

# FIDUCIARY INFORMATION

## Who is a fiduciary? What are your fiduciary responsibilities?

In an effort to educate employers about these fundamental issues, the Employee Benefits Security Administration (EBSA) developed the **Fiduciary Education Campaign**. This initiative emphasizes the obligation of plan sponsors and other fiduciaries to 1) understand the plan, 2) select and monitor service providers, 3) make timely contributions, 4) avoid prohibited transactions, and 5) make timely disclosures to employees, beneficiaries, and the government. Much helpful information, including publications, booklets, checklists, forms, archived webcasts, calculators, and more, is available on the Internet at [www.dol.gov/ebsa](http://www.dol.gov/ebsa) under the topic, Fiduciary Education. We encourage you to take advantage of these instructive materials. Below are some highlights of particular interest.



### Fiduciary Liability Insurance

A fiduciary of an ERISA qualified employee benefit program can be sued for plan losses or compliance problems. Claims can be filed as an individual action, a class action suite, or as a result of an investigation by a government agency, such as the Department of Labor or the Internal Revenue Service. The ERISA fidelity bond provides no protection against these charges. ERISA section 410 allows, but does not require, a plan to purchase fiduciary liability insurance.

Fiduciary liability insurance has been designed to protect fiduciaries against personal loss resulting from law suits claiming that the fiduciary was negligent in administering their company's pension or benefit plans. Fiduciary liability insurance will protect plan sponsors and trustees from personal liability for defense costs and penalties if they are sued for fiduciary decisions.

The premiums are affordable. Contact your business insurance carrier to obtain coverage. Fiduciary liability insurance may also be provided as an endorsement to an ERISA fidelity bond.

To get a quote or to apply online, go to [www.gfpension.com](http://www.gfpension.com).

Click on Featured Links > Colonial Surety Company

### Timing of Contributions

According to the Department of Labor (DOL), employers sponsoring a 401(k) plan are required to transfer participant deferrals and loan repayments to the plan by the **"earliest date on which such contributions can be reasonably segregated from the employer's general assets"**, but in no event later than the 15<sup>th</sup> business day of the month following the month in which the contributions were withheld or received by the employer. (This is sometimes referred to as the '15 day rule'.) The entire regulation, 29 C.F.R. § 2510.3-102, is available online at [www.dol.gov](http://www.dol.gov).

#### For Plans with more than 100 participants...

The '15 day rule' is not a safe harbor rule. The DOL expects that most employers can forward employee contributions well before this maximum time period ends. If you have been using the '15 day rule' to make your deposits, you should review your procedures immediately and begin making deposits as soon as administratively feasible. We recommend making deposits within 7 business days of employee contributions being received or withheld.

#### For Plans with fewer than 100 participants...

The DOL established a safe harbor period of 7 business days (following receipt or withholding of employee contributions) to make timely deposits.

#### What is the preferred timing of deposits?

Simply put, the most effective timing method would be to match, as closely as possible, the remittance of employee contributions to their payroll tax withholdings. For example, the DOL believes that employers who use electronic payroll processing should be able to deposit withheld amounts no later than 3 business days after each payroll date. If too much time passes between the remittance of a company's payroll taxes and the employee plan contributions, the DOL may deem the contribution as "late." Also, our experience with the DOL is that they want to see consistency. If you normally make deposits within 2 days, then your deposits should consistently be made within 2 days.

### ERISA Fidelity Bond

ERISA section 412 and related regulations generally require that **all fiduciaries who handle plan funds shall be bonded**. This coverage is intended to protect the plan from losses due to fraud or dishonesty committed by "plan officials" who handle plan funds. Before any plan funds are handled, a fidelity bond must be in effect with an approved surety company. The Department of the Treasury provides a list of approved surety companies online at <http://www.fms.treas.gov/c570>.

When purchasing a fidelity bond, keep these issues in mind:

- The plan itself should be the named insured.
- In general, each plan official must be bonded for at least 10% of all plan assets. The minimum bond amount required is \$1,000, and the maximum bond amount required is \$500,000 (\$1,000,000 if the plan holds employer securities).
- Each plan year, the bonding amount must be evaluated, and increased as necessary, to ensure that the minimum bonding requirements are met.
- The bonding amount is reported annually on Form 5500. Insufficient bonding may trigger an IRS audit.

See the Department of Labor Field Assistance Bulletin 2008-04 for question-and-answer guidance related to ERISA's bonding requirements, at [www.dol.gov/ebsa](http://www.dol.gov/ebsa) under the topic, Field Assistance Bulletins.

#### What are the consequences of "late" contributions?

Failure to remit or untimely remittance of contributions may constitute a prohibited transaction in the form of misuse of plan assets or an extension of credit between the employer and the plan. In certain cases, it could even be considered embezzlement of plan assets by the employer. If your plan experienced a long-term remittance problem, it may result in significant excise tax and civil penalties.

#### What will the DOL do if they investigate your plan?

They may begin by reviewing a limited period of payroll and deposit information. If they determine that deposits were made in an untimely manner, they could pursue an extensive "full-blown" DOL audit.

#### What should you do if you have a late contribution problem?

1. Correct any late remittance problems immediately and begin making deposits as soon as administratively feasible.
2. Report the late remittance on Form 5500, regardless of the amount.
3. File an application under the DOL Voluntary Fiduciary Correction Program (VFCP), which may provide relief from excise taxes under a class exemption. See the Frequently Asked Questions about the VFCP, available online at [www.dol.gov/ebsa](http://www.dol.gov/ebsa).