

Late 5500s

By Jewell Lim Esposito February 10, 2011



We re-visit one of the biggest issues that our clients encounter: the late filing of the Form 5500. Just last month (January 2011), a financial advisor forwarded the following email from his client. The sender is a CFO of a company whose 401(k) plan required an accountant's opinion be attached to its Form 5500:

I was late getting to the 5500...My bad...I saw [my CPA] today and he was visibly shaken...Can you tell the TPA people to back off and chill the f*#% out? If they don't want me as a client, that can be arranged.

Wow! Tough words. The penalties for failing to file a 5500 or failing to file an accurate one can be severe. The DOL can assess a penalty of \$1,100/day, with no maximum; the IRS; \$25/day, with a maximum of \$15,000. With willful violations, courts have discretion to impose severe penalties.

I have seen where the DOL notifies an employer that it lacks the accountant's opinion and accompanying audited financials. I have witnessed the DOL waiving a potential penalty when the employer quickly supplements with the accountant's opinion. Where an employer *does not*, I have seen where the DOL then assesses a penalty (in the case I saw, it was \$50,000). The employer ignored the notice. The DOL thus shifted its collection efforts to a private law firm, who then sought to recover \$67,000 (interest and more penalty). All this for one return that lacked the accountant's opinion. [Note: the IRS could have been issuing notices all the while to this same employer for the same return, but given that the employer was ignoring notices, it is possible it "overlooked" or even ignored penalty notices from the IRS as well.]

This past filing year, the DOL, IRS, and Pension Benefit Guaranty Corporation required plans to file 5500s through an all-electronic EFAST2 system. The goal of the system is to simplify and expedite the submission, receipt, and processing of the 5500 and 5500-SF. With the new EFAST2 system, the government knows immediately if an employer has not filed a return. The automated systems can generate the penalty notices with a quick read of filing status. Thus, being late on or cavalier regarding a 5500 filing is not an issue for individuals, like the e-mail sender above, to take lightly.

Those employers with delinquent 5500s should have their returns promptly prepared and then filed under the DOL's Delinquent Filer Voluntary Correction program. Under that program, employers will pay a reduced civil penalty.

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