Who Has the Duty to Monitor and Collect Delinquent Employee Contributions?

This is the first of a series of articles about issues that will need to be addressed when 401(k) and other defined contribution plans are restated using an IRS pre-approved prototype or volume submitter plan document. You may soon receive a restated plan document for your 401(k) or other defined contribution plan. You should review the document carefully and consider all the changes before you sign the document. This article discusses one reason to do so.

Background / Issue: In a 2008 Field Assistance Bulletin, the U.S. Department of Labor (DOL) addressed a problem that had been identified in DOL audits of 401(k) and other defined contribution plans. Employee contributions that were withheld from the pay of employees for the 401(k) or other plan were not being contributed to the plan in a timely manner. Financial institutions that were trustees for the plans were generally disclaiming any responsibility for collecting delinquent contributions and no fiduciary for the plan was accepting the duty to monitor and collect delinquent (or late) employee contributions.

DOL Solution: The DOL directed its investigators to require a plan sponsor to amend its 401(k) and other plan and trust documents to specify who has the duty to monitor and collect delinquent employee contributions, which could be one of the following: (1) a discretionary trustee; (2) a directed trustee; (3) another fiduciary for the plan, such as an investment manager, or (4) a special trustee.

Takeaway: The DOL position is that the failure to have a trustee or other fiduciary assume the responsibility to monitor and collect employee contributions is an ERISA prohibited transaction. It is unlikely that a corporate trustee, an investment manager or a third party administrator will be willing to accept this fiduciary responsibility. This means that the "special trustee" will most likely be an employee of the employer sponsoring the plan. We urge you to carefully review the responsibilities and ramifications of this special trustee role prior to naming the individual who will assume that responsibility. At a very minimum, the individual should have control over the plan sponsor's finances if the individual is to assume responsibility for the timely deposit of contributions to the plan.

Please let us know if you have any questions.

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