

Be very afraid: 100% penalty investigations are back

✘ The pandemic may have put many employers in a tough bind—continue to deposit the taxes withheld from employees' pay or use that money to stay afloat by paying employees and vendors. Logic would dictate the latter. And logic will trip you up every time.

Warning: The IRS is a cranky super creditor. If you opted for the latter, you can expect a visit from an IRS revenue officer and a 100% penalty assessment under **IRC § 6672** for those undeposited taxes.

Learn the lingo: Payroll taxes are called trust fund taxes, because once you withhold them, you hold those taxes in trust for the government until you deposit them. IRC § 6672 is the trust fund recovery penalty. Under this section of the tax code, you will be personally liable for 100% of your company's undeposited payroll taxes if you are a *responsible person who willfully fails* to deposit those taxes. You're a responsible person if you have *some* authority over how the company spends its money. You act *willfully* if you pay other creditors, including employees, before you pay the IRS.

Update on § 6672 procedures

Back in April the IRS [suspended most 100% penalty investigations](#). Now that the IRS [has snapped back to full strength](#) as of July 16, those investigations are back, too.

The IRS' Small Business/Self-Employed Division, which has jurisdiction of all aspect of payroll enforcement, regardless of the size of your business, has updated instructions to revenue officers who are handling 100% penalty cases.

Worse: Revenue officers are told to prioritize 100% penalty cases received during the time IRS offices were closed and mail was suspended.

The procedures provide guidance to revenue officers who are continuing 100% penalty work in a remote environment as a result of the pandemic. Revenue officers aren't going to hammer you with their first contact. They have been advised to use discretion when contacting you and to evaluate the impact covid-19 has had on you.

But revenue officers are also advised to continue to assemble core documentation showing you're liable for the 100% penalty. Core evidence includes:

- Form 4180 interviews
- Articles of Incorporation
- Bank signature cards or electronic PINs/Passwords assignment information
- Copies of a sampling of cancelled checks demonstrating payment to other creditors in preference to the government
- Bank statements demonstrating debit transaction payments in preference to the government, if the taxpayer predominately uses electronic banking.

Based on all of this evidence, revenue officers will construct a narrative regarding collectibility for each potential responsible person. This narrative passes muster:

The Articles of Incorporation indicate Mr. A was president of the corporation from (date) to (date). He was responsible for filing the tax returns, making financial decisions for the business, and he exercised his signature authority on corporate checks at the (Bank name). He stated during the Form 4180 interview he was aware of the liability but allowed other creditors to be paid so he could remain in business. A review of a sampling of checks for the periods of the liability indicate Mr. A paid payroll as well as other creditors in preference to the government, such as vehicle, utility and personal vacation expenses. He is both responsible and willful. A review of his financial statement shows equity in assets reflecting collection potential if the TFRP is assessed.

This narrative does not:

Mr. B. was an officer. He should have known the taxes had not been paid. He was also authorized to sign corporate checks. He is responsible and willful.

The adequacy of the narrative is key. At some point, you will receive Letter 1153, Proposed Trust Fund Recovery Penalty Notification. The letter, a copy of which isn't available on the IRS' website, informs you that the company is delinquent in its payroll deposits and explains the § 6672 penalty. If you disagree with the IRS' determination, you have 10 days to contact the person listed at the top of the form.