

Time to Pull Them Out From Under the Rug!

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The Department of Labor (“DOL”) has just made it easier for employers to correct errors they may have swept under the rug in the past.

Most plans are required to file a “Form 5500” each year.

The DOL is one of the agencies in charge of making sure employee benefit plans are in compliance with federal law (the other agency is the IRS). One way the DOL does this is by requiring most plans to file an annual report, called the “Form 5500.” The Form 5500 must be filed within seven months after the end of the plan year, which is July 31st for plans that are operated on a calendar year basis.

Sanctions for failing to file a Form 5500 are severe.

With all of the various burdens associated with maintaining a benefit plan, employers may have filed late Forms 5500, or may have neglected to file them at all. The penalty for late or missed Forms 5500 is rather severe. If the DOL discovers a late or missing Form 5500 in an audit, it has authority to impose a sanction of up to \$1,100 per day.

The penalty cannot be paid by the plan. Instead, the penalty is assessed against the plan administrator. Typically, the plan administrator is the company sponsoring the plan, but occasionally a plan will designate an individual as the plan administrator. In this instance, the individual will be personally liable for the DOL penalty.

Since the \$1,100 per day penalty is so draconian, the DOL not surprisingly noted that employers were reluctant to come forward if they discovered a failure to file a Form 5500. In 1995, the DOL initiated a program designed to reverse this trend.

The “DFVC” program provides amnesty for late Forms 5500.

The Delinquent Filer Voluntary Compliance Program (called “DFVC”) allows employers to file late 5500s for a fixed sanction that is significantly less than the \$1,100 per day penalty. Nevertheless, the fixed sanction under DFVC, as enacted in 1995, was still not cheap. For each form that was less than 12 months late, the sanction was \$50 per day up to a maximum of \$2,500. For each form that was more than 12 months late, the sanction was \$5,000.

The DFVC program is available only if the DOL has not yet notified the employer that the Form 5500 is late. Thus, if the DOL learns of the employer's failure to file 5500s through audit, participant complaint or otherwise, the employer faces the stiffer statutory penalties rather than the more reasonable DFVC sanctions.

The DFVC program is now even more cost-effective.

In response to comments that even the DFVC penalties were too expensive, the DOL recently revamped the DFVC program to lower the penalties. Effective March 28, 2002, the penalties are as follows:

- - The per-day penalty is reduced to \$10 per day.
 - The per-Form 5500 penalty is reduced to \$750 for plans with less than 100 participants, and \$2,000 for plans with more than 100 participants.
 - There is now a per-plan maximum, regardless of the number of late Forms 5500. For plans with less than 100 participants, the maximum is \$1,500 and for plans with more than 100 participants the maximum is \$4,000. For plans with less than 100 participants sponsored by tax-exempt organizations, the maximum is even less - \$750.

Like the 1995 version of DFVC, this new version is also only available if you go to the DOL, rather than waiting for them to discover a late or missing filing. So if you have simply swept a missed or late filing under the rug and are hoping the DOL won't catch you, maybe now is the time instead to come clean through the DFVC program.

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