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## The Risks and Remedies of Not Making Timely Payments

Employers must contribute participant elective deferrals and participant loan payments to a defined contribution pension plan in accordance with the terms of the plan, if the plan document includes language about the timing of deposits, and in accordance with Department of Labor (DOL) rules.

Not complying with the terms of the plan is considered an operational failure, which could subject the plan to civil penalties and even worse potential disqualification. This can be corrected under the IRS Employee Plans Compliance Resolution System (EPCRS). But, this type of mistake can also lead to a prohibited transaction. A prohibited transaction cannot be corrected under EPCRS. A prohibited transaction is a transaction between a plan and a disqualified person that the regulations prohibit. An employer is a disqualified person. The employer must correct this and pay an excise tax of 15% for each year until corrected. If the employer doesn't correct the transaction, an additional tax of 100% of the amount may be due.

The DOL rules require that the employer deposit deferrals and participant loan payments be made to the plan at the earliest date it can segregate the amounts from the general assets of the employer, but in no event can it be later than the 15th business day of the following month. The 15th business day of the following month is not a safe harbor but a maximum deadline. The DOL has provided a safe harbor of 7 business days for depositing deferrals for plans with fewer than 100 participants (small plans). No safe harbor exists for large plans. The determination of whether the deposit was timely is based on the individual employer's facts and circumstances.

If your fact and circumstances show that you could have made the deposit earlier than the 15th day requirement, then you must have deposited your salary deferrals by that earlier date for them to be considered timely.

The prohibited transaction created by making late payments can be corrected under the DOL's Voluntary Fiduciary Correction Program (VFCP). Applicants do not have to negotiate with the Employee Benefits Security Administration (EBSA) to use the VFCP. The EBSA lists a 4 step process to correct these violations.

1. Identify the violation and determine if it is covered by the VFCP. The VFCP provides a list of transactions that can be corrected by this program.
2. Follow the VFCP's process for correcting your specific violation. Such as restore to the plan the deposit amount involved.
3. Calculate and restore any losses or profits with interest.
4. File an application with the appropriate EBSA regional office that includes documentation showing evidence of the correction.

The DOL also offers an excise tax exemption to certain transaction corrections including failure to timely remit participant contributions and loan payments.

The IRS recommends that you discuss with your payroll provider the earliest date you can reasonably segregate the elective deferrals and loan payments from your general assets. You should then establish a procedure requiring that deferral deposits and participant loan payments be made coincident with or immediately following each payroll.

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