Pre-approved 403(b) Plans

A Practical Guidance® Practice Note by Carol V. Calhoun and Lisa A. Tavares, Venable LLP

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This practice note discusses pre-approved Internal Revenue Code (I.R.C.) § 403(b) plans (403(b) plans), including their advantages, legal pitfalls, and other issues that an eligible employer may consider when determining whether to use a pre-approved plan for a new 403(b) plan or convert its existing 403(b) plan into a pre-approved plan. In March 2017, the Internal Revenue Service (IRS) began issuing advisory and opinion letters to the first pre-approved retirement programs described in I.R.C. § 403(b).

This practice note discusses:

- What Is a 403(b) Plan?
- What Is a Pre-approved 403(b) Plan?
- What Are the Advantages of a Pre-approved 403(b) Plan?
- What Are the Legal Pitfalls of a Pre-approved 403(b) Plan?
- What Operational Issues Can Arise for a Pre-approved Plan?
- What Practical Issues Can Arise for a Pre-approved Plan?
- When Should an Employer Adopt a Pre-approved 403(b) Plan?
- Can the Employer Cure Past Plan Issues by Adopting a Pre-approved 403(b) Plan?
- What Should an Employer Do If It Did Not Comply with the Written Plan Document Requirement in the Past?

For discussion of 403(b) plan requirements, design, and operation, see 403(b) Plan Design and Compliance and Pre-approved Plan Eligibility Checklist. For corrections to 403(b) plans, see EPCRS Correction Rules and Procedures and see the 403(b) Answer Book, with questions like 403(b) Answer Book (CCH) Q 21:2, "Does SCP apply to all 403(b) arrangements?" You can find the 403(b) Answer Book in the Legal Research section of Lexis+ in the Employee Benefits & Executive Compensation practice area.

What Is a 403(b) Plan?

A 403(b) plan is a type of retirement plan providing for deferred taxation on certain contributions and earnings made by specific kinds of tax-exempt organizations (primarily, public schools and I.R.C. § 501(c)(3) tax-exempt organizations) for their employees and by certain ministers. I.R.C. § 403(b)(1). 403(b) plans are defined contribution plans, with the exception of certain grandfathered church defined benefit plans. Treas. Reg. § 1.403(b)-10(f)(1).

For the participant, a 403(b) plan appears much like a 401(k) plan in that it provides for an individual account for each participant (except in the case of grandfathered church defined benefit plans). However, 403(b) plans are funded by an annuity contract with an insurance company, a custodial account, or a retirement income account—as opposed to a trust—and investment options are more limited. In addition, 403(b) plans are subject to some, but not all of the

requirements that apply to 401(k) and other retirement plans qualified under I.R.C. § 401(a).

Public schools and universities and I.R.C. § 501(c)(3) nonprofit organizations have for many years maintained 403(b) plans, sometimes referred to as tax-deferred annuities or tax-sheltered annuities. When I.R.C. § 403(b) was enacted, its provisions were fairly simple. However, over time, 403(b) plans have become more complex, both in the types of plans available and in the legal requirements applicable to them. For example, prior to December 31, 2009, 403(b) plans were not subject to the plan document requirement, which was imposed by regulations issued in 2007. 72 Fed. Reg. 41,128 (July 26, 2007) (the effective date of which was delayed by I.R.S. Notice 2009-3). Today, they resemble the better-known 401(k) plans.

For more information on the I.R.C. requirements applicable to 403(b) plans generally, see 403(b) Plan Design and Compliance.

Requesting IRS Ruling Letters for 403(b) Plans

As the requirements for 403(b) plans have become more complex, employers have often sought assurances from the IRS that their plans meet the legal requirements. At one time, employers would typically obtain ruling letters from the IRS. However, in Revenue Procedure 2013-22, the IRS announced that it would no longer issue such letters to individual employers. Instead, it would issue only advisory or opinion letters to providers of pre-approved plans. That rule was later modified by Rev. Proc. 2022-40, 2022-47 IRB 487, to permit issuance of determination letters to individually designed 403(b) plans, but only as to their initial adoption or termination.

The guidance on requesting advisory or opinion letters on pre-approved plans is contained in Rev. Proc. 2023-37. See also IRS, 403(b) Pre-Approved Plan Program FAQs.

What Is a Pre-approved 403(b) Plan?

A pre-approved plan is a form plan document developed by a provider for use by at least 15 different employers [Rev. Proc. 2023-37, Section 4.01(15)(a)(ii)], except that a church-related organization is eligible to sponsor a pre-approved 403(b) plan that is intended to be a retirement income account under I.R.C. § 403(b)(9) without regard to the number of eligible employers that are expected to adopt the plan. Rev. Proc. 2023-37, Section4.01(15)(a)(ii)(A). The plan document will include certain required provisions but allow for an employer to choose various permissible options. Rev. Proc. 2023-37, Section 4.01(2) and (19). A pre-approved 403(b) plan may take one of two forms and can generally be adopted by any eligible employer for any type of 403(b) plan, with certain exceptions, as discussed in the following sections.

What Types and Formats of Pre-approved 403(b) Plans Are Available?

Employers may choose among two types of pre-approved 403(b) plans. Pre-approved 403(b) plans may take one of two forms:

- Standardized plans
- Nonstandardized plans

A pre-approved plan receives an opinion letter from the IRS if it is found to meet the 403(b) requirements.

A current list of pre-approved plans can be found on the IRS website.

Standardized and Nonstandardized Plans

A pre-approved plan (standardized or nonstandardized) can take the form of either a single plan document (Single Document Plan) or a basic plan document and an adoption agreement (Adoption Agreement Plan).In an Adoption Agreement Plan, the basic plan document contains all provisions that are the same for all employers. The adoption agreement contains choices regarding certain plan features and the employer checks boxes to indicate which features it wants to adopt. For example, the basic plan document might provide for the investment choices available, but the adoption agreement might allow the employer to choose to allow for employee pretax deferrals, employee after-tax contributions, Roth contributions, employer matches, employer mandatory contributions, employer discretionary contributions, or some combination.

The employer may not make any changes to a pre-approved plan other than the following or the plan will be treated as an individually designed plan:

1. Amendments to the plan to add or change a provision (including choosing among options in the plan) or to specify or change the effective date of a provision, provided the adopting employer is permitted to make the modification or amendment under the terms of the pre-approved plan as well as under the section 403(b) requirements, and the provision is identical to a provision in the pre-approved plan, except for the effective date;
2. Sample or model amendments (or an amendment that is substantially similar to a sample or model amendment in all material respects) that are adopted by the adopting employer, that are published by the IRS, and that specifically provide that their adoption will not cause a plan to fail to be identical to the pre-approved plan;

3. Amendments that adjust the limitations under §§ 415, 402(g), 401(a)(17), and 414(q)(1)(B) to reflect annual cost-of-living increases, or add automatic cost-of-living adjustment provisions to the plan;
4. Plan language completed by the adopting employer if such overriding language is necessary to satisfy § 415 because of the required aggregation of multiple plans under that section;
5. Interim amendments or discretionary amendments that are adopted as a result of a change in section 403(b) requirements;
6. Amendments that reflect a change of a provider's name, in which case the provider must notify the IRS, in writing, of the change in name and certify that it still satisfies the conditions to be a provider described in section 4.01(15);
7. Amendments to the administrative provisions in the plan (such as provisions relating to investments, plan claims procedures, and adopting employer's contact information), provided the amended provisions are not in conflict with any other provision of the plan, still meet the requirements of Rev. Proc. 2023-37, and do not cause the plan to fail to satisfy the section 403(b) requirements; and
8. Amendments with respect to which a closing agreement under the Audit Closing Agreement Program or a compliance statement under the Voluntary Correction Program of EPCRS has been issued.

Rev. Proc. 2023-37, Section 13.02.

If the employer makes amendments other than those listed, the employer would lose the protection of the IRS opinion letter issued to the provider. In some instances, a provider chooses the standardized form specifically for this reason. For example, a firm that provides an investment platform for the plan may offer a standardized plan document specifying that only the investment options provided in that platform are permissible options for investment by the plan. As another example, a third-party administrator may find administration more efficient if all of its employer clients have the same plan document.

An adopting employer of a nonstandardized plan that makes amendments to the plan that are not extensive will lose reliance on the nonstandardized plan's opinion letter but may obtain reliance that the form of the plan, as amended, satisfies the § 403(b) Requirements by requesting a determination letter using Form 5307. In the case of a standardized plan, the same is true only if the amendment is solely to add language to satisfy the requirements of § 415 due to the required aggregation of plans.

Difference between Standardized and Nonstandardized Plans

A standardized 403(b) plan allows employee salary deferrals. For any other types of contributions, if allowed, the plan must:

- State they will be made for all eligible employees
- Make all benefits, rights, and features of the plan available to all benefiting employees
- Have provisions for allocating employer nonelective contributions that meet I.R.C. § 401(a)(4) design-based safe harbor provisions
- Allocate contributions based on total compensation
- Define compensation in a way permissible under:
  - I.R.C. § 415(c)(3) (disregarding I.R.C. § 415(c)(3)(E) (i.e., elective deferrals under I.R.C. § 402(g)(3) and employer contributions not includible in the employee's gross income by reason of I.R.C. §§ 125, 132(f)(4), or 457))) –or–
  - Treas. Reg. § 1.414(s)–1(c)
- Require that if hardship distributions are permitted, any hardship distribution must satisfy the safe harbor standards in the regulations under § 401(k).

Rev. Proc. 2023-37, Section 9.03.

A nonstandardized 403(b) plan is a plan that doesn't meet the requirements to be a standardized plan. One example of such a plan would be a 403(b) plan that allows the adopting employer to select (in the adoption agreement) a method for allocating nonelective employer contributions that isn't an I.R.C. § 401(a)(4) design-based safe harbor, and therefore must meet the I.R.C.'s nondiscrimination testing rules (except in the case of the plan of a public school or university or a church, which are exempt from such testing).

Which Types of 403(b) Plans May Use a Pre-approved Plan Document?

A 403(b) plan can be a pre-approved plan unless it is one of the following types of grandfathered plans:

- **Church 403(b) defined benefit plans.** Section 251(e)(5) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), P.L. 97-248, permitted certain arrangements established by a church-related organization and in effect on September 3, 1982 (TEFRA church defined benefit plans) to be treated as I.R.C. § 403(b) contracts even though they are defined benefit arrangements, though such arrangements cannot be pre-approved plans. For a discussion of rules that apply to church plans, see Church Plans under ERISA and the Internal Revenue Code.
- **Self-insured state and local governmental 403(b) plans.** Revenue Ruling 82-102 reversed previous rulings that

had permitted certain arrangements that were neither annuities nor custodial accounts to be treated as 403(b) plans. However, it provided that the revenue ruling would not be applied to an arrangement established by an employer on or before May 17, 1982, if (1) the contract(s) issued pursuant to the arrangement (including self-insured arrangements) would have met the requirements of I.R.C. § 403(b) except that the contract(s) was not purchased from an insurance company, and (2) the arrangement only covered current and future employees of that employer. Such arrangements can be individually designed 403(b) plans, but cannot be pre-approved plans.

Rev. Proc. 2023-37, Section 10.02(3). In the case of self-insured state and local governmental 403(b) plans, the employer may wish to modify the plan to provide for investment in annuities or custodial accounts, at least going forward.

If a church wishes to continue to offer a 403(b) defined benefit plan, it will likely have to do so without an IRS approval letter. Even if it already has a ruling on its plan document, it will have to monitor carefully future changes in law, regulations, or administrative guidance to ensure that its plan does not go out of compliance.

What Organizations Provide Pre-approved Plans?

A wide variety of organizations, ranging from law firms to church benefit boards, provide pre-approved plans. A complete list of those providers that have applied for IRS opinion letters can be found here.

What Are the Advantages of a Pre-approved 403(b) Plan?

The primary advantages of pre-approved 403(b) plans over individually designed plans are:

- **Cost.** Drafting one plan document for 15 or more employers costs less per employer than drafting a plan just for one employer. The reduction in cost typically gets passed on to the adopting employers. In some instances, a provider may even offer the plan document free for those employers that use other bundled services (e.g., investment services or third-party administration services).
- **Reliance.** An advisory or opinion letter from the IRS provides assurances that a plan meets IRS requirements. Even if the IRS later changes its interpretation of a particular legal requirement, it will typically provide retroactive relief to plans that have obtained such letters. In contrast, the determination letter program for individually designed 403(b) plans is available only upon a plan's initial adoption or termination, and thus does not provide assurances that amendments adopted between those times comply with applicable law. [Rev. Proc. 2022-40, 2022-47 IRB 487]
- **Ability to correct retroactively.** If an employer amends its plan document to take the form of a pre-approved 403(b) plan, the IRS will allow it to correct certain past errors without penalty. Rev. Proc. 2017-18, Section 3. This provision does not apply to plans that update their plans without adopting pre-approved plans.
- **Updates.** A plan document must be revised to reflect new legislative, regulatory, and administrative requirements as they are created. As with the initial plan drafting, providers can amend pre-approved plan documents at less cost per employer as compared to the cost associated with drafting amendments for many individual employers.
- **Bundled third-party services.** A pre-approved plan is often part of "one-stop shopping" for the employer. The provider or an affiliate may also provide investment choices under the plan and third-party administrative services. This saves the employer from having to find different vendors for each of the functions under the plan. In addition, the vendors may be able to operate more efficiently if they need to become familiar with only one plan document, instead of a different one for each employer.

In many instances, employers adopting a pre-approved plan assume that if the plan is issued by a well-established sponsor and has an IRS opinion or advisory letter, the employer need not obtain any kind of legal review of the plan. However, as discussed in the following sections, there are a number of legal and practical issues that may arise even if the plan document itself is pre-approved.

For a discussion regarding employer contributions to 403(b) plans, see 403(b) Answer Book (CCH) Q 19:4, "What design considerations apply to employer contributions?"

What Are the Legal Pitfalls of a Pre-approved 403(b) Plan?

There are legal pitfalls of a pre-approved 403(b) plan. An opinion letter on a pre-approved plan will not cover certain issues:

- The opinion letter will not cover whether investment agreements such as annuity or custodial account agreements meet all legal requirements, even if they are incorporated into the 403(b) plan document. This issue

arose when participants in retirement plans for 12 major universities sued plan fiduciaries asserting breaches of fiduciary duty arising from allegedly excessive fees for administrative and investment management services, imprudent selection and monitoring of recordkeepers and investment options, underperforming plan investment options, and the offering of too many investment options (leading to decision paralysis on the part of the participants). See Doe v. Columbia Univ. et al (S.D.N.Y. filed Aug. 16, 2016).

- The opinion letter will not address whether the plan is subject to the Employee Retirement Income Security Act (ERISA) and, if so, whether it meets ERISA's requirements.
- The opinion letter will not cover whether the plan operates in such a way as to meet the I.R.C.'s requirements (as opposed to just the plan document meeting such requirements).

Moreover, the opinion letter merely assures that the plan document meets I.R.C. requirements. It does not assure that the plan will meet a particular employer's objectives or that the terms of the plan are understandable or easy to apply. In many instances, employers assume that if a plan is pre-approved, they need not obtain any kind of review of the plan before adopting it. This can be risky if, for example, the terms of a plan are not what the employer intended or are so unclear that the employer unwittingly violates IRS or Department of Labor (DOL) rules in operating the plan.

What Operational Issues Can Arise for a Pre-approved Plan?

The IRS has identified some common issues that may occur, even if the plan language meets legal requirements. These operational issues include:

- **Adoption by an ineligible employer.** Nonprofits other than those described in I.R.C. § 501(c)(3), such as unions or trade associations, cannot sponsor 403(b) plans. These failures sometimes occur due to a change in the employer, such as when a private nonprofit hospital that maintains a 403(b) plan is taken over by a governmental entity that is ineligible to maintain the 403(b) plan.
- **Excess contributions, including:**
  - Violating the 15-year catchup rule under I.R.C. § 402(g)(7) (which permits certain additional 403(b) contributions by employees of an adopting employer who have at least 15 years of full-time service with the same employer if the employer is an educational organization, hospital, home health service agency, health and welfare service agency, church, or convention or association of churches) –and–
  - Violating the maximum aggregate limit on employer and employee contributions (the annual additions limit) under I.R.C. § 415(c)

    Violation of these limits frequently occurs when an employee participates in more than one 403(b) plan and the employer fails to take account of contributions to one plan when determining the limits on contributions to the other(s).
- **Excluding eligible employees from participation:**
  - Eligible employees include part-time employees that would qualify to participate. With very limited exceptions (e.g., employees who normally work less than 20 hours per week and have normally worked less than 20 hours per week in all prior years), all employees must be permitted to make pretax contributions to a 403(b) plan if any employee is permitted to make such contributions. I.R.C. § 403(b)(12)(i). This is known as the universal availability rule. Compliance with the universal availability rule is especially an issue with casual employees such as substitute teachers, as the hours they will work are impossible to know in advance. Moreover, under the "once in always in" rule of Notice 2018-95, an employee who works over 1,000 in any year may not be excluded for any subsequent year. And effective for plan years beginning in and after 2025, the Secure 2.0 Act requires 403(b) plans subject to ERISA to include otherwise excluded part-time employees for purposes of making their own contributions (though not for purposes of an employer match or other employer contribution) if they accrue at least 500 hours of service for two consecutive 12-month periods. Pub. L. No. 117-328, Div. T, § 125 (adding ERISA §§ 202(c), 203(b)(4) (29 U.S.C. §§ 1102(c), 1103(b)(4)) and I.R.C. § 403(b)(12)(D)).
  - Contributions other than pretax (or Roth, if permitted) employee contributions must be tested to ensure the employer does not impermissibly discriminate in favor of highly compensated employees under the nondiscrimination rules. I.R.C. § 403(b)(12)(ii). If the employer excludes certain individuals from the calculation of the number of eligible employees under the plan, this will skew the nondiscrimination testing.

    Churches are exempt from both the universal availability rule and the nondiscrimination rules by reason of I.R.C. § 403(b)(1)(D), and governmental employers are exempt from the nondiscrimination rules by reason of I.R.C. § 403(b)(12)(C).

Issues with either the universal availability rule or the nondiscrimination rules can arise, for example, if an employer excludes individuals it believes to be independent contractors from the plan and the IRS later determines that such individuals are employees.

- **Plan loan issues.** Plan loan issues arise when (1) participants fail to make required payments when due, resulting in default of the entire loan; (2) loans are poorly documented; or (3) loans from multiple vendors result in the aggregate of plan loans to one participant exceeding permissible limits. I.R.C. § 72(p) provides limits on the maximum amount of loans, and I.R.C. § 72(p)(2)(E) provides that all plans of an employer and its controlled group are aggregated for purposes of applying the limits.
- **Hardship withdrawal issues.** These include failure to obtain documentation of the hardship or distributions from multiple vendors that exceed the amount necessary to relieve the hardship. I.R.C. § 403(b) requires that distributions not begin before age 59½, severance from employment, death, or disability, except in the case of hardship. Treas. Reg. § 1.401(k)-1(d)(3) requires that the determination of the existence of an immediate and heavy financial need and of the amount necessary to meet the need must be made in accordance with nondiscriminatory and objective standards set forth in the plan, and that the amount cannot exceed the amount necessary to relieve the hardship. This will be less of a concern going forward as plans are permitted to accept a participant's self-certification for hardship withdrawal eligibility unless the employer has actual knowledge to the contrary pursuant to the Secure 2.0 Act effective for plan years beginning in and after 2023. Pub. L. No. 117-328, Div. T, § 312.

For further discussion of issues related to 403(b) and 457 plans, see Top Ten Issues For IRC 403(b) and 457 Plans.

What Practical Issues Can Arise for a Pre-approved Plan?

Even if a 403(b) plan meets all IRS requirements, certain provisions may cause practical pitfalls for the employer. Counsel employers to be mindful of the following issues:

- **Plan provider issues.** These include issues with responsibilities, indemnification, and resolution of claims against the plan provider. For example, the plan may call for the provider to handle certain administrative requirements. However, if those requirements are not handled in an acceptable manner, participants may sue the employer, but the plan may not give the employer any recourse against the provider or indemnification against liability that the employer may have to participants. Or the plan may provide that such claims must be resolved through arbitration rather than lawsuits or those lawsuits must be filed in the provider's home state (which may be far from where the employer is located).
- **Insufficiency of plan provisions to protect the employer.** While the opinion letter on a plan will generally provide comfort that the plan is qualified in form, it may omit crucial protections for the employer. For example, if the plan document does not give the employer the right to interpret the terms of the plan, a court may hold that provisions have a meaning quite different from that which the employer assumed. In addition, the plan may either omit a statute of limitations on bringing claims for benefits or provide one that is shorter than the maximum statute of limitations available under state law.
- **Poor plan communications.** Many lawsuits are based on plan communications. An employer with a 403(b) plan subject to ERISA should ensure that the Summary Plan Description (SPD) and all other employee communications accurately describe the essential provisions of the pre-approved plan. See, e.g., Burstein v. Retirement Account Plan for Employees of Allegheny Health Education and Research Foundation, 336 F.3d 365 (3d Cir. 2003), in which the court found that when an SPD conflicted with the terms of a plan, the terms of the SPD controlled. In the case of a plan of a public school, the formal SPD requirements do not apply but the public school maintaining the plan typically uses some form of summary to communicate plan features to participants.
- **Failure to correctly identify whether the plan is subject to ERISA and to adopt an appropriate document.** Governmental plans (e.g., 403(b) plans of public schools or universities) are exempt from ERISA. Church plans are exempt from ERISA unless they have made an election to be covered by it. ERISA § 4 (29 U.S.C. § 1003). The 403(b) plans of other nonprofits are subject to ERISA unless they provide only for employee deferrals and have minimal levels of employer involvement. 29 C.F.R. § 2510.3-2(f).

  Use of a non-ERISA 403(b) plan document for an ERISA plan, or use of an ERISA plan document for a non-ERISA plan, can create problems for the employer. An ERISA 403(b) plan is subject to a variety of reporting, disclosure, fiduciary, and prohibited-transaction rules. If an employer adopts a plan document designed for a non-ERISA plan when its plan is subject to ERISA, it may not be aware of the ERISA requirements with which it needs to comply. Conversely, if an employer adopts a plan document designed for an ERISA plan when its plan is not subject to ERISA, it may contractually subject itself to requirements with which it would not otherwise be required to comply.

This can be a particularly serious issue in the case of the prohibited transaction requirements of ERISA § 406 (29 U.S.C. § 1106). Prohibited transactions requirements prohibit certain transactions between a plan and certain closely related entities. A plan that is subject to such requirements under ERISA can apply for an exemption from the DOL, whereas a plan that is subject to them under contract may be unable to escape them at all.

When Should an Employer Adopt a Pre-approved 403(b) Plan?

The IRS issued the first opinion and advisory letters on pre-approved plans in March 2017. Revenue Procedure 2017-18 announced that employers had until March 31, 2020 (extended to June 30, 2020, in response to the coronavirus outbreak, in I.R.S. Notice 2020-35) to convert their 403(b) plans to pre-approved form. The second cycle for pre-approved providers to amend and submit their plans ran from May 2, 2022 to May 1, 2023. [Section 1.03 of Rev. Proc. 2021-37.] The IRS is expected to announce a date for employers to adopt the Cycle 2 amendments to pre-approved 403(b) plans in the future.

Best Practice Is to Adopt a Pre-approved 403(b) Plan Early

For future remedial amendment periods, employers should consider adopting new versions of their 403(b) plans early (as soon as an updated pre-approved document is available from the plan provider). A 403(b) plan is required to operate in accordance with IRS requirements, even if the plan document has not yet been amended to incorporate such requirements. To prevent the confusion that can result if the rules under which the plan must operate differ from what is stated in the plan document, an employer will typically want to use the pre-approved document as soon as possible.

For more information on the recurring remedial amendment periods for correcting 403(b) plan document defects first occurring after June 30, 2020, see Rev. Proc. 2019-39 (as modified by Rev. Proc. 2020-40) and I.R.S. Notice 2020-35 (substituting the June 30 date for the originally announced date of March 31, 2020).

Can the Employer Cure Past Plan Issues by Adopting a Pre-approved 403(b) Plan?

Revenue Procedure 2013-22, as clarified by Revenue Procedure 2017-18, announced relief for an employer that adopted a formal written document in order to satisfy the written plan requirements in the 403(b) regulations by the later of January 1, 2010, or the plan's effective date. Such an employer was permitted to retroactively correct defects in the form of its plan by either adopting a 403(b) pre-approved plan or otherwise amending its 403(b) plan on or before June 30, 2020 (extended from March 31, 2020, in I.R.S. Notice 2020-35).

For an employer that did not meet the June 30, 2020 deadline, adoption of a pre-approved plan will not cure past failures. See the next section for correction mechanisms available in that situation.

What Should an Employer Do If It Did Not Comply with the Written Plan Document Requirement in the Past or If It Does Not Meet the Deadline for Correcting Past Errors?

If the organization did not have a written plan document by the deadline, or if it did not either adopt a 403(b) plan or otherwise amend its 403(b) plan on or before June 30, 2020, the IRS will permit the issue to be corrected using the principles of the Employee Plans Compliance Resolution System (EPCRS). The most recent EPCRS rules are found in Rev. Proc. 2021-30, as modified by Division T of the Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4459 (2022), known as the SECURE 2.0 Act of 2022 (SECURE 2.0) and Notice 2023-43.

For further discussion of correction of 403(b) plan errors under EPCRS, see 403(b) Plan Design and Compliance — Correcting 403(b) Plan Errors.

Consult Legal Counsel to Avoid IRS and DOL Scrutiny

Pre-approved 403(b) plans can provide significant advantages to nonprofit employers and public schools and universities. However, they do not provide complete assurances that the plan will in operation meet IRS requirements or that it will meet employer needs. Legal advice is still critical to avoid both IRS and DOL scrutiny and potential participant lawsuits.

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Carol Calhoun has significant experience with employee benefits matters, including qualified retirement plans, health and welfare arrangements, executive compensation, and insurance and annuity products. Carol has significant experience with standard pension plans – both defined benefit and defined contribution; 401(k); the full array of government and nonprofit plans, including 403(b) and 457; excess benefit plans; cafeteria/flexible spending; and a wide variety of welfare plans (e.g., health, life, and disability).

Carol assists employers of all kinds with their benefit plans. She also represents boards of trustees of multiemployer and governmental plans, and agencies charged with administering employee benefit plans.

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Lisa Tavares, co-chair of Venable's Business Division, advises clients on Employee Retirement Income Security Act (ERISA) and tax requirements applicable to retirement plans and non-qualified arrangements, health and welfare benefits, and fringe benefit arrangements. Lisa represents governmental employers on Internal Revenue Code (IRC) and other benefit plan issues related to governmental plans. She regularly assists with government correction programs, such as the Employee Plans Compliance Resolution System (EPCRS), the Department of Labor (DOL) Voluntary Compliance Program (VCP), and the Voluntary Closing Agreement Program. Lisa also navigates issues related to mergers and acquisitions, including due diligence, plan mergers, terminations, transition planning, and employee relations.

Lisa is experienced in negotiating service provider contracts and governance issues. She also has extensive regulatory experience in representing clients on compliance issues with the Treasury Department, Internal Revenue Service (IRS), Department of Labor (DOL), and the Pension Benefit Guaranty Corporation (PBGC). She has been involved in numerous IRS and DOL audits at all levels.

Lisa joined Venable after five years as an attorney with the IRS Office of Chief Counsel, National Office, where she concentrated on qualified plan issues under examination and in litigation. Her responsibilities included advising the IRS Tax Exempt and Government Entities Division, IRS appeals officers, and IRS agents. She worked extensively on litigation regarding plan disqualification, partial termination, prohibited transactions, and worker classification issues. Lisa also has a background as an underwriter for directors and officers liability and ERISA fiduciary liability insurance.

Lisa is a former chair of the Subcommittee on Self-Correction, Determination Letters and Other Administrative Practices of the ABA Tax Section, Employee Benefits Committee, in which she interfaced directly with IRS and DOL officials on issues related to retirement plan administration, regulatory compliance, and government enforcement initiatives.