

**So, You Think You're Ready for the Tricycle DC Restatements?  
Questions and Answers  
10/21/2020**

**Question:** Terminating Amendments required for terminating plans: As of what year must this be done? Plans terminating in 2020? Plans terminated prior to 2020?

**Answer:** As for restatements, my suggestion (and it is only a suggestion, not a requirement) is that they be restated to the most recent document as of the date of termination.

**Question:** Which terminating plans are required to have a Secure Act snap on amendment - anyone who terminated after the 12/20/19 effective date?

**Answer:** Because of the change in RMDs, I think the answer to that is yes.

**Question:** Is it a settlor function fee (not payable from plan assets) when a plan is taken over by a new TPA and the plan pays the fee to switch (restate) to that TPA's document. They want to pay from plan assets. What if the restatement is not a change from PPA to cycle 3, but a straight switch on the same cycle document?

**Answer:** Can the administration fees be paid from the plan? Yes. So is the decision to change TPAs a fiduciary decision? Yes. So, as part of that fiduciary decision, the plan can pay for the fees associated with the switch, including the cost of the restatement. IMNSHO.

**Question:** Is it realistic to think we will be able to include Secure Act & Cares Act amendments with our Cycle 3 updates starting in early 2021 or should we wait to amend until we have final IRS guidance?

**Answer:** CARES, we've got the guidance. SECURE, I expect more will come. I wouldn't delay doing restatements until we have SECURE guidance.

**Question:** Will you address in the restatement effective date for Cycle 3. I understand it can be no earlier than 1st day of current plan year (year in which it is signed).

**Answer:** Correct. That was the position the IRS took. If you need a special effective date for a particular provision within the remedial amendment period, you may wish to consider using an addendum to address that.

**Question:** What's your opinion of having clients initial and date on each page?

**Answer:** Don't like it. It's rather extreme and generally not customer service friendly.

**Question:** I plan to do all my restatements in 2021 (I'm a small CPA firm w/ about 20 plans) to avoid tax season 2022. Should my docs be eff 1/1/2022, and signed in 2022 (by the deadline of course), or should they be eff 1/1/2021 and signed with a 2021 date at the time of 2021 signing. Or are either an "okay" option? Just wondering if there is any "best practices" suggestion here. Thank you :- )

**Answer:** Either can be viable.

**Question:** Just to clarify, the deadlines are: for the Secure & CARES/RMD is 12/31/2022; correct?

**Answer:** Generally, yes. The deadline is the last day of the 2022 plan year. So if it's a calendar year plan it's 12/31/22. Governmental plans have an extra 2 years.

**Question:** A client has both a 401k and an MPP; they want to merge the MPP into the 401k. Can they term & merge the MPP into the 401k prior to restating for CY3 and then restate the 401k to CY3? Or must both plans be restated for CY3, & then termed & merged the MPP into the 401k?

**Answer:** I feel antsy about terminating before restating (after the merger)

**Question:** Is E-Signing really a good way to go? Some financial vendors in the past would not accept E-signatures. They wanted wet signatures.

**Answer:** I like it, myself, and there are many who do it. But for some clients it may not work. We discussed this at length in the program. We receive several questions on E-Signatures so we have provided a link to an article on E-Signatures on the ERISApedia.com webcast page.

**Question:** FYI. After listening to procedural issues, I wanted to add; we used all-electronic restatements last time. ALOT of up front work; but SOOOOO efficient after they were issued to the parties for signatures.

**Answer:** I like the concept.

**Question:** Can we use electronic signature for the Tricycle?

**Answer:** If that works with your document provider, I think that can make a great deal of sense.

**Question:** What are most charging for restatements (on average)?? What is industry high and low??

**Answer:** No idea.

**Question:** If a plan terminated on 12/31/2019, do they need the SECURE snap on amendment?

**Answer:** No.

**Question:** Is a PEP amendment within the parameters of a Minor Modification?

**Answer:** No. It cannot be submitted because it wasn't in the cumulative list. You adopt an interim amendment, and you will get reliance when you restate for cycle 4. It will be covered by the remedial amendment period.

**Question:** IF the interim amendment is adopted prior the restatement, doesn't it have to be readopted?

**Answer:** Probably not. Check the amendment itself. They may provide that they survive restatement. The restatement itself should have a clause addressing the issue. But ultimately this is document dependent.

**Question:** I've been hearing 7/31/2022 as the deadline too. I saw 12/31 somewhere too--I am not sure what the difference is. Are there different deadlines for certain plans?

**Answer:** The restatement deadline is 7/31/22

**Question:** If a profit sharing plan is wanting to add 401k safe harbor match for plan year 2021, can all this be done in the tricycle restatement?

**Answer:** Yes

**Question:** Does IRS/DOL accept electronically signed plan documents? Is there any regulation that goes against it?

**Answer:** Yes. No, they don't prohibit it.

**Question:** We haven't completed the hardship amendment for any of our clients, am i correct in that we still have time. The deadline is 12/31/2021? The secure and cares/rmd is 2022?

**Answer:** You are correct on both deadlines.

**Question:** For a plan that is terminating now, how do we do all the appropriate amendments when they are not available yet?

**Answer:** You do the best you can. With FIS all the amendments are available for terminating plans. Your provider may be different.

**Question:** Most of our small clients have a general business legal counsel with no ERISA knowledge. This causes confusion sometimes. Should we recommend obtaining ERISA legal counsel? Too expensive for small clients.

**Answer:** You shouldn't let that cause you to be trying to practice law instead. I think you should give the advice. If they don't take it, that's their choice. But that shouldn't prevent you from giving the best advice you can.

**Question:** Derrin - can you give an example or two of a "minor modification" that would compel you to submit Form 5307?

**Answer:** I (Alison) mentioned adding language regarding Puerto Rico employees that we file for. I could see filing for language that creates a unique formula for a certain group of employees. I (Derrin) note that the cycle 3 documents are very stingy on what can be entered in a describe line, particularly with regard to an allocation formula. There will be many times you will need to "color outside the colors" to specify the allocation formula the employer desires.

**Question:** IRS generally returns many 5307 even if the crayon went far outside the box. No real criteria for review. Any comment?

**Answer:** It is a delicate balance. If you color waaayyy outside the box, the IRS can consider it a major modification and kick it for being individually designed. If you are trying to trick the IRS into reviewing the document, they don't like that. Things like the Puerto Rico language are what they are looking for in a filing.

**Question:** If do minor modification and don't apply for letter with Form 5307, can the plan use EPCRS self correction and/or VCP?

**Answer:** To use EPCRS, you would have to have a document failure and I (Alison) don't think that a minor modification is a failure. For example, if I were to create a minor modification to exclude only members of Union 1234, so the regular exclusion box won't work. I wouldn't file that. it's a minor clarification. Remember, the reason you file a 5307 is to have reliance. Reliance lets you avoid a document failure. EPCRS is plan B, for when you have a document failure. But you won't know you have a document failure until you are audited, and by that point it is too late to self-correct. You will be in Audit CAP, paying a hefty sanction.

**Question:** The DOL was very insistent under the PPA Restatement that every document designate a Special Trustee to be responsible for late payrolls. It appears they are not requiring this under Cycle 3. Is this true? Thoughts?

**Answer:** The special trustee provisions would be part of the trust. The DOL position on the topic has not changed. Interestingly, the new PEP rules mandate that a trustee be appointed with systematic procedures to collect contributions from participating employers.

**Question:** Why would you have to restate? Wouldn't a copy of the full adoption agreement be part of the BPD?

**Answer:** This question presumably relates to dealing with collapsible adoption agreements. Check with your document vendor for amendment procedures.

**Question:** Do you need to redo the hardship amendment for Cycle-3 or does the PPA interim still work?

**Answer:** Depending on the language of the interim, many vendors don't use section references, so it will also cover the Cycle-3 document. No need to reissue in that case.

**Question:** Can the document sponsor adopt the Hardship Withdrawal Amendment for any client who did not elect the amendment individually?

**Answer:** Yes.

**Question:** If we created a hardship amendment previously then did the tricycle restatement - do we need to do an additional Hardship amendment to go with that?

**Answer:** The hardship amendment should survive the restatement, but check your amendment and basic plan document to be sure.

**Question:** if the ER wants to exclude bonuses for the 401k/SHMatch is this the time to do that?

**Answer:** This would be an impermissible mid-year change for a safe harbor plan, so you should coordinate this with the Plan Anniversary. Otherwise, it would be treated as a midyear suspension or reduction of the safe harbor match, requiring a 30-day notice and causing the plan to lose safe harbor status for the year.

**Question:** Calendar year safe harbor plan wants to change plan year to fiscal year ending 6/30. When would be a good time to do their restatement?

**Answer:** That's really a workflow question that turns on your procedures. It would be nice to coordinate it with the change in year. That would need to be adopted before the end of the short year.

**Question:** Do plan mergers fall into the same category as terminating plans in terms of bringing up to current law prior to merger?

**Answer:** If the plans are merging (as opposed to one of them terminating with full vesting), you can merge the plans first and then restate both together. If the plan is terminating, it should be brought up to date before termination (and preferably restated before termination, although that is not mandatory).

**Question:** So if the plan term 2019 and all assets distributed 2020, do you need restatement?

**Answer:** You absolutely need to restate if the plan terminates after July 31, 2022. It is a great idea to restate if the plan terminates before July 31, 2022 but the assets are not distributed until after that date. We had a case where the auditor wanted to disqualify a plan in that situation with the last restatement cycle. We won, but the cost of doing the restatement would have been less than the cost of hiring lawyers to do battle with the IRS. If the assets will be distributed before July 31, 2022, I recommend restating, but it is not required.

**Question:** What if the TPA pre-dates the documents? I know it's a little off-topic, but is that permissible?

**Answer:** That is impermissible.

**Question:** What is the deadline for restating?

**Answer:** 7/31/2022

**Question:** Do you have any points about doing this restatement manually vs electronically via the document vendor?

**Answer:** That depends on the vendor and the system. Overall, I'd suggest you are more likely to make a major mistake (such as leaving a key issue blank) if you try to complete the document manually. Such a mistake can easily cause the plan to lose reliance.

**Question:** Why are they saying 12/31/22?

**Answer:** It was a typo on the slide. Our apologies. 7/31/2022 is the deadline.

**Question:** Should TPA firms make certain to get back the signed Board Resolutions that go along with the restatement? We are having issues because we may not know how many board members the client has and if DocuSign has for example four spaces for signature but only two members it is asking for 4 signatures. Should we as TPA firms just give them the Board resolution as a sample for them to tweak and keep for their own records and not be concerned about getting esignatures back?

**Answer:** Whether you want to have a copy of the board resolution really turns on how much hand holding you want to do. The key thing is that the document itself be signed. The board resolution establishes that the officer signing the document was authorized to do so. The key benefit to the signed resolution is that it can provide a second source that the document was timely signed. We have used that successfully in dealing with the IRS when original documents could not be located.

**Question:** Clarifying my questions, if a client terminates with a termination effective date after 8/1, and we are restating the document should the effective date for the restatement be 8/1 or can you go back to 1/1/2020? If a client terminates the plan after 8/1, doesn't the plan have to be restated?

**Answer:** The plan does not have to be restated unless you are terminating the plan after 7/31/2022. You can have a retroactive effective date to the beginning of the plan year the document is signed.

**Question:** Do you return the doc and have them enter the date?

**Answer:** If the client did not date it, that is what I would do.

**Question:** Is the plan sponsor no longer required to have a "wet" signature on file. TPA will have scanned copy only

**Answer:** The IRS accepts electronic signatures & allows us to send scanned copies. They joined this century!

**Question:** I thought plan documents were settlor fees, which could not be paid from assets.

**Answer:** Restatements are administrative in nature, so forfeitures or plan assets can be used to pay. The cost of setting up the plan is a settlor expense. The cost of maintaining the plan and implementing settlor decisions (including the decision to restate so as to maintain qualification). See DOL Advisory Opinion 2001-01A.

**Question:** Service agreement same as an engagement letter and in the engagement letter state the fee to restate?

**Answer:** Whatever you use to document your services (agreement or engagement letter) should specify your fees for all services. If it's silent on restatements, you need to notify clients of these fees in advance.

**Question:** What is considered a reasonable fee for a plan restatement?

**Answer:** Oy. That's a loaded question. Given all of the circumstances that we discussed, fees can vary by what you'll cover by your fee (e.g., restatement, restatement + interims), geographic region, etc. We've seen \$1500 - \$3500.

**Question:** Can plan procedures for distributions be a separate document/policy or addendum to the adoption agreement?

**Answer:** Yes, procedures should always be a separate document. Not only were they not approved by the IRS, but they need to be flexible enough to change as functions change.

**Question:** You commented on informing a terminating plan about plan document requirements. How about a takeover client currently on a prior TPA's document? We cannot do SECURE act amendments until the plan is restated but can we wait until after 12/31/20 for that, in line with your recommendation not to do such amendments yet?

**Answer:** Nothing prevents the employer from signing a SECURE amendment, even if you as the TPA do not have authority to do so (because they have not restated onto your document).