



TAX EXEMPT AND  
GOVERNMENT ENTITIES  
DIVISION

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
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MEMORANDUM FOR ALL EMPLOYEE PLANS (EP) EMPLOYEES

FROM: Robert S. Choi /s/  
Director, Employee Plans

SUBJECT: Deadline for Adoption of Discretionary Plan Amendments

Purpose

This interim guidance provides direction to EP Determinations and Examinations employees reviewing a discretionary plan amendment adopted within the first 2-1/2 months after the end of a plan year that increased accrued benefits retroactively based on service for that prior plan year. We understand that this type of plan amendment is frequently adopted in conjunction with an Internal Revenue Code (IRC) § 412(d)(2) funding election. In light of the end-of-plan-year deadline for discretionary plan amendments provided in section 5.05(2) of Rev. Proc. 2007-44, EP employees have asked whether these plan amendments are permitted.

This is not a pronouncement of law and is not subject to use, citation, or reliance as such. Nothing in this interim guidance shall affect the operation of any other provision of the IRC, regulations, or guidance thereunder.

Discretionary Plan Amendments

Section 5 of Rev. Proc. 2007-44 describes the timing for adoption by employers of "interim amendments" and "discretionary amendments." For this purpose, a discretionary amendment is, in general, an amendment that is not otherwise required by reason of a change in a qualification requirement by statute or published guidance (i.e., not a required interim amendment). In conjunction with the timing of a discretionary amendment, section 5.05(2) provides:

[A]n employer . . . will be considered to have timely adopted the [discretionary] amendment if the plan amendment is adopted by the end of the plan year in which the plan amendment is effective.

The amendment deadlines set forth in section 5.05 of Rev. Proc. 2007-44 are tied to the requirement that a qualified plan must be operated in accordance with its terms. See section 5.04 of Rev. Proc. 2007-44. Accordingly, EP has generally interpreted section 5.05(2) to require

that a change in plan operation must be memorialized by an amendment that is adopted by the last day of the plan year in which the change in operation occurs.

Example 1: A calendar year defined benefit plan is operated to increase accrued benefits during 2014 for active participants based on their 2014 service. A discretionary plan amendment reflecting this change must be adopted by December 31, 2014 (the end of the plan year in which the amendment is effective) in order to avoid a failure to operate the plan according to its terms.

On the other hand, section 5.05(2) of Rev. Proc. 2007-44 does not bar a plan amendment that increases accrued benefits retroactively for the prior plan year but is not operationally effective until after the end of that prior year.

Example 2: The increased accrued benefit on account of 2014 service described in Example 1 is operationally effective in 2015 under a plan amendment adopted on March 15, 2015. In this case, since the change in operation occurs during 2015, the failure to adopt the plan amendment by December 31, 2014, did not cause the plan to fail to operate according to its terms, and the plan amendment is timely under section 5.05(2) of Rev. Proc. 2007-44.

#### Administrative Guidelines

- A. These guidelines apply to a discretionary plan amendment that:
- increased accrued benefits based on service during the immediately prior plan year; and
  - was adopted within the first 2½ months of the current plan year (as described in IRC section 412(d)(2)).
- B. Determination agents and specialists: If you are reviewing a retroactive discretionary amendment described in Paragraph A, you should conclude that the amendment does not adversely affect the plan's qualification in form.
- C. Examination agents: If a plan was amended as described in Paragraph A, you should (i) determine if the plan was operated in accordance with the terms of the amendment and (ii) review the form of the amendment if the plan does not have a determination letter that considered the amendment.

#### Effect on Other Documents

This guidance will be incorporated into IRM 7.11.1.12 by December 15, 2017.

#### Effective Date

This memo is effective December 16, 2015.

For questions regarding this interim guidance, contact Seth Tievsky ([seth.tievsky@irs.gov](mailto:seth.tievsky@irs.gov)).

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