BURNING BENEFITS NEWS

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401(k) COMPLIANCE QUESTIONNAIRE

The IRS's Employee Plans Compliance Unit will be sending a letter and instructions to a random sampling of 1,200 employers that sponsor 401(k) plans asking them to complete a comprehensive 401(k) Compliance Check Questionnaire. Completion of the Questionnaire is not optional. The IRS has indicated that failure to complete the Questionnaire will result in further enforcement action. The employer will have 90 days to respond to the 69-question Questionnaire.

The Questionnaire is designed to solicit answers to very specific compliance issues, for example: "Provide the average deferral percentage to the nearest hundredth of a percentage point for the highly and nonhighly compensated employees for the [2006, 2007, 2008] plan years shown in the table below." The same question then goes on to ask if the ADP test required a correction and, if so, how was the correction made and was it timely made (honest, this is just *one* question out of 69). Similar kinds of questions involve plan loans, employer stock, hardship distributions, etc. Take our word for it, this is a *very* comprehensive questionnaire. Better yet, take a look at the Questionnaire. It is attached to this e-mail.

The Questionnaire is clearly designed to ferret out noncompliance with the complex 401(k) rules. The employer, in many cases, will be faced with being truthful and "ratting" out its 401(k) plan or not being truthful in answering the questions of the Questionnaire (not completing and submitting the Questionnaire does not appear to be an option). We recommend that all employers complete the Questionnaire accurately. This means that, should you receive the Questionnaire, you should call your attorneys immediately and proceed to answer all questions to the best of your ability. If it happens that a question(s) cannot be answered without revealing noncompliance with the 401(k) rules, then action will have to be taken. The IRS has made it clear that receipt of the Questionnaire does not amount to "under examination" for purposes of the voluntary correction programs offered by the IRS. Therefore, you should consult with your attorneys and consider voluntary correction of any noncompliance issues discovered while completing the Questionnaire. Voluntary correction should be completed, to the extent possible, before the Questionnaire is sent to the IRS, that is, within the 90-day period.

Right now, the Questionnaire will be sent to only 1,200 employers, so the odds are slight that you will receive one. However, depending upon the success of this initiative by the IRS, more Questionnaires may follow. This gives each employer an opportunity to audit its 401(k) plan based upon the Questionnaire *before* it is faced with the Questionnaire or an IRS audit. Stevenson Keppelman Associates would be happy to help you with the Questionnaire, should you receive it, or an audit of your 401(k) plan should you be one of the fortunate ones who do not receive it.

Burning Benefits News is a communication designed to provide timely information regarding current employee benefits issues. It does not constitute legal advice, as we must address your specific facts in rendering legal opinions. As required by tax regulations, any tax information contained in the communication is not intended to be and cannot be used for the purpose of avoiding tax penalties.