The New 403(b) Plan Documents Part II: Don't Even Think About Removing My Appendix!

Susan D. Diehl, QPA, CPC, ERPA
President
PenServ Plan Services, Inc.
Susan.diehl@penserv.com

Agenda for Today

- This is Part II of a three-part series on the all new 403(b) pre-approved plan and the restatement process
- Part I focused on definitions as they relate to the restatement of 403(b) plans and the overview of the first ever RAP for 403(b)s
- Today under Part II we will dive a little deeper and cover the proper completion of the restated documents including:
  - “Recap” restatement sheet
  - Administrative appendix
  - Vendor attachment
  - “Underlying” investment vehicles
  - List of “program requirements”
- Part III will be a deep dive into the process with examples from employers that have already been restating!

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Poll Question #1: Quick Review from Part I

What is the deadline for employers who currently maintain a 403(b) to restate their plan under the first Remedial Amendment Period (RAP)?

A. December 31, 2019
B. March 31, 2020
C. There is no deadline!

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Quick Review from Part I

Why is this restatement so important?

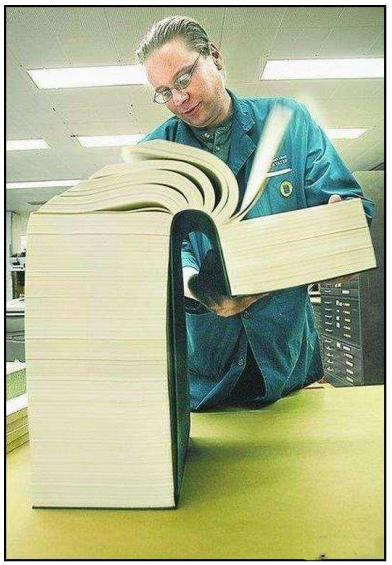
- ✓ Reliance for the employer back to 1/1/2010
- ✓ IRS audit
- ✓ Pre-approved plan protects the assets from being taxed
- ✓ If the employer does not restate by 3/31/2020, there could be tax consequences for employees

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Proceeding with Restatements

Keep in mind:

- Most employers are going from a four-to-five page document to a document that is 15-20 or more pages
- New items to complete that will need to be explained to the employer
- Administrative appendix is new
- Vendor attachment
  - Should have always been a part of the plan
- Advisers – you should be educating your client. Make sure they contact their TPA.



NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Proceeding with Restatements

- Handholding will be a must!
- K-12 schools are easier to do in a group rather than one-on-one
- While talking to the employer in regards to the adoption agreement, make sure they understand that their choices should reflect what they actually do operationally

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Two Important Items That You Will Find in Your Adoption Agreements

- First: the effective-date section
- Sample

Effective date: the employer has completed and signed this adoption agreement in order to:

		Initial Effective Date	Amendment/Restatement Effective Date
(a)	Establish a new 403(b) plan (not earlier than the 1st day of current Plan Year)		N/A
(b)	Restate a 403(b) plan previously adopted by the Employer (restatement date cannot be earlier than 1-01-2009, but not later than 1-01-2010 unless the initial effective date is after 1-01-2010)	**1/1/2009**	**1/1/2020**
(c)	Amend a 403(b) plan previously adopted by the Employer (Amendments made, if applicable: ___)		

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

It’s Clean-Up Time

This is the time to clean up past mistakes

Remember this will encompass the years from 2010 through the year the employer restates

- Let’s say that your client adopted a 403(b) compliant document in 2009 and is now restating in 2020
- In 2011 they added the Roth deferral feature to their plan
- In 2013 they permitted loans
- In 2015 they decided to remove the hardship-distribution option

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Second Important Page

AND…your client never amended the plan to reflect these provisions! So what do they do now?

GENERAL RESTATEMENT EFFECTIVE DATES	
Provision	Effective Date
(a) The eligibility requirements under Item	
(b) The Employer contribution provisions under Item	
(c) The Vesting Formula under Item	
(d) In-Service Distributions under Item _____ Removed Hardship distributions	1/1/2015
(e) Enter Provision and Item Number, if applicable: Roth Elective Deferrals	1/1/2011
(f) Enter Provision and Item Number, if applicable: Participant Loans	1/1/2013
Note: The effective date(s) above may not be earlier than January 1, 2010 and not later than the last day of the Plan Year in which the Adoption Agreement is signed.	

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Effective-Date Language Remains As…

		Initial Effective Date	Amendment/Restatement Effective Date
(a)	Establish a new 403(b) plan (not earlier than the 1st day of current Plan Year)		N/A
(b)	Restate a 403(b) plan previously adopted by the Employer (restatement date cannot be earlier than 1-01-2009, but not later than 1-01-2010 unless the initial effective date is after 1-01-2010)	**1/1/2009**	**1/1/2020**
(c)	Amend a 403(b) plan previously adopted by the Employer (Amendments made, if applicable: ___)		

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Poll Question #2

What does LRM stand for and who issues them?

A. Listing of Required Modifications issued by DOL
B. I have never heard of these
C. Listing of Required Modifications issued by IRS

LRMs

- LRMs (Listing of Required Modifications) are issued by the IRS for any retirement plan that a prototype/volume submitter plan is available and contain sample plan/adoption agreement language
- Unique to 403(b)s are some LRMs that are not based on the statute or regulations – they are referred to as “program requirements”
- In other words, IRS decided that there are some provisions that cannot be adopted by 403(b)s

Program Requirements

- Annual 415 notice
- Does not permit:
  - Pre-ERISA rules for churches and governmental employers
  - QCCOs and NonQCCOs can not be participants in a church Plan 403(b)(9)
  - Transfer/merger language from the Path Act for church plans
- “Once in, always in” rule
  - We are awaiting guidance on this
- Entry dates

Annual 415 Notice

The “415 rule” now contains an ***annual*** notice requirement and is mentioned in the new plan documents. This requirement begins with tax year after the employer restates their plan document – deadline 3/31/2020.

This rule is not new but the ***annual*** notice is new. *Decide how this notice will be distributed! – best practice to include in the Universal Availability Notice.*

If a participant in a §403(b) also owns another trade or business that adopts a plan, that individual has one overall limit under §415 between the §403(b) and the other plan

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Example: Doctor's Plans - 2018

Hospital 403(b) plan

- Deferrals only
- Doctor, age 52 with 20 years of service, participates and contributes:
  - $18,500 plus
  - $ 6,000 plus
  - $ 3,000

Doctor has own private practice

- Adopts a SEP
- No employees
- Contributes a total of $55,000

The doctor has a 415 excess ($21,500) that ***must be removed*** from the 403(b) Plan. Common error for doctors, professors, and teachers! Annual 415 notice will explain this rule.

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Poll Question #3

Do you work with church-plan employers?

A. Yes
B. No
C. Not sure

Church Plans Under 403(b)(9)

Prior to this restatement it was very common to see under a 403(b)(9) plan, participating employers that were:

- Steeple churches
- Qualified church-controlled organizations (QCCOs) and
- Non-qualified church-controlled organizations

- The new pre-approved LRMs no longer permits this
- RESA bill does have the “fix” in it!

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

QCCOs and NonQCCOs

A non-QCCO is a church-controlled organization

- Offers goods, services, or facilities for sale to the general public – At more than "nominal charge" and more than the cost of those goods, services, or facilities
- Receives more than 25 percent of support from governmental sources, receipts from admissions (i.e., tuition and fees), sales of merchandise, etc.

QCCOs and NonQCCOs

Examples of QCCOs

- Elementary schools on the property of a church
- Faith-based nonprofit under 501(c)(3) that receives their funds from the church

Examples of NonQCCOs

- Universities and colleges (Notre Dame and Villanova)
- Nursing homes
- Cemeteries
- Medical centers/hospitals

20-Hour Rule/'Once In Always In' Rule

History:

- IRS continued to audit based on the individual status from year-to-year after final regulations were issued in 2007
- LRM development: 2009 draft item #13 unclear on application
- LRM updates in 2013 did not clarify

20-Hour Rule/'Once in Always In' Rule

History:

- LRM updates in 2015 were the first time IRS used the term – "once in always in" rule

- ACT recommended in 2015 that the IRS address how the 20 hours per week and 1,000 hours per year rules work in "real-life," practical operation. The communication should stress that employees excluded under the less than 20 hours per week rule must also be tested under the 1,000 hours standard

20-Hour Rule/'Once in Always In' Rule

History:

- In practice, employers have used many different interpretations prior to IRS providing this limited guidance
- Lets look at some examples

Once In Always In Variations

Some employers continued to follow the year-by-year approach that was most frequently used in IRS examinations

Example:

Ava is hired 7/1/2017 for a position that requires her to work 15 hours per week. Since she is expected to work less than 1,000 hours per year, she is not offered the 403(b) plan.

Once In Always In Variations

Ava is a workaholic and in 2018 the employer realizes that Ava actually worked over 1,000 hours in 2017. The employer now treats Ava as eligible for 2018.

In 2018 Ava works only 900 hours and is therefore not eligible for 2019

As you can see we would have a “look-back year” type of determination

Once In Always In Variations

The other option is that once Ava is eligible (in this case 2018), she would remain eligible for future years as long as she is employed regardless how many hours she actually works

This would therefore not require the “look-back” rule for hours

It was not until the IRS webcast of 5/23/2016 when the IRS first addressed this rule and how it may work with no examples

The IRS webcast of 10/27/2016 provided some examples

But then came the question on rehires…

Once In Always In Variations

Some treated the employees as always eligible even if they severed employment and were subsequently rehired

Note, that this now would apparently be incorrect under the specific examples put forth in the webcast of 10/27/2016 (most common approach)

Some used the concept that an employee could again be subject to exclusion from elective deferrals after they were rehired following a severance of employment

Once In Always In Variations

However, the approach probably falls into two categories when evaluating the rehired employee under the *reasonably expected* to work 1,000-hour concept

- Only subjecting the rehired employee to meeting the expectation if they had a break in service
- Subjecting the rehired employee to meeting the expectation after any true severance of employment

Other variations that are presently unknown

Once In Always In Rule

We have come full circle!

IRS approved 403(b) documents that do not offer these options so … industry requests relief for employers

IRS has agreed to a “replacement page” to add the real meaning of this rules to the pre-approved 403(b)

Once IRS approves language, sponsors will be able to replace that language in your already approved plan documents – we are still waiting on this guidance

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Entry Dates for Elective Deferrals

Prior to the new pre-approved plan, there was no guidance on entry dates for elective deferrals

Many employers used a 90-day entry based on verbal comments from IRS

Entry Dates for Elective Deferrals

New plan language equates to a 60-day entry as follows:

- Within 30 days after commencement of employment employer provides opportunity to defer, and
- Permits the participant to make an election up to 30 days after notice is provided

**Problem with employers who used the 90-day entry date in prior years??

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Administrative Appendix

Should be completed by:

- TPA
- All vendors
- Any other service provider under the plan, such as a recordkeeper

When completed employer will know who is doing what and what they might be responsible for…

Administrative Appendix

Let’s look at the separate attachment that you all received

This is a sample of a K-12 plan. The appendix for an ERISA plan will of course be much longer

You can imagine how overwhelmed your employers will be!

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association

Questions?

NTSA
National Tax-Deferred Savings Association
Part of the American Retirement Association