

This update is published by The Law Offices of Ilene H. Ferenczy, LLC to provide information to our clients and friends about recent developments in the benefits community. It is intended to be informational and does not constitute legal advice for any particular situation. It also may be considered to be "attorney advertising" under the rules of certain states.



The Ferenczy Flash

FROM THE LAW OFFICES OF Ilene H. Ferenczy, LLC

The Latest Word in Employee Benefits . . .

IS THE DOL OUT TO GET YOU FOR LATE 401(k) DEPOSITS?

Based on inquiries we've received from some clients, it appears that the Department of Labor has sent out a mass mailing recently to companies whose Form 5500 Annual Report filing showed late deposits of 401(k) deferrals in 2007. The notice acknowledges that the Form 5500 contained this information and invites the company to enter the DOL's Voluntary Fiduciary Correction Program (VFCP).

If you receive this type of notice, the first thing to do is to confirm that the late deferrals have actually been deposited, and that you included in your deposit lost earnings for the period between the payroll date and the date of deposit (give or take a day or two). If you are counting on the new seven-day grace period for making the deferral deposits that applies for small plans, know that the grace period does not apply for purposes of determining the required lost earnings for a deposit that happens more than seven days after the payroll period. So, start the calculation of earnings on the payroll date or not more than a day or two later.

If you have made the late deposit and paid the lost earnings, you should then check to see if you filed a Form 5330 with the IRS to pay the excise tax on the late deposit. When a company deposits 401(k) funds late, the DOL considers it to be a loan to the company, which is a prohibited transaction. That gives rise to an excise tax equal to 15% of the *interest* on the loan. Usually these excise tax payments are quite small, but they are due to the IRS and you should pay them.

If you have done all this, respond to the DOL's letter by telling them that you made the deposit, included earnings, filed the Form 5330, and paid the excise tax. Then politely decline to enter VFCP.

Should you ever enter VFCP?

VFCP is available for many fiduciary issues in addition to the late deposit of 401(k) funds. It makes some sense for those other issues. But, VFCP requires a very detailed filing with the DOL and the legal and administrative fees attendant to that filing are considerably more than the very small excise taxes that you pay by just filing the Form 5330. So, it usually makes very little sense for you to take advantage of VFCP in connection with the late deposit of 401(k) funds. There may, of course, be exceptions to this recommendation. For example, if deposits have been consistently late over a long period of time or if a deposit was significantly late, you may want to weigh the benefits of filing a VFCP against the costs of doing so.

Should you be worried about this DOL notice?

Generally, if you follow the above instructions, no. There may be isolated instances where the DOL elects to initiate an investigation of your plan. If that occurs as a direct result of your declining to file under VFCP, such an investigation is purportedly against DOL policy. However, the DOL is certainly authorized to investigate plans when it sees fit to do so. We have not seen a correlation between companies who received these notices the last time the DOL sent them out (i.e., in regard to the 2006 calendar year) and companies whose plans were investigated during 2007.

If you have any questions or concerns, or require assistance with regard to a DOL matter, please call us. Happy Holidays!

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