

# employee plans news

PROTECTING RETIREMENT BENEFITS THROUGH EDUCATING CUSTOMERS

Internal Revenue Service  
Tax Exempt and Government  
Entities Division

A Publication of Employee Plans

**Determinations** - Don Kieffer [discusses](#) the March 30 Determination Letter Program Update phone forum

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## New on the Web

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## Recurring Columns

- [DOL Corner](#)
- [PBGC Insights](#)

## Employee Plans Determination Letter Program Update - Phone Forum

Employee Plans's Determination Letter Program Update phone forum was held on March 30. Don Kieffer and Andy Fedders presented a one-hour overview of the determination letter program, including several recently announced changes. We spoke with Don about the phone forum and the determination letter program.

### What did you want to highlight in this phone forum?

**DK:** We wanted the phone forum to highlight changes in our determination letter program and how the changes would affect determination letter applications.

### What were the the determination letter program changes?

**DK:** We've made several changes to the program. Two changes, of most concern to the public, recently went into effect.

First, as of May 1, we only accept [Form 5307](#), *Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans*, from volume submitter plan adopters that deviate from their pre-approved specimen document. Second, as of February 1 for plans with a [5-year](#) remedial amendment cycle (other than terminating plans), and May 1 for terminating plans and plans with a [6-year](#) remedial amendment cycle, we no longer accept accompanying Schedule Q or demonstrations as part of a determination letter application.

#### *Form 5307 applications*

Form 5307 filings generally involve plan submissions that adopt those documents we already reviewed. Adopting employers can already rely on the pre-approved plan's opinion or advisory letter that the form of the plan meets most qualification requirements. By not reviewing these already approved plans, we can take those resources and staffing and apply them to other areas.

#### *Demonstrations*

As Andy Fedders noted, a plan's allocation or benefit formula can often be quite complex. Demonstrations present information illustrating how benefits meet various qualification requirements, especially showing that the formula is definite or predetermined. Although not having demos in the future will speed our work, without having this information, our analysis will be more difficult, and we may have some additional questions for the plan sponsor about how benefits are scheduled.

In summary, we made these changes because we are focusing on consolidating and streamlining our work with the hope of improving efficiency, given the limited staffing and resources available. This will also help reduce the applications backlog.

### What are some of the common issues EP finds in determination letter reviews?

**DK:** Andy discussed several of our "recurring issue" topics, including IRC section 415 and compensation, problems with late amendments (including interim and discretionary ones) and covered several issues with merged plans and multiemployer submissions. As a front-line manager, Andy was able to convey very specific information about what reviewers find on current applications.

### What were some of the concerns and questions you received because of the phone forum?

**DK:** Wow, we had so many! I think the most common ones revolved around the changes I described earlier. The community is very concerned that we're removing services they've come to depend on. Several questions asked if we would consider some kind of substitute to these rulings, such as an alternative way to seek a nondiscrimination ruling, or a way to "register" adoptions of pre-approved EP documents. (We thought about these, but have not embarked on either.)

We also had some questions about how we're reviewing ESOPs, including some follow-up questions to our last year's [Determination Letter Issues Regarding Employee Stock Ownership Plans](#) phone forum. There, I detailed the challenges we face in reviewing these applications, and people wanted to know if we've seen improvement and what other ESOP-specific guidance we might be working on. We're improving the ESOP review process by streamlining it and we're posting ESOP guidance to our [ESOP Web page](#).

#### **CPE Credit**

Enrolled Agents, Enrolled Retirement Plan Agents and Enrolled Actuaries who attended the phone forum received a certification of completion.

#### **Transcript & Handout**

The transcript and handout for this forum is now available on our [phone forum Web page](#). We incorporated answers to most of the attendees' questions in our [Determination Letter](#) Web pages and [FAQs](#).

## Exam Priorities...With Monika Templeman - Today's Discussion: 403(b) Written Plan Failures and Examinations

*In each issue, Monika Templeman, Director of Employee Plans Examinations, responds to questions and offers insights on retirement plan topics uncovered during audits. You may provide feedback or suggest future topics for discussion by emailing her at: [RetirementPlanComments@irs.gov](mailto:RetirementPlanComments@irs.gov).*

I'd like to discuss the temporary guidance we've given to examination agents auditing 403(b) plans for the 2009 plan year and forward.

Exam agents found themselves in limbo when starting these audits. The [403\(b\) final regulations](#) require 403(b) plan sponsors to have a written plan in place starting January 1, 2009, and to follow the terms of their plan in operation. [Notice 2009-3](#) provided plan sponsors until December 31, 2009, to adopt a written 403(b) plan if they met the conditions outlined in the notice. In addition, the current Employee Plans Compliance Resolution System [Revenue Procedure 2008-50](#) doesn't offer relief for failing to comply with these new requirements. Therefore, we developed temporary guidance for the Exam agents' use until we release the updated EPCRS revenue procedure. If any 403(b) plan operational errors fall under the definitions of Revenue Procedure 2008-50, the agent works the examination under normal procedures.

Generally, if examination agents discover a failure to meet the requirements in Notice 2009-3, I requested that they prepare an [Audit Closing Agreement](#), but use a sanction closer to the fees that would be paid under the [Voluntary Correction Program](#). The amount of the sanction depends on:

- How did the plan sponsor comply with the Notice 2009-3 requirements prior to being informed of the audit?
- Did the plan sponsor timely adopt the 403(b) written plan?
- Is the sponsor operating the plan according to the written plan requirements?
- Were there other failures?

[Announcement 2009-89](#) provides a remedial amendment period for 403(b) plans that met the requirements of Notice 2009-3 or were new plans adopted after December 31, 2009. Generally, if the plan sponsor either adopts a pre-approved prototype plan or applies for an individual determination letter, they have reliance that their document satisfies the 403(b) written plan requirements beginning on the later of January 1, 2010, or the plan's effective date. The plan sponsor must, however, correct all form defects in the written plan retroactive to the applicable date.

If the plan falls under the remedial amendment period but has form defects, the agent will request an amendment to correct the form defect and help prevent operational defects. If the plan sponsor chooses not to make the amendment because its plan is in an open remedial amendment period, the agent will add the plan to a list for follow-up, which could be another examination.

A question I hear many times from plan sponsors is, "Should we wait to correct plan operational errors until the new EPCRS revenue procedure comes out?" I always answer, "No. Correcting now goes a long way in showing good faith to fix your plan failures if it is audited."

The agents and plan sponsors will follow the guidance of the new EPCRS revenue procedure when it is released. We'll also premier the new 403(b) Fix-It Guide on our website, which will assist you in finding, fixing, and avoiding the most common 403(b) plan errors.

## 401(k) Money Purchase Pension Plans: An EPCU Project

The [Employee Plans Compliance Unit](#) conducted a 401(k) Money Purchase Pension Plan project to determine if these plans met the grandfathering requirements of Internal Revenue Code section 401(k)(1). Only money purchase pension plans created prior to the Employee Retirement Income Security Act of 1974 can have a qualified 401(k) cash or deferred arrangement feature. After ERISA, new money purchase pension plans could no longer have a 401(k) feature.

### Project Goal

To determine whether the 401(k) money purchase pension plan was in existence before ERISA was enacted.

### Project Process

EPCU sent compliance contact letters to a sample of plan sponsors that had filed a [Form 5500](#), [Form 5500-SF](#), or [Form 5500-EZ](#) showing they were a money purchase pension plan with a 401(k) feature after the enactment of the ERISA. The contact letter asked plan sponsors to answer questions about their plan to determine if they had mistakenly adopted a money purchase pension plan with a 401(k) feature after ERISA was enacted and, if so, to correct this error.

### Project Results

*Money purchase pension plans merged into existing 401(k) plans*

Most plan sponsors in the sample had merged a money purchase pension plan into a 401(k) profit-sharing plan because of the increased profit-sharing deduction rules, which began in 2002. These changes allowed a plan sponsor to contribute and deduct in a single plan what previously could only be contributed and deducted in two separate plans. Rather than maintaining two defined contribution plans, sponsors adopted or continued a 401(k) profit-sharing plan, discontinued the separate money purchase pension plan and merged its assets into the 401(k) profit-sharing plan. After the merger, sponsors reported that they were both a money purchase pension plan and a 401(k) profit-sharing plan on their Form 5500-series returns, because of the special quality of the merged assets. For example, joint and survivor annuity rules continued to apply to the money purchase pension assets even when those assets were merged into the 401(k) profit-sharing plan.

Only one plan sponsor in the sample had adopted a money purchase pension plan with a 401(k) feature after ERISA was enacted by incorrectly adding a 401(k) feature to an already existing money purchase pension plan. Once brought to their attention, the plan sponsor corrected their error using the Employee Plans Compliance Resolution System ([EPCRS](#)). As opposed to an examination, errors discovered during the compliance check process may still be corrected using the Self-Correction or Voluntary Correction Programs through EPCRS because the plan is not under examination.

*Results of questions about Form 5500 plan characteristic codes*

EPCU selected plans whose Form 5500 plan characteristic code line listed that they were both a money purchase pension plan and a 401(k) plan. However, when asked in the compliance contact letter if the plan was a defined contribution plan, a money purchase pension plan or a 401(k) plan:

- Some sponsors indicated their plans were money purchase pension plans or 401(k) plans, but were not defined contribution plans. This response was incorrect because both money purchase pension and 401(k) plans are types of [defined contribution plans](#).
- A few plan sponsors said their plans were only money purchase pension plans and a few indicated their plans were neither 401(k) nor money purchase pension plans.

You can prevent Form 5500 plan characteristic code errors by reviewing your plan's characteristics and comparing them to the pension feature code descriptions in the [instructions to the Forms 5500](#).

Finally, we referred a few potentially noncompliant plans for examination.

A [compliance check](#) is not an examination and does not include a review of the plan sponsor's books and records.

### Contact EPCU

If you have questions about the 401(k) Money Purchase Pension Plan project, please [email](#) us and include the words "401(k) Money Purchase Project" in the subject line.

## Issues Found in Defined Benefit Plans Audited for PPA 2006

The Pension Protection Act of 2006 (PPA) made significant changes to funding requirements and administrative practices for defined benefit plans, including cash balance plans. Internal Revenue Code (IRC) section 430 describes the new funding requirements under PPA. One of the goals of PPA was to strengthen defined benefit plan funding levels. Consequently, the new law imposes restrictions via IRC section 436 on benefit payments, benefit increases and accruals when a plan is underfunded beyond certain thresholds. In addition, IRC section 401(a)(29) was added to provide that plans not in compliance with the new restrictions under IRC section 436 may be disqualified.

In an effort to provide guidance to Employee Plans examination agents conducting audits under the new law, the Employee Plans Emerging Issues Team collaborated on an examination project, which was designed to provide PPA training to agents, identify potential areas of non-compliance, outline consistent correction methods and report the findings. A team of agents received training in the new law and subsequently conducted a number of defined benefit plan audits. Although the project is still on-going, many of the cases have been completed and the following is a list of issues identified to date:

- Annual funding notices made late or not dated (PPA section 501(a); ERISA section 101(f))
- Elections to use or reduce prefunding and/or carryover balances made late/not dated (Treas. Regs. sections 1.430(f)-1(e) and (f))
- Elections to use prefunding and carryover balance to meet quarterly contributions made late or elections not specifying the dollar amount(s)
- Late Adjusted Funding Target Attainment Percentage certification (Treas. Regs. sections 1.436-1(f) and -1(h))
- Actuarial increase for late retirement benefits not made
- Assets valued differently for IRC section 430 versus IRC section 436
- Relative value disclosure notices didn't satisfy Treas. Regs. section 1.417(a)(3)-1(c)(1)(iv)
- Late contribution payments resulting in liquidity shortfalls
- Late quarterly contributions - IRC section 430(j)(3)
- Inappropriate inclusion of premiums for life insurance policies in target normal cost as plan expenses
- Funding in excess of IRC section 404(o) limitation
- Compensation for purposes of determining the accrued benefit in the valuation doesn't match the definition per plan terms
- Compensation for benefit purposes not defined in the plan
- Service incorrectly calculated for benefit purposes
- Incorrect interest rates used for calculating benefits distributions for payment options that are subject to IRC 417(e)(3)

Many of the identified issues are failures to comply with the funding rules and consequently, do not threaten the qualified status of the plan, but may result in assessment of excise tax or penalties. However, some of the issues do result in qualification failures, such as a plan not operating in accordance with its specific written terms or in compliance with the requirements of IRC section 401(a)(29). Resolution of the qualification failures have been addressed using the appropriate correction program (*i.e.*, SCP or Audit CAP), and applying the basic correction principles discussed in Revenue Procedure 2008-50.

## Form 8955-SSA and the FIRE System

The IRS permits electronic filing of [Form 8955-SSA](#), *Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits*, through the FIRE (Filing Information Returns Electronically) system.

Filing electronically ensures that:

- return information is accurately received by the IRS and transmitted promptly to the Social Security Administration, and
- plan participants will be notified by SSA of their potential retirement benefits when they apply for Social Security Benefits.

### FIRE Resources

Many filers took advantage of this opportunity and filed the Form 8955-SSA electronically for plan years 2009 and 2010. We encourage you to file electronically.

If you have concerns with using the FIRE system, please visit the [Form 8955-SSA Resources page](#), where you will find:

- a list of [approved software vendors](#),
- [frequently asked questions](#), and
- [IRS Publication 4810](#), *Specifications for Filing Form 8955-SSA, Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits, Electronically*.

For assistance in filing your Form 8955-SSA electronically, contact the IRS:

- (866) 455-7438 (toll free) or (304) 263-8700 (outside the U.S.)
- email [RetirementPlanComment@irs.gov](mailto:RetirementPlanComment@irs.gov) with "Form 8955-SSA" in the subject line. Please provide your phone number.

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## Form 2848: More Changes

A revised version of [Form 2848](#), *Power of Attorney and Declaration of Representative*, was released in March 2012. Beginning March 1, the IRS's three Centralized Authorization File processing sites:

- stopped processing all powers of attorney that are not submitted on either the October 2011 or March 2012 versions of the Form 2848 unless a completed Form 2848 on one of these versions is attached. ([Treas. Reg. section 601.503\(b\)\(2\)](#)).
- will continue processing powers of attorney submitted on either October 2011 or March 2012 versions of the Form 2848 until further guidance is issued.

Powers of attorney that will not be recorded on the CAF can be submitted on a document other than a Form 2848 as long as the document satisfies the requirements for a power of attorney. ([Treas. Reg. section 601.503\(a\)](#)).

## Changes to Form 2848 affecting retirement plans:

### Part I

Line 1	Taxpayer Information	<ul style="list-style-type: none"> <li>The latest form has only one box for any type of taxpayer identification number.</li> <li>Enter the 3-digit plan number in this area.</li> <li>List only one taxpayer. The taxpayer is the plan sponsor on a Form 2848 submitted for a determination letter or VCP submission.</li> <li>The plan and trust must submit separate Forms 2848 even if they are authorizing the same individual(s) to represent them.</li> </ul>
Line 2	Representative(s)	<ul style="list-style-type: none"> <li>Check the box in the name and address area if you want your representative to receive notices and communications. This replaces Line 7 on the prior version of Form 2848. If no box is checked on Line 2 requesting copies of notices and communications be sent to the taxpayer's authorized representative(s), the IRS will routinely send notices and communications only to the taxpayer. While IRS employees may continue to send copies of notices and communications to the taxpayer's authorized representative in some situations, these courtesy copies will not be sent routinely unless a box is checked on Line 2.</li> <li><a href="#">Notice 2011-6</a> now generally requires a preparer tax identification number for most tax forms. Representatives who have applied for, but not received their PTIN may enter "applied for."</li> <li>Form 5500-series, VCP, and determination letter applications are exempt from the PTIN requirement. For retirement plans, the PTIN would only be required on Form 2848 in the event of a discrepancy adjustment.</li> </ul>
Line 3	Matters	<ul style="list-style-type: none"> <li>The title "Tax Matters" has changed to "Matters" to reflect the use of the form for non-tax matters such as determination letters, closing agreements or the Employee Plans Compliance Resolution System (<a href="#">EPCRS</a>).</li> <li>Enter an explanation in the area titled "Description of Matter." The plan number is also required in this area.</li> <li>Enter the Tax Form Number and Year(s) or Period(s), if not applicable, enter "NA."</li> </ul>
Line 4	Specific Use not recorded on CAF	<ul style="list-style-type: none"> <li>An additional Employee Plans category was listed here: A Form 2848 covering an application for a determination letter is no longer recorded on the IRS's Centralized Authorization File.</li> </ul>
Line 5	Acts Authorized	<ul style="list-style-type: none"> <li>Check boxes have been provided to allow you to authorize your representative to perform certain actions not covered by the power of attorney without a specific authorization.</li> <li>Ensure that all necessary boxes are checked.</li> <li>For changes affecting unenrolled tax preparers, see <a href="#">"unenrolled tax preparers for Form 5500 examinations."</a></li> </ul>

Line 6	Retention/revocation of prior power(s) of attorney	<ul style="list-style-type: none"> <li>• This used to be Line 8.</li> <li>• Note that the old Line 6 used to refer to the receipt of refund checks. The CAF processing sites stopped processing taxpayer requests to have refund checks sent routinely to a named representative in November 2011.</li> </ul>
Line 7	Signature of Taxpayer	<ul style="list-style-type: none"> <li>• Latest form allows only one signature. Spouses (or former spouses) must now each file their own Form 2848.</li> <li>• As explained in the instructions, enter your PIN if you are submitting Form 2848 electronically.</li> </ul>

## Unenrolled Return Preparers and Form 5500 Examinations

Recent changes to the regulations governing practice before the IRS (Circular 230) clarify that unenrolled return preparers can only represent a taxpayer during an examination of a tax return if the return preparer signed the return as a paid tax return preparer. Form 5500-series returns aren't currently signed by the paid tax return preparer. Therefore, unenrolled return preparers can no longer represent a plan sponsor during a Form 5500-series return examination. In general, only attorneys, certified public accountants, enrolled agents or enrolled retirement plan agents can represent a plan sponsor in these examinations. See [Circular 230 section 10.7\(c\)](#) for other individuals who may be authorized to represent a plan sponsor in certain circumstances.

A taxpayer, however, may authorize any third party, including an unenrolled return preparer or a registered tax return preparer, to **inspect and/or receive tax information** in any IRS office by properly completing and filing a [Form 8821](#), *Tax Information Authorization*.

### Changes to rules for unenrolled return preparers

The following changes to the rules for unenrolled tax preparers were made in 2011:

- Circular 230, governing practice before the IRS, was amended to provide that a registered tax return preparer may only represent a taxpayer during an examination if they **signed** the return for the taxable year or period under examination ([Circular 230 section 10.3\(f\)\(3\)](#)).
- [Notice 2011-6](#) provides that an individual may only represent a taxpayer during an examination if the individual:
  - **prepared and signed** the taxpayer's return or claim for refund for the taxable period under examination, and
  - was permitted under the regulations or other published guidance to prepare the taxpayer's return or claim for refund for compensation.

Prior to August 2, 2011, an unenrolled tax return preparer who prepared a return, but wasn't required to sign the return according to regulations or the return's instructions, generally was permitted to represent a taxpayer during an examination of the taxable year or period covered by the return.

### Form 5500-series

Currently, the Form 5500-series returns don't have a:

- signature line for any category of tax return preparers, or
- an input area for tax return preparers to enter their identifying information.

Therefore, tax return preparers can't represent plan sponsors in Form 5500-series examinations.

## **We're Glad You Asked! – Vesting Service**

**Our 401(k) plan uses a 6-year graded vesting schedule for matching contributions and forfeits the nonvested portion in a terminated participant's matching contribution account after a cash-out or 5 consecutive 1-year breaks in service. Recently we rehired, on a full-time basis, a former employee who had 2 years of vesting service when he was cashed out in 2008. When he quit, he was 20% vested in his matching contribution account, and during his absence, he accrued 3 consecutive 1-year breaks in service. Must we give him credit for those 2 years of vesting service?**

Because the employee was rehired prior to having 5 consecutive 1-year breaks in service, his 2 pre-break years of service must be counted for vesting of his matching contribution account. If he repays the entire amount of the distribution, the amount forfeited when he was cashed out will be restored.

### *Breaks in service*

Plan participants have a 1-year break in service for any year in which they do not complete the minimum hours of service required by the plan's terms (for example, 501 hours).

### *5-year break-in-service rule*

Your plan uses the special break-in-service rule where an employee's post-break service is counted for vesting in pre-break accounts only if the employee is rehired prior to having 5 consecutive 1-year breaks in service.

### *Vesting of pre-break account*

Although your plan distributed the employee's entire vested account balance in 2008, it must give him the opportunity to repay his entire distribution to the plan within 5 years of being rehired because he didn't have 5 consecutive 1-year breaks in service. If the rehired employee repays the entire distribution to the plan, then you must reinstate the amount he forfeited and vest him in the reinstated amount based on both his pre and post-break years of service.

### *Vesting of post-break account*

Your employee was 20% vested when he left your company in 2008. He was rehired after having only 3 consecutive 1-year breaks in service (2009 – 2011). Therefore, your plan must credit his 2 pre-break years of service for vesting.

### *Post-break waiting period*

A plan may require an employee to complete up to 1 year of vesting service after being rehired to receive vesting credit for his pre-break years of service. If your plan has a post-break waiting period, your rehired employee must complete another year of service before he would be credited with 3 years of service (his 2 pre-break years plus his 1-year waiting period).

### *Types of contributions*

Participants are always 100% vested in their salary deferrals. The plan's 6-year graded vesting schedule applies only to the employer matching contributions.

### **Additional Resources:**

- Internal Revenue Code section [411\(a\)](#)
- [DOL Regs. section 2530.200b](#)

## PBGC Insights

### My PAA account information

- Password change: Federal information security regulations require us to strengthen the password requirements for My PAA. Stronger passwords will better protect personal and business information. Once the change takes effect (expected no later than August 1, 2012), you will be required to change your password to satisfy the new criteria. For example, the password must be between 10 and 24 characters and contain at least one uppercase character, one lowercase character, one number and one special character.
- Account updates: Be sure to keep your account information current (your name, email address and telephone number). To update this information, click on the My Account link that appears at the top of every My PAA screen.
- Account close out: When your account is no longer needed, ask the Filing Coordinator to remove the plans in your account and then contact our premium representatives (by email or telephone) to deactivate your account.

### Premium filing reminders for ongoing plans

- Start the e-filing early to submit by the filing due date:
  - For screen-prepared and imported filings, only the Filing Coordinator or Plan Administrator can submit a fully completed filing.
  - Any authorized account holder can upload a file containing one or more completed filings.
  - For all e-filings, the submitter will receive a confirmation if the filing was successfully submitted.
- Send payments timely and properly:
  - Send checks to the correct mailing address or delivery service address (both are on our website).
  - Notify the bank to forward electronic funds transfers to the proper PBGC account.
  - Send one payment for each plan rather than combining multiple plan payments into one overall payment.
  - Include the plan's employer identification number, plan number and plan year commencement date on each payment.
- Provide the email address and phone number for the plan-authorized contact person (for example, the plan's actuary).
- Respond promptly to follow-up notices and contacts from PBGC regarding filing errors and discrepancies.

### Premium filing reminders for sponsors of terminating plans

- Submit the final premium filing for a plan going through a standard termination (which may be for a short plan year).
- File the PBGC Form T and pay the "[termination premium](#)" annually for three years after plan termination for certain distress and involuntary pension plan terminations.