This update is published by Ferenczy Benefits Law Center LLP to provide information about recent developments to our clients and friends. It is intended to be informational and does not constitute legal advice for any particular situation. It also may be considered to be "attorney advertising" under the rules of certain states.

It’s That Time Again: The DC Restatement Season

If you are the sponsor of a 401(k) or profit sharing plan, it is likely that you have been contacted by your document service provider with regard to the restatement of your plan. We would like to take this FlashPoint to discuss this process and help you avoid some of the major pitfalls of the restatement season.

Plan Documents: What’s All the Hoopla?

Both the Internal Revenue Code (Code) and the main governing law for employee benefit plans, the Employee Retirement Income Security Act (ERISA), require that retirement plans be in writing, so that participants understand what they are being promised. These rules have been interpreted, particularly by the IRS, as requiring that certain provisions of the law – often common to all retirement plans – be recited in the plan documents. When those legal provisions change, as happens often, plan documents need to be updated. Also, when plan sponsors decide to voluntarily change their plans, those changes normally must be reflected in the company’s plan document. The goal is that the plan document should reflect fully the terms by which it operates.

Periodic Amendments and Restatements

Generally, sponsor-initiated plan changes must take place more or less contemporaneously with their inclusion in the plan (you may have until the end of the plan year in which the change is effective in some situations). Legally required modifications, however, have more varied deadlines. To make sure that your plan is clearly updated and documented periodically, the IRS requires periodic restatements. The difference between an amendment and a restatement is that an amendment modifies only a portion of the plan; a restatement rewrites the entire document.

Several factors are relevant to determining when a plan must be restated. First, do you have a defined contribution (e.g., 401(k) or profit sharing plan) or a defined benefit (including a cash balance) plan? Second, did an attorney or other practitioner draft an individual document just for your plan (called an individually-designed plan), or did your document provider use a document with fill-in-the-blanks that is preapproved for its clients’ use (called, appropriately enough, a preapproved document)? (Note that, as things stand right now, all ESOPs, 403(b), and 457 plans are individually-designed plans. There is a preapproved plan program in the works for 403(b) plans (and, in the meantime, such plans do not need to be restated). 457 plans are not subject to the restatement requirements.)

Preapproved documents must be restated approximately every six years based on an IRS-mandated cycle. Defined benefit and defined contribution plans operate on different but overlapping cycles. Individually-designed plans (including ESOPs) are on a five-year cycle that is defined with reference to the plan sponsor’s federal tax employer identification number.

So, What’s Happening Now?

We are in the midst of the last two-year portion of the defined contribution (DC) restatement cycle for preapproved plans. The document updates for these plans must be completed by April 30, 2016.
If you are a plan sponsor, your eyes probably just rolled at me, as you are thinking, “Aw heck, we have more than a year to do that!” But, you need to remember that your document provider must go through this process for every single DC plan for which it provides services. Providers are hearing the clock tick down the time they have in which to do this like a 60 Minutes episode.

The Possible Potholes in the Process

There are many opportunities for inadvertent glitches in the restatement cycle. The fact that document providers are processing so many plans in such a short interval means that errors are bound to happen. Furthermore, the restatements will be prepared using brand new documents just approved by the IRS. The unfamiliarity of those who process the documents with the new language creates additional opportunities for mistakes. Finally, it is common for plan sponsors to contemplate changes in plan terms in connection with the restatements to “kill two birds with one stone,” and it is easy for these desired changes to be mis-documented or accidentally omitted in their entirety or for these modifications to raise separate issues that must be addressed.

Let’s face it: retirement plans are big, complex legal documents that are difficult for laypeople to read and understand. As a result, plan sponsors commonly are unable to identify documentation mistakes, and these errors go unnoticed until the plan is the subject of scrutiny – such as, in an IRS audit.

Unfortunately, the IRS enforces the Code’s requirement that a plan be in writing to mean that the plan must operate according to its terms. As a result, when a documentation error causes a deviation between what the plan says and how it is administered, this is treated by the IRS as a critical violation … often leading to sizable corrective contributions coupled with sanctions or penalties to keep the plan tax-qualified. In fact, these problems can lead to IRS threats of disqualification which, if not resolved on a more favorable basis, could result in hundreds of thousands of dollars of taxes, penalties, and interest.

How Can You Prevent or Address These Errors?

The best way to find these mistakes before they become hard to correct is to have a second pair of eyes – such as those belonging to one of our attorneys – review and compare the original and restated documents, as well as requested plan changes, to ensure that the paperwork matches your intentions. While this will increase the cost to you of this documentation, the savings to you over what could happen if errors are finalized in your signed document are enormous.

There are other benefits to allowing us to do this type of review. First, it gives us an opportunity to notice issues that may not have been identified when plan amendments were originally contemplated. For example, instituting a change to your plan may produce transition issues that must be resolved. Second, it gives us a chance to look at the existing documentation to make sure that it is complete and includes all legally required changes. The first thing the IRS looks at when it audits a plan is whether all required amendments have been timely adopted. Finally, it allows us to think about the details of your plan, and we might identify improvements that have not yet been considered.

By the way, if your plan document permits plan assets to be used to pay expenses, fees related to plan restatements may be paid by the plan.

Can We Help?

If you are interested in having us coordinate a review of your proposed restatement with your document provider, call either Ilene or Gina.
Changes at the Firm

We are very pleased to announce that another associate attorney has joined our Firm. Alison Cohen, who most recently was a compliance specialist at Transamerica Retirement Solutions, has joined the Firm as a senior associate. Alison brings with her more than 15 years of technical plan experience, as well as considerable speaking and teaching qualifications. We are very pleased to welcome her to the Firm. To contact Alison, her email address is acohen@ferenczylaw.com and her direct dial is 678-399-6604.

Don’t Forget the Southern Retirement Plan Conference: April 16-17, Atlanta, GA

We are joining again this year with SunGard to bring you the Southern Retirement Plan Conference. This year, the conference will be held at the Century Center Marriott, near the Clairmont Road exit off the I-85 Freeway. Your favorite speakers from both our Firm and SunGard will be there. This two-day conference is a great opportunity for you and members of your organization to get up-to-date on all retirement plan changes, get your ethics credits for your ASPPA, NIPA, or ERPA designations, and congregate with colleagues from around the South. Please join us for this annual event (which includes the Thursday night barbecue at Ilene’s home).

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