

What Plan Sponsors Need To Know About The Cycle 3 Restatement Process

By Ary Rosenbaum, Esq.

During law school, I had the pleasure of being taught by Bernie Corr. Corr was one of the most entertaining law school professors with his humor and bluntness. I had the pleasure of taking Corr's Bankruptcy and Advance Bankruptcy courses. Corr said that one of the reasons that the bankruptcy law is changed is to give bankruptcy attorneys some work. So I jokingly say that the whole purpose of the retirement plan restatement process is to feed ERISA attorneys, but it is a joke. The Internal Revenue Service is in charge of creating the restatement process and they have decried that another one has begun and will end on July 31, 2020. So this article is all about the restatement process that will likely require you to restate your plan.

The purpose of a plan restatement

As part of the deal for having a qualified plan that allows for the tax deferral on employee and employer contributions, you have to abide by the Internal Revenue Code. One of the rules in the Code is that the IRS may require you to restate your retirement plan. A plan restatement is the complete re-writing of your plan document which the IRS has required to keep your plan up to date with current law. The plan restatement includes changes and amendments that have been adopted by your plan since the last restatement, which we called

the PPA restatement (to comply with the Pension Protection Act of 2006). That PPA restatement cycle ended on April 30, 2016.

Who Needs To Restate

Some retirement plans (usually the larger or collective bargained plans) have plan documents that are called "individually designed" plans. These plan documents are

will cost thousands in both legal work and IRS program fees. Most retirement plans use a pre-approved plan document, created by document plan providers. Using a pre-approved plan is less costly because the document has already been submitted to and approved by the IRS. The IRS issues a favorable opinion letter to the document provider that almost all plans that use that pre-approved plan can rely on. The restatement process that has started is for all defined-contribution plans (such as 401(k) plans and profit-sharing plans) using a pre-approved plan. Defined benefit plans, 403(b) plans, and individually designed plans have their own, separate restatement cycles.

What is the Cycle 3 restatement?

In the 22 years that I've been an ERISA attorney, this will be the 4th major restatement process I've gone through and this will be the first time it's not named by an acronym for a major retirement plan change law. This restatement is called the "Cycle 3 restatement." It's an odd title, but there hasn't been a major change in the law since the Pension Protec-

tion Act of 2006 that would an acronym to serve as the name for the restatement process. It's called Cycle 3 because this is the third six-year cycle that the IRS has issued since they went to a six-year cycle for pre-approved plans in 2004. The first pre-approved six-year cycle was the Economic Growth and Tax Relief Reconcilia-



tion Act (EGTRRA) restatement in 2010, and the second cycle. was the Pension Protection Act (PPA) restatement in 2016.

What law changes that Cycle 3 will cover and what it won't

We just had two major retirement plan law changes within the past 365 days and they won't be covered by this Cycle 3 restatement. The reason is that the process for pre-approved plan providers to get a favorable opinion letter from the IRS takes a very long time. This Cycle 3 restatement plan document was completed on laws through February 1, 2017. Some of the changes in the Cycle 3 document will include: the definition of "Spouse" to include the same gender, allowance of plan forfeitures to offset company contributions, allow in-plan Roth rollovers, and will give you the ability to amend Safe Harbor plans mid-year. So with only changes before 2017, that means the following changes will still have to be addressed in separate, snap-on, good-faith amendments rather than in the plan documents: hardship distributions regulations (effective January 2019), the SECURE Act (signed into law in December 2019), and the special COVID distributions under the CARES Act (signed into law in March 2020). The CARES Act will still require a separate, snap-on amendment before the end of 2022.

You have no choice, but to restate

I worked as an ERISA attorney for TPAs for almost 10 years and one of the more unpleasant parts of the job was the restatement process. The problem wasn't the actual process of restating the plan, but dealing with clients who were complaining about the need to restate. Aside from saying they didn't need to restate, I would get clients who wanted to be like Monty Hall from Let's Make A Deal and make



some sort of deal on our restatement pricing. Even if you just recently restated your plan because of a plan provider change or multiple plan provisions, a plan restatement will still be required. You have no choice here, if your plan falls under the restatement cycle, you have to amend. If you miss the deadline to restate your qualified retirement plan, the IRS can disqualify the plan, which takes away all the tax benefits of a qualified plan. This means contributions might not be deductible or employees will have them immediately included in income. Therefore, restating your document should be a high priority. Even if you want to terminate your plan to avoid a restatement, your plan document will still need to be restated before it can terminate. Bear in mind, that costs connected with restating your plan document can be paid by you directly or through plan assets.

What is the restatement deadline?

The IRS has announced that the Cycle 3 restatement window has already begun and has a final deadline of July 31, 2022. There may be an extension, but that is not something I'm betting on.

An opportunity to look at your plan provisions

While you are not going to be happy with the need to restate your plan, take this as an opportunity to review your plan provisions and see if any changes needed to be made to the other provisions. Perhaps demographics have changed and you might consider an eligibility requirement change or you need to add a safe harbor contribution. Maybe business is good and you have extra shekels for a cross-tested profit-sharing allocation. Regardless of your situation, this is the perfect time to look at your plan and make some changes if you need it since you're going to

pay for a restatement anyway.

Give me a call

You can have your TPA to restate their plan document or you can use an independent ERISA attorney like me to do the work at a flat fee. My fees are on par with what a TPA charges. If you have any questions, just give me a call.

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