

Employee Plans News

Issue 2013-2, June 24, 2013

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Employee Plans Compliance Unit

- [Nonprofit Top Hat Plans](#)- EPCU project will seek information from non-governmental 457(b) deferred compensation plan sponsors
- [EPCU FAQs](#) - your client must authorize you to discuss their plan with the IRS for a compliance check

Spotlights

- [Hardship Distributions](#) – EP Exam Director, Monika Templeman discusses errors found during audits and tips on how to avoid them
- [EP published guidance](#)
- [DOL Corner](#)
- [PBGC Insights](#)

Updated

- [SEP eligibility requirements](#), including the 3-of-5 year rule
- [IRA FAQs](#) about Roth rollovers, conversions and recharacterizations
- For the new correction revenue procedure:
 - [Fix-It Guides](#)
 - [Self-Correction Program FAQs](#)
 - [Voluntary Correction Program FAQs](#)

IRS Nationwide Tax Forums

Employee Plans and Exempt Organizations will participate in the [IRS Nationwide Tax Forums](#) in six cities starting in July. The forums are a major outreach event providing three packed days of seminars, workshops and an exhibit hall for the tax practitioner community. In addition to getting the latest tax information, tax professionals can earn continuing education credits for their attendance.

This year, EP will present two seminars. The first, "Grab the Money and Run? Retirement Plan Loans and Hardship Distributions," will cover the tax rules governing loans and early distributions from retirement plans and IRAs, including:

- Limits on loan amounts
- Rules for getting a hardship distribution
- Early distributions from IRAs
- Additional taxes you may incur
- What to do when loans don't go as planned

The second seminar, "2013 New Roth Conversion Opportunities and Other Retirement Curveballs," will discuss how the decisions you make affect the long term tax advantages of your retirement distributions, including:

- Expanded opportunities for Roth conversions within your 401(k) plan
- Added value of a solo 401(k) plan
- Beneficiary designations? Getting it wrong may cost you
- Inheriting an IRA? Your decision will affect your tax bill
- Is a longevity annuity right for you?
- Delaying Social Security could lead to a more secure retirement

Continuing the success of Tax Forum presentations from previous years, EO will again present multiple sessions of its Exempt Organization Workshop. This year's session will include a review of recent changes to the Form 990. In addition, the workshop will present several topics of interest to practitioners who work with exempt organizations.

The dates and locations of this year's forums are:

IRS Nationwide Tax Forums 2013 Locations and Dates	
Orlando, Fla.	July 9 - 11
Grapevine, Texas (Dallas)	July 30 - August 1
New Orleans, La.	August 13 - 15
Atlanta, Ga.	August 20 - 22
National Harbor, Md. (DC)	August 27 - 29
San Diego, Calif.	September 17 - 19

How Much Salary Can You Defer if You're Eligible for More than One Retirement Plan?

The amount you can contribute to retirement plans is your individual limit each calendar year no matter how many plans in which you participate. This limit must be aggregated for these plan types:

- 401(k)
- 403(b)
- SIMPLE plans (SIMPLE IRA and SIMPLE 401(k) plans)
- SARSEP

If you're eligible to defer to a [457\(b\) plan](#), you have a separate limit that includes both employee and employer contributions.

Make sure you don't exceed your individual limit. If you do and the excess isn't returned by April 15 of the next year, you could be subject to double taxation:

- once in the year you deferred your salary, and
- again when you receive a distribution.

Individual limit

The amount you can defer as pre-tax or designated Roth contributions to all your plans (not including 457(b) plans) is \$17,500 for [2013](#). Although your limit is affected by the plan terms, it doesn't depend on how many plans you belong to or who sponsors those plans.

Example

You're 40 years old and defer \$2,500 in pre-tax and designated Roth contributions to your company's 401(k) plan in 2013. You terminate employment and go to work for an unrelated employer and participate in your new employer's 401(k) plan immediately. The maximum you may defer to your new employer's plan in 2013 is \$15,000 (your \$17,500 individual limit - \$2,500 that you've already deferred to your former employer's 401(k)). The amount you can defer to both plans can't exceed your individual limit for that year.

Optional plan terms

- **age-50 catch-ups** - If you'll be 50 years or older by the end of the year, your individual limit is increased by \$5,500 (in 2013). This means your individual limit increases from \$17,500 to \$23,000 in 2013 even if one plan doesn't allow [age-50 catch-up contributions](#) (IRC Section [414\(v\)](#)).

Example

You're 50 years old and participate in both a 401(k) and a 403(b) plan. Both plans permit the maximum contributions for 2013, \$17,500; but the 403(b) doesn't allow age-50 catch-ups. You can still contribute a total of \$23,000 in pre-tax and designated Roth contributions to both plans. Your contributions can't exceed either:

- your individual limit plus the amount of age-50 catch-up contributions, or
 - the maximum contribution in 2013 for that plan type (for example, you couldn't contribute the entire \$23,000 to the 403(b) plan because that 403(b) plan only allows a maximum contribution of \$17,500 in 2013).
- **compensation** - Although plans may set lower deferral limits, the most you can contribute to a plan is the greater of:
 - the allowed amount for that [plan type](#) for the year, or
 - 100% of your eligible compensation defined by plan terms (includible compensation for 403(b) and 457(b) plans).

If you're self-employed, generally your compensation is your net earnings from self-employment (see [Retirement Plans for Self-Employed People](#)).

Example

You are 52 years old and participate in a 401(k) plan with Company #1 and a SIMPLE IRA plan with an unrelated employer Company #2. You'll receive \$10,000 in compensation in 2013 from Company #1 and another \$10,000 from Company #2. The most you can contribute to each plan is \$10,000 because your deferrals to each employer's plan can't exceed 100% of your compensation from that employer, even though your individual contribution limit for 2013 is \$23,000 (\$17,500 individual limit + \$5,500 age-50 catch-up limit). You can't defer more than \$10,000 to either plan (for example, \$12,000 to the 401(k) plan and \$8,000 to the SIMPLE IRA plan) because your deferrals to each employer's plan can't exceed 100% of your compensation from that employer.

- **15-year catch-up deferrals in 403(b) plans** - your individual limit may be increased by as much as \$3,000 if your 403(b) plan allows a 15-year catch-up contribution.

Example

If you're 51 years old in 2013 and participate in both a 401(k) plan and a 403(b) plan, you may contribute \$23,000 in total to both plans, and up to an additional \$3,000 to the 403(b) plan if the plan allows and you work for the same employer for 15 years.

The 15-year catch-up is separate from the age-50 catch-up. If you're eligible and the plan allows both types of catch-ups, your contributions above your annual limit are considered to have been made first under the 15-year catch-up. See [Publication 571, Tax-Sheltered Annuity Plans \(403\(b\) Plans\)](#), for more information on 403(b) contributions.

- **reduced deferral limit** - Although rare, your plan may limit the amount you can defer to an amount less than the allowed deferrals for that plan type for the year.

Example

You are 52 years old and participate in two 401(k) plans. Each plan limits salary deferrals to the lesser of \$5,000 or 100% of your eligible compensation. Although your eligible compensation is \$10,000 from each employer sponsoring the plan and your individual limit allows you to contribute \$23,000 for 2013 (\$17,500 + \$5,500 age-50 catch-up limit), the most you may contribute is \$5,000 to each plan because of the plans' deferral limits set by their terms.

A plan with a 401(k) feature may also reduce the amount you can defer to ensure the plan meets nondiscrimination requirements. The plan may return some of your deferrals even if they don't exceed your individual limit.

457(b) plan

You have a [separate deferral limit](#) if you're also eligible to participate in a 457(b) plan. The amount of employee and employer deferrals allowed to a 457(b) plan depends on:

- if you're in a governmental or a tax-exempt 457(b) plan, and
- the plan's terms.

In 2013, you may defer the greater of \$17,500 or 100% of your includible compensation to a 457(b) plan. The plan may also permit:

- a special "last 3-year catch-up," which allows you to defer in the three years before you reach the plan's normal retirement age:
 - twice the annual 457(b) limit (2013, $\$17,500 \times 2 = \$35,000$), or
 - the annual 457(b) limit, plus amounts allowed in prior years that you didn't contribute; and

- age-50 catch-ups of an additional \$5,500, if it's a governmental 457(b) plan. Tax-exempt organizations are not eligible for the age-50 catch-ups.

If a governmental 457(b) allows both the age-50 catch-up and the 3-year catch-up, you can use the one that allows a larger deferral but not both.

Example

You're in a 457(b) and a 403(b) plan, each plan allows the maximum deferrals for 2013 and you have enough includible compensation, you may be able to defer:

- \$17,500 to each plan, regardless of your age
- 23,000 to the 403(b) plan and \$17,500 to the 457(b) plan if you're age 50 or older by the end of 2013 and the 403(b) plan allows age-50 catch-ups
- \$23,000 to each plan if you're in a governmental 457(b) plan and both plans allow age-50 catch-ups
- \$23,000 to the 403(b) plan if it allows and you're eligible to make age-50 catch-up, and \$35,000 to the 457(b) plan if it allows catch-up contributions and you're eligible for the last 3-year catch-up.
- an additional \$3,000 to the 403(b), if you've worked for a qualified organization at least 15 years and the plan terms allow these catch-ups.

Track your annual contributions

You should track your deferrals to ensure that you don't exceed the individual limit and 457(b) limits. Be especially careful if you participate in more than one plan.

Distribution of excess contributions

If you do exceed your individual and 457(b) limits, to avoid double taxation, contact your plan administrator and ask them to distribute any excess amounts. The plan should distribute the excess contribution to you by April 15 of the following year (or an earlier date specified in the plan). For information about taxes on excess contributions, see [What Happens When an Employee has Elective Deferrals in Excess of the Limits?](#)

When deciding from which plan to request a distribution of excess contributions keep in mind:

- getting the maximum matching contribution that may be offered
- type of investments
- plan fees

Additional resources

- [Publication 560](#), *Retirement Plans for Small Business (SEP, SIMPLE, and Qualified Plans)* Chapters 2 and 4

Is a Frozen Defined Benefit Plan Subject to the Top-Heavy Minimum Benefit Rules?

Yes. A frozen defined benefit plan must meet the top-heavy minimum benefit rules.

A frozen plan may be one in which benefit accruals have ceased but all assets have not been distributed to participants or their beneficiaries. A defined benefit plan is top-heavy if, as of the determination date, the present value of the accrued benefits under the plan for the key employees is more than 60% of these benefits under the plan for all employees. If a frozen DB plan is top-heavy, it must provide top-heavy minimum benefit accruals to all non-key employees.

Many employers sponsor both a defined contribution and a defined benefit plan. In many instances, these plans' provisions require the defined contribution plan to provide an extra minimum top-heavy contribution covering employees in both plans instead of the defined benefit plan crediting top-heavy minimum benefit accruals for these employees.

Alert: Employers that are amending a defined benefit plan to freeze benefit accruals should carefully review the plan's top-heavy language. If these employers also maintain a defined contribution plan, they may want to amend both plans so that any top-heavy minimums are provided under the defined contribution plan. These amendments would avoid the frozen defined benefit plan having to provide minimum benefit accruals if the plan becomes top-heavy.

Additional resources:

- [Defined benefit plan](#)
 - [Internal Revenue Manual section 4.72.5](#)
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403(b) Pre-Approved Plan Program

[Revenue Procedure 2013-22](#) contains details of the 403(b) pre-approved plan program and the procedures to apply for:

- opinion letters for 403(b) prototype plans, and
- advisory letters for 403(b) volume submitter plans.

We'll accept applications beginning June 28, 2013, and issue opinion and advisory letters to 403(b) pre-approved plans that meet the requirements of Internal Revenue Code Section [403\(b\)](#) and the [403\(b\) final regulations](#).

An employer that adopts a sponsor's 403(b) pre-approved plan generally has assurance that its plan document complies with IRC Section 403(b). Please note that the IRS does not intend to establish a determination letter program for individually designed 403(b) plans at this time.

Eligible plans

403(b) prototype plans may be either standardized or nonstandardized, and consist of:

- a basic plan document, containing nonelective provisions that apply to all employers adopting the plan; and
- an adoption agreement, listing all available options under the basic plan document for the employer to select to customize its plan.

- A **standardized** prototype plan
 - allows only employee salary deferrals; or
 - if contributions other than salary deferrals are permitted, has plan terms that satisfy certain uniform coverage, nondiscrimination and other requirements.
- A **nonstandardized** prototype plan is a prototype plan that's not a standardized plan. For example, a 403(b) prototype plan is a nonstandardized plan if it permits a non-design-based safe harbor method for allocating employer contributions.

403(b) volume submitter plans consist of:

- a specimen plan, which is a model plan document (as opposed to the actual plan of an employer); and
- an adoption agreement, if applicable (adoption agreements are not required for VS plans).

An eligible employer's actual plan must be substantially similar to the VS plan sponsor's pre-approved specimen plan.

Eligible plan sponsors

A **prototype or VS plan sponsor** must:

- have an established place of business in the U.S. where it can be reached every business day; and
- expect at least 30 eligible employers to adopt its plan(s).

Certain church-related organizations may sponsor an IRC Section [403\(b\)\(9\)](#) retirement income account plan as either a prototype or VS plan, regardless of how many employers are expected to adopt the plan.

A **mass submitter** of a prototype or VS plan must:

- have an established place of business in the U.S. where it can be reached every business day; and
- submit opinion or advisory letter applications on behalf of at least 30 prototype plan sponsors or 30 VS plan sponsors, each of which is sponsoring, on a word-for-word identical basis, the same basic plan document or specimen plan.

A **sponsor of a mass submitter's plan** must have an established place of business in the U.S. where it can be reached every business day. The sponsor of a:

- prototype plan of a mass submitter may sponsor the plan as a word-for-word identical adopter or as a minor modifier of the plan; and
- VS plan of a mass submitter may only sponsor the plan as a word-for-word identical adopter of the plan.
 - **Word-for-word identical adopter** - a plan that is identical, on a word-for-word basis, to a mass submitter's basic plan document or specimen plan.
 - **Minor modifier** - a plan that contains only minor changes from a mass submitter's basic plan document that don't require in-depth technical review to receive a favorable opinion letter.

Mandatory plan provisions

Revenue Procedure 2013-22 lists mandatory provisions for all 403(b) pre-approved plans, and additional required provisions for 403(b) prototype plans and for 403(b)(9) plans. We'll only review a plan's basic plan document or specimen plan (and adoption agreement, if applicable) and not any investment arrangements' terms or other documents incorporated by reference.

To draft 403(b) pre-approved plans, sponsors can use:

- [Section 403\(b\) Pre-approved Plans Sample Plan Provisions and Information Package](#)
- [Revenue Procedure 2007-71](#) - sample plan language for public school 403(b) plans

403(b) pre-approved plan sponsor's duties

Generally, a pre-approved plan sponsor must:

- keep a written record of the eligible employers who adopted its plan and if requested by IRS, provide their names, addresses and [Employer Identification Numbers](#) (this requirement does not apply to a church-related organization sponsoring a pre-approved plan 403(b)(9) retirement income account); and
- keep the plan approved by:
 - amending the plan for law changes;
 - applying for a new opinion or advisory letter when required;
 - informing about and providing each adopting employer all restated plans, amendments, and opinion or advisory letters; and
 - complying with all required notice procedures.

Scope of an opinion or advisory letter

IRS will issue a favorable opinion or advisory letter to a pre-approved 403(b) plan if the submitted plan meets the requirements of IRC Section 403(b). A favorable opinion or advisory letter won't cover whether the plan is subject to, or satisfies, any [ERISA](#) requirements, any investment arrangements' terms or other documents incorporated by reference.

Application procedures

Beginning June 28, 2013, you can apply for opinion and advisory letters for 403(b) pre-approved plans. Revenue Procedure 2013-22 contains the specific application procedures. For example, you must:

1. Submit separate applications for each:
 - VS plan, or
 - prototype plan;

If you have more than one adoption agreement that may be used with a basic plan document or specimen plan, each pair of adoption agreement and basic plan document or specimen plan is considered a separate 403(b) pre-approved plan and requires a separate application.

2. Submit a signed Revenue Procedure 2013-22, [Appendix - Application for Approval of §403\(b\) Pre-approved Plan](#), with each application;
3. Include the correct user fee with each application (see [Revenue Procedure 2013-8](#) for the 2013 user fees); and

4. A mass submitter must also include opinion or advisory letter applications of at least 30 word-for-word identical adopters of the mass submitter's basic plan document or specimen plan (unless the mass submitter has already satisfied this requirement in a separate mass submitter application).

Additional resources

- [An Overview of Pre-Approved 403\(b\) Retirement Plans](#) (video)
 - [How to Apply for a 403\(b\) Plan Opinion or Advisory Letter](#) (video)
 - [Duties of a Pre-Approved 403\(b\) Plan Sponsor](#) (video)
 - [How to apply for a letter for 403\(b\) pre-approved plans](#) Web page
 - [FAQs: 403\(b\) Pre-Approved Plan Program](#)
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Apply for an Opinion or Advisory Letter - Pre-Approved 403(b) Plans

Sponsors can obtain IRS pre-approval of a 403(b) prototype or volume submitter plan document as complying with Internal Revenue Code Section 403(b) (see [Revenue Procedure 2013-22](#)).

An employer that adopts a sponsor's 403(b) pre-approved plan generally has assurance that its plan document complies with IRC Section 403(b). Please note that the IRS does not intend to establish a determination letter program for individually designed 403(b) plans at this time.

When to apply

Submit your 403(b) pre-approved plan application beginning June 28, 2013.

How to apply

Your 403(b) pre-approved plan application must include all documents required under Revenue Procedure 2013-22 and may include additional documents, as appropriate.

Application Steps

1. **Complete** your application package
2. **Pay** the appropriate user fee based on the [user fee schedule](#)
3. **Mail** your application package to:

Internal Revenue Service
Commissioner, TE/GE
Attention: SE:T:EP:RA
P.O. Box 27063
McPherson Station
Washington, D.C. 20038
4. **Wait** for your application to be assigned to an IRS employee for review
5. **Respond** to any inquiries from the IRS employee assigned to your case
6. **Receive** your official IRS opinion letter (prototype plans) or advisory letter (volume submitter plans) once the plan has been approved

Required items

- Application for Approval of Section 403(b) Pre-Approved Plan (see the [Appendix](#) of Revenue Procedure 2013-22)
- [Form 8717-A](#), User Fee for Employee Plan Opinion or Advisory Letter Request
- **A check or money order** payable to the "United States Treasury" for the required user fee

- **A copy of the plan document**

For prototype plans – your 403(b) plan that consists of:

- **a basic plan document** that contains all of the plan’s nonelective provisions that apply to all adopting eligible employers and that does not have any options or blanks, and
- **an adoption agreement** that allows an adopting eligible employer to select among plan design alternatives available under the basic plan document.

If you have more than one adoption agreement that may be used with your basic plan document, each basic plan document and adoption agreement pair is considered one separate 403(b) prototype plan and requires a separate application.

For volume submitter plans – your 403(b) plan that consists of:

- **a specimen plan**, which is a model plan document (as opposed to the actual plan of an employer), and
- **an adoption agreement**, if applicable (adoption agreements are not required for volume submitter plans).

If you have more than one adoption agreement that may be used with your specimen plan, each specimen plan and adoption agreement pair constitutes one separate 403(b) volume submitter plan and requires a separate application.

Retirement income accounts cannot be included in the same plan as non-retirement income accounts and, therefore, require their own separate plan document. Retirement income accounts are 403(b) plans available only for churches and may be either prototype or volume submitter plans.

For mass submitters – your initial application, containing your basic plan document or specimen plan, must include applications filed on behalf of at least 30 word-for-word identical adopters of the basic plan document or specimen plan. The basic plan document or specimen plan must include language designating the mass submitter as agent of the prototype sponsor or volume submitter for purposes of making plan amendments.

Additional items

- [Form 2848](#), Power of Attorney and Declaration of Representative – if you want an attorney or another qualified individual to represent you.
- [Form 8821](#), Tax Information Authorization – if you want the IRS to mail copies to or correspond about your application with another person.

Who can apply

You can apply for an:

Opinion letter for a 403(b) prototype plans if you’re a:

1. Prototype sponsor,
2. A mass submitter for a mass submitter prototype plan, or
3. A mass submitter on behalf of either (a) a word-for-word identical adopter, or (b) a minor modifier of a mass submitter’s prototype plan.

Advisory letter for 403(b) volume submitter plans if you're a:

1. Volume submitter practitioner,
2. A mass submitter for a mass submitter volume submitter plan, or
3. A mass submitter on behalf of a word-for-word identical adopter of a mass submitter's volume submitter plan.

What adopting employers must do

Employers that adopt a 403(b) pre-approved plan within the adoption period (to be announced when opinion and advisory letters are issued) will generally be treated as retroactively complying with IRC Section 403(b).

Additional resources

- [403\(b\) Pre-approved Plan Program](#)
- [FAQs](#) on the 403(b) Pre-approved Plan Program
- [403\(b\) Plans](#) home page
- [Determination, Opinion and Advisory Letters](#)
- [An Overview of Pre-Approved 403\(b\) Retirement Plans](#) (video)
- [How to Apply for a 403\(b\) Plan Opinion or Advisory Letter](#) (video)
- [Duties of a Pre-Approved 403\(b\) Plan Sponsor](#) (video)

403(b) Pre-Approved Plan Program FAQs

The 403(b) Pre-approved Plan Program is designed to provide assurance that a 403(b) pre-approved plan document meets Internal Revenue Code Section 403(b) requirements (Revenue Procedure 2013-22). The IRS will accept 403(b) pre-approved plan applications beginning June 28, 2013.

These FAQs provide general information and should not be cited as legal authority. Because these answers do not apply to every situation, yours may require additional research.

1. [What is a pre-approved 403\(b\) plan?](#)
2. [Eligible plan sponsors](#)
3. [Required plan provisions](#)
4. [Duties of plan sponsors](#)
5. [Application procedures](#)
6. [Eligible adopting employers and reliance on letters](#)
7. [Remedial amendment period](#)

Additional resources

- [403\(b\) Pre-approved Plan Program](#)
- [403\(b\) Plans](#) homepage

403(b) Pre-Approved Plans for Eligible Employers

If you are an [eligible employer](#), you can satisfy the 403(b) written plan requirement by adopting a 403(b) pre-approved plan instead of an individually designed plan. All 403(b) plans (except church plans that don't contain any retirement income accounts) must satisfy the [written plan requirement](#).

If you adopt a 403(b) pre-approved plan, it's important that you operate the plan according to its written terms to maintain its tax-qualified status.

You can adopt a 403(b) pre-approved plan after the pre-approved sponsor receives a favorable:

- opinion letter for a 403(b) prototype plan, or
- advisory letter for a 403(b) volume submitter plan.

The IRS will begin accepting applications from 403(b) pre-approved plan sponsors on June 28, 2013, and will issue favorable letters to plans that meet the requirements of Internal Revenue Code Section [403\(b\)](#) and the [403\(b\) final regulations](#).

Why you may want to adopt a 403(b) pre-approved plan

Cost – Typically, the cost for a pre-approved plan is less than for an individually designed plan.

Reliance – You generally have peace of mind that the form of the pre-approved plan meets the legal requirements. However, you should review the favorable opinion or advisory letter for complete details on the scope of the plan's letter.

In addition to having all legally required provisions, a pre-approved plan may offer optional plan provisions that you can choose, usually by selecting them in the adoption agreement.

Exceptions

You **can't** rely on a 403(b) pre-approved plan's favorable opinion or advisory letter for whether the plan's:

- **investment agreements** meet all legal requirements even if these are incorporated into the plan by reference. These investment agreements include:
 - annuity contracts,
 - custodial accounts, or
 - other ancillary documents.
- form meets all legal requirements if you cause it to become an **individually designed plan** by changing the 403(b) pre-approved plan document. Please note that the IRS does not intend to establish a determination letter program for individually designed 403(b) plans at this time.
- You also can't rely on a 403(b) pre-approved plan's favorable opinion or advisory letter for whether the plan is subject to, or satisfies, the requirements of ERISA.

Updates – Law changes may require you to amend your 403(b) plan by certain deadlines so your plan may continue meeting tax qualification requirements. If an update is necessary, the pre-approved plan sponsor must amend the plan and notify you of the amendment, or updated plan document, and your required signature, if applicable.

Support services – Your 403(b) pre-approved plan sponsor may offer you additional support with plan administration. Make sure you carefully review and select any offered service agreement options.

Additional resources:

- [403\(b\) Pre-Approved Plan](#) Web pages
 - [403\(b\) plan](#) Web pages
 - [403\(b\) plan FAQs](#)
 - [Publication 4483](#), *403(b) Tax-Sheltered Annuity Plan for Sponsor*
 - [Publication 4484](#), *Choose a retirement plan for employees of tax-exempt and government entities (schools, hospitals, churches, charities)*
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403(b) Plans With Operational Failures

You can correct most retirement plan operational failures under the Employee Plans Compliance Resolution System ([EPCRS](#)). For most plans, an operational failure is when a plan sponsor does not follow its plan's terms. That general definition now applies to IRC Section [403\(b\) plans](#) but only for failures that occurred on or after January 1, 2009.

For failures that occurred before January 1, 2009, the definition of operational failure for 403(b) plans was limited to certain failures listed in [Revenue Procedure 2008-50](#). These included operational failures that occurred because the plan sponsor didn't:

- follow the universal availability rule
- limit a participant's compensation
- satisfy the actual contribution percentage test requirements
- comply with the distribution restrictions
- satisfy incidental death benefit rules
- pay minimum required distributions
- allow employees the right to elect a direct rollover
- give the direct rollover rights in the annuity contract or custodial agreement
- limit annual elective deferrals
- state the annual limit on elective deferrals in the annuity contract or custodial agreement
- limit contributions or allocations and causing excess amounts
- satisfy any other 403(b) plan requirements that caused the plan or one or more of its custodial accounts to lose its 403(b) status, other than a demographic failure, employer eligibility failure or a failure of making contributions for non-employees.

Why are operational failures occurring before January 1, 2009, treated differently?

403(b) plans weren't required to have or operate according to a written plan before January 1, 2009. Therefore, a 403(b) plan sponsor's failure to follow the plan's terms before January 1, 2009, wasn't a failure that a sponsor could fix through EPCRS. Sponsors can still correct only those operational failures that occurred before January 1, 2009, that are allowed under Revenue Procedure 2008-50.

How is an operational failure that spans the period before January 1, 2009 and continues past that date treated?

We can't address a failure to follow the terms of a 403(b) plan document that occurred before January 1, 2009, unless the failure meets one of the operational failures outlined in Revenue Procedure 2008-50. So, if a failure occurring before January 1, 2009 doesn't meet the Revenue Procedure 2008-50 definition of a 403(b) operational failure, a plan sponsor may correct it using [Revenue Procedure 2013-12](#) but only for the period after December 31, 2008.

Voluntary Correction Program Fees for Multiple Failures

The fee for your Voluntary Correction Program (VCP) submission with multiple plan failures will vary depending on the circumstances. For example, if:

- any one of the failures is not eligible for a discount, the fee is the amount listed in the general fee schedule.
- you have more than one failure that is eligible for a discount, the fee is the lesser of the:
 - sum of the discount fees, or
 - amount listed in the general fee schedule.

Fees

The general [VCP compliance fees](#) for sponsors of a qualified or 403(b) plan are listed in a general fee schedule and are based on the number of plan participants. However, you may qualify for discounts in certain circumstances or for certain plan errors. For example:

- Not making required minimum distributions for 50 or fewer participants
- Certain loan failures
- Orphan plans
- A 403(b) plan sponsor's failure to adopt a written plan
- Not amending a plan for certain amendments by the required deadlines

More than one discount

If your VCP submission covers more than one plan error that qualifies for a discount:

- Compare the sum of the discounted fees to the general schedule fee for your plan and pay the lesser amount.
- Don't file multiple VCP submissions (a separate submission for each error).

Example 1: Your plan has 19 participants. You make a VCP submission for a failure to:

- adopt an interim amendment by the required deadline qualifying for a reduced fee of \$375.
- comply with the minimum distribution rules qualifying for a reduced fee of \$500.

The sum of the discounted fees is \$875 (\$375 + \$500), compared with the \$750 fee listed in the general fee schedule for a plan with 19 participants. You should pay the lesser of the two, or \$750.

Example 2: The same facts in example 1, except the plan has 25 participants and the employer has a third failure because it didn't timely adopt an amendment required by the plan's favorable determination letter. This third failure is also eligible for a discounted fee of \$500.

The sum of this plan's discounted fees is now \$1,375 (\$375 + \$500 + \$500), compared with the \$1,000 fee listed in the general fee schedule for a plan with 25 participants. You should pay the lesser of the two, or \$1,000.

Reporting your fee on Form 8951

You must file a [Form 8951](#), *Compliance Fee for Application for Voluntary Correction Program (VCP)*, with your VCP submission, and complete:

- Line 7, if the amount listed in the general fee schedule applies to your plan
- Line 8(a) – (f), if your submission is solely for plan failures that qualify for one or more discounted fees, and the total of the discounted fees is less than the amount listed for your plan in the general fee schedule, or
- Line 8(g) – (j), if your submission qualifies for a discounted fee listed

Form 5300 - Use April 2011 Version

Plan sponsors can continue using the [April 2011 version of Form 5300](#), *Application for Determination for Employee Benefit Plan*, and its instructions until we announce the release of the final updated version later this year.

We released draft revisions to Form 5300 and its instructions in February 2013. When we release the final version, you may continue to use the April 2011 version for six months after its publishing date.

Additional resources

- [Instructions for Form 5300 \(Rev. April 2011\)](#)
- [Determination, Opinion and Advisory Letters](#)

Employee Plans Determination Letter Program Reminders

We've made several changes to the Employee Plans Determination Letter Program, including changes to:

- Form 2848
- Determination letter application user fees
- Acceptance of demonstrations

Form 2848

We revised [Form 2848](#), *Power of Attorney and Declaration of Representative* ([instructions](#)). Please review the [chart](#) that explains the revisions, especially to lines 1, 2 and 4 that affect determination letter applications.

Determination letter application user fees

Please pay the correct user fee amount for your determination letter application using these current rates (effective February 1, 2011).

Form	User Fee
Form 5300 , <i>Application for Determination for Employee Benefit Plan</i> (instructions)	\$2,500 – no demonstration
Form 5307 , <i>Application for Determination for Adopters of Master or Prototype or Volume Submitter Plans</i> (instructions)	\$300 – no demonstration
Form 5310 , <i>Application for Determination for Terminating Plan</i> (instructions)	\$2,000 – no demonstration

Revenue Procedure 2013-8 Section 6 (Fee Schedule) lists all current Employee Plans user fees.

[User fee exemption](#) – if your plan qualifies, you may not have to pay the user fee for your plan's determination letter application.

Acceptance of demonstrations

We eliminated the option to request a determination on coverage and nondiscrimination demonstrations ([Revenue Procedure 2013-6](#)) beginning:

- February 1, 2012, for plans with a [5-year](#) remedial amendment cycle (other than terminating plans), and

- May 1, 2012, for:
 - terminating plans, and
 - plans with a [6-year](#) remedial amendment cycle.

Previously, you could've submitted Schedule Q (Form 5300), *Elective Determination Requests*, with your determination letter application and included data demonstrating compliance with coverage or nondiscrimination requirements.

Additional Resources

- Retirement Plan FAQs - [Changes Relating to Form 5307 and Demos](#)
- [Determination, Opinion and Advisory Letters](#)

Determination Letter Review Process

Employee Plans Determinations has changed the determination letter application review process to more efficiently serve the demand for determination letters. EP uses a multi-step review process for determination letter applications to:

- reduce the technical review processing time, and
- improve the quality of our technical review of each application.

Step 1 – technical screening

EP assigns the application to a technical screener to determine if the:

- sponsor has any other pending applications, and
- plan has any prior determination letters.

We review the application to make sure it is:

- [on-cycle](#) (under Revenue Procedure 2007-44), and
- [procedurally complete](#)
 - correct user fee is submitted
 - required forms are completed, signed and dated
 - plan document and amendments included

We return applications that do not meet the requirements of [Revenue Procedure 2013-6](#) (as annually updated).

Step 2 – review for applicable Cumulative List

A specialist reviews the application under its applicable [Cumulative List](#).

- If there aren't any technical issues and the plan document fully complies with the Cumulative List, then the specialist will issue a favorable determination letter and close the file.
- If the specialist discovers technical issues or needs more information, then that person will forward the application to the third step of review.

Step 3 – further review

A specialist reviews the application and will contact the applicant and designated representative to resolve any issues before issuing a favorable determination letter.

Additional resources:

- [Submission Procedures for Individually Designed Plans](#)
- [Tips for expediting the determination, opinion and advisory letter process](#)
- [FAQs on determination, opinion or advisory letter issues](#)

Employee Stock Ownership Plans Determination Letter Application Review Process

Background

An employee stock ownership plan (ESOP) is an individually designed stock bonus plan, which is qualified under Internal Revenue Code Section 401(a), or a stock bonus and a money purchase plan both of which are qualified under IRC Section 401(a), and which are designed to invest primarily in qualifying employer securities. An ESOP may form a portion of a plan the balance of which includes a tax-qualified pension, profit-sharing, or stock bonus plan which isn't an ESOP. ESOPs generally have participation, vesting and allocation features common to all qualified plans. ESOPs are subject to the distribution provisions of IRC Section 401(a)(14), but must also comply with the distribution and payment requirements of IRC Section 409(o).

ESOPs generally are also required to:

- provide participants with the right to demand distributions in the form of employer securities;
- prohibit allocations of certain securities acquired in a sale to which IRC Section 1042 applies;
- prohibit allocations of securities in an S corporation under certain circumstances; and
- provide certain voting rights if the employer has a registration-type class of securities.

In addition, ESOPs may have distinctive features, for example:

- plan provisions related to the debt-financed acquisition of stock to generate cash for the employer's corporation; and
- plan provisions related to a C corporation plan sponsor's ability to deduct dividends paid on stock held by the ESOP.

In 2009 and 2010, Employee Plans issued a series of Responses to Technical Assistance Requests (Memoranda), which addressed certain ESOP issues.

Review process

A team of ESOP specialists reviews all ESOP determination letter applications to ensure that the plan document meets applicable requirements under the Internal Revenue Code and related regulations. This article provides information on:

- How we review ESOP determination letter applications
- How to check on the status of your letter
- When you must provide documentation for your controlled group election
- Plan provisions permitting transfers from non-ESOP plans

How we review ESOP determination letter applications

ESOP determination letter applications are reviewed in a 2-step process.

Step 1 – Technical Screening

The application is assigned to an ESOP specialist, who reviews whether it:

- has a prior determination letter application or letter;
- submitted the application during its [5-year remedial amendment cycle](#) or is [off-cycle](#); and
- enclosed:
 - the correct determination letter application [user fee](#) (or whether the plan sponsor qualifies for a user fee [exemption](#)),
 - [all required forms](#) (completed, signed and dated), and
 - the plan document and amendments.

During this step, the same specialist reviews the plan document using:

- the applicable [Cumulative List](#);
- the [Memoranda](#);
- a standardized ESOP [worksheet \(rev. 08/11\)](#); and
- feedback from the ESOP Technical Manager and ESOP Technical Lead.

If there aren't any technical issues and the plan document fully complies with all applicable legal requirements under the Code and related regulations, the specialist will issue a favorable determination letter and close the application.

However, if the specialist discovers technical issues or needs more information, then the specialist will forward the application to Step 2.

Step 2 – Further review

When an application enters Step 2, a different ESOP team specialist will contact the applicant (and/or the authorized representative) about any technical issues identified during Step 1 and obtain additional information necessary to resolve those issues.

Check the status of your letter

Currently, the ESOP specialist team is:

- finishing their processing of Cycle D applications, and
- beginning the Step 1 review for Cycle E applications.

You can [check the status](#) of your pending determination letter. This Web page is updated every few weeks to list the postmark dates for each type of application that are currently being reviewed. ESOP applications are listed separately from other Form 5300 and Form 5310 applications.

Controlled group election

If you are planning to submit a determination letter request for an ESOP maintained by a member of a controlled group of corporations under the current five-year cycles, you should include the documentation for a controlled group election submitted to the IRS in the previous five-year cycles.

Plans with language permitting transfers from non-ESOP plans

Plan sponsors may transfer S corporation stock to a non-ESOP plan or non-ESOP portion of a plan to prevent a nonallocation year under IRC Section 409(p). In general, a nonallocation year is any ESOP plan year during which:

- the plan holds stock in an S corporation, and
- disqualified persons own at least 50% of the number of shares of stock in the S corporation.

We're studying whether it is permissible under the Code and related regulations for an ESOP to provide that the plan sponsor may transfer S corporation stock from a non-ESOP plan (or non-ESOP portion of a plan) back to the ESOP (or ESOP portion of the plan) if a nonallocation year wouldn't occur. If the plan contains any such language, we recommend that it be removed from the plan so that we can keep processing the determination letter application; otherwise, the application will be put into suspense until this issue is resolved.

Employee Plans Compliance Unit (EPCU) – Non-Governmental 457(b) Plans Project

Federal law permits tax-exempt entities to sponsor non-qualified deferred compensation plans for select groups of highly compensated employees, managers, directors or officers. These plans, allowed under Internal Revenue Code Section 457(b), are often referred to as “Top Hat” plans.

Why did I receive an EPCU compliance check letter?

Our records show that you filed Forms W-2 for 2011 showing contributions to a non-governmental 457(b) plan (often referred to as a “Top Hat” plan) and also filed Form 990.

What actions do I need to take?

Please provide a timely response to the request for information. If you don’t have a non-governmental 457(b) plan or if you believe for any other reason that you shouldn’t have been contacted, please contact us and explain your circumstances.

You may furnish other documents or clarifying material that you believe will be helpful for us to review. Please answer the questions as completely and accurately as possible.

This letter initiates a compliance check. We will not inspect your books and records to determine a filing liability for a particular tax period. If you don’t respond, however, we may need to take other measures to ensure compliance, including an audit of your plan or organization.

What is EPCU attempting to determine?

Our project goals are to:

- learn more about the operation of non-governmental 457(b) plans,
- verify that the plans comply with the Internal Revenue Code requirements,
- identify issues of noncompliance, and
- recommend ways to remove any barriers to compliance.

We’ll correspond with plan sponsors to solicit information about the characteristics and features of their plans, including contributions and employer and employee eligibility.

We’ll focus on the following issues:

1. verify that the deferrals reported on the sponsors’ Forms W-2 represent a 457(b) plan;
2. determine if the plan sponsor is eligible to have a 457(b) plan, and, if eligible, whether the sponsor is:
 - a governmental unit,
 - exempt from income tax under IRC Section 501(c), or
 - a ‘dual status’ entity that is both governmental and exempt under 501(c);
3. verify that participation in the plan is limited to a select group of highly compensated employees, managers, directors or officers;
4. determine whether the plan contains features not permitted in a top hat plan, such as:
 - loans,
 - age 50 catch-up provisions, or
 - contributions placed in a trust for the exclusive benefit of participants; and
5. determine whether unforeseeable emergency distributions have been made.

In instances where a plan isn’t established or operated in accordance with IRC Section 457(b), we will inform the sponsor what actions are needed, which may include an audit of the plan or correction under the [Voluntary Correction Program](#).

EPCU plans to send compliance check letters and questionnaires to approximately 200 organizations in IRS fiscal year 2013 (ending 9/30/2013) and another 200 in fiscal year 2014 (ending 9/30/2014) as part of this review.

If You Have Questions

Review the Other Resources provided below. Also, feel free to [email](#) us and we will be glad to answer any questions you have about the project and how it relates to you. Please include “Top Hat” in the subject line of the message.

Additional Resources

[Non-Governmental 457\(b\) Plans](#)

[IRC 457 plans home page](#)

[EPCU Letter](#) – Request for Information on IRC Section 457(b) Top Hat Plans

[FAQs on the Department of Labor Delinquent Filer Voluntary Compliance Program](#)

Examination Tips for Hardship Distributions

Monika Templeman, Director of EP Examinations, responds to questions and offers insights on retirement plan topics uncovered during audits. You may provide feedback or suggest future topics by emailing her at: RetirementPlanComments@irs.gov.

We receive many questions and find many errors in the way retirement plan administrators apply the hardship distribution rules. I’d like to address the most recent “frequently asked questions” for hardship distributions and give administrators some tips on avoiding common errors. These include plan sponsors not following the plan terms and not making sure that hardship distributions meet the Internal Revenue Code requirements.

Question: What are the most common hardship distribution errors that Employee Plans agents find during plan audits?

Answer: Often, the agent finds that the plan made hardship distributions to participants, even though the plan document didn’t permit these distributions.

We also find plans that allow hardship distributions but don’t follow the plan document’s specific hardship criteria and distribute the money for another reason. For example, if the plan states hardships distributions can only be made to pay tuition, then it can’t permit a hardship distribution for any other reason, such as a home purchase.

Tips:

Read the plan document to ensure that it allows hardship distributions. If the plan doesn’t allow them, then the plan must be amended. Fortunately, a retroactive amendment is permitted under the [Self-Correction Program](#) if a plan made hardship distributions, but didn’t have provisions authorizing them. Review the terms of the plan, including:

- whether the plan allows hardship distributions;
- the procedures the employee must follow to request a hardship distribution;
- the plan’s definition of a hardship; and

- any limits on the amount and type of funds that can be distributed for a hardship from an employee's accounts.

If plan language allows hardship distributions only under specific circumstances, the plan can't be more liberal in its operation. While the law permits hardships for funeral expenses, a plan can't distribute funds for these expenses unless the plan has payment of funeral expenses as a stated hardship. Again, if a plan sponsor decides to be more liberal in its definition of a hardship, they must amend their plan.

Keep records of information that you used to determine a participant's eligibility for a hardship distribution.

Keep in mind, the hardship distribution should only be made because of a participant's (employee, employee's spouse, dependent or the employee's beneficiary) immediate and heavy financial need and should only be made in an amount necessary to satisfy that need. A distribution won't be considered necessary to satisfy an immediate and heavy financial need if:

- it exceeds the amount needed to relieve the person's financial need, or
- the participant can obtain money from other reasonably available resources.

Question: If a plan allows loans, what are the required steps before granting a hardship distribution?

Answer: If the plan allows loans, it may require you to document that the employee has exhausted any loans or distributions, other than hardship distributions, available under the plan or any other plan of the employer in which the employee participates.

Tip: The plan sponsor should have procedures in place to review hardship applications and loans.

Question: What do agents look for when they examine hardship distributions?

Answer: Agents examine hardship distributions to confirm they comply with the plan language and the law.

Tips:

- Good internal controls – will reduce or eliminate hardship distribution errors. When a plan has a strong internal control system, agents will usually check a sample of hardship distributions and move on to another area if they don't find errors. Good internal controls lead to a smoother and more efficient overall examination.
- Recordkeeping – The plan sponsor, and not the plan participant, is responsible for verifying hardship requests and making hardship distributions only if they satisfy the plan rules and the law. For example, the agent will look for documentation that the:
 - plan sponsor confirmed that the employee requesting the hardship had exhausted other permitted plan distributions, such as loans.
 - hardship distribution didn't exceed the amount necessary to satisfy the participant's immediate and heavy financial need.
- Electronic hardship application – I've heard about the growing trend for plans to grant hardships to participants who electronically apply for them. Participants use their PIN and self-certify that they meet the hardship criteria. While this seems to be an easy process for the participant, enabling them to quickly receive their distribution, I stress that this process doesn't relieve the plan sponsor's need for verification and recordkeeping. The agent will still look for the same documentation I mentioned above to ensure that the plan made hardship distributions according to its terms and the law.

We commonly see hardship distribution errors. However, a plan sponsor may reduce or even eliminate these errors by reading the plan, maintaining strong internal controls and having the proper documentation.

DOL Corner

The Department of Labor's Employee Benefits Security Administration (DOL/EBSA) announced new guidance as featured below. You can subscribe to [DOL/EBSA's homepage](#) for updates.

Abandoned plans

On June 3, DOL/EBSA announced that it has approved a process for JP Morgan Chase Bank NA and ADP Inc. to terminate and wind up approximately 180 defined contribution plans abandoned by their plan sponsors. This action, conducted through DOL/EBSA's abandoned plan program, will give plan participants control over the fate of their retirement savings.

When employers abandon their individual account plans, custodians such as banks, insurers and mutual fund companies are left holding the assets of these abandoned plans but without the authority to terminate such plans and make benefit distributions – even in response to participant demands. DOL/EBSA developed the abandoned plan program to facilitate a voluntary, safe and efficient process for winding up the affairs of abandoned individual account plans so that benefit distributions are made to participants and beneficiaries. Visit DOL/EBSA's website for more information on the [abandoned plan program](#).

Comment letter on Proposed FASB Accounting Standards Update

On May 30, DOL/EBSA submitted a [comment letter](#) to the Financial Accounting Standards Board on the Proposed Accounting Standards Update – Deferral of the Effective Date of Certain Disclosures for Nonpublic Employee Benefit Plans in Update No. 2011-04.

Pension benefit statements – lifetime income illustrations

On May 8, DOL/EBSA published an [advanced notice of proposed rulemaking](#) (ANPRM) focusing on lifetime income illustrations given to participants in defined contribution plans such as 401(k) and 403(b) plans.

DOL/EBSA is developing proposed regulations on the pension benefit statement requirements under ERISA Section 105. The ANPRM solicits input on a rule that would require a participant's accrued benefit to be included on his or her pension benefit statement as an estimated lifetime stream of payments, in addition to an account balance. DOL/EBSA also requests comments on a rule that would require a participant's accrued benefits to be projected to his or her retirement date, assuming annual contributions and an estimated rate of return, and then presented as an estimated lifetime stream of payments.

In conjunction with the publication of this ANPRM, the Department also has an [interactive calculator](#) that computes lifetime income streams in accordance with the proposed regulatory framework.

The ANPRM serves as a request for comment on specific language and concepts in advance of the proposed regulations. Comments are due by July 8, 2013. Comments received are posted on the [DOL/EBSA](#) website.

New annual funding notice requirements

On March 8, DOL/EBSA issued [Field Assistance Bulletin 2013-01](#) concerning new disclosure requirements mandated by the Moving Ahead for Progress in the 21st Century Act.

MAP-21 amended ERISA Section 101(f) to require plan administrators of single-employer defined benefit pension plans to provide participants and others additional information on the impact of MAP-21's interest rate stabilization rules on the plan's funding status. An estimated 12,000 single-employer plans covering approximately 33.5 million participants and beneficiaries are subject to the new disclosure requirements. Many of these plans must furnish their first annual funding notice under the new law no later than April 30, 2013.

The FAB addresses a need for interim guidance pending adoption of regulations or other guidance under Section 101(f) as amended by MAP-21. The FAB sets forth technical questions and answers and provides a model supplement that plan administrators may use to meet their MAP-21 disclosure obligations.

Outreach and education

For notice of upcoming events as they are scheduled, subscribe on DOL/EBSA's homepage. DOL/EBSA also conducts seminars for small businesses sponsoring health benefits plans. Information on these events is also available on [DOL/EBSA's](#) homepage.

PBGC Insights

Reportable events

On April 3, 2013 at 78 FR 20039, PBGC published a [proposed rule](#) to relieve reporting burdens on the majority of companies and plans that pose little risk to pensions. The change would exempt all small plans and the more than 70% of pension plans whose sponsors are financially sound from many requirements. Some reporting requirements like bankruptcy filings would be eliminated because PBGC can get the information from other sources without burdening companies or plans.

The proposal would amend the reportable events regulation (29 CFR Part 4043) to:

- track statutory changes,
- change the scope of some reportable events, and
- replace the existing waiver structure with a new structure including "safe harbors."

The comment period on the proposed rule closed June 3. We held a hearing June 18.

Missing Participant Program address changes

The lockbox addresses for sending payment of designated benefits and other amounts due missing participants with a completed payment voucher have changed. Filers can find the new addresses for U.S. Postal Service and other mail delivery services, as well as for wire transfers, on page five of our [Missing Participants Filing Instructions](#). The address for sending the Schedule MP (including any required attachments) along with the post-distribution certification hasn't changed.

Premium filing reminders

- **Passwords:** My Plan Administration Account (My PAA) passwords must be between 15 and 20 characters without any spaces, contain at least two uppercase and two lowercase characters and contain at least three numbers and three acceptable special characters. If you get locked out after three incorrect tries, call the premium contact center (see the last bullet).
- **Payments:** If you select to pay online via My PAA, be sure to enter the correct account number and bank routing number and confirm with your bank that PBGC is authorized to transfer money from your account. After the payment processes, confirm that the payment was posted to your plan's account history. We'll automatically waive penalties for payment issues resolved within seven days of the due date.
- **Filings:** When a filing is screen-prepared or imported, if the Filing Manager Page is visible, it means that the filing hasn't been submitted. To complete the filing and pay premiums, follow the instructions shown on the Filing Manager Page and then view the receipt on the plan page. When a filing is uploaded from third-party software, only the uploader can immediately confirm the filing was submitted (by viewing the upload section of his/her home page). After a filing is submitted, all filing team members who are given the "view account history permission" can view the plan's account history after a few

days to confirm that the filing was properly posted and to see if there are any overpayments or underpayments.

- **Filing teams:** The plan's filing coordinator is responsible for keeping the filing team members current by adding and removing team members as changes occur. If a practitioner will no longer use My PAA for any plans, please contact the premium contact center to deactivate the account. PBGC monitors accounts for inactivity, and notifies account holders when unused My PAA accounts are due to be deactivated.
 - **Premium website information and contact center:** For information about how to use My PAA (such as demos and FAQs) please review [Online Premium Filing with My PAA](#) on our website. If you have any questions or need assistance, please call 800-736-2444 and select the "premium" option, or send an email to premiums@pbgc.gov. PBGC's business hours are 8 a.m. to 5 p.m. EDT, Monday through Friday, except federal holidays.
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SEP Plan Eligibility Requirements

Which employees must participate in my company's SEP plan?

Check your SEP plan document for your plan's specific eligibility requirements.

If your SEP plan has the most restrictive eligibility requirements the law permits, your company would only make a plan contribution for employees who have:

- reached age 21,
- worked for your company in at least 3 of the last 5 years, and
- received at least \$550 in compensation from your company for the year (subject to [annual cost-of-living adjustments](#) in later years).

However, your SEP plan may use less restrictive requirements. For example, you could allow employees to participate who:

- are at least age 18, and
- earn at least \$550 for the year.

What is the 3-of-5 eligibility rule?

The 3-of-5 eligibility rule means you must include any employee in your plan who has worked for you in any 3 of the last 5 years. SEP plans can choose not to use the 3-of-5 eligibility rule. Instead, your SEP plan may allow employees to participate immediately or after a shorter period of employment (for example, after working for only 1 year).

If you use this 3-of-5 eligibility rule, you must count **any work** an employee has performed for you, no matter how little, in the 5 years immediately before the current year.

Example: If your SEP plan uses the 3-of-5 eligibility rule, has a calendar-year plan year and has no other conditions for participation, you must make a 2013 plan contribution for an employee who has worked for you for **any length of time** in any 3 years from 2008 to 2012.

If we use the 3-of-5 eligibility rule, do we have to make a 2013 SEP plan contribution for an employee who was hired in 2010?

Yes. If your SEP plan uses the 3-of-5 eligibility rule, a SEP contribution is required for any employee for the year after the employee has worked for you for any length of time in 3 of the last 5 years. For the 3-of-5 eligibility rule, only plan years are counted, not years based on the date the employee started working for you.

Here, the employee worked for your company for plan years 2010, 2011 and 2012 and, therefore, has met the 3-of-5 year eligibility rule. If the employee meets any other plan eligibility requirements in 2013 (for example, age or compensation requirements), then this employee must share in any 2013 SEP contribution you make.

If our SEP plan's only eligibility requirement is age 21, can we prorate an employee's compensation from the date he turns 21 in 2013 for his 2013 SEP contribution?

No. You must base your 2013 SEP plan contribution for the employee on his entire 2013 plan-year compensation.

Our SEP plan requires employees to earn at least \$550 in compensation for 2013 to participate in the plan. Can we prorate an employee's compensation from the date he earns more than \$550 in 2013 for his 2013 SEP contribution?

No. Once the employee earns at least \$550 in 2013 and meets any other plan eligibility requirements, you must base his 2013 SEP plan contribution on his entire plan-year compensation.

Are the eligibility requirements the same for all employees in a SEP plan, including owners?

Yes. The eligibility provisions stated in the SEP plan document must apply equally to owners and employees.

If my spouse and I own the business we work for, must we both meet the SEP plan's eligibility requirements to receive a plan contribution?

Yes. Each of you must meet the plan's eligibility requirements to participate in the plan. For example, if your plan uses the 3-of-5 eligibility rule, even if you're eligible for a 2013 SEP contribution, your wife isn't eligible if she only worked in 2011 and 2012 for the business because she didn't meet the 3-of-5 eligibility rule.

Is my new employee eligible to participate in our SEP plan immediately?

Maybe, if your SEP has no service requirement and the employee meets any other eligibility requirements stated in your SEP plan document. Review your plan document to determine the plan's eligibility requirements.

I'd like to establish a SEP plan that allows me to participate immediately. Can I establish different SEP plan eligibility requirements for future employees?

Yes. You can initially establish the SEP plan so that you are immediately eligible to participate in the plan. Later, you can amend the plan to have more restrictive eligibility requirements, but you must also meet the new eligibility requirements to participate in the plan.

Additional resources:

- [SEP homepage](#)
- [FAQs - SEPs](#)
- [Retirement Topics - Who Can Participate in a SEP or SARSEP Plan?](#)
- [Pub 560](#), *Retirement Plans for Small Business (SEP, SIMPLE, and Qualified Plans)*, chapter 2 Simplified Employee Pension (SEP)
- [Pub 4333](#), *SEP Retirement Plans for Small Businesses*
- [Publication 4285](#), *SEP Checklist*