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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 . . .*

#### **WE NEED YOUR FEEDBACK REGARDING IRS EXAMINATIONS OF RETIREMENT PLANS**

As many of you know, our firm is very active in representing clients in IRS and Department of Labor examinations and investigations. We frequently help negotiate the penalties the IRS charges our clients for failing to meet all of the complex rules relating to their retirement plans.

It is our impression that there has been a marked change in the IRS's approach to these examinations during the past year or so. In particular, we have experienced:

- IRS agents imposing harsher penalties for the plan sponsor failures to adopt required amendments to their plans, even when the plan was operated in compliance with the law;
- IRS reviewers taking positions that are not technically correct;
- IRS staff approaching the correction of problems with less flexibility than in the past;
- IRS reviewers exercising their discretion in a more punitive fashion – for example, choosing to consider an infraction in the harshest light or refusing to accept indirect proof of transactions;
- IRS managers imposing significantly higher sanctions or penalties than in the past, with little consistency from one plan to the next.

We have been told by some IRS examiners that their discretion in these matters has been limited under "guidelines" that have been provided to them by supervisors. We have yet to encounter a supervisor who will confirm that any such guidelines exist. Furthermore, we have found that the results of examinations tend to be disproportionately punitive to smaller employers. While we appreciate that the IRS has a strong interest in enforcing retirement plan laws, we believe that the very existence of a business – particularly a small business – should not be put at risk because of unintended failures to comply with these very complex laws and procedures.

Ilene has an appointment in mid-September to meet with the IRS's Director of EP Examinations (i.e., the person in charge of enforcement for the employee benefits division) in Washington, DC to discuss these issues. The goal in this meeting is to assess whether there is truly a change in policy coming from the National Office, to encourage more even-handed treatment of small businesses (as was encouraged by Congress in the Pension Protection Act), and to determine if we should modify our advice to clients to consider a harsher and more punitive audit environment than we have previously experienced.

In order for Ilene's discussion with the IRS to successfully portray the difficulties that small plan

practitioners and the plans' sponsors are having, which we hope may lead to a change in policy going forward, she needs to go into the meeting armed with hard facts about audits nationwide. We need to compile as much anecdotal evidence of practitioners' actual audit experience as possible. Therefore, we are eliciting your feedback.

Please share your experience with us about situations *involving IRS examinations of retirement plans*:

- Have you seen the IRS impose a sanction that you believe was disproportionate to the size of the company, the assets in the plan, and/or the severity of the compliance failure?
- Have you experienced a situation in which the auditor had discretion to consider a situation in a more favorable light and chose not to do so?
- Have you had a situation in which the IRS found – on audit or in a favorable determination letter application – that the client had failed to adopt an amendment that was required since the GUST restatements?
- Have you worked on an IRS examination in which the IRS claimed that a technical violation of the qualification requirements occurred, but you demonstrated that the IRS's position was contrary to the law and/or published guidance?

Please email your input to Ilene at [Ilene@ihflaw.com](mailto:Ilene@ihflaw.com) by September 4, 2009, with a description of the circumstances at issue and your areas of concern. If you have the following data, it also would be helpful to us: the number of participants; the total assets in the plan; the maximum payment amount; and the amount of the sanction charged. Ilene will review the responses and, if necessary, will contact you for more information. Your anecdotal experiences will bolster our evidence and strengthen our position when she meets with the IRS management in Washington next month.

Thank you in advance for your assistance. We are proud to be working to make the retirement plan environment more favorable to small and medium-sized business.

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