

# PUBLICATION

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## **DOL to Retirement Plan Sponsors: Criminal Sanctions Will Increase For Certain Non-Compliance**

**November 30, 2009**

The Employee Benefit Security Administration (EBSA), the division of the Department of Labor (the DOL) that oversees employee benefit issues, has set out its priorities for 2010. Topping that list is the timely remittance of employee contributions to retirement plans.

While the DOL has penalized employers in the past for being slow to remit elective deferral contributions to its 401(k) plan trusts, Assistant Secretary of Labor Phyllis Borzi, the new head of EBSA, intends to get even tougher. Criminal investigations and prosecutions are not new (EBSA reportedly pursued more than 200 criminal investigations last year); however, Borzi's September 14 speech at the 2009 ASPPA/DOL Speaks conference signals that the EBSA is prepared to take an even stronger stance on untimely remittances than in the past, at least in some circumstances.

Employee contributions (such as elective deferrals to 401(k) plans) must be remitted by the employer to the plan as soon as such contributions can reasonably be segregated from the employer's general assets. The DOL has typically expected the remittance to the plans to be made within a couple of days after the tax deposits are due for the same payroll. A late deposit has always been considered a breach of fiduciary duty and a prohibited loan to the employer, giving rise to possible sanctions such as excise taxes, penalties and liability for lost earnings to the participants. Now, at least in "egregious" cases, the DOL will also consider criminal sanctions. Presumably, this may occur such as when the very late remittance to the plan is not made until discovered by the DOL or other circumstances where embezzlement of plan assets is suspected.

In that same speech on September 14, Borzi said that EBSA is similarly considering criminal sanctions in situations where employers have filed Annual Returns (Forms 5500) with information that is known by the filer to be false, as well as in situations where multiple-employer welfare arrangements have engaged in health care fraud. According to Borzi, EBSA will also take action to protect participants in plans of bankrupt companies. Finally, greater attention will be given by the EBSA to valuation issues in employee stock ownership plans and to compensation paid to service fiduciaries.

Should you have questions or wish to discuss any of the foregoing, please contact one of the attorneys in the Firm's Tax Department.