

Employee Benefits & Executive Compensation ADVISORY

February 23, 2010

Employers Beware: April 30, 2010, Deadline to Adopt Restated Prototype Plan Documents

April 30, 2010, is the deadline for employers with pre-approved defined contribution Master & Prototype plans or Volume Submitter plans (collectively referred to as “prototype plans” in this advisory) to adopt an EGTRRA-approved plan document. Failure to meet this deadline will result in significant adverse tax consequences to the retirement plan and to the plan’s participants.

What Is a Prototype Plan?

Prototype plans are plans that have been pre-approved by the IRS (the pre-approval is known as an opinion letter) before being marketed to employers, usually by a mutual fund, insurance company, bank or other financial institution. A prototype plan generally consists of two separate documents: a basic plan document containing the general plan provisions and an adoption agreement where employers can select individual options applicable to their plan.

What Do I Need to Do by April 30, 2010?

If you are an employer with a prototype plan, you must adopt an EGTRRA-restated plan document no later than April 30, 2010. Your prototype plan should have adopted EGTRRA good-faith amendments previously, but now must be restated by April 30, 2010, to incorporate the EGTRRA good-faith amendments and other plan qualification requirements into a single plan document. You should pay careful attention to all of your retirement plans, including plans sponsored by subsidiaries or by acquired companies to determine whether you have any plans subject to the April 30, 2010, deadline.

Is There Anything Else I Have to Do?

April 30, 2010, is also the deadline for filing your prototype plan with the IRS to obtain an individual determination letter. This advisory discusses several advantages of obtaining an individual determination letter. This advisory also discusses some errors or compliance issues that often affect prototype plans and steps you can take to help your prototype plan operate smoothly.

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Employers Beware: April 30, 2010, Deadline to Submit Your Prototype Plan to the IRS for an Individual Determination Letter

Prototype plans receive an opinion letter from the IRS as evidence that the form of the prototype plan document has been pre-approved by the IRS. While the opinion letter is issued to the institution marketing the prototype plan, employers may also (but are not required to) file their prototype plan with the IRS to obtain their own letter, known as a determination letter. This part of the advisory discusses some possible advantages of obtaining an individual determination letter.

Do I Need a Determination Letter?

Although a determination letter is not required, employers may, for a number of reasons, want to obtain a determination letter covering their plan. An individual determination letter:

- provides the ability to get Form 7805(b) relief later (this is relief from retroactive plan disqualification);
- provides relatively inexpensive IRS approval of all provisions of the prototype plan, including the employer's individual selection of options in the adoption agreement;
- facilitates plan audits—the IRS will generally not re-examine the terms of a plan with a current determination letter;
- facilitates transfers and rollovers—generally, the receiving plan or IRA will require proof that the distributing plan is tax qualified;
- facilitates ongoing compliance with the Internal Revenue Code—the determination letter submission process may reveal deficiencies in the plan's terms that the employer will be able to correct at a relatively low cost;
- simplifies future recordkeeping; and
- provides added protection for individual employees under the bankruptcy law to protect their retirement benefits from creditors.

What Do I Need to Do by April 30, 2010?

The deadline for filing pre-approved EGTRRA restatements of defined contribution plans is April 30, 2010. Submitting the plan by the filing deadline preserves the employer's right to make any retroactive amendments to the plan that the IRS requires to ensure the plan satisfies the qualification requirements. The determination letter filing process includes advance notice to participants and requires completion of additional forms. If you are planning to file for a determination letter, you should begin soon to ensure adequate time to meet the April 30, 2010, deadline.

Employers Beware: Keep Your Prototype Plan Practically Perfect Instead of Persistently Problematic

Through our experience advising clients who have prototype plans, we have noticed several common issues that, if left undiscovered, can cause significant plan correction issues in the future. Since it is generally much easier to avoid plan errors than fix them, below are a few of the most common problems we have seen in prototype plans. Of course, some of these problems are not unique to prototype plans, and occur frequently in individually designed plans as well. However, in our experience, they tend to occur most frequently in prototype plans that are placed on autopilot—where employers expect their prototype plan to basically run itself.

Common Problems Found in Prototype Plans:

- The employer does not realize that the plan document covers employees of sister companies or a parent company that are not intended to be covered by the plan.
- The plan document covers categories of employees that are intended and believed by the employer to be non-benefits eligible, such as summer interns or part-time workers.
- Required plan amendments are not timely adopted or executed.
- Adoption agreements and plan amendments are completed incorrectly (e.g., the wrong box is selected based on previous plan documents).
- Summary Plan Descriptions or Summary of Material Modifications don't reflect the correct plan terms.
- Administration manuals or operating procedures used by the plan's recordkeeper do not reflect the plan documents or employer's intent.
- There are problems with discrimination testing due to incorrect or incomplete employee census data.
- Participant communication documents are distributed without legal counsel review.
- There is a lack of consistent ERISA fiduciary procedures.

Prototype plans that are “practically perfect” tend to have the employer, recordkeeper, investment manager, legal counsel and other outside advisors working closely together to ensure consistent plan administration and operation.

Please do not hesitate to contact your Alston & Bird attorney for assistance with reviewing your prototype plan documents and administration procedures—to help keep your plan “practically perfect.”

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