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The Ferenczy Flash

FROM THE LAW OFFICES OF Ilene H. Ferenczy, LLC

The Latest Word in Employee Benefits . . .

IRS CHASING DOWN UNFILED OR LATE FILED FORMS 5500

The IRS recently sent out a spate of letters to plan sponsors referencing late or missing Forms 5500, asking for the filings to be made and threatening that late filing penalties will be levied.

Although your Form 5500 and attachments are filed with the Department of Labor (DOL), the forms are shared with the IRS. The law provides that either or both agencies may levy penalties for late filings. The DOL penalties can be as high as \$1,100 per day per late form (although they generally run in the range of \$50 to \$300 per day). The IRS penalties are \$25 per day up to \$15,000 per late form.

We have had several clients receive one of the IRS's follow-ups on Form 5500 filings. Although having the government point out noncompliance is never pleasant, and having the IRS threaten penalties can be intimidating, there is a saving grace to these letters that you should know about.

The DOL has a program in place that permits you to file late forms for a significantly reduced penalty. This program, called the Delinquent Filers Voluntary Compliance (DFVC) Program, permits a plan sponsor that has not filed a Form 5500 on a timely basis to make the filing and pay the following penalties:

- **If the plan has 100 or fewer participants**, the reduced penalty is \$10 per day late, up to a maximum of \$750. If the forms are late for more than one year for the plan, the plan sponsor may file as many late forms as are necessary for a total maximum penalty of \$1,500.
- **If the plan has more than 100 participants**, the reduced penalty is \$10 per day, up to a maximum of \$1,500. Multiple years' filings for the same plan can be submitted for a total maximum penalty of \$4,000.

Needless to say, when one is facing thousands of dollars of penalties, DFVC is a great

alternative. And, it has one additional advantage: the IRS has said that, if a company resolves its late or unfiled forms through DFVC, the IRS will also waive its late filing penalties.

The new mailings from the IRS reinforce its support of DFVC, noting that, if a company is still eligible to file under DFVC and does so or if the company already sent a DFVC filing, the IRS will waive its penalties.

So, what should you do if you get a letter from the IRS?

If you haven't prepared the forms:

- 1. Get it done right away.
- 2. File the forms with the DFVC program, and pay the reduced penalty.
- 3. Send a response to the IRS letter, reflecting proof that you filed with DFVC.

If you filed your forms late, and didn't use DFVC:

- 1. Refile the forms with DFVC, and pay the reduced penalty.
- 2. Send a response to the IRS letter, reflecting proof that you filed with DFVC.

If you filed your forms on time, send a response to the IRS letter, reflecting proof that you filed on a timely basis.

If you want to do the DFVC filing, you may get information about the program on the DOL's website, at http://www.dol.gov/ebsa/newsroom/0302fact_sheet.html

Or, you can call us, and we'll be happy to send you information about the program or help you with your filing.

Remember that the filing must be complete, including such things as audited financial statements (if the plan has more than 100 participants) and the required schedule attachments. If obtaining these items will cause your response to the IRS to go beyond the deadline, you should contact the IRS for an extension of time.

You may not file through DFVC if

- you have received a late filing notice from the Department of Labor (as opposed to the IRS);
or
- your plan covers only the business owners and you file Form 5500-EZ.

Last but not least, sometimes your failure to file is due to bona fide cause. If that is the case, you may ask both the DOL and the IRS for a waiver of late filing penalties due to reasonable cause. However, use this method carefully; once you have requested a waiver of penalties from the DOL, you are ineligible to use the DFVC program.

Please call us if you have any questions.

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