

DOL Announces Program to Reduce Penalties for Delinquent Employee Benefit Return Filers

Rachel L. Hawbaker

Deloitte & Touche LLP

Department of Labor Grants Relief to Tardy Filers

Many of today's gaming companies have implemented various qualified retirement and health and welfare benefit plans. With the implementation of the various employee benefit plans comes an added filing requirement of Form 5500 with the Internal Revenue Service. For those who are delinquent or were unaware of this filing requirement, the Department of Labor (DOL) has unveiled a new program to bring delinquent filers back into the system.

The DOL, in a surprising turn to the principles of "supply side economics," has concluded that lower penalties for overdue Employee Benefit Tax Returns, Form 5500s, will lead to more overdue forms actually being filed. On April 27, 1995, a *Federal Register* notice announced the "Delinquent Filer Voluntary Compliance Program" (DFVC Program), under which the penalty for late filing is reduced from an uncapped \$50 a day to a maximum of \$5,000. For nonfilers who are caught by the Department, the penalty remains at \$300 a day (capped at \$30,000 a year). Generally, Form 5500 (or a variation, such as Form 5500 C/R) needs to be filed by all qualified retirement plans (i.e., 401(k), profit sharing, money purchase, defined benefit) regardless of the number of participants. All health and welfare benefit plans with 100 or more participants also need to file such form. Health and welfare benefit plans with less than 100 participants may have a filing requirement depending on how the plan is funded. Filing requirements also exist for other types of employee benefit plans.

Form 5500 (or variation thereof) is due seven months after the plan year end. Therefore, for calendar year plans, Form 5500 is due on July 31. An automatic two and one-half month extension is granted if Form 5558 is filed on or before the original due date. Alternatively, if certain tests are met, a plan may be automatically extended if the corporate sponsor has extended its corporate return. Employee benefit plan returns which are past due should immediately file under the DFVC Program summarized below.

- ♦ The new penalty schedule applies to Form 5500s and Form 5500-C/Rs for plan years beginning on or after January 1, 1988. (Before then, the DOL had no authority to assess penalties.)

- ◆ If all DFVC Program requirements are met, the penalty for late filing of Form 5500 is \$2,500 if the form is no more than twelve months overdue, or \$5,000 if it is more than a year late. For Form 5500-C/R, the penalties are \$1,000 and \$2,000, respectively. If the normal \$50 a day penalty is less, the lower amount is assessed instead. For example, both the regular and DFVC Program penalties are \$450 if the form is nine days late.

- ◆ The plan administrator must complete the DFVC Program procedure before the DOL gives notice that it has not received the delinquent filing. The notice is unclear as to whether an IRS inquiry about failure to receive a form counts as notice from the DOL.

- ◆ There are specific steps needed to qualify for DFVC Program relief:
 - ◆ File the overdue form with the IRS. In addition to all of the normal information and attachments, the form must include, at the top center of the first page in red, bold print, the words "DFVC Program." (Forms filed before April 27, 1995, need not be refiled to add the magic words.) If the plan files Form 5500C/R, Form 5500-C must be filed, even if Form 5500-R would ordinarily be required for that particular year. (Apparently, previously filed Form 5500-Rs need not be refiled as Form 5500-Cs, though this point is not dealt with clearly in the notice.)

 - ◆ Send a signed and dated copy of the first page of the filing, with a check payable to "U.S. Department of Labor" in the amount of the penalty, to the U.S. Department of Labor, DFVC Program, P.O. Box 277025, Atlanta, GA 30384. The words "DFVC Program" must appear at the top center of this copy in red, bold print. As in the DOL's 1992 "grace period" program, the copy must bear an original signature (though this requirement is stated murkily, perhaps in hopes of tripping up the unwary).

- ◆ DFVC Program penalties may not be paid from plan assets, and filing under the program waives the administrator's right to seek abatement of the penalty for reasonable cause. Note, too, that this is purely a DOL program. The IRS has its own penalties for late filings of Form 5500s for qualified plans (\$25 a day, to a maximum of \$15,000). Abatement of those penalties is at the discretion of the IRS, which once was very lenient but has toughened its standards over the past few years. According to IRS Employee Plans Division Director Evelyn

The DOL is also working toward making it possible for employers to file Form 5500 electronically.

Petschek, if the penalty is being reduced under the DOL program, an “employer will have the ability to write us a letter when filing [the Form] 5500 late and give us the reason they believe the penalty should be abated for cause, noting the Labor [DOL] exemption.”

- ◆ “Top hat” plans (deferred compensation plans covering a select group of management or highly compensated employees) and apprenticeship programs that have never filed one-page registration statements with the Department of Labor can file under DFVC and obtain exemption from all other past and future reporting requirements. The procedure to be followed is set forth in the notice and will not be repeated here. In essence, the plan administrator must submit the registration statement, some identifying information on Form 5500, and a check for \$2,500. One oddity is that the *check* must include the notation “DFVC Program” in red, bold print. Note that, under DOL regulations, an employer that has *ever* filed a top-hat registration statement need never do so again, even if it adds new plans.

- ◆ The DFVC program is not available to cafeteria plans that cover fewer than 100 employees, because those plans have only an Internal Revenue Code, not ERISA, filing obligation.

IRS/DOL Working to Simplify Form 5500

According to Alan Lebowitz, Deputy Assistant Secretary for Program Operations at Pension and Welfare Benefit Administration, the IRS is working with the DOL and Pension Benefit Guaranty Corporation (PBGC) to find a way to simplify Form 5500. “We recognize voluntary compliance does more than make it easier to pay penalties,” he said. “It has to make it easier to file. [Form] 5500 hardly fits into that category.” The DOL is “working very hard now to develop a very different form. We hope to create a streamlined form that is less burdensome, costly, and has less traps that might lead to penalties,” he said. “Our goal is to have something for the 1996 plan year.”

Lebowitz said he wants to reduce the duplication that he believes currently exists on Form 5500. He noted there is a “set of financial statements required on the form and one certified by audits. That seems like a duplication. We want to see if there is a way to create a unified set of financial statements on which plan accountants can opine,” Lebowitz said. He pointed out that “under regulations now, it is possible for an accountant to certify [the financial statements on] the form. But that rarely happens.”

The DOL is also working toward making it possible for employers to file Form 5500 electronically. Lebowitz noted that Form 5500 “caught the attention” of the Vice President’s office while it was conducting the National Performance Review. “There were specific [NPR] recommendations on ways to automate the Form 5500,” he said. “It is a great incentive for us to move ahead when the Vice President says he thinks it is a good idea.”

Lebowitz envisions “electronic filing on a vast scale.” He said he thinks “there are very significant changes we can make on the filings—how you fill out the information and how we process it. An awful lot of that, we’re convinced, can be automated.”