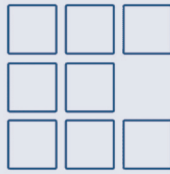


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A non-technical review of qualified retirement plan legislative and administrative issues

August 2008

EGTRRA Restatements... The time has come

It's that time again! Time for what, you ask? 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.

The Economic Growth and Tax Relief Reconciliation Act (EGTRRA), which was signed into law in June 2001, introduced sweeping changes to the retirement plan arena. The restatement deadline is now upon us to incorporate the EGTRRA provisions into qualified plan documents.

Some of the key provisions of EGTRRA are:

- Increased benefit and contribution limits;
- Increased elective deferral limits;
- Increased compensation limit;
- Created a "catch-up" provision for older workers, allowing individuals age 50 and older to make additional elective deferrals;
- Liberalized the rollover rules;

- Created the Roth 401(k); and
- Created additional incentives for small employers to offer retirement plans to their employees.

Background and History

After new 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" amendments to bring their plans into temporary compliance with EGTRRA pending this restatement period.

Over the last few years, a significant amount of guidance and other relative information has been released from the IRS about how and when plans were to be amended for EGTRRA.

Types of Plan Documents

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

INDIVIDUALLY DESIGNED PLAN DOCUMENTS: This type of plan document is custom designed to meet the plan sponsor's specific needs. An individually designed plan offers the greatest degree of flexibility possible.

VOLUME SUBMITTER PLANS: Volume submitter plans may look like individually designed documents, but they consist of language that has been pre-approved by the IRS. Volume submitter plans generally offer more flexibility than prototype plans but not as much as individually designed plans.

PROTOTYPE DOCUMENTS: Prototype plans are also pre-approved by the IRS and come with two types of adoption agreements—standardized and non-standardized. A standardized prototype is more conservative and prevents the plan sponsor from designing a plan that will not satisfy any of the various coverage or discrimination tests, provided it is operated in accordance with its terms.

Non-standardized plans offer additional flexibility, including the ability to exclude certain forms of compensation for allocation purposes or exclude certain employees from plan or contribution eligibility, within the boundaries of IRS standards.

For the first time, the IRS is allowing prototype documents to include age-weighted, age-based and comparability allocation formulas. Previously, plan sponsors desiring to use these allocation formulas needed to utilize a volume submitter or individually designed plan document.

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 Documents

Once the plan has been reviewed, additional requested changes have been made (if any) and the restated documents are drafted, they should be read very carefully. The final signature-ready documents may consist of the following:

- A restated plan document;
- A resolution adopting the restated document;
- A separate trust document (in some cases); and
- An adoption agreement (for prototype documents).

The plan's summary plan description is also required to be updated and will need to be distributed to all participants and beneficiaries to inform them about the restated plan's provisions.

Deadlines

The actual restatement deadline will partly depend on the type of document being utilized and the type of retirement plan being restated.

There is a staggered cycle for submitting documents to the IRS. This staggered approach applies both to individual retirement plan sponsors (who adopt plans to benefit their own employees) and retirement plan drafters (who design prototype and volume submitter plans which get approved to be utilized by retirement plan sponsors around the country).

VOLUME SUBMITTER AND PROTOTYPE PLANS (collectively referred to as pre-approved plans by the IRS): Pre-approved plans need to be submitted once every six years. Pre-approved defined contribution plans were recently approved and may be uti-

lized for restatements up through April 30, 2010. Pre-approved defined benefit plans will follow in about two years.

INDIVIDUALLY DESIGNED PLANS: These plans have a five-year staggered cycle beginning in 2006 depending on the last digit of the employer's taxpayer identification number. The IRS has created five cycles: A, B, C, D and E. Each cycle will create a 12-month period in which plan sponsors of individually designed plans may submit their plan documents to the IRS for approval. Prior to each cycle, the IRS announces on what issues plan sponsors may request a ruling.

Currently, Cycle C is underway (February 1, 2008 through January 31, 2009) for single plan sponsors that have a 3 or an 8 as the last digit of their taxpayer identification number or sponsors of Code Section 414(d) governmental plans.

Special rules apply to plan sponsors that want to change from an individually designed plan document to a pre-approved plan document or vice versa.

IRS Determination Letter

In order to receive a measure of assurance that a given plan is in full compliance, as it relates to the documents, a plan may be presented to the IRS to receive a "determination" as to its acceptability and qualification under current pension law. To receive a determination letter, the plan must be submitted to the IRS along with standard forms and supporting data.

Pre-approved plans, which meet the IRS's standards, are issued favorable opinion letters by the IRS. Adopting employers of pre-approved plans may generally rely on the opinion letters without applying for their own determination letter. Sponsors of pre-approved plans that have coverage or nondiscrimination issues or have made

modifications to the document will generally want to apply for a determination letter.

Plan Restatement Cost

The cost of restating a plan will vary, depending primarily on the type of plan. Some variables that may influence plan restatement cost are:

- Nature of plan design;
- Nature of plan sponsor demographics;
- Nature and number of contribution types;
- Type of plan document structure; and
- Preparation of IRS determination letter submission, if applicable.

Since no two plans or companies are exactly alike, an appropriate fee is generally determined through overall plan evaluation. Necessary expenses to restate the plan for IRS compliance may be paid from the plan assets if permitted by the plan document.

Determination Letter User Fees

The IRS charges a fee to review the plan and issue a determination letter. This fee is called a "user" fee and ranges from \$300 to \$1,800 depending upon the type of plan, the type of document being utilized and the scope of the request.

A Form 5307 (pre-approved plans) submission carries a user fee of \$300 to \$1,000. A Form 5300 (individually designed plans) has additional complexities and the user fees are between \$1,000 and \$1,800 for single retirement plan sponsors.

There is an exemption from the user fee for certain small employers who sponsor a plan that has at least one non-highly compensated employee and, for defined contribution plans, the plan was effective on or after January 2, 1997.

Pension Protection Act of 2006

President Bush signed the Pension Protection Act of 2006 (PPA) into law in August 2006. Some

have called this tax act the most sweeping reform of pension legislation since ERISA was enacted in 1974. Indeed it contained many adjustments to the rules affecting defined benefit and defined contribution plans including:

- Enhanced a number of the rules around the funding of defined benefit pension plans;
- Liberalized the rules around funding such that plan sponsors can contribute more heavily in positive economic years and build a “cushion,” keeping their plan solvent in more difficult times;
- Created clear rules around automatic enrollment in defined contribution plans;
- Mandated additional participant disclosures;
- Expanded hardship distributions to meet the financial needs of any person who is listed as the participant’s beneficiary under the plan;
- Provided greater access to professional advice about investing for retirement; and
- Made permanent the increased contribution and deduction limits passed by EGTRRA.

We are a number of years away from officially restating retirement plans for PPA. However, the IRS will likely mandate amendments to be adopted in the coming years for existing retirement plans to insure that the PPA rules are being followed ahead of the official restatement.

Conclusion

Sponsoring and maintaining a qualified retirement plan is a serious matter. So many individuals, participants and beneficiaries alike, eagerly look forward to the day when they will realize their hard earned benefits. Protecting these benefits is something to be taken seriously.

Ensuring the tax-favored status of those benefits is the fundamental principle upon which the restatement requirement is founded. We are committed to providing the support, attention and professional expertise needed throughout this restatement period to make it a positive experience for all.

This newsletter is intended to provide general information on matters of interest in the area of qualified retirement plans and is distributed with the understanding that the publisher and distributor are not rendering legal, tax or other professional advice. You should not act or rely on any information in this newsletter without first seeking the advice of a qualified tax advisor such as an attorney or CPA.

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