



The Ferenczy Flash

FROM THE LAW OFFICES OF *Ilene H. Ferenczy, LLC*

The Latest Word in Employee Benefits . . .

ERISA Triple Play: Not Tinker to Evers to Chance, but EFAST to EGTRRA to FDLs!

In the recent few weeks, three important events and developments have happened in the retirement plan arena that we thought bear mentioning:

- **EFAST:** There is a new option for electronic filing of Form 5500 annual returns. Will it help you through EFAST2?
- **To EGTRRA:** The deadline for restating your pre-approved defined contribution plan is passed. What can you do if your amendment was done late?
- **To FDLs:** The deadline for submitting your pre-approved defined contribution plan for a determination letter on Form 5307 was April 30. What can you do if you missed that deadline but want a determination letter?

New EFAST2 Filing Option

As you probably know (unless you've been in hiding for the past several months), beginning January 1, 2010, annual Form 5500 returns must be filed electronically. The bump in the rug has been the requirement for the plan sponsor/administrator to obtain his or her own signing credentials by obtaining a User ID and PIN through the Department of Labor's (DOL) website, and then to electronically sign the return before it's submitted to the DOL. While many plan sponsors would like to avoid personal involvement with the DOL's computer system, the DOL does not permit the plan sponsor to share his or her personal PIN information with the form preparer, nor may the form preparer sign on the plan sponsor's behalf. The process poses a particularly thorny problem for small plan sponsors who may not even use a computer or have Internet access. (That may be one of the reasons why they have service providers!)

Service providers, in anticipation of this new new signing requirement, have been trying to figure out how to get plan sponsors to perform the necessary electronic exercises in time for the filing deadline. They also asked for relief.

Never let it be said that the government doesn't listen. Relief has arrived – in the form of an optional filing method, as announced in [News Release Number 10-680-NAT](#), and discussed in a new [FAQ 33a](#). Although the plan sponsor still may not share his or her PIN, the new optional process **eliminates the need for the plan sponsor to obtain electronic signing credentials at all.**

The optional process allows a plan sponsor to authorize the form preparer or third party administrator (referred to hereafter collectively as TPA) to submit the Form 5500 or 5500-SF on his or her behalf using the TPA's own signing credentials, as follows:

1. The TPA needs to obtain its own signing credentials.
2. The plan sponsor must provide written authorization for the TPA to submit each plan's electronic filing. The TPA needs to keep this authorization in its records. It is unclear whether this statement may authorize the process for more than one year, or whether an annual authorization will be required. We suggest that the authorization statement be "evergreen," i.e., able to be relied upon until the plan sponsor provides a written revocation.
3. The plan sponsor must actually sign a paper copy of the completed report, which the plan sponsor must maintain and make available for inspection by participants and beneficiaries as requested.
4. The TPA must include a PDF copy of the first two pages of the manually signed form and attach it as an "other attachment" in the electronic filing.
5. The TPA must inform the plan sponsor that, by selecting this electronic signature option, the image of the plan sponsor's manual signature will be included with the rest of the return posted by the DOL on the Internet for public disclosure.
6. The TPA must communicate to the plan sponsor any inquiries or information received from the EFAST2, DOL, IRS, or PBGC regarding the return.

Some plan sponsors are uncomfortable with the idea that their signature will be disclosed through the Internet in these days of identity theft. If that is a concern, then the original option of having the plan sponsor electronically sign the form is still available.

Deadline for Signing the EGTRRA Restatement

The deadline for restating a pre-approved (i.e., prototype or volume submitter) defined contribution plan to conform to the Economic Growth and Tax Relief and Recovery Act (EGTRRA) was April 30, 2010. If you missed it, your plan, or your client's plan, may be a "nonamender," – which could mean it is at risk for loss of its tax-qualified status. The IRS has provided a quick and relatively inexpensive way to fix this problem, particularly if it's done within one year of the April 30, 2010 deadline.

The late amended plan can be submitted to the IRS for resolution under the Voluntary Correction Program (VCP). The normal VCP fee is reduced by 50% if the only problem is the nonamender failure and the plan is submitted to the VCP program within one-year period of the original due date. So, if you're late, fix the problem soon, and get it blessed by the IRS. You can also get a favorable determination letter as part of this process, if you choose to do so.

Deadline for Filing on Form 5307

Although prototype and volume submitter plans can generally rely on the IRS's preapproval to show that the document meets all qualification rules, there are times where it is best to get an individual IRS approval of the plan document, called a "favorable determination letter." So, what if you got your document timely amended and signed, and planned to submit for a determination letter on IRS Form 5307, but didn't realize that the filing deadline for the Form 5307 was also April 30?

Currently, the IRS does not accept "off-cycle" filing for pre-approved plans, except in limited circumstances. Furthermore, the IRS correction programs contain no "fix" for this specific problem.

But, hope springs eternal. This is the end of the very first six-year cycle in the restatement process for pre-approved DC plans. The IRS has acknowledged, at least verbally, that it may need to make some adjustments to the process or allowances for the first-time filers. For example, a filing extension may be granted for those who filed late due to natural disasters, similar to what was done in the aftermath of Hurricane Katrina. Additionally, the Service may provide relief for Form 5307 late filers by instituting a compliance fee of some kind. There's no guarantee that this relief is forthcoming, but stay tuned – we'll keep you posted as things develop.

We're Here to Help

Contact us if you have any questions or need assistance with any of these issues.

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