

Practice Update

Time Sensitive Updates for Employer-Sponsored Retirement Plans

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There are two time sensitive updates affecting employer sponsored retirement plans that companies should be aware of and review to determine whether action is needed. The first update applies to employers that sponsor a 401(k) plan or other type of defined contribution retirement plan using a pre-approved plan document, and the second addresses changes that the IRS recently made to its Employee Plans Compliance Resolution System (EPCRS).

Update #1: Plan Restatement Deadline Faces Defined Contribution Plan Sponsors

Under current law, employers that sponsor a 401(k) plan or other type of defined contribution retirement plan using a pre-approved plan document are required to restate their plan document every six years to incorporate changes to the law since the prior restatement. The restatement period for employers that use a pre-approved (i.e. prototype or volume submitter) plan document is currently underway, and is being called the “PPA Restatement,” since the majority of required changes originate from the Pension Protection Act of 2006 (PPA).

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Employers that use a pre-approved plan document are required to adopt their restated plan document **no later than April 30, 2016**, or else will face costly correction fees and possible plan disqualification.

As a preliminary matter, the sponsors of pre-approved plan documents, such as third-party administrators, were required to submit their form of restated plan document to the IRS for approval. Once the IRS determined that the form of restated plan document met the requirements for tax qualification, an opinion letter (for prototype plans) or advisory letter (for volume submitter plans) was issued by the IRS. Most sponsors of pre-approved plan documents received their opinion letters or advisory letters signifying IRS approval in April 2014, and therefore the restated plan document packages are slowly making their way to employers for adoption. The restated plan document package that employers are starting to receive may also include a revised version of the Summary Plan Description, enrollment forms or other forms, and participant notices.

Many service providers are requiring that employers review, sign, and return the restated pre-approved plan documents in the Fall 2015, during what is typically a very busy time for HR/Benefits professionals due to benefits open enrollment season.

Suggested Next Steps

We suggest the following tasks be undertaken by employers that offer any type of pre-approved defined contribution retirement plan as soon as possible in 2015:

- Ask for the updated plan document, SPD and other collateral material from the service provider.
- Confirm the selection of the plan's third party administrator/recordkeeper, and initiate any contract negotiations.

- Confirm that the terms of the plan document reflect actual plan administration.
- Identify provisions that have changed and determine whether all changes are acceptable from a business perspective.
- Provide plan and contract drafts to qualified employee benefits/ERISA counsel for a review as to whether all changes are acceptable from a legal perspective.
- Respond to service provider by stated deadline in Fall 2015.
- By April 30, 2016, officially adopt restated plans and update all other materials.

Update #2: IRS Correction Program is Simplified

The IRS currently offers an Employee Plans Compliance Resolution System (EPCRS) for retirement plan sponsors seeking to correct plan document and operational errors that otherwise might result in costly fines or jeopardize a plan's tax-qualified status. EPCRS consists of three components: the self-correction program (SCP), the voluntary correction program (VCP), and the Audit Cap program.

The IRS recently issued two pieces of guidance updating the EPCRS, making it easier (and in some cases, less expensive) for plan sponsors to correct common plan failures. It is important for retirement plan sponsors that are aware of specific plan errors to take advantage of these enhanced correction opportunities.

Revenue Procedure 2015-27

Historically, EPCRS required that plan sponsors make a reasonable effort to recover overpayments made to participants by the retirement plan. Revenue Procedure 2015-27 changes the overpayment correction method. Employers now have flexibility to determine if correction for an

overpayment should be made by recouping costs from affected participants, or rather by other means, including a contribution to the plan by the employer. This change is extremely helpful for situations in which an error occurred over a long period of time, or if repayment would cause financial difficulty for the affected participants.

Revenue Procedure 2015-27 also clarifies that plan sponsors do not need to file a determination letter application in connection with their VCP submission if: (i) the plan sponsor is correcting an operational error with a corrective amendment to a volume submitter or prototype plan; or (ii) more than twelve months have passed since all plan assets have been distributed in connection with a plan termination.

Some additional changes to EPCRS made by Revenue Procedure 2015-27 include reduced VCP compliance fees for certain plan loan failures and minimum distributions errors, and revised references to certain updated forms.

Revenue Procedure 2015-28

Several days after the release of Revenue Procedure 2015-27, the IRS issued another update to EPCRS. Revenue Procedure 2015-28 contains new safe harbor methods for correcting elective deferral failures within retirement plans. The current correction method for failures involving employee deferral elections is for the employer to make a qualified nonelective contribution (QNEC) to the affected participants, generally equal to the sum of 50% of the amount the affected participant would have deferred from pay had the elective deferrals been properly implemented, plus 100% of the matching contributions the affected participant would have received, plus earnings.

The new safe harbors are intended to address employer concerns that the current correction method provides participants with a windfall, in particular, in plans with auto-enrollment features, by

reducing, and in some cases eliminating the need to make a QNEC contribution for failures involving employee deferral elections.

Auto-Enrollment Failure: The first new safe harbor provides that, through 2020, a QNEC will not be required to correct an auto-enrollment failure concerning an employee elective deferral in a § 401(k) plan or § 403(b) plan if the plan sponsor corrects the issue before the first paycheck issued on or after: (i) 9½ months after the end of the year in which the failure first occurred, or (ii) if earlier, on or after the last day of the month after the month in which the affected employee notifies the plan sponsor of the failure.

Other Elective Deferral Failures: The new guidance also includes a safe harbor for elective deferrals failures that are unrelated to auto-enrollment. Correction methods under this safe harbor differ depending on the length of the failure. The correction methods range from completely eliminating the need for the plan sponsor to make a QNEC if the plan sponsor identifies and corrects the deferral failure within three months of the date it first occurred, to allowing the plan sponsor to make a reduced QNEC equal to 25% of the missed deferrals, instead of the 50% QNEC that is normally required, if the plan sponsor identifies and corrects the failure during the two years following the plan year in which the failure first occurred.

Under both new safe-harbor correction methods, participants must still receive the matching contributions they would have received had the elective deferral failures not occurred, plus earnings. Plan sponsors using either one of the two new safe harbors will also need to provide employees with notice of the failure no later than 45 days after the date on which correct deferrals begin.

The guidance in Revenue Procedure 2015-28 is effective immediately, and although the effective date for the guidance in Revenue Procedure 2015-27

is July 1, 2015, plan sponsors are also free to begin implementing the revisions and updates from that guidance immediately.

Please contact any member of Akerman's Employee Benefits Practice Group with any questions about the PPA Restatement period, or the updates to the EPCRS program.

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