

DEPARTMENT OF LABOR AUDITS ARE AVOIDABLE

As any employer who has undergone a retirement plan examination by the U.S. Department of Labor can tell you, the best outcome is that nothing bad happens at its conclusion. Without question, a visit from the Labor Department is not something that most employers welcome. It requires an expenditure of staff time and may involve costly searches through records archives to locate the various items that an auditor has every right to request and examine. Unlike death and taxes, many Labor Department audits are avoidable. Employers who follow the following tips will have a much lower likelihood of entertaining DOL audit personnel on their premises.

Listen and Respond to Employees

First and foremost, the Labor Department entertains complaints from disgruntled plan participants who have grievances against their employer's operation of the plan. A significant percentage of DOL audits are due to participant referrals. Employers are encouraged to listen to employee questions or complaints and make sure the employee is aware that his or her complaint was carefully considered. If the employee cannot get what they want, they should at least be provided reasons why the plan cannot meet their expectations. Most employees are not aware of the myriad rules that govern tax favored employee retirement plans and do not appreciate the fine line that a Plan Administrator must follow in balancing laws, regulations, and financial realities with employee expectations concerning the retirement plan.

Inform Plan Participants

Employees need to be kept informed about their retirement plan benefits. Employers are required by law to distribute Summary Plan Descriptions,

Summary of Material Modifications, and periodic benefit statements to participants. Failure to do so can enhance audit chances because the DOL agent will be unable to study these materials in an effort to informally resolve any employee complaint. Probably more importantly, failure to provide frequent and readable information is the cause of many employee complaints.

Deposit Employee Money Promptly

If a plan includes participant loans and/or employee salary deferral contributions, the employer is well advised to make a special effort to deposit the employee money into the plan very shortly after it is withheld from the employee's paycheck. This item is one of the items most carefully monitored by the DOL. The annual report Form 5500 requires that any late payments be disclosed, so the DOL has a ready data base concerning slow funding and payers.

Avoid Plan Prohibited Transactions

A failure to timely deposit employee monies into the plan is viewed as a prohibited transaction; similar to a situation where the employer borrows money from the employee plan to finance business needs. By law, plan assets must be used for the exclusive benefit of participants or beneficiaries. Form 5330 is required to be filed to accompany an excise tax levied against those who benefit from prohibited transactions and these forms can be a reason for DOL audit activity.

Provide Advance "Black Out" Notices

If a plan offers participants the opportunity to direct their own asset investment, the employer must be sensitive to the need for advance notice before any participant's ability to exercise this option is temporarily restricted (such as due to a change in investment provider). A similar notice is required for the temporary cessation of the ability

to take plan loans or receive plan distributions. Failure to provide this notice can not only bring unwanted government attention, hefty financial penalties are also payable.

Don't Ignore Uncle Sam

If an employee approaches the DOL with a plan related complaint and the matter cannot be resolved without further information about the plan and the employer; DOL representatives usually make a phone call or two in an effort to obtain data necessary to resolve the issue. Oddly enough, a small percentage of employers ignore these requests; perhaps in the mistaken belief that the issue will just go away. It won't. The Labor Department, like the Internal Revenue Service, needs information in order to discharge its responsibilities. If the information is not obtained informally, a more formal approach is taken that may involve an extensive plan audit or even subpoenaed data.

Employers who follow these tips have a much lower chance of an audit from their neighborhood Department of Labor office. Perhaps more importantly, they will probably have a more enlightened and more satisfied work force who will better appreciate the company retirement plan.

IMPORTANT REMINDERS

SEPTEMBER 15 IS FUNDING DATE FOR MANY RETIREMENT PLANS

September 15 is the last day to make 2010 year employer contributions for many tax qualified calendar year retirement plans. This is the latest date for an employer to make required funding for the 2010 plan year for any defined benefit pension plan. Employers that have been making quarterly contributions should nevertheless check to be sure that the entire 2010 minimum funding requirement has been met and pay any required remaining amount.

Calendar year defined contribution plans must also be sensitive to the September 15 date in many cases. Corporations and partnerships that obtained extensions in filing their 2010 tax returns until September 15, 2011 must be sure that any deducted profit sharing contribution is paid no later than September 15.

SAFE HARBOR 401(K) PLAN START UPS AND NOTICES

October 1 represents the latest date that a 401(k) safe harbor plan can be created for the 2011 calendar year. Employers with new plans or existing profit sharing plans adding a new 401(k) feature mid year must adopt a plan and have deferrals established for a minimum of three months if they want to use a safe harbor contribution to avoid discrimination testing. For calendar year plans, this means the new plan must be adopted and in operation by October 1. If this date is missed, the new 401(k) plan can be established later in the year, but will be required to perform non-discrimination tests for that year.

On a related note, notices to plan participants advising them of 2012 safe harbor provisions generally must be provided between 30 and 90 days before the start of the year. For calendar year plans, this means that notices can be provided as early as October 1. NRS will be providing these notices to clients in the coming weeks.

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