

IRM PROCEDURAL UPDATE

DATE: 06/14/2016

NUMBER: sbse-05-0616-1064

SUBJECT: Funds in Pension or Retirement Plans

AFFECTED IRM(s)/SUBSECTION(s): 5.11.6.2

CHANGE(s):

IRM 5.11.6.2(3) is revised to allow the employee to consider a taxpayer request to levy their retirement account.

IRM 5.11.6.2(4) is revised to reference pre-levy considerations and requirement to document levy determination.

IRM 5.11.6.2(6) is revised to add alpha identifier to each example.

IRM 5.11.6.2(6) is revised to change order of examples.

IRM 5.11.6.2(6) is revised to modify caution to note automatically enrolled taxpayers is not flagrant conduct.

IRM 5.11.6.2(6) is revised to add reference to retirement or profit sharing plans for example C.

IRM 5.11.6.2(6) is revised to clarify example H on taxpayer not complying with financial analysis or tax deposits.

IRM 5.11.6.2(6) is revised to clarify example J to incorporate assessment of trust fund tax per modules rather than one assessment.

IRM 5.11.6.2(6) is revised to clarify example K that taxpayers conduct has to delay the collection of the tax due.

IRM 5.11.6.2(7) is revised to update correct Publication 590-B for life expectancy tables.

1. These instructions cover assets accumulated in a pension or retirement plan, as well as Individual Retirement Arrangements (IRAs). They do not deal with levying retirement income. See section IRM 5.11.6.1 above. Also see Delegation Order 5-3 (Rev-1) at IRM 1.2.44.4 (23)c and IRM 5.17.3.9.19 *Pension and Retirement Benefits*.
2. There are many employer and self-sponsored retirement vehicles that are not exempt from levy. These plans include, for example:

- Qualified Pension, Profit Sharing, and Stock Bonus Plans under ERISA
 - IRAs
 - Retirement Plans for the Self-Employed (such as SEP-IRAs and Keogh Plans)
3. Because these retirement vehicles provide for the taxpayer's future welfare, levy on the assets in a retirement account (as contrasted with income from the account) only after following the procedures set forth below. If the taxpayer provides a written request to the Service to levy the assets in the retirement account, we should consider the taxpayer's request to levy the account as part of the ability to pay determination. Prior to levying pursuant to the taxpayer's request, follow step 1 as described in paragraph (4) (consider alternatives to levy on retirement assets) and step 3 as described in paragraph (7) (determine whether the taxpayer needs the retirement assets for necessary living expenses). Document the case history and levy approval memo that the taxpayer requested the IRS to issue the levy; do not make the flagrant conduct determination in step 2 as described in paragraphs (5) and (6) below. Follow guidance in IRM 5.15.1.27, Retirement or Profit Sharing Plans.

NOTE: If the taxpayer requests the levy and you decide that the Service should levy after following steps 1 and 3 in paragraphs (4) and (7), respectively, before issuing the levy, verify that the taxpayer has received CDP rights. If the taxpayer has not received CDP rights, then follow the procedures in IRM 5.11.1.3.3, Satisfying the Notice Requirements.

NOTE: An imminent collection statute expiration date (CSED), alone, does not justify levying on retirement assets. Levying on assets in retirement accounts requires application of the procedures set forth below.

4. The first step in deciding whether to levy on a retirement account is to determine what property, retirement assets and non-retirement assets, is available to collect the liability. If there is property other than retirement assets that can be used to collect the liability, or if a payment agreement can be reached, consider these alternatives before issuing a levy on retirement accounts. Also consider the expense of pursuing other assets as well as the amount to be collected. Levy determinations are made on a case-by-case basis and Revenue Officers must exercise good judgment in making the determination to levy. See IRM 5.11.1.3.1, Pre-Levy Considerations. Document the case history with the determinations made in steps (4) through (7) below. Additionally, levying on assets in retirement accounts requires application of the following procedures.
5. The second step in deciding whether to levy on a retirement account is to determine whether the taxpayer's conduct has been flagrant. If the taxpayer has not engaged in flagrant conduct, do not levy on retirement accounts. Deciding whether the taxpayer has engaged in flagrant conduct must be done on a case-by-case basis. Keep in mind, however, extenuating circumstances

may exist that mitigate the taxpayer's flagrant conduct. See IRM 5.1.10.3.2(9)(b).

CAUTION: Keep in mind, however, extenuating circumstances may exist that mitigate the taxpayer's flagrant conduct.

EXAMPLE: Extenuating circumstances are at times situations beyond the control of taxpayers. Examples of extenuating circumstances to consider include; illness, loss of employment, a personal loss (family or loved one), identity theft/return preparer misconduct/embezzlement or natural acts of nature, etc.

6. The following are some examples of flagrant conduct.

EXAMPLE: (A) Taxpayers whose failure to pay is based on frivolous arguments which are listed in Notice 2010–33, IRB 2010–1 C.B. 609, or subsequent updates. See IRB 2010–33 at http://www.irs.gov/irb/2010-17_IRB/ar13.html.

EXAMPLE: (B) Taxpayers who voluntarily contributed to retirement accounts during the time period the taxpayer knew unpaid taxes were accruing. See IRM 5.15.1.27, Retirement or Profit Sharing Plans.

CAUTION: When the taxpayer verifies they have been automatically enrolled to have a limited percentage of their basic pay deducted and deposited into a retirement account do not consider this flagrant conduct.

EXAMPLE: (C) Taxpayers who continue to make voluntary contributions to retirement accounts while asserting an inability to pay an amount that is owed while IRS determined voluntary contributions not necessary living expenses and disallowed them for the purpose of determining taxpayers' ability to pay. See IRM 5.15.1.27, Retirement or Profit Sharing Plans.

CAUTION: Where a tax liability has been discharged in bankruptcy, the IRS may continue to have a valid tax lien on certain retirement assets that existed prior to the bankruptcy. See IRM 5.11.6.2(15). Voluntary contributions made to such retirement assets after the bankruptcy petition was filed are not considered flagrant.

CAUTION: When the taxpayer verifies they have been automatically enrolled to have a limited percentage of their basic pay deducted and deposited into a retirement account do not consider this flagrant conduct.

EXAMPLE: (D) Taxpayers convicted of tax evasion for the tax debt.

EXAMPLE: (E) Taxpayers assessed with a fraud penalty for the tax debt.

EXAMPLE: (F) Taxpayers assisting others in evading tax.

EXAMPLE: (G) Taxpayers with liabilities based on illegal income.

EXAMPLE: (H) Taxpayers who are in business, pyramiding unpaid trust fund taxes, and fail to provide a complete CIS, does not comply with the results of the Service's financial analysis or fail to timely make FTDs.

EXAMPLE: (I) Individual taxpayers who are accumulating unpaid income taxes over multiple tax periods and will not adjust their withholding or make timely and adequate estimated tax payments to prevent future delinquencies. See IRM 5.1.10.3.2(5)(e).

EXAMPLE: (J) Trust Fund Recovery Penalty modules has been assessed at different times or against more than one business entity.

EXAMPLE: (K) Taxpayers who have demonstrated a pattern of uncooperative or unresponsive behavior that delays the collection of the tax due, e.g., failing to meet established deadlines, failing to attend scheduled appointments, documented broken promises to pay, failing to respond to IRS employee's attempts to contact. In such cases, determining alternatives and the taxpayer's dependence on the money in the retirement accounts (final step) may not be possible, so a levy may need to be served without making those determinations.

EXAMPLE: (L) Taxpayers who have placed other assets beyond the reach of the government, e.g., sending them outside the country, concealing them, dissipating them, or transferring them to other people.

EXAMPLE: (M) Taxpayers with jeopardy or termination assessments subject to collection.

7. The final step in deciding whether to levy on retirement assets is to determine whether the taxpayer depends on the money in the retirement account (or will in the near future) for necessary living expenses. If the taxpayer is dependent on the funds in the retirement account (or will be in the near future), do not levy the retirement account. In determining whether the taxpayer depends on the money (or will in the near future), use the standards in IRM 5.15, *Financial Analysis*, to establish necessary living expenses. Use the life expectancy tables in Pub 590-B, *Distribution from Individual Retirement Arrangements (IRAs)*, to estimate how much can be withdrawn annually to deplete the retirement account in the taxpayer's remaining life. Also, consider any special circumstances in the taxpayer's specific situation, such as extraordinary expenses or additional sources of income that will be available to pay expenses during retirement.