



A publication of the ASPPA Government Affairs Committee
November 25, 2009 :: No. 09-42

©2009, ASPPA All rights reserved, except permission is expressly granted to duplicate this publication for internal purposes only.

Required (and Optional) Qualified Plan Amendments for the 2009 Plan Year

By Aimee Nash, J.D. Ft. William LLC, Milwaukee, WI

All retirement plans will likely need to be amended for the Pension Protection Act of 2006 (PPA) before the end of the 2009 plan year. This is generally true even if a plan has been restated for EGTRRA (or otherwise recently restated). Some qualified documents may not require an employer signature and can be adopted at the prototype sponsor/volume submitter practitioner level. The deadline, requirements for signatures and the PPA provisions that need to be adopted will be discussed below. We will also briefly discuss other required amendments that may be included with PPA Amendments or that will be required in the near future.

Please note that this article is meant to be general in nature. Document vendors may take different approaches in preparing amendments and documents. Qualified, pre-approved plans (volume submitter and prototype documents) will generally require a separate amendment for PPA. Individually drafted plans (403(b), 457(b), ESOPs, cash balance plans, and other custom qualified plans) may have PPA provisions incorporated into the document.

Please also note, the IRS has not provided guidance (as it has in years past) in the form of a specific list of interim required amendments for 2009.

Deadline

The deadline for amending a plan to comply with PPA is the last day of the plan year beginning on or after January 1, 2009 (December 31, 2009 for calendar year plans). A later deadline applies for governmental

plans (last day of the plan year beginning on or after January 1, 2011).

Document Types and Plan Sponsor Signature Requirements

It is possible for certain plan types to have interim required amendments adopted on behalf of plan sponsors. The prototype sponsor or volume submitter practitioner would select the optional provisions on behalf of the plan sponsors, sign the amendment and send the completed amendment to the relevant plan sponsors.

In some cases, the prototype sponsor or volume submitter practitioner will be the document vendor. In this case, typically the vendor will select the "default" provisions and amend the plans on behalf of plan sponsors with the defaults. If the defaults are not applicable, the plan sponsor will need to execute the amendment.

In other cases, practitioners may have gotten a "letter in their own name" and can customize and adopt amendments on behalf of plan sponsors.

The following plan types can be amended by the prototype sponsor or volume submitter practitioner:

- EGTRRA qualified DC documents (prototype and volume submitter plans);
- GUST qualified prototype DC Documents; and

- GUST qualified volume submitter DC Documents, if the employer has adopted an amendment to permit the practitioner to amend on its behalf (Announcement 2005–37 provided a sample amendment; probably only a small number of plans will have implemented this).

The following plan types require an employer signature for amendments:

- Defined benefit plans (EGTRRA DB plans will have this option but those documents have not yet been released);
- GUST qualified volume submitter DC Documents if the employer has not adopted an amendment to permit the practitioner to amend on its behalf (probably the majority of GUST volume submitter plans);
- ESOP plans;
- 403(b) plans; and
- 457(b) plans.

PPA Provisions Required For the 2009 Plan Year

The PPA provisions required to be amended by the end of the 2009 plan year are very briefly discussed below and arranged according to the applicable plan types. Also included are technical corrections from the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA). There are other PPA provisions that were required to be amended in prior plan years that are not included in this listing (therefore, is not an exhaustive list of PPA provisions).

Generally applicable to all plans

- QOSA. Any plan that provides an annuity form of distribution must allow an additional

Qualified Optional Survivor Annuity, if not already provided under the plan.

- Rollover Distributions.
 - Non-Roth eligible rollover distributions may be made directly to a Roth IRA, subject to income limitations prior to 2010 (TIPRA eliminated the income limits after 2009).
 - Non-spouse beneficiaries may take advantage of eligible rollover distributions into inherited IRAs. (WRERA makes this mandatory for plan years after 2009.)
- Rollover Contributions. If a plan accepts rollovers from all tax favored vehicles, after-tax contributions are also included. After-tax contributions may be rolled over to qualified plan trusts and 403(b) annuity contracts that agree to separately account for the after-tax contributions.
- Notice Periods. Notice periods for rollovers, consent to distribution and joint and survivor annuities are increased from 90 days to 180 days.
- QDROs. A domestic relations order may revise another DRO or QDRO and may be issued after a participant's death, divorce or annuity starting date.
- 402(f) Notices. A description of the right to defer distribution must include a description of the consequences of failing to do so.

Applicable to Defined Contribution plans

- QACA. Plans providing for elective salary deferrals may opt to utilize the qualified automatic contribution arrangement to satisfy nondiscrimination testing.
- EACA. Plans with automatic contribution arrangements may utilize the eligible automatic contribution arrangement which allows participants to withdraw such automatic contributions within 90 days of the initial contribution and forfeit matching contributions, if applicable. If the automatic contribution arrangement applies to all participants, the normal 2-1/2 month testing period is extended to 6 months after the plan year end.
- Vesting. Vesting schedules may not exceed 2-6 year graded or 3-year cliff vesting schedules (includes top heavy schedules).
- Gap Period Income. Gap period income is no longer distributed on excess contributions and excess aggregate contributions. (WRERA also repealed GAP period income on refunds of excess 402(g) deferrals. Gap period income is applied to distributions of excess Code section 402(g) deferrals for the 2007 taxable year.)
- Hardship Criteria May Include Beneficiary. If the Plan provides for in service withdrawals on account of hardship and uses the safe harbor criteria for hardship determinations, the hardship criteria may be expanded to include the beneficiary of the participant.
- Optional Qualified Reservist Distributions. A qualified reservist distribution of elective deferrals from a 401(k) or 403(b) plan is not subject to the 10% early distribution penalty.

(HEART Act removed sunset date.)

- Diversification in Plans Holding Employer Securities. Contributions which are invested in publicly traded employer securities must permit a participant to direct the plan to divest any such securities and to reinvest in permitted investments. WRERA notes this does not apply to one-participant plans.

Defined benefit, money purchase and target benefit plans

- In-service at Age 62. A pension plan may provide that a distribution may be made to an employee who has attained age 62 and who is not separated from employment at the time of such distribution.
- Normal Retirement Age. Normal Retirement Age of less than 62 may need to be amended or file for determination letter ruling on industry standard.

Defined benefit plans

- Minimum Funding Rules for Single Employer Plans. The Plan's funding target attainment percentage (FTAP) and adjusted funding target attainment percentage (AFTAP) may be determined using such methods of estimation as provided in proposed regulations, Notice 2008-21 and Notice 2008-73 up to the first Plan Year in which Code section 436 applies.
- Benefit Restrictions (Prohibited Payments) and Benefit Accruals for Single Employer Plans - final 436 regulations. Funding based limits apply to (i) unpredictable/contingent benefits, (ii) accelerated benefit distribution, and (iii) benefit accruals. Participants must receive notice of funding based limitations within 30 days.

Other Required Amendments

The following may or may not be included in a vendor's PPA Amendment either because of a future due date or other business reasons.

- HEART Act - Amendments not required until the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012 for governmental plans). The HEART Act provisions include:
 - Death During Qualified Military Service. Any additional benefits that may be provided by a plan due to the death of a participant, other than additional benefit accruals, must be provided to the beneficiaries of a participant who dies in qualified military service (e.g., 100% vesting upon death).
 - Differential Wage Payments. Differential wage payments provided to participants during qualified military service, are treated as compensation to an active employee, even though the employee may be considered terminated for purposes of taking a distribution, after which elective deferrals must be suspended for 6 months.
 - Optional Benefit Accruals. A plan may opt to provide benefit accruals for the period of qualified military service for participants who die or become disabled during that qualified military service (including elective deferrals based on elective deferrals in prior year).
- Other provisions that may or may not be included in the PPA Amendment (from the Cycle D cumulative list, prior interim amendment lists, etc.):
 - Recent IRS Revenue Rulings (2008-40 Transfer to Nonqualified Plan, 2008-45 Exclusive Benefit Rule and 2007-43 Partial plan termination);
 - Heinz case language;
 - PFEA (DB plans);
 - Announcement 2007-59 (mid-year change to add a Roth provision or to allow a safe harbor hardship withdrawal for purposes of a primary beneficiary will not affect a safe harbor provision in a plan);
 - Some top heavy language may be added for the benefit of IRS agents reviewing plans for determination letters (the term "severance from employment" substituted for "separation from service").
- 2009 Waiver of Required Minimum Distributions.

Amendments are not required for this provision of WRERA until the last day of the first plan year beginning on or after January 1, 2011 (January 1, 2012 for governmental plans). Most document providers have not yet provided amendment language for the WRERA provision that waived required 2009 minimum distributions. Sample language has been provided by the IRS (Notice 2009-82), however, that could be included with a PPA Amendment.