

Action Required: New Retirement Plans for Businesses Required by April 30, 2010

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Businesses should worry if they do not have brand new retirement plan documents in place by or before April 30, 2010.

Why? Because the “EGTRRA Restatements” must be in place by then. What is an EGTRRA Restatement? It is a complete rewrite of the company’s qualified retirement plan document that incorporates into the body of the document all of the law changes made by EGTRRA (the Economic Growth and Tax Relief Reconciliation Act of 2001), as well as a laundry list of other law changes that have been made since 2001. Note that it is not enough to have adopted tack-on plan amendments from time-to-time since 2001 – the Internal Revenue Service is requiring complete restatements in order for plans to be assured that they retain their tax-qualified status. What is a qualified retirement plan? The category includes 401(k), profit sharing, employee stock ownership, cash balance and defined benefit plans, and is a retirement plan that enjoys favorable tax treatment, including current tax deductions of contributions to the plan, tax-deferred earnings on assets held by the plan, and tax-free rollovers into IRAs or other qualified plans.

If a private company uses an individually designed plan document (i.e. one that is not pre-approved by the IRS), this restatement should have already been done by now, unless the employer’s tax identification number ends in “5” or “0,” in which case the plan has until January 31, 2011 to complete this task. However, most employers use pre-approved documents for their plans. The most common pre-approved documents are “prototype” plans, which usually come in the form of a hefty master plan with an accompanying completed and signed checklist called an “adoption agreement.” The April 30, 2010 deadline for signing updated EGTRRA documents applies to plans that use prototype documents.

The other type of pre-approved document is a “volume submitter” plan. Typically a volume submitter document looks just like an individually designed plan, where the company’s plan is all contained in a single document that is customized to include only the company’s selected plan provisions. However, if the plan is a volume submitter plan, it was produced by using an approved provider’s template and is accompanied by the provider’s “advisory opinion” from the IRS that the plan is pre-approved. The April 30, 2010 deadline to restate the plans onto updated EGTRRA documents also applies to volume submitter documents.

One of the advantages of using a pre-approved document is that, in most cases, the plan sponsor can rely on the document provider’s IRS approval letter for assurance that the IRS considers that particular plan document to

contain all of the required provisions to date to be a qualified document. Thus, no individualized IRS determination letter needs to be obtained with respect to the company's own version of that plan. However, if the April 30, 2010 deadline is missed, the plan loses that reliance, and the plan will then be considered to be on an individually designed plan which does not have its own determination letter. The plan is then vulnerable to disqualification, with all of the attendant negative tax consequences. The IRS does offer voluntary correction programs to restore the plan's qualified status, but that can be an expensive process, particularly if the problems with the plan document are discovered in a tax audit.

Feel free to contact a McGlinchey benefits attorney if you want to make sure that you have met these deadlines and that your plan document is up to date.

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Kathy Conklin