

Qualified Plan News

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Helpful Web Links

Department of Labor
www.dol.gov/

Taking the Mystery Out of
Retirement Planning
www.dol.gov/ebsa/publications/nearretirement.html

Internal Revenue Service
www.irs.gov/

Timely Adoption of Amendments is a Plan Qualification Requirement

QPN Highlights

Action Required: Employers should work with their document provider to ensure their plan document is timely amended for all required, interim and discretionary amendments.

- Failure to timely amend is a violation of plan qualification requirements.
- IRS guidance defines cyclical Remedial Amendment Period (RAP) and interim/discretionary amendment deadlines.
- EGTRRA and certain other required amendments must be adopted over the next few years.
- IRS' VCP program provides a means to correct a failure to amend.

From time to time qualified plans are required to be amended as a result of statutory changes, regulatory changes or other related guidance ("required amendments"). In addition, the employer may choose to amend the plan for provisions that are optional under statutory or regulatory changes or in various other ways as provided for in the plan document (e.g., eligibility requirements, contribution limits, profit sharing formula, etc.), ("discretionary amendments"). Currently all qualified plans must be restated for the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) and certain

required amendments must be adopted in 2009, 2010 and 2011. If a plan is not timely amended the employer must correct this failure.

Consequences of Failure to Timely Amend – Failure to adopt a required amendment in a timely manner results in a plan document failure. That is, the absence of a plan provision covering a new qualification requirement causes the plan to violate the requirements of a qualified plan under Internal Revenue Code Section 401(a). Failure to timely amend the plan for an amendment that is integral to a change in qualification requirements, or a discretionary change that is implemented, results in a disqualification failure that is operational in nature. That is, the plan is not being operated in accordance with the provisions of the plan document. **To avoid a failure to timely amend, plan sponsors must know when their plans must be amended for required and discretionary amendments.**

IRS Sets Staggered Remedial Amendment Period - During 2005, the IRS released Revenue Procedure 2005-66, which was later superseded by Revenue Procedure 2007-44 (http://www.irs.gov/irb/2007-28_IRB/ar12.html). The purpose of the new procedure is to implement a new remedial amendment period (RAP), and



related determination letter filing process that provides a more even workflow for the IRS. The RAP is the period of time the employer has to retroactively amend their plan document for legislatively required changes and restatements that became effective in prior years. To accomplish this, the timing of all amendments, restatements and determination letter applications by plan sponsors is to be based on a specific recurring cycle. Pre-Approved Plans (i.e., prototypes and volume submitter plans) are all on the same 6-year cycle (see Part IV of 2007-44). Individually Designed Plans (IDPs) are placed into 5 groups based on the plan's Employer Identification Number (EIN) and each group has a different 5-year cycle (see Part III of 2007-44).

Some changes that occur during the RAP cycles may be required to be adopted during the RAP and then rolled into an overall restatement of the plan by the end of the RAP. These are either Interim Amendments or Discretionary Amendments.

Interim amendments – These are amendments covering a disqualifying provision that is a required change as a result of new legislation, regulatory changes or other related guidance that occurs during the RAP. **Unless other wise directed, the deadline for adopting interim amendments is the later of:**

- the due date (including extensions) for filing the employer's tax return for the year in which the applicable RAP began, or
- the last day of the plan year in which the RAP began.

Discretionary amendments – These are generally any amendment that is not an interim amendment and is made at the discretion of the employer. **The deadline for adopting an amendment of this type, for both pre-approved plans and IDPs, is the last day of the plan year in which the amendment becomes effective.**

Current Amendment Deadlines – The following chart lists the amendments that must be adopted by qualified defined contribution plans over the next few years.

Amendment	Deadline for Adoption
EGTRRA Restatement	See Revenue Procedure 2007-44 (link provided above)*
Pension Protection Act of 2006	Last day of 2009 plan year
Heroes Earnings Assistance and Relief Tax Act of 2008	Last day of 2010 plan year (2012 for Government plans)
Waiver of the 2009 Required Minimum Distribution	Last day of 2011 plan year (2012 for Government plans)
Discretionary Amendments	Last day of plan year in which the amendment was effective

*Note that based on Section 9 of Revenue Procedures 2007-44 the RAP for the EGTRRA restatement for IDPs in groups A, B and C has already ended. Based on Section 16 of 2007-44, in its discretion the IRS has announced April 30, 2010 as the deadline for pre-approved plans (i.e., prototypes and volume submitters).

Correction of a Failure to Amend - When a failure to timely amend is discovered and the missing amendment is adopted, the qualification failure is corrected only for the year the amendment is adopted and the succeeding years (i.e., prospectively only). It does not correct the failure for the period of time for which the amendment should have been adopted, but was not. Those years continue to be exposed to possible disqualification sanctions. To correct those years the employer may turn to the Employee Plans Compliance Resolution System (EPCRS).

EPCRS and VCP - EPCRS is an Internal Revenue Service (IRS) program that encourages employers to find and correct many different types of errors and is described in IRS Revenue Procedure 2008-50 (http://www.irs.gov/irb/2008-35_IRB/ar10.html). The correction methods must be based on the principles and guidance provided by the program. Plan amendment failures may only be corrected by submitting a special filing (and related IRS User Fee) to the IRS for consideration under a subset of

EPCRS called the Voluntary Correction Program (VCP). The VCP portion of the program provides a sample filing including related forms and specific instructions for completing it. To assist employers with the filing the IRS has posted fill-in documents (in Adobe Acrobat format), on the [Correcting Plan Errors](#) web page.

IRS user fee relief provided for certain late amenders - The IRS User Fee for VCP is generally based on the number of participants in the plan as Described in Section 12 of Revenue Procedure 2008-50 (link provided above). However, if the only error reported in the VCP submission is a failure to timely amend for a disqualifying plan provision, the user fee is reduced by 50% if it is submitted within a one-year period following the expiration of the plan's RAP for complying with such changes. Notwithstanding the above, the compliance fee for a submission that contains only a failure to timely adopt interim amendments or amendments required to implement optional law changes that may be implemented at the employer's discretion is \$375, no matter how many participants are in the plan. In addition, a streamlined VCP application procedure is provided for these amendment failures. However, this type of amendment failure must be corrected within the applicable RAP cycle. If it is corrected after the applicable RAP the User Fee schedule based on participant count will apply, including the 50% reduction noted above. The IRS provides additional guidance for nonamenders regarding the VCP at <http://www.irs.gov/retirement/article/0,,id=205524,00.html>.

Plans that may file under VCP – Eligibility for VCP requires only that the plan not be under examination. The definition of Under Examination may be found in Section 5 of Revenue Procedure 2008-50 (link provided above).

Ongoing review of the plan document, knowledge of future amendments and the time period for adopting such amendments will help to prevent an amendment failure. However, if an amendment failure does occur, the VCP program provides specific direction from the IRS for correcting such

failures. Since failure to timely amend is a plan qualification issue, we suggest that an employer in this situation discuss the error and the correction process with their plan attorney before proceeding.

IRS Circular 230 Disclosure

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