

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

### *The Latest Word in Employee Benefits . . .*

#### **DOL DEJA VU**

It appears that the Department of Labor (DOL) has sent out a recent mass mailing to companies that showed late deposits on their Form 5500 Annual Report. The notice acknowledges that the Form 5500 indicates late deposits and invites the company to enter the DOL's Voluntary Fiduciary Correction Program (VFCP).

#### *Sound familiar?*

We sent out a flash about this very item in December, 2008. Then, as now, just because you receive this notice, it does not mean that you have been found to be out of compliance by the DOL. Apparently, the notice is issued automatically when a Form 5500 showing the occurrence of late deposits is processed. Accordingly, if you reported a late deposit, you are likely to receive the notice, as part of this latest mass-mailing from the DOL.

Our original recommendations bear repeating....

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 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 already 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. We have been assured by our sources in Washington, D.C., that it is against DOL policy for the agency to instigate an investigation as a result of your declining to file under VFCP. However, the DOL is certainly authorized to investigate plans when it sees fit to do so.

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

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