

Employee Benefits Plan Newsletter

IRS Issues Advisory and Opinion Letters for 403(b) Plans

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The IRS has begun issuing Advisory and Opinion Letters approving prototype and volume submitter plan documents for Section 403(b) plans. Several vendors who provide document preparation services have announced that they have received the necessary approval from the IRS to prepare and issue these plan documents.

This article is an update to our previously issued Employee Benefits Plan Newsletter, [IRS to Issue Advisory and Opinion Letters for 403\(b\) Plans](#). That article provided information on the historical reliance that was not provided to an employer who maintained a 403(b) plan since there was no formal plan document approval process by the IRS applicable to 403(b) plans.

The following is some current pertinent information with respect to 403(b) plans.

Differences between a Prototype Plan and a Volume Submitter

Although both types of plans are commonly referred to as “pre-approved plans,” there are differences between a prototype plan and a volume submitter plan. A prototype plan receives an Opinion Letter from the IRS as to the “form” of the plan document, while a volume submitter plan receives an Advisory Letter from the IRS pertaining to its satisfaction of the “form” requirements.

Another major difference is the flexibility and availability of plan provisions for a volume submitter plan to accommodate 403(b) plan employers with specific needs. A volume submitter plan consists of a specimen plan document that offers choices over plan terms, a trust or custodial account, and many times does not have an adoption agreement containing elective provisions. Similar documentation is also provided for prototype plans except the basic plan document contains mandatory provisions. Employers’ choices are made in the required adoption agreement.

The plan amendment process can also be different for these two types of plans. A volume submitter may amend the plan on behalf of an adopting employer, if the plan provides for a provision authorizing the practitioner-creator of the plan document to do so. Amendments made for prototype plans frequently require an actual employer adoption (i.e., wet signature) as many times an amendment may offer choices that can be adopted and a selection is required. In certain situations, a prototype document preparer does unilaterally adopt a plan amendment on behalf of the plan they drafted. This occurs most frequently when a change in law is required and no choice in the statute is provided.

The above is intended to be an overview of the similarities and differences of a prototype plan and a volume submitter type of pre-approved plan document. There are many other characteristics and differences between the two types of plans that are not addressed in this summary.

What's Next?

Sponsors of 403(b) plans will have until March 31, 2020 to adopt a pre-approved plan that has a 2017 Opinion or Advisory Letter. Any sponsor who previously adopted a plan by December 31, 2009 and now adopts a pre-approved plan will be excused from any plan document errors that may have existed in the original document. NOTE: This relief is not available to plan sponsors who continue to use their prior specimen plan document. The new pre-approved plan document will have to be adopted by these employers.

It is our understanding from speaking with vendors and record keepers of 403(b) plans that the process of contacting employers and sponsors of 403(b) plans will begin later this year.

Failure to Timely Adopt

Any employer who failed to timely adopt a 403(b) plan document by December 31, 2009 (or, if later, the effective date of the plan) will not be able to simply adopt a pre-approved plan. They will need to correct the failure to timely adopt the document through the IRS Voluntary Correction Program (VCP), which is part of the Employee Plans Compliance Resolution System (EPCRS) described in Rev. Proc. 2016-51.

Contact Us

The Employee Benefit Services Group at PKF O'Connor Davies is available to assist employers with 403(b) plans, as well as provide representation during IRS examinations. We provide a full spectrum of compliance services for qualified and non-qualified benefit plans. For more information, please email Tim Desmond at tdesmond@pkfod.com or Louis F. LiBrandi at lilibrandi@pkfod.com or telephone 212.286.2600.

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