



eBenefits Alert: Changes on the Horizon for 403(b) Plans

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If you have a 403(b) plan^[1] you probably already know that you need to have a plan document that complies with the requirements set out in Section 403(b) of the Internal Revenue Code.^[2] Recently, the IRS issued a series of "pre-approval" letters to sponsors of prototype and volume submitter 403(b) plans. These letters and the plans they cover offer essentially the same advantages to 403(b) plans that 401(k) plans have had for a long time, namely, reduced costs and administrative burden, along with a measure of safety regarding plan document compliance. Employers sponsoring 403(b) plans will want to review their plan documents and consider whether a pre-approved plan is right for them.

The 403(b) document requirement went into effect at the beginning of 2010. It required that all 403(b) plans have a plan document that specifies the major elements of the plan in a manner that complies with the 403(b) rules. At a minimum, the document has to specify the terms governing eligibility and participation, benefits provided, and the time and form of distributions. However, the IRS provided an important exception to the document compliance requirement. Plan documents that are brought into compliance by the end of the "403(b) remedial amendment period" are deemed to satisfy the document requirement. ^[3]

Earlier this year, the IRS announced that the end of the "403(b) remedial amendment period" is March 31, 2020. Accordingly, all 403(b) plan documents brought into compliance with the 403(b) rules by March 31, 2020, will be treated by the IRS as if they were in compliance with those rules since the document requirement went into effect in 2010. Plans that are not brought into compliance by March 31, 2020, risk losing their tax-preferred status not only prospectively but retroactively.

Shortly after the IRS announced the end of the 403(b) remedial amendment period, it began issuing letters granting pre-approved status to a number of 403(b) plan vendors, such as insurance companies, financial institutions, retirement plan document providers, and law firms, which had previously submitted their plans for approval to the IRS under a program the IRS opened in 2013. ^[4] As with pre-approved 401(k) plans, once the form of the plan is approved by the IRS, the IRS issues an opinion or advisory letter to the vendor, and the vendor becomes the sponsor of the plan. The vendor then either provides the document for purchase or furnishes it to its employers as part of the package of services it supplies to the employer. Upon adoption of the pre-approved plan by the employer, the employer can rely on the opinion or advisory letter



received by the vendor/sponsor that the plan document complies with the 403(b) rules.

While pre-approved plans have been around for a long time in the 401(k) marketplace, 403(b) plans are newcomers. That's because, as mentioned above, until the beginning of 2010, the Internal Revenue Code did not require that a 403(b) plan have a plan document. The announcement of the end of the 403(b) remedial amendment period along with the issuance of the 403(b) pre-approval letters begins a new era for 403(b) plans. Starting March 31, 2020, just like with 401(k) and other qualified retirement plans, 403(b) plan documents must be in compliance with all the Internal Revenue Code requirements. But, just like with 401(k) and other qualified retirement plans, by adopting a pre-approved plan, employers maintaining a 403(b) plan now have the option of taking a similar streamlined approach to plan administration and getting some certainty about document compliance. The differences between 401(k) plans and 403(b) plans have been narrowing over the years, and this marks another step in that process.

There are different types of pre-approved plans offering more or less flexibility in the plan design. However, all pre-approved plans necessarily have limits on the flexibility offered. This is the major drawback of a pre-approved plan. Not all employers will want to use one. But, if you can fit your plan into one of the alternatives available without a loss of plan features that are important to you, there are clearly some advantages to doing so. Pre-approved plans are generally less costly, afford safety because the adopting employer can rely on the opinion or advisory letter issued by the IRS to the sponsor regarding the plan's compliance,^[5] and the sponsor (not the employer) is usually required to keep the plan document up to date.

Regardless of whether you decide to adopt a pre-approved plan, you'll want to check with your employee benefits counsel. If you do decide to adopt a pre-approved plan, you'll want to find one that meshes with your current plan design as closely as possible, unless, of course, you want to change that design. You'll want to make sure that you clearly understand all of the plan design features that you might be adopting, or perhaps losing, in the process. If you decide that a pre-approved plan is not right for you, you'll want to consult with your employee benefits counsel to make sure that your plan document is brought into compliance with all of the required 403(b) plan rules before the March 31, 2020 deadline. Because the conversion or plan update process can take some time and compliance deadlines come upon us before we know it, it's not too early to start thinking about this.

Gray Plant Mooty can assist you in the process of determining if a pre-approved plan is right for you, and if so, prepare that plan for you. If you decide that a pre-approved plan is not the best choice for you, we can update your plan to assure that it complies with all of the 403(b) requirements.



[1] Only certain employers are eligible to maintain a 403(b) plan. These are public schools, tax-exempt organizations, and ministers.

[2] Only church plans that do not have retirement income accounts are exempt from the written plan document requirement.

[3] No relief was given, however, for operational compliance, so that plans must be operated in compliance with the 403(b) rules at all times.

[4] As of the end of May, 2017, 575 entities had applied for pre-approval letters, with most receiving a favorable letter.

[5] Unlike with 401(k) and other qualified retirement plans, there is no determination letter process for 403(b) plans to seek approval from the IRS regarding the plan document's compliance with the applicable rules.