions must be **deposited by Wednesday, April 17.**

<u>*Example 2*</u>*:* Employer Y is a large, national corporation with several payroll locations, each of which has a different pay period. Each location maintains its own books for payroll accounting, records for which are sent to a single outside payroll processing service that handles all of Y's paychecks and payroll deductions.

The payroll service combines all payroll deductions for 401(k) contributions for all locations into a consolidated monthly data tape, which it forwards to Y's headquarters, where the data tape is reviewed for accuracy. Y receives the data tape four business days after the end of the month, and Y needs six additional business days to accurately segregate and reconcile 401(k) contributions for each participant and issue a consolidated check to the 401(k) trust.

In this case, 401(k) contributions must be **deposited no later than 10 business days** after the end of the month.

## Violation of Deposit Rules

Once the above deadline is passed, the 401(k) contributions and loan payments are treated as plan assets, even if the employer has not yet deposited them in the trust. Therefore, if an employer fails to timely deposit 401(k) contributions, it will be treated as commingling plan assets with its general assets. The DOL could assert a breach of the requirement that plan assets must be held in a trust or the rule that plan assets may not inure to the benefit of an employer, and must be held for the exclusive benefit of plan participants.

In addition, a prohibited transaction between the employer and the plan may have occurred. That is, there may have been an indirect transfer of plan assets to the employer.

A violation of one of the fiduciary standards will require the employer to make up lost earnings on the delayed contributions and restore any profits the employer may have made. In addition, if the DOL pursues a civil action against the employer, a court may order any other equitable or remedial relief it deems appropriate. Lastly, if a prohibited transaction is deemed to have occurred, a 15% excise tax is assessed under the Internal Revenue Code.