

# Missing Form 5500? DOL requires corrective action



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Department of Labor's Employee Benefits Security Administration (EBSA) pursues voluntary compliance as a means to encourage plan administrators to bring their plans into compliance with ERISA's filing requirements. In FY 2009 the EBSA received more than 26,603 annual reports through their compliance assistance program. The Department of Labor (DOL) also periodically sends formal Notice of Rejection (NOR) letters to plan administrators that fail to attach an audit report to their Form 5500.

## **What should you do if you receive a Notice of Rejection (NOR) letter?**

Upon receipt of a NOR letter, the plan administrator has 45 days to make any necessary corrections to the Form 5500 filing. You should contact your auditor immediately as they will most likely have to correct audit reports which may require performing additional fieldwork in audit areas where work was deemed by the DOL to be insufficient.

## **Ramifications of not correcting Form 5500**

If after the 45 day period the Form 5500 filing remains deficient, the DOL will provide a written notice of intent to assess a penalty (NOI). The NOI will include the amount of the penalty, the number of individuals involved, the period of time to which the penalty applies, and the reasons for the penalty.

While most deficiencies are penalized at \$150 per day with penalties capped at \$50,000, the maximum penalty permitted is \$1,100 per day. These penalties are imposed from the day after the original due date of the filing, which is seven months from the end of the plan year or month where plan assets are completely liquidated, whichever is earlier.

After receipt of the DOL notice, the plan administrator has 35 days to file a written statement of reasonable cause explaining why the penalty should be reduced or not assessed. As a rule the DOL will not consider abatement of any penalties in cases where deficiencies still exist.

If the plan administrator does not file a statement of reasonable cause within the 35 day period, it is considered an admission of the facts alleged in the notice. The notice itself becomes the final order and the plan administrator forfeits all rights to appeal.

If the plan administrator submits a statement of reasonable cause, the DOL will review and make their final order. The agency will issue a notice of determination which contains the final penalty amount assessed against the plan administrator. The plan administrator may choose to pay the penalty amount or if unsatisfied with the final decision, may request a hearing with an administrative law judge, appealing the penalty. If requesting a hearing, one must do so within 35 days of the receipt of the notice of determination.

The plan administrator is personally liable for payment of any penalty. Failure to make all efforts to file an accurate and complete Form 5500 may result in future enforcement correspondence from the DOL, Internal Revenue Service (IRS) or Pension Benefit Guaranty Corporation (PBGC).

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## **What can you do if you have not filed prior years' Form 5500?**

Before the DOL, IRS or PBGC contacts you, file your delinquent annual reports immediately. In an effort to encourage pension and welfare plan administrators to file overdue annual reports the Department of Labor's Employee Benefits Security Administration (EBSA) provides plan administrators with the opportunity to pay reduced civil penalties for voluntarily complying with the annual reporting requirements through the Delinquent Filer Voluntary Compliance Program (DFVCP).

***Any questions regarding the DOL DFVCP or penalty process should be directed to the DOL Employee Benefit Security Administration's Office of Chief Accountant (OCA) at (202) 693-8360. You can also find more information including a penalty calculator on the DOL Employee Benefit Security Administration Office website. In 2009 an online DFVCP filing and payment option was added to the site and has made the program even easier to use.***

***You may also contact Baker Tilly. We provide in-depth Employee Benefit Plan Audit knowledge and an experienced audit team that is ready to help you any time of year. Baker Tilly is an involved member of the AICPA Employee Benefit Plan Audit Quality Center and devoted to developing "best practices" for their clients.***