

Ready or Not, Here it Comes... the PPA Plan Restatement

It's time again to participate in that never ending ritual of qualified retirement plan restatements. As legislation affecting retirement plans is enacted, the Internal Revenue Service (IRS) requires all plan sponsors to restate or "rewrite" their plans to conform to current law.

For pre-approved plans, these required restatements take place on a regular six-year cycle. The current cycle of defined contribution plan restatements is being referred to as the "PPA restatement" after the Pension Protection Act (PPA).

If you sponsor a 401(k) or other type of defined contribution retirement plan for your employees and use a pre-approved type of plan, you will be required to restate the plan within the next two years. Failure to complete this restatement before the deadline of April 30, 2016, could result in the disqualification of your plan and result in possible taxation for participants and your loss of deductions and penalties.

In addition, an interim amendment to the plan may be required by the end of the year to comply

with IRS guidance released in April regarding same gender marriages.

Background

After tax legislation is enacted, the law is analyzed by the IRS to determine how it will affect qualified plans in actual operation. This analysis usually takes years, and practitioners may be left to operate their plans on a "good faith" basis during this period.

In other words, plans are required to be operated in the best possible way based on the prevailing understanding of the current law even though official regulations and/or guidance has yet to be issued. As a result, many plan sponsors have adopted "good faith" interim amendments to bring their plans into temporary compliance with PPA, other laws and new guidance issued by the IRS pending this restatement period.

PPA was a sweeping piece of legislation enacted in 2006 which made major changes in the tax laws relating to retirement plans. It is the largest piece of legislation included in the plan restatement. The restatement takes the language from the prior Economic Growth and Tax Relief Reconciliation Act (EGTRRA) restatement

document and includes any new laws added by Congress and any guidance issued by the IRS through the fall of 2010 including:

- The Pension Protection Act (PPA)
- The final Section 415 regulations
- The Heroes Earnings Assistance and Relief Tax Act (HEART)
- The Worker, Retiree, and Employer Recovery Act (WRERA)
- The Katrina Emergency Tax Relief Act of 2005 (KETRA)
- The GULF Opportunity Zone Act of 2005 (GOZone)

Types of Plan Documents

All qualified plans are required to have a written plan document. The plan document can take various forms:

- **Individually Designed Plan Document:** This type of plan document is custom designed by an attorney exclusively for an individual employer to meet its specific needs. An individually designed plan offers the greatest degree of flexibility possible.
- **Pre-Approved Plan Document:** There are two types of pre-approved plan documents—volume submitter plans and prototype plans. Volume submitter plans generally offer more flexibility than prototype plans but not as much as individually designed plans. Pre-approved plan documents are available for most types of plans including 401(k), profit sharing, new comparability and defined benefit plans.

Restatement Cycles

More than 80% of all plans use prototype or volume submitter pre-approved documents. Currently, we are in the second six-year cycle for defined contribution plans. Most pre-approved plan documents have now been rewritten and

approved by the IRS. Beginning on May 1, 2014, the window for restating documents opened. The IRS provides a period of two years for all employers who use a pre-approved plan to finish the restatement.

Pre-approved defined benefit plans are on a different six-year restatement cycle than defined contribution plans. Individually designed plans are on a five-year cycle and must be restated every five years.

IRS Letters

In order to receive a measure of assurance that an individually designed plan document is in full compliance, the plan document may be voluntarily submitted to the IRS to receive a determination that its terms and conditions satisfy all applicable IRS tax-qualification requirements (referred to as a “determination letter”).

With pre-approved plans, the IRS has already reviewed the plan language and determined that it meets the requirements for tax qualification. The IRS issues an “opinion letter” for prototype plans and an “advisory letter” for volume submitter plans to the plan document provider who files with the IRS for pre-approval of the plan. As long as an employer does not modify the pre-approved provisions, the employer will have reliance on the opinion or advisory letter issued to the plan document provider.

During the last restatement cycle, any employer could ask the IRS for a determination letter on a pre-approved plan. Effective last year, the IRS will no longer issue an opinion or advisory letter to employers who adopt prototype or volume submitter documents with no changes. These plan sponsors are entitled to rely on the opinion or advisory letter as if they had a determination letter of their own.

If an employer adopts a volume submitter plan document which has minor modifications, a determination letter may be requested with a simplified filing. If the modifications are not minor, the IRS will consider the plan to be individually designed and will require a more complex determination letter application. If a prototype plan document is modified, it is considered an individually designed plan. If the pre-approved plan has been modified for unique circumstances, a determination may be desirable but never required.

Protected Benefits

Special care must be taken to ensure one plan document does not blindly replace another plan document. For example, if a prototype plan is used to restate an individually designed plan, there are special issues to consider such as ensuring certain benefits, called “protected benefits,” are not accidentally eliminated or reduced. Protected benefits include forms of distributions (such as lump sum and annuities) and timing of distributions (such as early retirement provisions).

Restatement Process

The restated plan document will incorporate all of the changes that were made in your document between the last restatement and this restatement. An inventory of all amendments and their effective dates will need to be compiled so these changes can be accurately reflected in the new document. In addition, now is an ideal time to make any plan design changes that you may have been contemplating which can be incorporated into the restated document.

After the document is completed, it should be thoroughly reviewed. The IRS is very strict when it comes to following the plan document. If your plan document does not reflect the operation of your plan, you may have a serious issue that could

affect the qualification of your plan. Any issues discovered during the restatement process should be addressed as soon as possible.

In addition to the plan document, you may need to have a new summary plan description (SPD) drafted which describes the terms of the plan in a manner designed to be understood by an average plan participant. The SPD will need to be distributed to all participants in the plan.

Most corporate attorneys consider the adoption of a plan or the restatement of a plan to be an important action which should be ratified by the board of directors or managing partners in the case of a partnership. As such, you should document the restatement with the board of director’s minutes, consent resolution or similar written acknowledgement.

In most cases, the resolution instructs the president or other officer to execute any documents necessary to accomplish the restatement. Finally, an authorized officer of the plan sponsor should sign the restatement. If a new trust agreement is also included with the document, the trustees should sign as well.

Because a large number of plans need to be restated within the two-year period, not all restatements will be started right away.

Same Gender Marriage Interim Amendments

On June 26, 2013, in *United States v. Windsor*, the Supreme Court invalidated Section 3 of the Defense of Marriage Act (DOMA) which limited marriage to opposite sex couples for purposes of federal law (including retirement plan administration).

On September 16, 2013, the IRS issued a ruling holding that same-sex marriages legally entered into in any state recognizing such marriages

(referred to as the “state of celebration”) would be recognized for federal tax purposes. The ruling also held that the state of celebration would control for federal tax purposes, even if the couple lives in a state that does not recognize the marriage.

The IRS recently issued a notice that provides information on interim plan amendments that may be required to comply with the Supreme Court decision. In general, if the language in the plan document does not comply with the *Windsor* decision, the plan must be amended by December 31, 2014. In any case, the plan must comply in operation with the new rules beginning on June 26, 2013, the date of the Supreme Court decision.

The need to amend the plan will depend on the definition of marriage in the document. Some documents may define marriage as marriage between a man and a woman, some plans may refer to the DOMA definition and some may define marriage as marriage under “applicable law.” The

first two definitions will need an amendment, the last may not.

Conclusion

Millions of employees rely on their employers to provide retirement benefits. Part of the responsibility for providing those benefits is maintaining the plan in accordance with current tax laws. A plan must be operated in accordance with all laws and regulations and the plan documentation must reflect the laws currently in effect.

The IRS may disqualify a plan that does not comply with the plan restatement requirements, which could result in taxation for the participants and loss of deductions and penalties for the employer.

We are committed to providing the support, attention and professional expertise needed throughout this restatement period to make it a positive experience for all.

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