



Client Alert



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ARE YOUR IRS PRE-APPROVED PENSION PLAN RESTATEMENTS UP-TO-DATE?

A Question for Employers That Is More Important Today Than in the Past

If you are an employer maintaining an IRS pre-approved qualified pension plan (previously also called a prototype or volume submitter plan) that is either a defined contribution (“DC”) plan (including 401(k) and profit-sharing plans) or a defined benefit (“DB”) plan (including cash balance plans), you are probably already familiar with the IRS’s “cycle” system requiring periodic, full restatements of the plan to maintain its pre-approved status. The restatements are mandatory, lest the employer risk the loss of that pre-approved plan status and its ability to rely on the related IRS opinion letter. Without such timely restatement, the plan might also become disqualified (unless it can satisfy qualification requirements as an “individually designed plan”). The cycles are generally six years in length, with time periods and deadlines differing for DC and DB plans and with usually a two-year window (from the date of the IRS opinion letter) for sponsoring employers to adopt the required restatements. For DC plans, we currently just started “Cycle 4,” with the window for adopting the Cycle 3 restatement having closed on July 31, 2022. For DB plans, whose cycle lags the related DC cycle slightly, the Cycle 3 window just opened on April 1, 2023 and will close on March 25, 2025.

What you might not be aware of is that starting with the 2023 Form 5500 series (which includes Form 5500, Form 5500-SF and Form 5500-EZ), new compliance boxes require any qualified DC or DB plan that relies upon an IRS opinion letter issued to an IRS pre-approved plan to insert both the serial number and date of the *latest* such letter. Among other things, this clearly will

call to IRS's attention any plans that are relying on an out-of-date opinion letter, i.e., will identify plans for which the deadline for employer adoption of the applicable cycle restatement has passed. It would therefore behoove any employer sponsors of such plans to move quickly to update their plans in order to avoid an inquiry from the IRS.

Since the filing deadline for such 2023 series 5500 Form for calendar year plans is July 31, 2024, with a permitted two-and-one-half month extension to October 15, 2024, the deadline for such action is approaching quickly. Moreover, since these Forms are signed under penalties of perjury, plan administrators and employers signing them would not want to be using an IRS opinion serial number and date unless the related updated restatement is actually completed and signed.

Nor would they want to leave the item blank, since that might engender the same IRS inquiry. For a DC pre-approved plan, the correct opinion letter and date would be for a timely Cycle 3 restatement (signed some time during the window that opened 8/1/2020 and closed on 7/31/2022 with an IRS opinion letter dated about 6/30/2020). For a DB pre-approved plan, as indicated above, the Cycle 3 window is still open until March 31, 2025, so it should be fine to have a timely Cycle 2 restatement (signed some time during the window that opened 5/1/2018 and closed on 7/31/2020 with an IRS opinion letter dated about 3/31/2018). But that will be good only until next March 31, 2025, when the Cycle 3 window closes. It might be prudent to restate such DB plan now also (before that deadline) since the information will be needed for 2024 series 5500 Form filing (and could be used now).



If the employer is in the unfortunate situation of have missed the deadline for the required restatement of either a DC or DB pre-approved plan, completing the restatement now, although late, and coming back into compliance as a pre-approved plan is advisable and has actually just become easier. Under certain liberalized changes for self-correcting under the SECURE 2.0 Act (and current IRS guidance thereunder in Notice 2023-43), the adoption of the late restatement itself might be sufficient, with no need (except as discussed below) for any affirmative IRS correction filings (e.g., a so-called Voluntary Correction Program ("VCP") filing). However, qualified benefits counsel should be involved to confirm that the new self-correction rules apply and to assist in selecting the proper effective dates for restatement provisions, which might need to be retroactive to appropriate dates in some cases. Also, it has been our recent experience that more is often involved in such cases than just the restatement itself, i.e., that some operational issues are also involved. To properly correct those, benefits counsel should clearly be involved. These might or might not be correctable under the recently expanded self-correction rules. For example, if there are any late RMDs (required minimum distributions), a filing under VCP might be advisable to avoid excessive excise tax penalties.

On the positive side, a restatement, whether timely or late, also offers an opportunity to review plan provisions and make desirable changes. Although neither of the DC or DB Cycle 3 restatements covers SECURE Act, CARES Act or SECURE 2.0 Act required or optional provisions (for which much needed guidance is still being awaited from the IRS, etc.), some changes in that regard can nevertheless be incorporated now, e.g., the increased mandatory cash-out limit from \$5,000 to \$7,000. Most pre-approved plan restatement packages offer "interim" amendments to cover such desired changes.

In sum, while much work regarding the legislation mentioned above awaits more IRS, etc. guidance and can be deferred, the restatement deadlines above do require your immediate attention. As benefits counsel, we are available to assist you regarding any such work that you might need or desire. Please note also that we do provide our clients with up-to-date IRS preapproved DB and/or DC plan documents and packages. You can call us at 508-785-0250 or email us at zjskapars@skapars.com.

SKAPARS & ASSOCIATES, P.C.

2 Tower Drive
Dover, MA 02030
508-785-0250

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508-359-4775 fax
www.skapars.com

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Z. John Skapars zjskapars@skapars.com

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Skapars & Associates, P.C. | 2 Tower Drive, Dover, MA 02030

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Sent by zjskapars@skapars.com