

Pre-approved Plan Eligibility Checklist

A Practical Guidance® Checklist by Carol V. Calhoun, Venable LLP



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Use this checklist to determine which retirement plans can use pre-approved plan documents to satisfy the requirements for preferential tax treatment under the Internal Revenue Code (I.R.C.). The IRS maintains preapproved plan programs pursuant to Rev. Proc. 2023-37, (1) for retirement plans described in I.R.C. § 401(a) (qualified plans), and (2) for annuity contracts or custodial accounts described in I.R.C. § 403(b) (403(b) plans). The programs available for pre-approved plans are different depending on the type of plan and the type of employer.

For more detailed information on pre-approved qualified plans, see [Pre-approved Plan Design and Compliance](#). For more detailed information on pre-approved 403(b) plans, see [Pre-approved 403\(b\) Plans](#). For a description of the various types of retirement plans (including a more detailed explanation of certain types and sub-types that may or may not be described in this checklist), see [Qualified Retirement Plan Types 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.

Part I: General Limitations on Eligibility for Pre-approved Qualified Plan Document Use

Qualified plans that are ineligible for pre-approved plan document use. The following types of qualified plans cannot use pre-approved plan documents, regardless of any other factors:

- Multiemployer plans (Rev. Proc. 2023-37, Section 10.02(2)(a))
- Collectively bargained plans (although a pre-approved plan can cover collectively bargained employees so long as its terms are not modified by the collective bargaining agreement) (Rev. Proc. 2023-37, Section 10.02(2)(b))

Certain employer limitations. The extent to which an employer can use a pre-approved qualified plan document depends in part on whether the plan is (1) maintained by the federal government, a state or local government, an Indian tribal government, or an international organization (governmental plan); (2) maintained by a church or qualified church-controlled organization (church plan); or (3) subject to the Employee Retirement Income Security Act (ERISA).

Qualified governmental plans can be pre-approved plans if they meet the requirements discussed below. However, because qualified governmental plans are exempt from ERISA and from many of the I.R.C. qualification requirements, but are subject to special requirements under state law, the same pre-approved qualified plan cannot cover both governmental and nongovernmental employers. Rev. Proc. 2023-37, Section 14.06(1)(b). A plan maintained by a church or qualified church-controlled organization (church plan) can

elect to be subject to ERISA. I.R.C. § 410(d). A church plan that has not made this election is referred to as a nonelecting church plan. A nonelecting church plan can be a pre-approved qualified plan, but the same pre-approved plan cannot cover nonelecting churches and either governmental employers or employers that are neither governments nor churches. Rev. Proc. 2023-37, Section 14.06(1)(b).

Qualified plans other than governmental and church plans are subject to ERISA (ERISA plans). This includes plans of taxable employers and not-for-profit organizations (other than governmental or church organizations) which are tax-exempt under I.R.C. § 501(c). Qualified ERISA plans can be pre-approved plans if they meet the requirements set forth below.

Part II: Extent to Which Other Qualified Plans Can Be Pre-Approved Plans

In addition to the limitations described in Part I, different types of plans are subject to different rules regarding whether they can take the form of pre-approved plans, as discussed below.

Certain Defined Terms

Pension plan. A pension plan is a plan that provides for benefits that can be determined based on:

- A benefit formula set forth in the plan (defined benefit plan)
- A formula for contributions set forth in the plan (defined contribution plan) in which the plan allocates contributions to participants' accounts, and the participant ultimately receives the contributions plus earnings
- A combination of the first two (hybrid plan)

Defined benefit plan. A defined benefit plan can be either:

- A traditional defined benefit plan –or–
- A cash balance plan or other “statutory hybrid plans” described under 26 C.F.R. § 1.411(a)(13)-1

Defined contribution pension plans. Defined contribution pension plans can take one of two forms:

- Money purchase pension plans –or–
- Target benefit plans

Hybrid plans. In a hybrid plan, the benefits are a combination of defined benefit and defined contribution plans. For example, a plan might provide that the benefit is the greater of the participant's separate account or a benefit stated in the plan.

Profit sharing and stock bonus plans. These are defined contribution plans. However, unlike defined contribution pension plans, they allow for employer discretion, on an annual basis, as to how much of a contribution to make, and how to allocate it. Profit sharing and stock bonus plans are very similar, except that stock bonus plans are designed to be primarily invested in stock of the employer. All plans with 401(k) features must be profit-sharing or stock bonus plans.

Defined Benefit Plan Eligibility for Pre-approved Plan Document Use

Traditional defined benefit plans. The following (traditional) defined benefit plans cannot be pre-approved plans:

- Variable annuity plans (Rev. Proc. 2023-37, Section 10.02(2)(m))
- Any defined benefit plan that provides a benefit derived from employer contributions that is based partly on the balance of the separate account of a participant (Rev. Proc. 2023-37, Section 10.02(2)(g))
- Plans that provide for medical accounts under I.R.C. § 401(h) or I.R.C. § 105 (Rev. Proc. 2023-37, Section 10.02(1)(e) and (f))
- Plans that include so-called fail-safe provisions for I.R.C. § 401(a)(4) or the average benefit test under I.R.C. § 410(b) (Rev. Proc. 2023-37, Section 10.02(1)(g))
- Governmental defined benefit plans that include “deferred retirement option plan” (DROP) or similar features (Rev. Proc. 2023-37, Section 10.02(1)(i))

All other defined benefit plans can be pre-approved plans.

Cash balance plans. Cash balance plans must meet special requirements to be eligible for pre-approved status, as follows:

- Prior benefit structures must be protected. Rev. Proc. 2023-37, Section 9.05(1).
- Cash balance plans that contain any structure of principal credits that increase with age, service, or other measure during a participant's employment must be definitely determinable, operationally nondiscriminatory, and at all times in compliance with the 133 1/3% rule of I.R.C. § 411(b)(1)(B) and the regulations thereunder. Rev. Proc. 2023-37, Section 9.05(2).

Moreover, cash balance plans cannot be pre-approved plans if they have terms that provide for:

- Hypothetical interest crediting based on rates of return that are subject to participant choice, or any rate that does not meet the requirements of § 1.411(b)(5)-1(d) (Rev. Proc. 2023-37, Section 10.02(2)(f)(ii))
- A rate used to determine hypothetical interest based on actual return on a subset of plan assets or the rate of

return on certain RICs; provided that the plan's interest crediting rate may be set equal to the actual rate of return on the aggregate assets of the plan (even if that rate includes returns on such RICs) (Rev. Proc. 2023-37, Section 10.02(2)(f)(iii))

- A Conversion Amendment, except for plans providing that, after the effective date of the Conversion Amendment, a participant's accrued benefit is equal to the sum of accruals under the prior formula plus the benefit based on the Cash Balance Formula ("A+B Conversion") (Rev. Proc. 2023-37, Section 10.02(2)(f)(iv))
- A provision that uses the 3% accrual rule or the fractional accrual rule under § 411(b)(1)(A) or (C) to satisfy the accrued benefit requirements under § 411(b)(1) (Rev. Proc. 2023-37, Section 10.02(2)(f)(v))
- Funding exclusively through insurance contracts (Rev. Proc. 2023-37, Section 10.02(2)(f)(vi))
- Offsets of benefits accrued under another plan (the offsetting plan), unless all of the following are true, as applicable:
 - The offset is applied on an accumulated basis at the participant's annuity starting date, rather than offsetting each year's principal credit by that year's accruals or contributions under the offsetting plan.
 - The cash balance formula is treated as a lump sum-based benefit formula under Treas. Reg. § 1.411(a)(13)-1(d)(3) only if the offsetting plan is a defined contribution plan and the offset is applied by subtracting the account balance under the defined contribution plan from the hypothetical account balance under the cash balance formula prior to converting the balance to an annuity benefit.
 - The offset meets the safe harbor requirements of Treas. Reg. § 1.401(a)(4)-8(d) (except that the offset can be computed by subtracting the account balance under the offsetting plan from the hypothetical account balance under the cash balance formula), including the requirement that the offsetting plan cannot be a section 401(k) plan or a section 401(m) plan.
 - For the purpose of determining the amount of the offset against any defined benefit formula, the offset reflects the value of any distributions from the offsetting plan made prior to the participant's annuity starting date under the cash balance plan.
 - The offset is applied on a uniform basis for all participants.
 - The plan provides a minimum accrued benefit to participants (expressed as a lifetime annuity commencing at normal retirement age) of no less than

0.5% of compensation for each year of credited service, which is not reduced by the offset applied to other formulas under the plan.

- Accrued benefits, considered in conjunction with defined contribution accounts subject to any offset, meet nondiscrimination requirements.
- The amount of the offset, including any procedures and actuarial assumptions for converting a defined contribution account balance (under a specifically named defined contribution plan) to an annuity amount, is definitely determinable.

Rev. Proc. 2023-37, Section 10.02(2)(f)(vii).

- So-called fail-safe provisions for I.R.C. § 401(a)(4) or the average benefit test under I.R.C. § 410(b) (Rev. Proc. 2023-37, Section 10.02(1)(g))
- Medical accounts under I.R.C. § 401(h) (Rev. Proc. 2023-37, Section 10.02(1)(f)), or I.R.C. § 105 (Rev. Proc. 2023-37, Section 10.02(1)(e))

Cash balance plans that meet the above requirements can be pre-approved plans.

Money Purchase Plan, Target Benefit Plan, and Hybrid Plan Eligibility for Pre-approved Plan Document Use

Money purchase pension plans. A money purchase pension plan can be a pre-approved plan unless it:

- Includes so-called fail-safe provisions for I.R.C. § 401(a)(4) or the average benefit test under I.R.C. § 410(b) (Rev. Proc. 2023-37, Section 10.02(1)(g)) –or–
- Provides for medical accounts under I.R.C. §§ 401(h) or 105 (Rev. Proc. 2023-37, Section 10.02(1)(e) and (f))

Target benefit plans. A target benefit plan that does not meet the I.R.C. § 401(a)(4) safe harbors cannot be a pre-approved plan. Rev. Proc. 2023-37, Section 10.02(1)(h). Other target benefit plans can be pre-approved plans, unless they:

- Include so-called fail-safe provisions for I.R.C. § 401(a)(4) or the average benefit test under I.R.C. § 410(b) (Rev. Proc. 2023-37, Section 10.02(1)(g)) –or–
- Provide for medical accounts under I.R.C. § 401(h) or 105 (Rev. Proc. 2023-37, Section 10.02(1)(e) and (f))

Hybrid plans. Eligible combined (defined benefit/defined contribution) plans and statutory hybrid plans (other than cash balance plans) cannot be pre-approved plans. Rev. Proc. 2023-37, Section 10.02(2)(f)(1) and (g).

Profit Sharing Plan and Stock Bonus Plan

Eligibility for Pre-approved Plan Document Use

Profit sharing plans. Profit sharing plans (including 401(k) plans) can take the form of pre-approved plans, unless they:

- Include so-called fail-safe provisions for I.R.C. § 401(a)(4) or the average benefit test under I.R.C. § 410(b) (Rev. Proc. 2023-37, Section 10.02(1)(g))
- Provide for medical accounts under I.R.C. § 401(h) or 105 (Rev. Proc. 2023-37, Section 10.02(1)(e) and (f)) –or–
- Provide for 401(k) hardship distributions other than safe harbor distributions, unless the distributions are subject to nondiscriminatory and objective criteria contained in the plan (Rev. Proc. 2023-27, Section 10.02(1)(c))

Stock bonus plans. A stock bonus plan other than an employee stock ownership plan (ESOP) cannot be a pre-approved plan. Rev. Proc. 2023-37, Section 10.02(2)(c).

An ESOP cannot be a pre-approved plan if it:

- Is a combination of a stock bonus plan and a money purchase plan (Rev. Proc. 2023-37, Section 10.02(2)(d))
- Provides for the holding of preferred employer stock (Rev. Proc. 2023-37, Section 10.02(2)(e))
- Includes so-called fail-safe provisions for I.R.C. § 401(a)(4) or the average benefit test under I.R.C. § 410(b) (Rev. Proc. 2023-37, Section 10.02(1)(g)) –or–
- Provides for medical accounts under I.R.C. § 401(h) or I.R.C. § 105 (Rev. Proc. 2023-37, Section 10.02(1)(e) and (f))

Any other ESOP can be a pre-approved plan only if it includes all of the following provisions:

- Statement that the plan is an employee stock ownership plan within the meaning of I.R.C. § 4975(e)(7) and is designed to invest primarily in employer stock
- Definition of employer stock in accordance with I.R.C. § 409(l)(1) or (2)
- Diversification rights required by I.R.C. § 401(a)(28)(B) or, if applicable, I.R.C. § 401(a)(35)
- ESOP rules regarding valuation, independent appraiser, allocation of earnings, voting right to demand and put options, distribution, exempt loans, annual addition, forfeiture, employer securities, and I.R.C. § 409(n) requirements

- Provisions that meet the voting requirements of § 409(e)
- Provisions that meet the right-to-demand and put-option requirements of § 409(h), to the extent applicable
- Provisions that meet the distribution requirements of § 409(o)
- Provisions that set forth the requirements relating to exempt loans as described in § 4975(d)(3), § 54.4975-7, and § 54.4975-11(c)
- Provisions that meet the ESOP annual addition requirements described in § 1.415(c)-1(f) and, if the ESOP is maintained by an employer that is a C corporation (as defined in § 1361(a)(2)), the requirements described in § 415(c)(6)
- If an ESOP provides for forfeitures, provisions that meet the forfeiture requirement of § 54.4975-11(d)(4)
- If an ESOP holds employer securities consisting of stock in an S corporation (as defined in § 1361(a)(1)), provisions that meet the requirements of § 409(p) and § 1.409(p)-1
- If an ESOP is maintained by employers that are C corporations, provisions that meet the requirements of § 409(n) –and–
- Identification of the plan sponsor as either a C corporation or an S corporation

Rev. Proc. 2023-37, Section 9.04. For a discussion of ESOPs, see [Employee Stock Ownership Plan Design and Compliance](#).

Part III: Extent to Which 403(b) Plans Can Be Pre-Approved Plans

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 (Rev. Proc. 2023-37, Section 10.02(3)(a))
- Self-insured state and local government 403(b) plans (Rev. Proc. 2023-37, Section 10.02(3)(b))

The limitations described in Part I do not apply to 403(b) plans. See [Church Plans under ERISA and the Internal Revenue Code](#).

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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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