

eBenefits Alert: A Whole New World for 403(b) Plans: IRS Establishes a Pre-Approved Plan Program

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Many nonprofit organizations, churches, public schools and other governmental entities are eligible to sponsor 403(b) retirement plans for their employees. Like the 401(k) plans common in the for-profit world, 403(b) plans provide a pre-tax opportunity for employees to save for retirement. Employers can, but do not have to, contribute something as well. However, there have always been important differences, and the IRS has historically treated them very differently. Much of that changed in 2009, when major revisions to the regulations under section 403(b) of the Internal Revenue Code became effective, and began to make 403(b) plans operate a lot more like 401(k) plans. Still, 403(b) plan sponsors had no determination, opinion, or advisory letter program under which they could apply to the IRS for reassurance that their plans met all necessary requirements, whereas 401(k) plan sponsors have had such a system for decades. Four years ago, the IRS proposed a similar program in draft form for 403(b) plans.

Finally, the IRS has established a pre-approved plan program for the 403(b) plan. All pre-approved plans will include a basic plan document, and most will also include an adoption agreement for employers to make limited choices about their plan features. Employers that adopt a pre-approved plan can rely on the IRS opinion or advisory letter stating that it complies in form with the IRS requirements applicable to 403(b) plans.

Highlights

- The program includes only opinion and advisory letters for pre-approved plans. There will be no determination letters for individually-designed plans. This means plan sponsors who want to be sure their plan language meets IRS requirements will have to use pre-approved plans.
- There will be a remedial amendment period for plan sponsors to correct defects in their plan documents. Sponsors of individually-designed plans can correct defects by adopting amendments, or by adopting a pre-approved plan. This will provide a welcome opportunity to clean up some of the inadvertent defects that found their way into documents adopted in 2008 and 2009.
- Plan sponsors will still be able to apply vesting schedules to employer contributions. This is an important change from the draft program, and will allow many more plans to use pre-approved documents.
- Church plan retirement income accounts can be provided for in pre-approved plans. This is another welcome change from the draft program and will make it easier for churches to stay in compliance with section 403(b).



- Plan documents must incorporate investment arrangements by reference and provide that the terms of the plan control in the case of a conflict. This will be a significant change for many 403(b) plans currently providing that investment contract language trumps plan document language.
- The IRS also issued some sample plan language for use by sponsors requesting IRS approval through the new program. Sponsors of individually-designed plans can model their language on the sample language, even though this program does not allow their plans to get the IRS stamp of approval.

Next Steps for Plan Sponsors

While the end point for the remedial amendment period hasn't been announced yet, it will be coordinated with availability of pre-approved plans. In the meantime, plan sponsors of individually-designed plans can begin considering whether they wish to migrate to a pre-approved plan. Adopting a pre-approved plan will provide assurance that the plan complies in form with the requirements applicable to 403(b) plans. However, it will also mean a loss of flexibility and the inability to continue to use certain plan design features. Plan sponsors that choose to adopt a pre-approved plan must be very careful in completing adoption agreements and in identifying effective dates for certain provisions. These are not tasks that should be left to the last minute. Plan sponsors that decide to continue to maintain individually-designed plans may need to adopt amendments to correct defects and to take advantage of the guidance the IRS has provided.

Revenue Procedure 2013-22 announcing and describing the program can be found here: <http://www.irs.gov/pub/irs-drop/rp-13-22.pdf>.

Contact the Gray Plant Mooty attorney you normally work with, or any member of the Employee Benefits and Executive Compensation Group, to discuss how the new program affects your plan.

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