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SELF AUDITS OF BENEFIT PLANS CAN SAVE SUBSTANTIAL MONEY

Do you know what a Form 5500 is? It is the “tax return” for employee benefit plans. Why should you even care? Employers often offer pension, health and welfare benefits for employees without knowing about the yearly requirement to file Form 5500 for these plans.

Failure to file Form 5500 can result in fines totaling \$300/day up to a maximum of \$30,000/year from the U.S. Department of Labor and up to \$15,000/year from the IRS for certain plans. These fines are per year, per filing. If an employer fails to file Form 5500 for two years for one plan, the Department of Labor alone could assess a total penalty of \$90,000. Fines cannot be paid out of plan assets but must be paid by the employer.

If you think you haven’t timely filed your Form 5500s, all hope is not lost! To encourage delinquent employers to come forward and file all delinquent 5500s, the Department of Labor has established the “Delinquent Filer Voluntary Compliance” (“DFVC”) Program. Under this program, employers can self-correct their Form 5500 filings and pay substantially reduced fines.

This advisory first describes more about Form 5500 and how it might be required for some or all of your benefits programs. It then discusses the benefits of using the DFVC program to correct delinquent filings.

What is Form 5500?

Form 5500 is the yearly return that must be filed by most pension and welfare benefit plans. It is required for traditional pension plans, 401(k) and profit-sharing plans. It is also required for many medical care plans, long-term disability plans, certain vacation benefits, and certain employer-provided child-care benefits. There are exceptions to the filing requirement, including an exception for plans with a small number of participants. The exceptions are highly technical. For example, a small plan may be excused from filing in one year, but then in the following year, it may have

to file because the number of participants has changed. A failure to file in the second year is a violation.

Form 5500 contains general and technical information about a plan. It reports information about the plan’s financial conditions, general operation, and general coverage of employees. Form 5500 helps the government ensure that the plans are operated in accordance with law and that employees and government agencies have sufficient information about the plans. It asks questions about the employer, the employees, any funding for the plan (insurance, for example), status of plan assets, and other information needed to ensure a plan is compliant with law.

The deadline for filing is the end of the seventh month following the end of the plan year. The amount of work required to complete a Form 5500 can vary with the type of plan at issue. A 5500 for dental insurance provided by an employer via an insurance carrier can be fairly simple to complete. A 5500 for a pension plan can be quite burdensome, particularly if an audit of the plan is required.

What is the DFVC Program?

The DFVC Program was established to encourage employers to correct their own Form 5500 filings before they are discovered by the government. Some employers do not know about Form 5500 requirements. Others may simply not file the return on time or may file an incomplete return (not filing the required auditor’s report, for example). Even if the employer is up-to-date on its own filings, it may have acquired a plan through a merger transaction, and the Form 5500 history on that plan may not be clear.

In an effort to encourage employers to voluntarily come forward and correct the filings, the Department of Labor developed the DFVC Program. The carrot offered by the Department of Labor is that the fines to voluntarily correct Form 5500 filings are substantially less than the fines imposed if the mistakes are discovered by the Department of Labor

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or the IRS. These reduced fines may not be paid out of plan assets either.

A DFVC filing involves two steps. First, all delinquent Form 5500s for the plan must be completed and submitted to the proper parties. Second, the employer must pay the reduced penalty amount. Generally, the penalty schedule is as follows:

Small Plan Filers – If a plan has less than 100 participants at the beginning of the plan year, the penalty amount per filing is the lesser of \$10 per day, \$750 per filing year, or \$1,500 per plan.

Large Plan Filers – If a plan has 100 or more participants at the beginning of the plan year, the applicable penalty amount is lesser of \$10 per day, \$2,000 per filing, or \$4,000 per plan.

This summary of penalties shows that, at most, a large plan would pay \$4,000 for several years of delinquent filings, as compared to the \$30,000 *per year, per filing* penalties that the Department of Labor could impose. The IRS will also abate penalties for DFVC participants who successfully file under the DFVC program. ***Employers that are “caught” by the Department of Labor cannot take advantage of the DFVC Program and its substantially reduced fines.*** It is much better to participate in the DFVC program instead of taking the chance that the Department of Labor or the IRS will find the missing filings.

Conclusion

Increasingly, employers are receiving notices of delinquent or incomplete Form 5500 filings from the Department of Labor and/or the IRS. Before these notices are issued, employers can voluntarily correct errors in their filings. Once the government agencies issues notices of delinquent or incomplete filings, the employer’s options are limited and reduced penalties may no longer be available. The year 2009 is a great time to perform a self-audit of your company’s Form 5500 filings. Self-discovery can save you lots of headaches and money!

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If you have questions or would like further information, please contact Brooks Pierce attorneys Howard Williams, Allison Grimm, or Phillip Long at (336) 373-8850.

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