

IT'S TIME TO UPDATE QUALIFIED RETIREMENT PLANS

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NOVEMBER 6, 2009

Pension law, usually arcane and often dense, is front and center this fall. An 8-year-old law that many employers may have forgotten requires all qualified plans to now be updated, or restated, to conform to current law. For defined contribution plans that are pre-approved plans, that restatement deadline is April 30, 2010.

The Economic Growth and Tax Relief Reconciliation Act ("EGTRRA"), was signed into law in 2001, and mandated significant changes to retirement plans, including 401(k) plans and profit sharing plans.

EGTRRA changes include the addition of catch-up contributions, the increase in maximum contribution limits, an increase in elective deferral limits, faster vesting, and an increased compensation limit.

These changes may sound familiar. In fact, employers may be thinking that they already made these changes. That is correct.

EGTRRA changes became effective for plan years starting in 2002. These provisions should already have been added to an employer's plan from time to time, in the form of "good faith" amendments. These amendments, however, only brought plans into temporary compliance with EGTRRA. During that same time period, plan providers completely rewrote their plan documents and adoption agreements (the starting point for each employer plan) to comply with all of the elements of the new law, submitted their new versions to the IRS for review, and waited for IRS approval of their rewrites.

That process is now finished for pre-approved defined contribution plans - such as 401(k) plans and profit sharing plans. Restatements of defined benefit plans - pension plans that base their benefit payments on a formula of years worked and compensation in final years - are still in the pipeline. Employers must complete their EGTRRA restatements of pre-approved defined contribution plans by April 30, 2010.

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Employers that elect to adopt pre-approved plans will follow either a “volume submitter” or a “prototype” format. Although each version has its strengths and limitations, both versions have gone through an advance review by the IRS before being offered to employers. All pre-approved plans offer a limited set of choices for an employer’s plan design. Because of this restriction, however, an employer gains assurance that the plan will comply with IRS qualification requirements as adopted.

Another kind of plan, called an “individually designed plan”, is not standardized, cannot be pre-approved before its adoption and contains custom terms often drafted by the employer for special situations.

As part of the EGTRRA restatement process, the IRS dramatically revised their procedures and timeframes for amending qualified retirement plans. In the past, whenever a major revision to retirement plan law occurred, the IRS set a date by which all plans needed to scramble to comply with the changes. Under the new procedures, pre-approved plans adopted by employers will need to be restated every six years; April 30, 2010 is the first cycle’s deadline for defined contribution plans. Individually designed plans are on a five-year cycle. The restatement deadlines for those plans will be staggered, based on the last digit of the employer’s EIN. Going forward, as each new restatement cycle occurs, plan revisions that become legislatively required during the interim years will be incorporated into the next restatement.

What should employers do? Employers who have one or another version of a pre-approved plan should be in some stage of the process of restating their plan documents now. Your benefits attorney, third party administrator or other plan professional can assist in rewriting the plan’s adoption agreement, which will drive the substance of the updated plan.

It has probably been many years since the last wholesale review of an employer’s plan, so this is also a timely opportunity to confirm that the plan still meets an employer’s - and employees’ - needs and goals as intended. Perhaps small revisions have been put off over the past few years. Now, since the entire plan needs to be revised anyway, it is likely more efficient and cost-effective to consider all those changes now.

What if employers do not comply with these changes within the stated deadlines? The consequences are onerous. The IRS could disqualify the plan, thus stripping the plan of its favorable tax consequences: employer deductions for plan contributions would

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be lost, vested employee accounts would immediately become taxable and the trust holding the plan assets would become a taxable trust.

The good news, relatively speaking, is that the IRS administers comprehensive correction programs for failed retirement plan. One remedy for a plan that has fallen out of compliance is to submit the now-updated plan through the correction program, pay a sanction amount, and receive the IRS' blessing that the plan is back on track. However, the best strategy is to update now, while the restatement period is open. Even in a challenging economy, this is not the time to skimp on the maintenance and upkeep of a retirement plan.

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