

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, LL

### **Are You Kidding? The Fall Will Probably Kill You!**

In a recent Ferenczy Flash, we outlined our thoughts about the flood of advice being published by practitioners nationwide in relation to ERISA's fiduciary rules. Certainly, fulfilling your fiduciary responsibilities is really important and failure to do so can subject you to lawsuits and penalties.

However, concentrating *so hard* on the fiduciary issues can in some respects be like the Sundance Kid worrying that he would drown after jumping off a cliff into a river because he couldn't swim. As Butch Cassidy reminded him, the jump into the river itself would probably be fatal. Similarly, while worrying about fiduciary issues has value, placing all of your concentration there may be missing the point. In our experience, it is much more common for sponsors of small-to-medium-size retirement plans to be subject to an **IRS** examination than it is for them to undergo investigation by the Department of Labor. And, the chances that there are problems with the plan from a tax perspective are much greater than that there are significant fiduciary liabilities – particularly for plan sponsors that are diligent about making their 401(k) deferral deposits on a timely basis.

In truth, the IRS enforces the Code rules very strictly and a failure to follow those rules can put the plan sponsor and the participants at risk for significant taxes and penalties. What is worse, it is easy for these very technical rules to be broken without the plan sponsor ever knowing it.

There are common plan problems that we see and need to address daily for clients who think they're doing everything by the book. We thought it would be helpful to outline a few of these problems and to give you our tips on how to avoid them.

#### **Big Problem No. 1: Plan Documentation**

The IRS is absolutely obsessed with proper plan documentation. Commonly, the documents have all been prepared, but no one has signed and dated the copies of that documentation. This is particularly problematic for clients who have changed service providers over the years.

#### *What You Need to Do:*

- Contact whoever is responsible for your plan documentation and get a copy of every plan document, amendment, board resolution adopting documentation, employee notice, and summary plan description that they have.

- Make sure you have a signed and dated copy of each document.
- Put it all in a plan binder and keep it up to date.
- Make sure your service providers have up-to-date copies of your documentation so that they are administering your plan properly.

### **Big Problem No. 2: Who's on First**

You would be amazed at how much needs to be done to keep a plan in compliance! It is very possible that you, as the plan sponsor, have duties that you don't even know exist. The IRS will seek to make sure that everything required to be done is actually accomplished.

*What You Need to Do:*

- Have someone assess the tasks that need to be done to keep your plan in compliance and determine who is responsible for each task. (We have a worksheet you can use for 401(k) plans. Just drop us a line and we'll give you a copy.)
- If you know everything that must be done and who's doing what, you can determine whether there are unmet needs, or whether you are paying twice for the same service.
- Plug the holes, and get rid of the duplications.

### **Big Problem No. 3: Consider a Plan Health Check-Up**

Only professionals can really review your plan to make sure that you are in compliance with the law. If you have a large enough plan, your independent auditors will be reviewing some areas of compliance in their plan examination. But your auditors don't claim to be plan compliance experts, and they focus their attention on the financial operations of the plan. So you might want to invest in a compliance review – that is, an examination by a professional that is not unlike an IRS audit, to see what the IRS *would* turn up if it examined your plan. The IRS has correction programs that permit you to fix errors before an audit is a glimmer in the IRS's eye – and by coming forward voluntarily to the IRS, you pay much lower fees or penalties to the IRS (often only in the hundreds of dollars) than you would pay if you got caught being noncompliant by an IRS examiner. You also accomplish this with considerably less wear and tear on you. It's somewhat like catching a disease in the early and curable stages.

*What You Need to Do:*

Consider hiring someone independent to review your plan for compliance with IRS rules. If problems are found, work with a professional advisor (perhaps your favorite ERISA law firm!) to resolve the problems before they become deadly.

### **Changes at IHF Law:**

IHF Law proudly welcomes our newest employees as we continue to grow in order to serve our clients better:

*Louise Hughes* joined the Firm as our new Office Administrator and CIO. As we have added new and improved computer systems, we found we needed someone who could speak “computer-ese” to our IT providers. Louise comes to us with many years of experience in the

Atlanta business community.

*Erica Gray* joined the Firm as a legal assistant to Matt Cristy and Barbara Murphy. Erica has worked for several years at another law firm, and hopes to finish her B.A. in night school and ultimately attend law school. We love recruiting 'em early!

*Jerry Ferenczy* joined the Firm as our CFO. He is a CPA and audit specialist, and will handle the financial end of the business.

### **Remember the BCOS!**

The Benefits Conference of the South is coming to Atlanta on May 12-13. A conference co-produced by ASPPA and the IRS, BCOS provides a unique opportunity for local professionals and plan sponsors to hear national speakers, including leaders of the IRS's Employee Plans Group in Washington, DC. Contact Matt Cristy of our office at [matt@ihflaw.com](mailto:matt@ihflaw.com) or contact ASPPA at [www.asppa.org](http://www.asppa.org) for more information. (Be sure to attend the BBQ at Ilene's house on May 12th! Contact [mward@ihflaw.com](mailto:mward@ihflaw.com) if you are interested.)

### **RECORDED WEBINAR AVAILABLE FOR CE CREDIT: "ADP/ACP Testing: Back to Basics and Then Some"**

In January, Ilene Ferenczy and Adam Pozek presented a webinar reviewing ADP/ACP testing and delving into some of the common oversights that can throw a wrench into the works. Topics covered included determining which employees must be included in the test, using the statutory exclusions and otherwise excludable rules, and taking advantage of the complete bag of tricks to correct failed tests.

This recorded webinar is an excellent refresher for seasoned compliance folks and a great introduction for those who are newer to the wonderful world of ADP/ACP testing. The webinar lasts approximately 100 minutes and is designed to provide participants with 2 hours of continuing education credit for ERPAs and other professional designations.

For more information, please email: [info@pensionpundits.com](mailto:info@pensionpundits.com).

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