

# From the files of

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

BRUCKER



MORRA

A Professional Corporation

### **DUE DILIGENCE**

#### **Equitably including exclusions**

##### *What happened:*

The new owner of the amusement park congratulated himself over his summer hires. The Ivy League law student grumbled at first about working the BB Gun Star Shootout, but quickly perked up after chatting with the old-timer at Whack-A-Mole. He even invited classmates to take sweaty Midway jobs. Future lawyers made great carnies, the owner decided. They enticed visitors by ballyhooing the legitimacy of the Ping Pong Goldfish Toss, the Basketball Shoot, and the ultimate challenge: the Milk Can Softball Toss. Summer ended. The law students left. The owner got a letter. Free funnel cakes and corn dogs were nice perks, the first summer hire wrote, but please remember to contribute to our 401(k) accounts. The owner called his TPA, who explained that the future attorney — possibly a pension lawyer? — had discovered that the park's plan documents allowed immediate eligibility and did not exclude summer employees. *continued on other side*

As experts in every tax and labor aspect of the Employee Retirement Income Security Act (ERISA), we at Brucker & Morra are challenged by our clients to devise creative solutions to a wide range of problems. Peoples' lives, unlike pension law, can be imprecise and messy. We know that. Our job is to bring legal order to personal chaos.

In this newsletter, we bring you cases and client predicaments from our files that we find intriguing and, we admit, a little entertaining. Of course, we change names and peripheral facts to maintain confidentiality.

Albert Einstein once said, "We can't solve problems by using the same kind of thinking we used when we created them." The attorneys at Brucker & Morra excel at skillfully applying pension law and common sense to achieve workable solutions to your pension plan problems. Our objective is that your plan complies with the latest regulations and your own expectations.

If your pension or profit-sharing plan sometimes seems like the theory of special relativity, we invite you to contact us. Humble lawyers though we may be, we like to think that Einstein would approve of our elegant solutions. That's because the Nobel Prize winner also said, "The hardest thing in the world to understand is the income tax."

#### **ABUSIVE TAX SHELTER AMNESTY PROGRAM DEADLINE JANUARY 23, 2006**

Employers who participated in retirement or welfare plan tax shelters that the IRS has ruled abusive have until January 23, 2006 to apply for an IRS amnesty program. The IRS promises to pursue and assess full penalties on any employer with an abusive tax shelter who does not participate in the program. Therefore we recommend that employers consult as soon as possible with their ERISA attorney to assess the merits of participating in the program.

The amnesty program covers the following plans, among others:

- Some S corporation ESOPs established before March 15, 2001
- Pension plans that fail to satisfy Code section 412(i)
- Multiple-employer welfare plans formed under Code section 419A(f)(6)
- Welfare plans formed under Code section 419A(f)(5) involving owner "unions"

The amnesty program is available to employers whether or not they are under audit.

Participating employers will be required to file amended returns, and pay taxes, interest, and a significantly reduced penalty.

Employers have until January 23, 2006 to notify the IRS of their intent to participate in the amnesty program, which the IRS calls a "settlement initiative." A written election form must be sent to the IRS on or before that date.

Brucker & Morra can help employers

- Evaluate the advantages and disadvantages of participating in the amnesty program.
- Prepare and submit the election form to the IRS.

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### *What we did:*

Alex Brucker confirmed that the request for the Dollar Toss was legitimate. Contribute to all your summer employees' accounts, he told the owner, or you'll have to contend with the IRS, which will order you to contribute anyway and assess a penalty. Alex then eliminated the issue for future hires by writing new documents that legally excluded the non-qualifying class of short-term employees.

### *Comment from Alex:*

Smaller companies tend to use off-the-shelf plans from the handful of professional document providers in the country. These templates are not all-inclusive. For example, they often fail to include a provision for excludable classes of employees. Our firm spent thousands of hours writing the most comprehensive retirement plan document you can find. Then we got it pre-approved by the Internal Revenue Service. The document's many options remind employers of potentially critical exclusions, such as summer employees. They also serve as a checklist for beneficial features employers may want to incorporate. —Alex Brucker, [abrucker@pensionlawyers.com](mailto:abrucker@pensionlawyers.com)

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## **SURVIVING AUDITS**

### **When to park a plan**

#### *What happened:*

The owner of a valet parking company to the stars was once an aspiring actor. He had a soft spot for Hollywood hopefuls and was happy to hire them for brief, curbside encounters with celebs. Knowing his parkers' chances for screen success, he generously established a 401(k) for the 120 or so minimum-wage employees. Only a dozen participated. The rest believed that a prosperous tomorrow meant investing the maximum today in good hair, sharp clothes, a bright smile, and acting lessons. When filing Form 5500 with the IRS, the paternalistic owner sighed over the meager number of 401(k) participants. When the Department of Labor reviewed the 5500 filing, it responded that plans with 100 or more eligible participants require an independent audit report, regardless of the number of contributing participants. When the owner discovered that the DOL demanded \$100,000 for his failure to conduct an audit that can cost up to \$15,000, he calculated that his generous gesture would amount to an astounding \$9,500 per contributing participant! He emoted with a range that, years earlier, would surely have earned him a part.

#### *What we did:*

Meredith Sesser knows that some penalties are negotiable. She argued that Mr. Nice Guy was the victim of reasonable circumstances: The payroll service that set up his plan never told him about the automatic audit trigger. The DOL, which assesses penalties of up to hundreds of thousands of dollars for incomplete 5500s, concurred and slashed the penalty. 📌

### *Comment from Meredith:*

You really need legal experts to advise you about filing requirements. If your business employs a lot of struggling 20-somethings who don't believe in delayed gratification or don't understand the benefits of tax-deferred income, you should narrow the eligible participant pool to under 100. —Meredith J. Sesser, [msesser@pensionlawyers.com](mailto:msesser@pensionlawyers.com)

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## **MORE DUE DILIGENCE**

### **Maintaining the letters of the law**

#### *What happened:*

The construction firm was seeing double and didn't like it. Their 401(k) and a profit-sharing plans essentially accomplished the same aim. Two plans, naturally, required filing two tax returns and paying two administrators. Most maddening, business had been terrible for five years, so the company made no cash contributions for its three designated employee groups: (A) the laborers, (B) the office workers, and (C) the owners. The plans lay moldering and unread. Then business improved. In a spate of cost conservation, the owners decided to merge the profit-sharing plan into the 401(k). But a bedeviling defect lurked in the details, and if hawk-eyed IRS agents spotted it, the company would have the devil to pay.

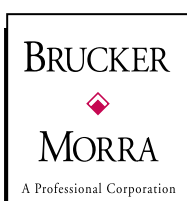
#### *What we did:*

Michael Cotter, ever attentive, saw what document-plan typists and proofreaders obviously missed. Corporate contribution amounts, which varied by employee group, were assigned in the documents to, literally, just "A," "B" and "C." Merging the imprecise and tainted profit-sharing plan with the chaste 401(k) would have poisoned the new 401(k). Michael went into the corporate archives for the original documents. He amended the profit-sharing plan to include the definitions — (A) the laborers, (B) the office workers, and (C) the owners—and submitted the document to the IRS for approval. Then, from two pure plans, he created one clean 401(k) with one filing requirement and a one administrative payment.

#### *Comment from Michael:*

You really have to be attentive to every detail in your plan documents. Better yet, attend to your business and let us attend to the docs. On the bright side, we found a silver lining in the company's cloud of prior unprofitability. The IRS agreed to waive penalties for misallocated contributions because everyone in each of the plans got precisely the same amount during the down years: Nothing. —Michael Cotter, [mlcotter@pensionlawyers.com](mailto:mlcotter@pensionlawyers.com)

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