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IRS Issues Comprehensive Guidance on Pre-Approved Retirement Plans

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Rev. Proc. 2023-37 (Nov. 21, 2023)

Available at **https://www.irs.gov/pub/irs-drop/rp-23-37.pdf**

The IRS has issued Revenue Procedure 2023-37, combining, conforming, clarifying, and updating prior guidance for qualified pre-approved retirement plans and 403(b) pre-approved plans relating to remedial amendment periods and plan amendment deadlines, opinion letter submissions by providers, and determination letter applications by adopting employers. The new pre-approved plan guidance, which is effective November 21, 2023, complements earlier guidance affecting individually designed plans. Here are items of interest for pre-approved 401(k) plans:

- *End of Remedial Amendment Period for Timely Adopted Interim Amendments.* Except as provided below with respect to certain discretionary amendments, the remedial amendment period for a disqualifying provision arising from an interim amendment to a non-governmental plan that is timely adopted in good faith expires at the later of (1) the end of the cycle that includes that date on which the remedial amendment period would have ended if the plan were an individually designed plan (generally, the last day of the second calendar year that begins after the issuance of the applicable Required Amendments List), or (2) the end of the first cycle in which an application for an opinion letter that considers the disqualifying provision may be submitted. (A "disqualifying provision" is a required provision that is not in the plan document, a provision in the document that does not comply with the Internal Revenue Code's qualification requirements, or a provision so designated by the IRS.)
- *End of Remedial Amendment Period for Discretionary Amendments Made by Adopting Employers.* The remedial amendment period for a disqualifying provision arising from a discretionary amendment in a non-governmental plan expires at the end of the cycle that includes that date on which the remedial amendment period would have ended if the plan were an individually designed plan (generally, the end of the plan year in which the plan amendment is operationally put into effect).
- *Failure of Adopting Employer to Timely Adopt Interim Amendment.* If an adopting employer does not correct a failure to timely adopt an interim amendment during a cycle with a change in qualification requirements by the last day of the second calendar year that begins after issuance of the Required Amendments List, the adopting employer's plan will be treated as an individually designed plan at the end of that two-year period.
- *Starter 401(k) Deferral-only Plans.* Adopting employers may rely on a starter 401(k) deferral-only plan's opinion letter.
- *Qualified Pre-Approved Plan Cycles.* Each cycle for a qualified pre-approved plan now ends on the last day of the employer adoption window for that cycle. "Employer adoption window" means the period during which an adopting employer must adopt a newly approved pre-approved plan for a cycle, as announced by the IRS. Most employers will have around two years to adopt a newly approved pre-approved plan and file for a determination letter, if applicable. Prior to this change, each cycle was a fixed six years.
- *Provider Applications for Opinion Letters.* In reviewing opinion letter requests for a cycle, the IRS will consider only items included on the applicable cumulative list for that cycle. However, if a plan that has not been

previously reviewed is submitted for a cycle, or a plan has been amended with respect to previously approved language, the IRS will also review the plan for items that appear on earlier cumulative lists, as well as any other relevant qualification requirements considered by the IRS in issuing opinion letters prior to the implementation of cumulative lists. Opinion letters will not be issued for amendments made between submission periods. Providers must instead submit a restated plan that incorporates the amendments during the next submission period. When requesting an opinion letter, pre-approved 401(k) plans no longer have to submit Attachment I for Application for Approval of Pre-Approved Defined Contribution Plans. (This attachment required the applicant to indicate the article or section and page number of the plan where over 100 specified provisions were contained.)

- *Conformity With Section 403(b) Pre-Approved Plan Rules.* Several changes are made to conform rules applicable to qualified pre-approved plans with those applicable to section 403(b) pre-approved plans. For example, a provider's failure to disclose a material fact, misrepresentation of a material fact, or failure to accurately provide information on any form required by the revenue procedure may result in the inability of adopting employers to rely on the opinion letter, and the provider may be required to immediately notify adopting employers of plans negatively affected by the failure.

EBIA Comment: This consolidated guidance should provide welcome relief to providers and adopting employer sponsors of pre-approved 401(k) plans who no longer must sift through multiple revenue procedures to find all the rules for determining remedial amendment periods or applying for an opinion or determination letter. The IRS has also updated Publication 794, which contains information on the limitations and scope of a favorable determination letter issued to a pre-approved plan. For more information, see EBIA's 401(k) Plans manual at Sections XXVII.F ("Remedial Amendment Periods Under the Code"), XXVII.K ("Adopting a Pre-Approved Plan"), and XXVII.L ("Pre-Approved Plan: Opinion Letter Program").

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