

## Retirement Plan Restatement (and Plan Document Basics)

### Tulsa Employee Benefits Group

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### Topics

- What is a retirement plan restatement?
- What do the terms “individually designed”, “prototype” and “volume submitter” mean?
- What are the current options for getting IRS approval of a retirement plan document?
- When should my plan be amended and how do I know what’s required?
- What are some common plan document issues?

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**The comments in these slides generally relate to single employer qualified plans that are not governmental plans and are not 403(b) plans.**

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## Topics

**What is a retirement plan restatement?**

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**What do the terms “individually designed”, “prototype” and “volume submitter” mean?**

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- Individually Designed Plans
  - Do not have IRS pre-approval
  - Often used by larger employers
  - Accommodate more complex plan designs and/or administrative provisions
  - Have less access to IRS approval than in prior years

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## Types of Plan Documents



- Pre-Approved Plans
  - Have been submitted to the IRS prior to use by employers
  - Six year cycles for restating documents
  - Use adoption agreement/basic plan document format
  - Employers that use a pre-approved plan without significant modifications can rely on IRS approval obtained by document vendor

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## Types of Plan Documents



- Types of Pre-Approved Plans
  - Current
    - Master and Prototype (Standardized and Non-Standardized)
    - Volume Submitter
  - Future
    - Standardized Pre-Approved
    - Non-Standardized Pre-Approved

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## Types of Plan Documents



- Future Types of Pre-Approved Plans
  - Standardized Pre-Approved
    - Fewer design choices
    - No modifications
    - Reliance on provider's opinion letter
  - Non-Standardized Pre-Approved
    - Modifications will cause loss of reliance but employer can file for its own determination letter if modifications are minor

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## Current Approval Cycles of Pre-Approved Plans



- Defined Contribution Plans – Cycle 3
  - Vendors were required to submit their updated plans by 12/31/18; not approved yet
  - Employers will have 2 years after opinion letters are issued to restate their plans
  - ESOPs included in this cycle
- Defined Benefit Plans – Cycle 2 (PPA)
  - Employers have until April 30, 2020 to restate their plans

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- 403(b) Plans
  - A pre-approved plan program is now available for 403(b) plans (this is new)
  - Relief for prior document failures is available if a pre-approved plan document is adopted by March 31, 2020

**What are the current options for getting IRS approval of a retirement plan document?**

## Types of Letters



- Determination letter: Obtained by an employer with respect to an individually designed plan maintained by that employer
- Opinion/advisory letter: Obtained by prototype/volume submitter document providers with respect to the form of the documents to be provided to employer customers
  - Prospectively, opinion letters will be issued with respect to pre-approved plans

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## Benefits of a Favorable Letter



- Employer has reliance that – if the plan is operated according to the terms of a plan document with a favorable determination, opinion or advisory letter – the plan will satisfy the law in operation and remain tax-qualified
- Certain IRS programs for self-correcting errors are available only to plans with favorable letters
- Ability to retroactively amend non-compliant provisions during review process
- Facilitates M&A due diligence and review by plan auditors

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## Determination Letters



IRS Publication 794 regarding the impact of a determination letter for an individually designed plan:

“A favorable determination letter expresses the IRS opinion on the form of the plan document. However, to be a qualified plan under Code Section 401(a) entitled to favorable tax treatment, a plan must satisfy, in both form and operation, the requirements of Code Section 401(a), including nondiscrimination and coverage.”

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## Determination Letters



- For individually designed plans, determination letters are currently only available for:
  - A plan seeking an initial determination letter
  - A terminating plan
  - A statutory hybrid plan (DB plans that express the accrued benefit in a manner similar to DC plan), only from 9/1/19 to 8/31/20
  - A plan that results from the merger of two or more plans into a single individually designed plan (plan merger and DL application must occur within certain time periods)

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## Determination Letters



- For individually designed plans, existing determination letters are still good for provisions that are not amended or affected by law changes. Thus, it is important to maintain a clear record of provisions that have been changed.

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## Determination Letters



- Employers that utilize pre-approved plans without modification can rely on the opinion or advisory letter issued to the document provider
- An employer that makes “limited modifications” to a volume submitter plan may submit the plan to the IRS on Form 5307 for a determination letter

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## When should my plan be amended and how do I know what's required?

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### Required Amendments List

- For individually designed plans, the IRS publishes a “Required Amendments List” each year (beginning in 2016), which identifies changes in qualification requirements that require an amendment to certain types of plans
- The amendment deadline for an item on the Required Amendments List is generally the end of the second calendar year following the year in which the list is issued
- <https://www.irs.gov/retirement-plans/required-amendments-list>

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## Required Amendments List

Year	Required Amendments	General Plan Amendment Deadline
2016	<ul style="list-style-type: none"> <li>Collectively-bargained defined benefit plans: Restrictions on accelerated distributions from underfunded single-employer plans in employer bankruptcy under § 436 (may require an amendment)</li> </ul>	12/31/2018
2017	<ul style="list-style-type: none"> <li>Final regulations regarding cash balance/hybrid plans (regulations regarding market rate of return and certain other requirements)</li> <li>Benefit restrictions for certain defined benefit plans that are eligible cooperative plans or eligible charity plans</li> <li>Final regulations regarding partial annuity distribution options for defined benefit pension plans (may require an amendment)</li> </ul>	12/31/2019
2018	None	12/31/2020

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## Operational Compliance List

- The IRS now publishes an “Operational Compliance List” which identifies changes in qualification requirements during a calendar year
- Intended to help plan sponsors and practitioners achieve operational compliance – even though amendments may not yet be required
- The IRS caveats that this list is not comprehensive
- Only available on IRS website:  
<https://www.irs.gov/retirement-plans/operational-compliance-list>

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## Operational Compliance List

Year	Changes in Qualification Requirements
2019	<ul style="list-style-type: none"> <li>• Changes Relating to Hardship Distributions (Bipartisan Budget Act of 2018 and proposed hardship withdrawal regulations)</li> <li>• Relief for Victims of Hurricanes Florence and Michael</li> <li>• Extension of temporary nondiscrim relief for closed DB plans</li> </ul>
2018	<ul style="list-style-type: none"> <li>• Final QNEC and QMAC Regulations (permit forfeitures to be used to fund QNECs and QMACs)</li> <li>• Relief for California Wildfires</li> <li>• Extension of temporary nondiscrim relief for closed DB plans</li> <li>• Extended rollover periods for certain amounts (qualified plan loan offset amounts and refunds of improper tax levies)</li> <li>• Modification of deduction for personal casualty losses (impacts hardship distributions)</li> </ul>

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## Operational Compliance List

Year	Changes in Qualification Requirements
2017	<ul style="list-style-type: none"> <li>• Relief for 2016 disaster areas</li> <li>• Relief for plans that make loans and hardship distributions to victims of Hurricanes Harvey, Irma, and Maria and of the California wildfires</li> <li>• New “qualified hurricane distributions” and increased plan loan limits permitted for victims of Hurricanes Harvey, Irma, and Maria</li> <li>• Proposed regs regarding QNECs and QMACs in DC plans</li> <li>• Extension of temporary nondiscrim relief for closed DB plans</li> <li>• Final regulations regarding partial annuity distribution options for defined benefit pension plans</li> <li>• Final regulations regarding cash balance/hybrid plans</li> <li>• Application of benefit restrictions for certain defined benefit plans (eligible cooperative plans or eligible charity plans)</li> </ul>

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## Discretionary Amendments

- For individually designed plans, discretionary amendments generally must be adopted by the last day of the plan year in which they become effective
- Need to consider participant and vendor communication even if amendment not executed until end of year

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## Pre-Approved Plans

- Though pre-approved plans are restated every 6 years, “interim amendments” must be signed to reflect changes in the law and discretionary amendments
- For law changes, interim amendments generally must be adopted by the tax return due date (including extensions)
- For discretionary changes, amendments must be adopted by the last day of the plan year in which the change becomes effective

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## What are some common plan document issues?

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### Common Plan Document Issues

- Confusion regarding responsibility for plan document maintenance
- Inaccurate conversion from one pre-approved plan to another
- When converting to or changing pre-approved documents, be aware of loss of unique plan design and fiduciary/committee provisions
- Without periodic restatement process for individually designed plans, it is possible that plan sponsors may miss required amendments

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## Common Plan Document Issues



- Divergence between plan document and vendor's administrative procedures
- Failure to communicate desired or implemented changes to vendor
- Failure to timely execute discretionary amendments

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## Common Plan Document Issues



- Incorrect definition of plan compensation
  - Mistaken inclusion or exclusion of compensation items, such as bonuses or group term life imputed income
  - Amended/restated plan documents do not incorporate unique compensation definition in prior document
  - Use of safe harbor definitions incorporate unintended compensation items, such as equity compensation and taxable non-cash fringe benefits (review those payroll codes)

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## Amendment Example: Hardship Distribution Changes

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### Hardship Distribution Changes

- Bipartisan Budget Act of 2018 (2/9/18)
  - IRS directed to modify regulations to delete 6-month suspension
  - QNECs, QMACs available for hardships
  - No requirement to take a loan

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## Hardship Distribution Changes



- IRS Proposed Regulations (11/14/18)
  - Clarified that maintaining 6-month suspension was optional for 2019, but elimination required for 2020 and beyond
  - Clarified that elimination of plan loan requirement was optional beginning in 2019
  - Clarified that expansion of available sources for withdrawals – plus availability of earnings for withdrawal – was optional beginning in 2019 (Note: Different rules apply for 403(b) plans)

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## Hardship Distribution Changes



- IRS Proposed Regulations (11/14/18)
  - Addressed changes to casualty loss hardships
  - Added new hardship event related to federally declared disasters (optional beginning in 2019)
  - Modified standards for determining whether a distribution is necessary to satisfy a financial need (optional beginning in 2019; mandatory for 2020 and beyond)

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## Hardship Distribution Changes



- IRS Final Regulations (9/23/19)
  - Largely confirmed proposed regulations
  - Clarified that casualty loss expense changes are optional for 2018 and 2019, required for 2020 and beyond

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## Hardship Distribution Changes



- Amendments will be required to reflect changes and plan sponsor elections
  - Individually designed plans: amendments required by end of second calendar year that begins after the changes are on the Required Amendments List (likely deadline is 12/31/21)
  - Pre-approved plans: interim amendment required by tax filing deadline (including extensions) for year in which the amendment is effective; *not clear whether 2019 changes must be adopted by 2019 tax filing deadline*

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## Hardship Distribution Changes

- Different amendment timing rules for 403(b) and governmental plans
- Despite delayed amendments, plan sponsors still need to:
  - Confirm design elections with vendors
  - Communicate changes to participants
  - Operate in accordance with new rules and design elections

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**The foregoing presentation is a summary of various statutes, regulations, guidance items and cases. As with any summary, some details are omitted.**

**This summary should not be relied upon for legal or tax advice for particular situations.**

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