



The Nonamender's Lament: But, I Swear I Signed it!

By Alison J. Cohen

Still living in the land of virtual meetings, Paul and Ira Buchman, owners of Buchman's Sporting Goods, log onto the annual meeting with their financial advisor, Murray, and Third Party Administrator. Jamie, from Stemple Pension Services, reviews the action items coming up with the group. In addition to the census data needed for the 2020 testing, Jamie tells Paul and Ira that the 401(k) Plan will need to be restated this year for the Third Cycle Restatement period. She also casually mentions that the document Stemple has on file from the PPA restatement isn't signed or dated and asks if the boys can check their files. "I'm sure it was signed and dated. If you sent it to us, we would have done that," Ira insists. Paul leaves the screen for a moment, drawers are heard opening, papers go flying, and after a few minutes, he returns with the document in hand. "See? Here it is. And if I go to the signature page..." There is an awkward pause and Paul's face is crestfallen. "It's not signed. How could it not be signed? Ira?" "What Ira? You're the one with the document, Paul!" Jamie listens to the men bicker, happy that they haven't blamed her yet.

What is a Nonamender Failure?

Put simply, if a plan sponsor fails to timely adopt any mandatory restatement or interim amendment, there is a disqualifying event. Adoption not only means that the signatures are on the document, but that the signatures are dated in a timely manner. It is painfully common to see signed documents with no date, but this would also constitute a nonamender failure. If the document isn't signed in all the correct places, that can also constitute a nonamender failure. For example, let's say Paul signed as an individual Trustee, but no one signed on behalf of the Plan Sponsor; that would still be a nonamender failure.

Can't We Just Sign Now and Backdate the Document?

No. That's tax fraud and you can get into very big trouble doing that. I'm going to pretend you didn't even ask. La la la la. My fingers are in my ears. I didn't hear you.

How Do You Fix a Nonamender Failure?

Here is where there is both good news and bad news. The good news is that EPCRS (currently embodied in Revenue Procedure 2019-19) provides for the ability to correct a nonamender failure through self-correction. [See, EPCRS Section 4.05(2)(c)] This was a wonderful new addition in 2019. The catch is that such a failure is considered to be a significant failure, which means that we have to correct by not later than the last day of the second plan year following the plan year for which the failure occurred [EPCRS Section 9.02].

Let's see how this is put into practice. Let's say Buchman Sporting Goods sponsored a Defined Benefit Plan. The deadline for restating Defined Benefit Plans was July 31, 2020. The Buchmans missed that deadline. Based on the above timing, the year of failure would be 2020. They would have until the end of 2022 to self-correct the adoption of the mandatory restatement. There are a few teeny, tiny catches. To qualify for correction under self-correction, the plan would have to be either pre-approved or have a favorable determination letter. [EPCRS Section 4.03] The Plan Sponsor is also required to have established practices and procedures (formal or informal) reasonably designed to promote compliance with the Code (Section 4.04). If they can meet these requirements, the Buchmans' Defined Benefit Plan can be self-corrected. Huzzah!

Here's the bad news – the Buchmans have a 401(k) Plan. The PPA restatement signature deadline was in 2016. That means that, before Rev. Proc. 2019-19 even came out, the self-correction window expired. To correct the PPA restatement (or any earlier missing restatement or interim amendment), the only solution that is left is to file with the Internal Revenue Service's Voluntary Correction Program (VCP). Based on the fees published in Rev. Proc. 2021-04, the user fees remain the same as in 2020:

Plan Assets	User Fee
<\$500,000	\$1,500
\$500,001 – \$10m	\$3,000
\$10m+	\$3,500

The nice part about the nonamender VCP is that the IRS is likely to fast-track such a filing and the Compliance Statement could be received in just a few weeks or months.

What's a TPA Like Jamie Supposed to Do?

Fortunately, neither Paul nor Ira blamed Jamie for not noticing that the PPA restatement was never signed, but Murray wasn't so nice. He demanded that Jamie research all of his clients with Stemple Pension Services to determine whether they are nonamenders, too. With the Third Cycle restatements, this is going to become a frequent issue in the pension world. Do not think that you can bury this. That would be an ethics violation. Update your procedures to review the status of the PPA restatement as part of the Third Cycle process. If an unsigned document is found, create a standard set of talking points and an easy-to-understand "next steps" email for your clients. Of all the possible failures, a nonamender failure is one of the easiest to correct.

Even better, plan for success in the Third Cycle restatements by making sure your procedures include obtaining a timely signed and dated document back from your clients. That way, you will

know within the self-correction period whether there is a nonamender problem, and can protect your clients from finding out that they have a problem when it is less convenient, like when the IRS audits.



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