

***Southern California's largest firm exclusively practicing employee benefits law***

***This is Jeopardy! ERISA Edition!***

**Answer:** Brucker & Morra

**Question:** What law firm has expertise in every tax and labor aspect of the Employee Retirement Income Security Act (ERISA) and is always challenged by clients to devise creative solutions to a wide range of problems?

**Answer:** To bring legal order to personal chaos.

**Question:** When people's lives, unlike pension law, are imprecise and messy, what can clients expect from Brucker & Morra?

**In this newsletter,** we open our files to present cases and client predicaments that we find intriguing and, we admit, a little entertaining. Although we reserve the right

to change case specifics to maintain client confidentiality, we think many readers may recognize their own plights or the plights of their clients because people often put themselves in jeopardy by failing to comply with complicated pension and benefits laws. Fortunately, we are experts in jeopardy benefits categories. Also fortunately, we know how to ask the right questions to apply the law properly. While a lot of law firms focus on the legal problem at hand, we take time getting to know our clients. We ask questions that help us understand small problems within their larger contexts. By seeing the picture within the picture, we find answers that make sense legally within the tax code and personally for our clients. For those reasons and in this

special issue, we quote SNL Celebrity Jeopardy! Contestant "Tom Cruise," who made this prescient on-air plea: "Help me, Alex! Help me, help you!"

**The attorneys at Brucker & Morra** invite you or your clients to work with us when you start a pension or welfare benefit plan so you can prevent problems from ever arising. But if you find yourself in financial jeopardy from a pension or benefits matter, definitely contact us. We are experts at skillfully applying pension law and common sense to achieve workable solutions. We pledge to get you out of jeopardy in the most efficient and cost-effective manner.

**Category**  
**IRA Distributions**

**Answer:** Your death

**Question:** What is *not* a valid excuse for returning money withdrawn from an IRA after a 60-day grace period and avoiding a distribution?

**Answer:** Debilitating heart attack, abduction in a foreign country, felony jail time, postal error

**Question:** What excuses for failing to return funds accidentally withdrawn from a qualified account are *possible considerations* so you can restore the assets' tax-protected status and avoid a distribution?

**Answer:** Bank error

**Question:** What is the only *automatic* and valid excuse the Internal Revenue Service will accept so you can return your withdrawn IRA money after the grace period, penalty-free, to its original tax-advantaged status?

**Meet the contestant**

I am a 40-something investor. Two years ago I was having lunch with a friend who invited me to back a new drug company working on The Next Big Thing. I accepted. I was so excited that I went directly to my broker to transfer \$250,000 from my IRA to my friend's lawyer's custodial account. I signed simple distribution papers and left – feeling great! A few days later I got a letter from the lawyer that the money hit the escrow account. A few months later I was having lunch with another friend. This guy was complaining about the trouble he went through to roll his IRA money into a private investment. He griped about the paperwork, the broker, the custodial lawyer, and the investment manager – everyone who touched the transaction. They all had to swear in blood that his IRA money would stay in an IRA account. I thought back to my own deal – and my blood ran cold! My transaction seemed waaaaay too simple. And the paperwork from the custodial lawyer never mentioned an IRA. My \$250,000 had become taxable income – plus a 10 percent penalty! Help me, Meredith!

**Meet Jeopardy Expert Meredith Sesser**

Whenever you withdraw IRA funds, you have 60 days to return the money without penalty. That's how people use retirement money for short-term loans. My client, unfortunately, discovered his error after the grace period. Fortunately, he discovered the gaffe before his friend took the money from escrow. On his behalf, I wrote a beautiful letter to the IRS invoking bank error immunity. I included affidavits from his friend, his broker, and the custodial lawyer testifying to his intention to maintain the IRA. The IRS told me that my letter was the most well-organized, well-constructed application for a waiver they'd ever seen, and – oh yes, the agency granted the waiver. My client's friend was equally accommodating. He kept my client's money in escrow until we got the IRS clearance to move it – with the proper and onerous paperwork. Bonus: The reason you can't use your own death as an excuse for failing to repay a short-term IRA loan is that no one really knows if you ever intended to return the money.

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## Category

# Profit Sharing Contributions

**Answer:** To preempt a lawsuit alleging breach of fiduciary responsibility

**Question:** What is a permitted exclusion under the Internal Revenue Code that allows an employer to make a second tax-advantaged contribution in one calendar year?

**Answer:** Discriminate

**Question:** How can the employer who makes the allowable contribution under the Internal Revenue Code save some out-of-pocket cash?

### Meet the contestant

I co-own a company that employs 25 people. I'm a director and a trustee of the profit-sharing plan and I was duped! In 2007, I directed the investment of \$450,000 from our profit sharing plan in what I discovered in 2008 was a Ponzi scheme. I couldn't believe it! Fraud! We lost it all. The other two owners and I felt terrible. We agreed to make up the loss to our employees from our own pockets. We figured that the employees would accept a reasonable decline in value in 2008, but not a huge decline. That would make them suspicious. Our employees' accounts were down 45 percent for the year while the market was down 28 percent. We could bring the plan's full-year decline to 28 percent by putting in \$180,000, allocated on a per-capita basis. That would make the fraud invisible. We felt like conspirators because we weren't acting from generosity. We were acting because we didn't want to be sued for breach of fiduciary responsibility. But we had two problems. First, we had already made our 2008

plan contribution. Second, the down market wiped out most of our own cash. Help me, Jeremy!

### Meet Jeopardy Expert Jeremy Pelphrey

Ponzi schemes pop up from time to time. That's terrible. Worse, the conventional wisdom among employers that are defrauded in their profit sharing plans is this: Do nothing. Cross your fingers. Pray no one notices. That's why we applauded our clients for taking preemptive action. We had two objectives in this case: To make a second allocation and to minimize our clients' cash outlays in reimbursing the plan. We knew from IRS rulings and the tax code that reimbursement of a fiduciary loss is allowed if the plan and its trustees are exposed to a reasonable risk of fiduciary liability under ERISA. That certainly fit this situation. We also knew that the law allows trustees to discriminate – that is, contribute only to the employees and not the responsible fiduciaries. We prepared a resolution allowing our clients to make the additional discriminatory contribution on a tax-advantaged basis only to their employees' accounts. This brought the full-year decline on the plan account to 28 percent, the same as the market decline. The IRS allowed it. The owners applauded it. They told us they really *Madoff* with a win in this Ponzi case. Ouch!

## Category

# Defined Benefits Plan Termination

**Answer:** Tenets of faith

**Question:** What exempts an organization from complying with all the laws of the IRS,

ERISA, the Department of Labor and the Pension Benefits Guaranty Corporation?

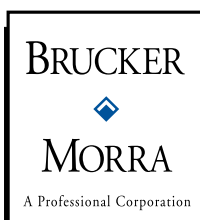
### Meet the contestant

I am the CEO of a charitable organization serving the city's poorest residents. Years ago, on the premise that charity begins at the office and when we were flush, we set up a defined benefit plan for our 30 employees. But as donations fell off, we stopped contributing. Now we want to terminate our under-funded plan because we can't afford the annual contributions. But we're in an untenable situation: If we spend our money to bring our plan into compliance so we can get rid of it, we'll go broke. If we spend our money to file for a distress termination, we'll go broke. Either way, we won't have a retirement plan. Worse, either way, we won't be able to feed our clients. Help me, Alex!

### Meet Jeopardy Expert Alex Brucker

These people had hearts of gold. We sat in my conference room and talked about their work, the people they help, their founders and their history. I learned that my clients' community service center is open to the public – to anyone who needs a nutritious meal or a helping hand. They told me they were following the tenets of their faith to help the distressed and feed the hungry. I wanted to know more about those tenets. That's when I found out that the group had faith-based operating principles and articles of incorporation – and a church plan. That was the answer to their prayers! Under ERISA, faith-based organizations are exempt from DOL and PBGC laws and many IRS laws. I said a little prayer of thanks and restated the plan to comply with GUST as a non-electing church plan. Then I terminated the plan without liability for the unfunded part. The IRS approved everything. Now I'll take Biblical Tax Facts for \$800.

IRS regulations require us to notify you that information in this newsletter cannot be used by you as a taxpayer for the purpose of avoiding penalties that the IRS might impose on you or for promoting, marketing or recommending to another party any tax-related matters contained in this communication.



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