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DELINQUENT FILER VOLUNTARY COMPLIANCE PROGRAM

FOR LATE FILERS AND NON-FILERS

By: Matt W. Zeigler, Esq.

Many different kinds of employee benefit plans have the requirement to file an annual report form, called Form 5500, Return/Report of Employee Benefit Plan. Such plans include retirement plans, cafeteria plans, tuition assistance plans, welfare plans, apprenticeship and training plans, top hat plans and funded deferred compensation plans. Some plan sponsors have not been aware that the laws administered by the Department of Labor ("DOL") and the Internal Revenue Service require this form to be filed every year following the adoption of such a plan.

If a plan does not file the Return annually, then the plan faces disqualification, the plan participants face taxation on the amounts received, and the IRS and DOL can assess additional penalties for the failure to file the Form 5500. However, following the success of the various IRS and DOL programs that have encouraged Plan sponsors to "come in from the cold" and correct operational defects in various kinds of retirement plans, these departments have come forth with yet another program to further support compliance with these laws.

Effective April 27, 1995 the DOL has initiated a program known as the Delinquent Filer Voluntary Compliance Program ("DFVC").

Under DFVC, Plan Sponsors have the opportunity to pay reduced civil penalties for voluntarily complying with the required plan annual reporting requirements for 1988 and subsequent plan years. Plan assets cannot be used to pay the civil penalties assessed. These must be paid by the plan administrator, who is normally the Plan Sponsor, i.e. the employer.

To be eligible to pay the reduced civil penalties, the Plan Sponsor must file the delinquent returns under DFVC prior to the date on which the administrator is:

- Notified in writing, pursuant to 29 CFR §2560.502c-2, of the Department's intention to assess a civil penalty under ERISA §502(c)(2) for failure to file a timely annual report; or
- Otherwise notified in writing by the Department of a failure to file a timely annual report under Title I of ERISA.

Without correction of the failure to file, the maximum penalties that apply are:

- Late Filers - May be assessed \$50.00 per day, with no limit, for the period they failed to file, determined without regard to any extensions for filing.
- Non-filers - May be assessed \$300.00 per day, up to \$30,000 per year, until a complete annual report is filed.

The DOL may, in its discretion, waive all or part of a civil penalty assessed if the administrator can show that there was a reasonable cause for the failure to file a complete and timely annual report.

The reduced penalties under DFVC are:

- A return filed on or before twelve months of the date it was due (without regard to an extension) \$50 for each day the annual report was filed after the date due (disregarding extensions), up to a maximum of \$2,500 for Form 5500 filers, covering plans with more than 100 participants, and \$1,000 for 5500-C filers, covering plans with fewer than 100 participants.
- A return filed more than twelve months after the date it was due (without regard to an extension) \$5,000 for Form 5500 filers and \$2,000 for Form 5500-C filers

The penalties apply on a per 5500 return for each year unfiled. In other words, if the 1992 return was not filed, the penalty for 1992 would be \$2,000 maximum for that single year. The plan administrator cannot obtain a waiver from the applicable penalty amount.

To take advantage of the DFVC Program, a plan administrator must complete and file the forms 5500 or 5500-C with all required schedules attached to the appropriate Internal Revenue Service Center for all the unfiled years.

The Internal Revenue Service does not participate in the DFVC Program. The IRS may assess additional penalties for failing to timely file a Form 5500. If there is reasonable cause, attach a cover letter demonstrating same to the 5500 return.

Top Hat, apprenticeship and training programs have some different steps under the DFVC Program.

In conclusion, if you have a broken plan, it can be fixed at a reasonable cost. The goal of the DOL and the IRS is not to discourage compliance with the law. Instead, those Departments would rather that plan sponsors bring the plan into current compliance with the law at what they think is a reasonable cost. If you would like further information regarding the DFVC program regarding filing under the program, contact your tax advisor.