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***The DC Plan Document
Restatement Window is Open***
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All preapproved defined contribution “volume submitter” and “prototype” plan documents must be restated in their entirety and properly adopted by the sponsoring employer(s) by April 30, 2016.¹ Defined contribution plans include profit sharing and 401(k) plans. Employers must timely and appropriately complete this process to avoid costly problems.

The Two Year Window

The two year window for adopting new preapproved defined contribution plan documents opened in Spring 2014 when the IRS issued “advisory letters” and “opinion letters” approving the new “PPA” restatements. The PPA generation restatement incorporates legally required document changes in response to the Pension Protection Act of 2006, along with subsequent legally required document changes such as those prompted by the Heroes Earnings Assistance and Relief Tax Act of 2008 (“HEART”) and the Worker, Retiree, and Employer Recovery Act of 2008 (“WRERA”). An employer’s prior adoption of the legally required stand alone PPA, HEART, and WRERA amendments will not fulfill the PPA restatement obligation.

Timely Adoption is Critical

Employers that do not timely adopt a PPA restatement will suffer a “qualification failure.” In this regard, employers should recognize that they are the plan sponsor and are responsible to ensure that fulfilling of legal requirements such as the timely adoption of a plan restatement falls on them; not their service providers.

¹ Preapproved plan documents are in contrast to “individually designed” plan documents. Individually designed plan documents must be restated (and submitted to the IRS for a determination letter) on a different schedule. The individually designed plan document schedule is not discussed in this Newsletter, nor is the two year window for preapproved defined benefit plan restatements (which is not currently open).

A qualification failure generally results in a plan's loss of its favored tax status under the Internal Revenue Code. Without getting into detail, this is obviously a negative for the sponsoring employer and the plan participants. Additionally, if not remedied properly and timely, a qualification failure may result in the IRS' imposition of significant monetary penalties on the employer. The timely update of plan documents is a priority for the IRS, and appears to be one of the top issues it examines in reviewing a plan's "internal controls."²

The failure to timely adopt "EGTRRA" restatements in 2010 was rampant. As a result, the IRS established a special correction method under its "EPCRS" correction program. This special correction method allowed employer plan sponsors who missed the EGTRRA restatement deadline to submit a streamlined "VCP" application and pay a special reduced fee under EPCRS in order to correct that particular qualification failure and avoid more significant "Audit CAP" sanctions. The IRS may implement a similar program with regard to the upcoming PPA restatement deadline; however, it would be preferable to avoid missing the deadline in the first place. This will avoid unnecessary expenses and logistical burdens. As such, it is important for employers to be cognizant of the April 30, 2016 deadline.

Proceeding Properly is Important

The PPA document restatement must be accomplished properly. The new plan document should be carefully completed, and its terms consistent with the existing plan provisions (unless some design changes are incorporated during the process, which will be acceptable in many cases). The restatement is also an opportune time to assess whether the plan is properly existing and operating in the first place (i.e., whether the plan was previously timely updated for changes in the law and/or whether it is achieving the employer's design objectives).

The following are some examples of issues for employers to consider during the restatement process:

- Do several business entities participate in the plan, and/or are there several business entities that are part of the "controlled group" or "affiliated service group?" If so, it is important to ensure that proper participating employer adoptions are in place and/or to ensure the desired exclusions of related employers are appropriately in place.
- If the plan is a "multiple employer" plan, the plan document must properly reflect that arrangement. Additionally, the plan must be appropriately operated in light of its multiple employer status. For example, there are new Form 5500 reporting requirements regarding multiple employer plans, and multiple employer plans must conduct separate discrimination testing.
- If the plan excludes certain groups of employees, such as part-time and/or temporary employees, this type of exclusion must be written in a legally permissible manner.

² Internal controls are an employer plan sponsor's processes and reviews aimed at identifying and preventing errors relative to a plan's operations and document updates. Whether a plan maintains adequate internal controls has been the focus of recent IRS initiatives. It has recently been reported that the administration is seeking an 18% increase in funding for IRS enforcement.

- Employers should exercise caution to ensure any preexisting stand alone amendments that are not reflected in the plan restatement are not superseded in the event there is a desire or need to retain the stand alone amendment.
- Employers should ensure the restated plan document properly reflects any plan mergers. In this regard, it is also imperative that the sponsoring employer retain merged plan documents (and confirm those plan documents were up to date prior to the merger).
- A properly worded Board of Directors' consent or resolution should, in most cases, be prepared and executed approving the plan document restatement. Whether or not this is required will vary depending on plan terms and a particular business entity's policies and procedures, but is always a good idea.
- The restated plan document should appropriately and legally reflect any special effective dates.
- The restated plan document should appropriately and legally reflect any special provisions particular to the plan; for example, exclusion of employees who work at Location X.
- There are constraints relative to amending a 401(k) "safe harbor" plan mid-year. Employers should be sure to exercise caution relative to a mid-year restatement's effect on a plan's safe harbor status; particularly if other changes are incorporated as part of the restatement process.

Determination Letter Submissions

The IRS does not provide individual "determination letters" to preapproved plan document providers; individual adopting employers must seek those on their own if they are desired.

With certain exceptions, employers utilizing a preapproved prototype plan document may no longer submit an application to the IRS for their own determination letter. However, employers utilizing a volume submitter plan document may still submit an application to the IRS for their own determination letter if changes have been made to the provider's specimen document (that is, if the generic provisions of the document that the provider has furnished are modified in some respects).³

An employer that wishes to obtain its own determination letter relative to its volume submitter plan must apply for such by April 30, 2016. Employers should exercise caution in submitting such applications to ensure that their plan is legally up to date and clean, and that the application is appropriately completed. Notably, there have been recent changes to the determination letter application process.

³ Too many changes of this sort could result in a volume submitter plan being deemed an individually designed plan.

Conclusion

If you sponsor a preapproved defined contribution plan (or if you desire to move from an individually designed document to a preapproved document), efforts should be undertaken to timely and properly complete that process. Please contact Jeff Mandell (jeff@erisalawgroup.com) or John C. Hughes (john@erisalawgroup.com) if we can be of assistance in addressing these important legal issues by preparing, reviewing, and/or submitting your plan document restatement.

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