Your Responsibilities as a 401(k) Plan Fiduciary

The following article discusses the responsibilities of a 401(k) Plan Fiduciary. In this article we will answer the following questions:

- What are the responsibilities of plan fiduciaries?
- When does the employer need to deposit employee contributions in the plan?
- What are the plan fiduciaries' obligations regarding the fees and expenses paid by the plan?
- What if a plan fiduciary fails to carry out its responsibilities?

What are the responsibilities of plan fiduciaries?

Fiduciaries act on behalf of the participants in the plan and therefore have certain fiduciary responsibilities. These responsibilities include:

- Acting solely in the interest of plan participants and their beneficiaries, with the exclusive purpose of providing benefits to them;
- Carrying out their duties with skill, prudence, and diligence;
- Following the plan documents (unless inconsistent with Employee Retirement Income Security Act, ERISA);
- Diversifying plan investments;
- Paying only reasonable expenses of administering the plan and investing its assets;
- Avoiding conflicts of interest.

The fiduciary is also responsible for selecting investment providers investment options, and for monitoring their performance. Some plans, such as most 401(k) or profit sharing plans, can be set up to permit participants to choose the investments in their accounts (within certain investment options provided by the plan). If the plan is properly set up to give participants control over their investments, then the fiduciary is not liable for losses resulting from the participant's investment decisions. Department of Labor (DOL) rules provide guidance designed to ensure participants have sufficient information specific to their investment options so they can make informed decisions. This information includes:

- A description of each investment option, including the investment goals, risk, and return characteristics;
- Information about any designated investment managers;

- An explanation of when and how to request changes in investments, plus any restrictions on when you can change investments;
- A statement of the fees that may be charged to your account when you change investment options or buy and sell investments;
- The name, address, and telephone number of the plan fiduciary or other person designated to provide certain additional information on request.

When does the employer need to deposit employee contributions in the plan?

The law says that the employer of a large plan (those with 100 or more eligible participants) must deposit participant contributions **as soon as it is reasonably possible to separate them from the company's assets**. For small plans (those with fewer than 100 participants), salary reduction contributions deposited with the plan no later than the 7th business day following withholding by the employer will be considered contributed in compliance with the law.

The key to timely deposit of participant contributions is **consistency**. In one investigation, the DOL took the position that a plan sponsor had the ability to remit employee contributions to the plan within six calendar days (or four business days) following the date on which the contributions were withheld. The DOL took the position that remittances made to the plan more than four business days after the contribution withholding dates failed to comply with DOL regulations and that these untimely remittances of employee deferral contributions to the plan and the retention thereof violated ERISA guidelines. In this example, the plan sponsor must consistently deposit employee contributions into the plan by the fourth business day after the contribution is withheld in order to avoid paying lost earnings and penalties.

If employers deposit participant contributions late and fail to execute their fiduciary duties, they should take the following corrective action:

- Correct the late deposit of participant contributions by filing under the Voluntary Fiduciary Correction Program (VFCP) and comply with the requirements of Prohibited Transaction Exemption 2002-51;
- Pay the excise tax;
- Footnote the Schedule H or I of IRS Form 5500 to indicate to the DOL that the correction has taken place.

If an employer corrects the late deposit of participant contributions by filing under the VFCP, the employer does not have to pay the prohibited transaction excise tax. Even if the employer qualifies for the excise tax exemption, the employer must report the late deposits in IRS Form 5500. For questions about correction to late contributions and the VFCP, please contact your Third Party Administrator (TPA). The DOL continues to

focus on the timeliness of the remittance of participant contributions, and this remains an enforcement initiative of the Employee Benefits Security Administration (EBSA).

What are the plan fiduciaries' obligations regarding the fees and expenses paid by the plan?

ERISA's fiduciary standards, discussed above, mean that fiduciaries must establish a prudent process for selecting investment alternatives and service providers to the plan; ensure that fees paid to service providers and other expenses of the plan are reasonable in light of the level and quality of services provided; select investment alternatives that are prudent and adequately diversified; and monitor investment alternatives and service providers once selected to see that they continue to be appropriate choices.

What if a plan fiduciary fails to carry out its responsibilities?

Fiduciaries that do not follow the required standards of conduct may be **personally liable**. If the plan lost money because of a breach of their duties, fiduciaries would have to restore those losses, or any profits received through their improper actions. For example, if an employer did not forward participants' 401(k) contributions to the plan, they would have to pay back the contributions to the plan as well as any lost earnings, and return any profits they improperly received. Fiduciaries also can be removed from their positions as fiduciaries if they fail to follow the standards of conduct.

ERISA requires the DOL to assess a **civil penalty** against a fiduciary who breaches a fiduciary responsibility under, or commits any other violation of, ERISA, **including the late deposit of 401(k) elective deferral contributions**. The penalty under ERISA is equal to 20% of the "applicable recovery amount," meaning any amount recovered from an ERISA fiduciary or other person with respect to the breach or violation. Furthermore, any ERISA violation may be the subject of **legal action** taken by third parties, including plan participants or other governmental agencies.

Monetary sanctions and penalty taxes of substantial amounts may be imposed by the IRS and the DOL even if the failures are unintentional administrative errors. The IRS has emphasized that sanctions will be imposed for failure to follow the terms of the governing plan document, even if the plan's operation otherwise complies with the qualification requirements of the IRC.

If you have any questions or concerns about your 401(k) plan please contact your TPA.