DB Restatements

Robert M. Richter, J.D., LL.M.
Retirement Education Counsel
American Retirement Association

Pre-approved DB Restatement Deadline

- April 30, 2020
- Relatively few changes in the law so restatement process “shouldn’t” be too painful
  - Except for cash balance plans
    - If format changed
    - If existing plan doesn’t have a determination letter

Effective Date of Restatement

- For most plans, you will use a current effective date of restatement (e.g., 1/1/2020 if you restate this year)
- Consider a retroactive effective date for new cash balance plans you did not submit for a DL when the plan was established
  - Only way to obtain retroactive reliance on all provisions
  - Requires you to reflect all changes that have been made to the plan since the plan was established
Example

• A new cash balance plan was effective January 1, 2015
• A DL wasn’t requested because the expectation was that it would fit onto a PPA preapproved DB plan (which, for the first time, permits cash balance plans)
• If a current restatement effective date is used, then there is no reliance on provisions other than those that are retroactive (such as PPA provisions)
• If a retroactive restatement effective date of January 1, 2015, then the employer has reliance on all plan provisions

Determination Letter (DL) Submissions

• If desired, must also file for a determination letter (DL) by April 30, 2020
  • DL is always optional
  • IRS will not accept 5307 of identical adopters
  • IRS will not accept 5307 off-cycle (i.e., outside of the 2 year period)
  • IRS will not accept 5307 for prototype plans
  • IRS will generally not accept 5300 submissions except in limited situations (discussed later)

Plan Terminations

• Does a DB plan need to be restated onto new preapproved plan prior to termination?
  • Can never go wrong by restating
  • Restatement isn’t a qualification requirement
    • Rev. Proc. 2018-4 §§ 11.05 & 15.06: Sponsors of terminating plans are encouraged, but not required to submit a restatement when submitting a DL application
    • There haven’t been many interim amendments
      • As time goes on, individually designed plans may have more at risk by restating
      • If not filing Form 5310 then safest is to restate if using a preapproved plan
Impermissible Provisions

- Collectively Bargained plans (single-employer or multi-employer)
  - Union employees of single-employer can be covered under preapproved plan
  - Failsafe provisions for IRC §401(a)(4) or average benefits test of IRC §410(b)

- Cannot incorporate by reference the IRC §415 limits
- Cannot include blanks or fill-in provisions unless the provisions have parameters precluding their completion in a manner that could violate the qualification requirements
Impermissible Provisions

- Plans with 401(h) accounts (post-retirement medical)
- DB/K plans (414(x))
- DB plans with 414(k) accounts (pre-EGTRRA provisions are grandfathered)
- Rollover accounts are permitted
- Governmental DB plans that include a DROP (deferred retirement option plan)

Impermissible Hybrid Provisions

- Cannot have a pension equity plan
- Cannot have interest credit based on a participant's choice, a subset of assets, or rate of return on certain regulated investment companies (RICs)
- Must use 133 1/3% accrual method
- If conversion from traditional DB, must use an A + B approach
  - No wear-away approach
- Cannot have a fully insured hybrid plan (IRC §412(e)(3))

Impermissible Hybrid Provisions

- Cannot have an offset provision unless:
  - Offset is applied on an accumulate basis at the annuity starting date
  - Offset meets the safe harbor requirements of Regulation §1.401(a)(4)-8
  - Minimum accrued benefit of 0.5% of comp for each year of credited service
Other Prohibitions

- No NRA less than 55
- Other items the IRS deems inappropriate in a preapproved plan
  - What if a preapproved plan is amended to add arbitration in light of 9th Circuit decision (Dorman v. Charles Schwab)?
  - What if a preapproved plan is amended to add de-risking due to Notice 2019-18?

Cash Balance Plans
Last minute change - IRS permitted actual rate of return to be used as interest crediting rate

OOPs – Treasury-Based Crediting Rate

- IRS language did not permit the use of a lookback month and stability period when using a Treasury-based interest crediting rate
- Reliance on a preapproved plan will not be lost if a plan is modified to specify a look back month and stability period
Modifications of Preapproved Plans

Concerns with Modifications
- Impact on 6-year cycle
- Impact on Reliance
- Different rules for each

Impact of Modifications – 6-year Cycle
- General rule – still an adopter of a pre-approved plan regardless of modification
- Anti-abuse provisions – IRS has discretion to determine that 6-year cycle does not apply
- If modification is to add impermissible provision in pre-approved plan (e.g., interest credit based on a subset of assets), then lose ability to use 6-year cycle in following cycle if amend after 1 year
  - If amend within 1 year of adopting pre-approved plan, then not entitled to use 6-year cycle at all
Example

- ABC Company established a traditional DB plan on October 1, 2019 (using new PPA preapproved plan)
- Employer wants to convert to a cash-balance plan with an interest credit based on a subset of assets (an impermissible provision) for 2020
- If amendment adopted before 10/1/2020 (less than 12 months after adoption of preapproved plan) then 6-year cycle does not apply
- If amendment adopted on or after 10/1/2020 then the 6-year cycle applies and at the end of the next cycle the employer could file for a retroactive DL
  - Employer could file for a DL now or wait to see if the impermissible provision becomes permissible with the next cycle
  - Retroactive RAP would cover all amendments

Impact of Modifications - Reliance

- Loss of Reliance (subject to exceptions)
- Still able to adopt amendments on behalf of adopting employers (unless impermissible or abusive modifications)
- Prototype becomes individually designed
- Volume submitter may still be considered VS if changes are not extensive
  - In most cases, if DL desired, submit Form 5307

Permissible Amendments

- Reliance not lost if modification is for:
  - Trust or custodial provisions
  - Special effective dates if restatement could accomplish same result
  - Adoption of interim amendments
  - Amendments to the administrative provisions of the plan (such as provisions relating to investments, claims procedures and employer contact information)
  - COLA adjustments
  - Changes to a provider’s name
  - Adding stability period/lookback month for interest credits based on Treasury rates
Describe or Other Lines

• Completion of describe or other line is NOT a modification as long as parameter is followed
• OK to be creative
• How do you ensure you haven’t crossed the line?
  • Submit a 5307 – which means you are considering it to be a modification

IRS User Fees (Rev. Proc. 2020-4)

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Exemption from User Fees

• Must be an “eligible ER”
  • An “eligible ER” is defined in IRC §408(p)(2)(C)(ii)(I) is an employer which had no more than 100 employees who received at least $5,000 of compensation from the ER in prior year
  • Must have at least 1 NHCE participating
  • Plan must have been established within past 10 years (with some exceptions – e.g., hybrid DB plan effective 1/1/2010 would qualify)
QAB 2008-2

- Quality Assurance Bulletin 2008-02
- If an IRS specialist or agent believes there is an error in a preapproved plan, it should be referred to the preapproved plans coordinator

Expansion of the DL program for IDPs

- Rev. Proc. 2019-20 expanded the individually designed determination letter program for two limited situations
  - Limited expansion for certain hybrid plans
  - Certain merged plans

Hybrid Plans

- When the IRS eliminated the 5-year remedial amendment period for individually designed plans, certain statutory hybrid plans were not able to obtain a determination letter with respect to the market rate of return rules issued in 2010, 2014 and 2015 (the final hybrid regulations)
  - These plans may be submitted for a determination letter between September 1, 2019 and October 31, 2020
    - No 411(d)(6) relief is provided
Merged Plans
• As of September 1, 2019, the IRS began accepting DL submissions for certain individually designed merged plans
• The date of the plan merger can be no later than the last day of the first plan year that begins after the plan year that include the date of the business transaction, and
• The submission must be made after the date of the plan merger and on or before the last day of the first plan year of the merged plan that begins after the date of the plan merger
  • This is the last day of the IRC §410(b)(6)(C) transition period

Expansion of the DL program - Sanctions
• There are special sanctions for document errors found in hybrid or merged plans submitted under the expansion
  • No sanction will be imposed
    • For statutory hybrid plans if the failure is due to a provision required to satisfy the final hybrid plan regulations
    • For a merged plan if the failure is due to a plan provision included to effectuate the plan merger
  • Any other errors are subject VCP or audit CAP sanctions depending on the duration of the failure
  • Moral of the story: Be careful when submitting a plan under the new expansion

Scrivener Errors
• What happens when a mistake is made in the restatement process?
  • IRS does not like “scrivener error” corrections
  • Plan document failures can generally only be fixed through VCP
  • Make sure you have proof
    • If error favors participants it will be tougher to correct
    • Verizon case is a notable (and rare) exception
Self-Correction Program (SCP)

• SCP generally could not be used to correct Plan Document failures
• 4 exceptions:
  • Loans made without loan provision in plan
  • Hardships without hardship provision in plan
  • IRC §401(a)(17) violations, if corrected by increasing contribution rate for everyone
  • Early inclusion of ineligible employees, if predominately NHCEs


• Rev. Proc. 2019-19 expands SCP to fix Plan Document Failures (plan doesn’t conform to operation) if:
  • A benefit, right, or feature would increase as a result of the amendment;
  • The increase applies to all eligible employees (IRS takes strict interpretation of this); and
  • Providing the increase is consistent with the EPCRS correction principles

Plan Document Failures

• Plan Document Failures include:
  • Failure to timely adopt interim amendment
  • Failure to timely adopt an amendment to an individually designed plan to comply with Required Amendments List
  • May include late restatements
Plan Document Failures
• IRS considers these always to be significant failures
  • This means they must be adopted within the two-year self-correction period
• If too late, need to use VCP to fully correct
• Remember: SCP requires procedures

Sponsoring Organization Requirements

Sponsor Duties
• Must amend their pre-approved plans to comply with the law
• Must make reasonable and diligent efforts to ensure adopting employers have actually received and are aware of all plan amendments and that new documents are adopted when necessary
• If a provider reasonably concludes the employer has a qualification problem, then it is “incumbent” on the provider to either correct under EPCRS or notify employer of availability of EPCRS
**Sponsor Duties**

- Maintain record of the names, addresses, and taxpayer identification numbers of adopting employers
  - Must include employers who have ceased to maintain the plan within the previous three years
  - IRS may request these records at any time
- Notify IRS and employers if plan will not be maintained

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**What If Sponsor Does Not Comply?**

IRS can revoke opinion/advisory letters

Is there liability to the employer (e.g., if an interim amendment is not provided)?

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**Kicking an Employer Off Your Plan**

- No IRS guidance
- Notify (certified mail) employer that plan will be treated as an IDP and you no longer provide interim amendments
- Employer has reliance until next required update to pre-approved plan

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Further Consolidated Appropriations Act, 2020
Provisions Affecting DB Plans

What Is It?
• Further Consolidated Appropriations Act, 2020
  • https://www.congress.gov/116/bills/hr1865/BILLS-116hr1865eah.pdf
  • Signed into law on December 20, 2019
• Three Sections Impact Retirement Plans
  • Division M – Bipartisan American Miners
  • Division O - Setting Every Community Up for Retirement Security (SECURE) Act of 2019
  • Division Q – Revenue Provisions

RMD Age Increase To 72
• Provision: RMD age increased from 70 ½ to 72
• Effective Date: Distributions after December 31, 2019, for those who attain age 70 ½ after that date
  • Turn 70 ½ in 2019 – not impacted by this change, even if first distribution isn’t made until April 1, 2020
  • Turn 70 ½ in 2020 (born after June 30, 1949) – distribution not required until year of 72nd birthday
RMD Age Increase – What Now?

• Need to implement system and processes to address the change
• Can plans keep age 70 1/2?
• If yes, are the amounts paid prior to 72 eligible for rollover?
  • No, if using minimums (substantially equal period payments)
  • Yes, if entire account is being distributed
• Will we get rules similar to SBPA (Notice 97-75)?

In-Service Distributions

• Provision: The age for in-service distributions for DBs, MPs and governmental 457(b) plans is lowered from 62 to 59 ½
• Effective Date: PYs beginning after December 31, 2019

Small Employer Start-Up Credit

• Provision: Tax credit for adoption of a plan is the greater of
  • $500
  • Lesser of
    • $250 per NHCE, or
    • $5,000
  • Small employer = Less than 100 employees who receive less than $5,000 in compensation
  • Based on 50% of start-up costs
• Effective Date: Taxable years that begin after December 31, 2019
Example: Small Employer Start-Up Credit

- Assume a plan with 30 NHCEs
- Greater of
  - $500,
  - Lesser of
    - $250 per NHCE, x 30 = $7,500
    - $5,000
- Credit is $5,000 (greater of $500 or $5,000)
  - Assuming start-up cost was $10,000

Deadline for Adopting Plans

- Provision: New plans may be adopted by the due date of the tax return (including extensions) for the tax year it first applies to
  - Still cannot accept deferrals until plan is actually adopted
  - No exception for DB funding rules (which is 9½ months after the end of the PY)
- Effective Date: Tax years beginning after December 31, 2019
  - Effectively not available until 2021

Plan Amendments

- Plan Amendments to reflect any changes in the SECURE Act do not need to be adopted until the last day of 2022 PY
- Additional Two Years for:
  - Union plans
  - Governmental Plans
  - IRC §411(d)(6) relief provided
  - Terminating plans must be updated at time of termination
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