

Should I Be Getting an Updated IRS Determination Letter?

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If you maintain a qualified retirement plan, such as a 401(k) or pension plan, that covers more than 100 employees, you are likely in the midst of your annual plan audit. During this process, your auditor might ask for a copy of your updated IRS determination letter, leaving you to wonder: How do I answer that question? And, should I be getting an updated letter?

While those are sensible thoughts, a better question is, can you even get one?

As a reminder, an IRS letter is obtained when a qualified retirement plan is filed with the IRS, which then checks the plan to ensure that all legally required provisions are included. If the IRS is satisfied with the terms of the plan document, it will issue some type of letter on that plan. There are two categories of retirement plans, and the types of letters they can receive, and their ability to receive them, varies.

The first category of retirement plans is a pre-approved plan, often referred to as a prototype or volume submitter plan.

This is a type of form plan document that includes a variety of optional provisions that may be selected by the employer. Most employers obtain their pre-approved plans from a vendor, such as a third-party administrator. The vendor that supplies the plan is responsible for filing it with the IRS every few years and for obtaining a favorable “opinion” or “advisory” letter. Employers that utilize that form plan (which has been pre-approved by the IRS, hence the name) are generally entitled to rely on that letter as applying to their particular plan document. Under current IRS rules, vendors that offer pre-approved plans are still able to obtain updated opinion letters every few years as their plan documents are revised for legal changes.

The second category of retirement plans is generally known as “individually designed” plans, which are custom plan documents that are typically drafted by legal counsel. Historically, the employer sponsoring the plan would file its plan with the IRS every five years for review, and if the plan provisions were acceptable to the IRS, the IRS would issue a favorable “determination” letter.

An employer’s ability to obtain an updated letter for an individually designed plan has been significantly curtailed in recent years. Starting in 2017, the IRS limited the determination letter program to only newly adopted or terminating plans (see IRS Revenue Procedure 2016-37 for more information). Recently, the IRS announced in IRS Revenue Procedure 2019-20 that “statutory hybrid plans” (which are pension plans that include a cash balance or pension equity design) and certain merged plans may also obtain updated determination letters. A short summary of the new rules [can be found here](#).

If your individually designed plan does not fit into one of those categories, however, then you cannot get an updated letter, even if you want to. So, when your auditor asks about it, just point him or her to the IRS website link above, and explain that you are not permitted to get a new letter. Of course, if you do sponsor a statutory hybrid plan, then you should consider obtaining an updated letter; your window to do so runs from September 1, 2019, through August 30, 2020.

Or, if your qualified retirement plan undergoes (or has recently undergone) a qualifying plan merger, then you should also consider filing for an updated letter. To qualify, the plan merger must involve plans of previously



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unrelated employers that experience a merger, acquisition or similar type of business transaction, the plans' merger must be completed by the end of the year after the year of the transaction, and the determination letter application must be filed within the first year after the plans' merger.

What if you sponsor a 403(b) plan? Well, if you utilize a pre-approved plan document, your vendor is able to get an opinion letter. But, if your 403(b) plan is individually designed, you never were eligible, and still aren't eligible, to get a favorable determination letter for that type of plan.

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