

News & Types: Employment, Labor & Benefits Update

# Employment, Labor & Benefits Update - October 2017

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By: Frank J. Del Barto

Practices: Employment, Labor & Benefits

## MESSAGE FROM THE CHAIR

On behalf of the Employment, Labor & Benefits Practice Group, I want to thank all clients and friends who attended our annual seminar. I trust that you found the information presented during the seminar to be both useful and timely to your organization. As we plan our webinar and seminar schedule for 2018 and beyond, please contact me with any topics of interest for consideration. By providing your topics of interest, we can better tailor our presentations. Again, we thank you for coming to the seminar and for the opportunity to be of service.

Frank J. Del Barto  
Practice Group Chair

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## CORRECTING A FAILURE TO FILE FORM 5500

By Frank Del Barto

**Facts:** Five months ago, you accepted employment as the new HR\Benefits Manager for a 300 employee manufacturing company. Now that you are comfortable in your new role, you decide to review the manila file folders that your predecessor left behind in a pile on a shelf. As you review the file folders, you notice that one is labeled, "Form 5500 Annual Report – 2010." You review the file folder and determine that the 2010 Form 5500 annual report for the medical plan was never filed with the U.S. Department of Labor ("DOL"). You research and learn that the 2010 through 2017 Form 5500 annual reports were not filed with the DOL.

**Issue:** As a seasoned HR\Benefits manager, you know that the DOL can assess civil penalties against plan administrators who fail to file a timely Form 5500 annual report for each plan year. If a Form 5500 annual report filing is late, the DOL may assess a \$50 per day penalty with no limit for the period of the failure. If the Form 5500 annual report is not filed, the DOL may assess a penalty of \$300 per day, up to \$30,000 per year, until a complete annual report is filed.

**Solution:** The DOL established the Delinquent Filer Voluntary Compliance Program ("DFVCP") to encourage retirement and welfare plan sponsors to file late Form 5500 annual reports and pay a reduced civil penalty. To correct, plan sponsors must first electronically file a complete Form 5500 annual report with all schedules and

attachments for each plan year that the plan sponsor is seeking relief. Second, plan sponsors utilize the DOL's online penalty calculator to compute the correct penalty amount and make the proper payment electronically using the online instructions.

For small plans (fewer than 100 participants at the beginning of the plan year), the penalty amount is \$10 per day for each day a single Form 5500 annual report is filed after its due date, not to exceed \$750. In the case of more than one delinquent Form 5500 annual report for the same plan, the maximum penalty amount is \$750 for each annual report, not to exceed \$1500 per plan.

For large plan (100 or more participants at the beginning of the plan year), the penalty amount is \$10 per day for each day a single Form 5500 annual report is filed after its due date, not to exceed \$2,000. In the case of more than one delinquent Form 5500 annual report for the same plan, the maximum penalty amount is \$2,000 for each annual report, not to exceed \$4,000 per plan.

As the company's HR/Benefits manager, you ensure that the plan information is gathered in order to prepare the Form 5500 annual reports for all past due plan years (2010-2016), and you coordinate the payment of the maximum penalty amount (\$4,000) for large plans in order to re-establish plan compliance. The good news is that the DOL established this correction program in order to encourage plan sponsors to correct for late filings, and plan sponsors should have no fear entering this correction program. Should you have any questions about late Form 5500 annual reports, please call your relationship attorney.

## **SHOULD THE FOOTBALL PLAYERS BE FIRED - THE NEED FOR DUE DILIGENCE**

By Alan M. Kaplan

As the public debates the actions of some football players and how the owners of the football teams react, human resource professionals have a special perspective. They are the company's risk managers. When deciding whether to discipline or discharge an employee, risk managers conduct a due diligence analysis.

- Are the football teams privately or publicly owned? They are privately owned and are not public entities such as school districts or agencies of the federal, state or local governments.
- Do the football players have any constitutional rights? Government employees have the right of free speech in certain circumstances. The football players, as employees of privately-owned companies, do not have free speech rights while working.
- Do the football players have contract rights? As employees of privately-owned companies, the football players are protected by two different contracts. First, football players sign individual contracts with the football teams. These contracts may have provisions giving the owners the right to discipline and terminate the players. Second, the football players are represented by a union, which has a collective bargaining agreement with the owners. This agreement also includes provisions regarding discipline and termination.
- Do the football players have statutory rights? When examining statutory rights, management needs to analyze federal and state laws that protect employees of privately-owned companies. Under federal law, the football players are protected by Title VII of the Civil Rights Act and the National Labor Relations Act. The legal question is whether the owner is terminating a player because of his race. Is the football player protesting the flag or the treatment of African-Americans by the police? Under the National Labor Relations

Act, employees have the right to engage in concerted, protected activity. Although the protest is concerted, because the players are acting as a group, is the protest protected as complaints about their wages, hours and working conditions? Probably not. Under some state laws, football players – like all employees in that state – have the right to engage in lawful activities. For example, a company may not terminate an employee for smoking, which is a lawful activity. In other states, statutes protect employees to engage in political activities. The question then becomes whether the football players' protest is a political statement.

- Do the football players have common law rights? In many states, companies may not retaliate against a privately-employed employee when the state has a public policy to protect employees. For example, in many states, the courts protect against retaliation when employees exercise their rights under the states' workers' compensation laws. Many state courts have created the right of privately-employed employees to act as whistleblowers, if the company is violating a law or regulation. Regarding the football players, the question is whether discipline of the football players would violate a public policy.

These are difficult, legal questions, some with no easy answers. However, every company should complete this checklist when considering disciplinary action, including termination. By completing a due diligence analysis, management will determine the risks involved, make knowing decisions based upon those risks and mitigate those risks when acting.

For more information about this or any other employment law topic, please contact Frank Del Barto, Chair of the Employment, Labor & Benefits Group, at 847.734.8811 or via email at [fdelbarto@masudafunai.com](mailto:fdelbarto@masudafunai.com).