

Retirement News for Employers

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Internal Revenue Service Tax Exempt and Government Entities

Spring 2011

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403(b) Plans

- [Plan errors ineligible](#) for the Voluntary Correction Program
- [New guidance](#) on 403(b) plan terminations
- [Updated frequently asked questions](#)

New and Updated Forms and Publications:

- [Form 8955-SSA](#) (draft)

- [Pub 571](#), *Tax-Sheltered Annuity Plans (403(b) Plans) For Employees of Public Schools and Certain Tax-Exempt Organizations* (rev. December 2010)
- [Pub 575](#), *Pension and Annuity Income*
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Retirement Plans for Self-Employed People

Are you self-employed? Did you know you have many of the same options to save for retirement on a tax-deferred basis as employees participating in company plans?

Here are highlights of a few of your retirement plan options.

Savings Incentive Match Plan for Employees ([SIMPLE IRA Plan](#))

- You can put all your [net earnings from self-employment](#) in the plan: up to \$11,500 (plus an additional \$2,500 if you're 50 or older) in salary reduction contributions and either a 2% fixed contribution or a 3% matching contribution.
- Establish the plan:
 1. complete
 - [Form 5305-SIMPLE](#), *Savings Incentive Match Plan for Employees of Small Employers (SIMPLE) – for Use With a Designated Financial Institution*,
 - [Form 5304-SIMPLE](#), *Savings Incentive Match Plan for Employees of Small Employers (SIMPLE) - Not for Use With a Designated Financial Institution*, or
 - an IRS-approved “prototype SIMPLE IRA plan” offered by many mutual funds, banks and other financial institutions, and by plan administration companies; and
 2. open a SIMPLE IRA through a bank or another financial institution.
- Set up a SIMPLE IRA plan at any time January 1 through October 1. If you became self-employed after October 1, you can set up a SIMPLE IRA plan for the year as soon as administratively feasible after your business starts.

Simplified Employee Pension ([SEP](#))

- Contribute as much as 25% of your [net earnings from self-employment](#) (not including contributions for yourself), up to \$49,000.
- Establish the plan:
 1. complete
 - [Form 5305-SEP](#), *Simplified Employee Pension - Individual Retirement Accounts Contribution Agreement*, or
 - an IRS-approved “prototype SEP plan” offered by many mutual funds, banks and other financial institutions, and by plan administration companies; and
 2. open a SEP-IRA through a bank or other financial institution.

Set up the SEP plan for a year as late as the due date (including extensions) of your income tax return for that year.

401(k) Plan

- Make salary deferrals up to \$16,500 (plus an additional \$5,500 if you're 50 or older) of your compensation from the business either on a pre-tax basis or as a [designated Roth contribution](#).

- Contribute up to an additional 25% of your [net earnings from self-employment](#) (not including contributions for yourself), up to \$49,000 including salary deferrals.
- Tailor the plan to allow you access to the money in the plan through [loans](#) and [hardship distributions](#).
- A [one-participant 401\(k\) plan](#) is sometimes referred to as a “solo-401(k),” “individual 401(k)” or “uni-401(k).” It is generally the same as other 401(k) plans, but because there are no other employees, other than the spouse, that work for the business, it is exempt from discrimination testing.

Other Defined Contribution Plans

- [Profit-sharing plan](#): allows you to decide how much to contribute on an annual basis, up to 25% of compensation (not including contributions for yourself) or \$49,000.
- [Money purchase plan](#): requires you to contribute a fixed percentage of your income every year, up to 25% of compensation (not including contributions for yourself), according to a formula stated in the plan.

Defined Benefit Plans

- Traditional pension plan with a stated annual benefit you will receive at retirement, usually based on salary and years of service.
- Benefit may also be defined based on a cash balance formula in a hypothetical individual account (a cash balance plan).
- Maximum annual benefit can be up to \$195,000.
- Contributions are calculated by an actuary based on the benefit you set and other factors (your age, expected returns on plan investments, etc.); no other annual contribution limit applies.

Retirement plans for self-employed people were formerly referred to as “Keogh plans” after the law that first allowed unincorporated businesses to sponsor retirement plans. Since the law no longer distinguishes between corporate and other plan sponsors, the term is seldom used.

Dollar figures are for 2011 and are subject to annual [cost-of-living adjustments](#).

Common Mistakes in Recent Voluntary Correction Program Submissions and Tips to Avoid Them

You can correct mistakes in your retirement plan by using the IRS’s [Voluntary Correction Program](#) (VCP). Recently, our EP Voluntary Compliance Staff (“VC”) have noticed some common mistakes with VCP submissions. Follow these tips to avoid processing delays for your VCP submission.

1. Missing compliance fee check. Include the required compliance fee or your submission will be returned to you.

All VCP submissions must include the appropriate [compliance fee](#).

- Compliance fees are fixed and can’t be reduced or waived by the IRS.
- Most plan sponsors, including sole proprietors and governmental entities, are required to pay the fee.

- Terminating [Orphan Plans](#) may be exempt from the fee requirement, but this exemption applies to very few plans. (See Rev. Proc. 2008-50 Sections 5.03 & 12.02(4)).

Beginning June 1, 2011, VC will automatically return your entire VCP submission if it does not contain a check for the compliance fee.

- We will no longer contact you to ask for the missing fee.
- If we return a submission for lack of payment, you may resubmit it with the appropriate fee. However, we'll treat the resubmission as a new case, subject to the compliance fee in effect on the date of your new VCP submission.

2. Some late interim amendments not properly identified. Identify your late interim amendment failures.

Specifically describe any late interim amendments associated with a change in tax law that are to be included in your VCP submission. These may include changes required by the Pension Protection Act of 2006 or the Heroes Earnings Assistance and Relief Tax Act of 2008. List each PPA or HEART Act provision that was adopted late. A general statement that is limited to "The plan was not timely amended for PPA or HEART" is not acceptable. Compliance statements are legal documents that must fully describe all plan document failures.

- On Appendix F, Schedule 1, part A, check the box for "other" and enter "see attachment" in the text box.
- On your separate attachment, include a complete description of each provision that was not timely adopted.
- If you need assistance describing the individual amendments, you can use the descriptions for PPA provisions in [Notice 2007-94](#) and for HEART provisions, [Notice 2009-98](#).
- Remember that Appendix F, Schedule 1 is only for interim amendments that were adopted late, but before the end of your plan's last remedial amendment cycle that included those late amendments.
 - Use Schedule 2 if your late interim amendments (such as good faith EGTRRA or PPA amendments) are adopted after the close of the remedial amendment cycle in which they should have been adopted.

3. Appendix F, Schedules 1 & 2 not completed properly. Check the right boxes.

Check the boxes applicable to your submission, and do not check other boxes. For example:

- Only check boxes for amendments that apply to your type of plan.
- If you're late for your amendment cycle, check only the single [Cumulative List](#) box on Schedule 2 that relates to your cycle.
- Don't check boxes to request excise tax waivers unless they actually apply to your VCP submission. If they do apply, include an explanation of why you should be granted the waiver.
- On the Applicant's Representations page on Appendix F Part III, be sure to check one of the boxes to indicate whether the plan sponsor or plan engaged in an abusive tax transaction. If applicable, include details in a separate written statement.

4. Appendix F or Applicant's Representations not signed by the correct person. Ensure that the right person signs your forms.

- Make sure the Applicant's Representations in Part III of Appendix F (also known as the penalty of perjury statement) are signed by an authorized officer of the plan sponsor, and **not** by the sponsor's legal representative.
- Your Power of Attorney, Form 2848, if included, should be signed by an authorized person such as an officer of the plan sponsor.
- Generally, the above items cannot be signed by a plan trustee or plan administrator unless the plan is a multiemployer plan or a governmental plan governed by an independent board of trustees.

5. Remember the limits of your compliance statement.

VC's review of your VCP submission is limited to the failures and correction methods that you identify. The VC staff will not:

- review the language in your plan document or plan amendments submitted to resolve late amender plan document failures; or
- conduct a compliance review of all paperwork included with your submission to see if there are other plan document failures that may not have been noted in the VCP submission.

If you include a determination letter application with your VCP submission, it will not be reviewed by VC. It will be transferred to our EP Determinations staff to process. They will then review your determination letter application independently. Once your VCP case is closed by VC, your issued compliance statement cannot be used to resolve additional failures that may be subsequently discovered by EP Determinations or Examinations staff.

For additional information, see [Common Mistakes in Voluntary Correction Program \(VCP\) Submissions](#).

Higher Education Organizations Asked to Confirm Compliance with Universal Availability

A new Employee Plans Compliance Unit project focuses on how higher education organizations apply the universal availability rule to their 403(b) plans. Under this rule, if a 403(b) plan permits **any** employee to make salary deferrals to the plan, then it must offer the same opportunity to **all** employees (with limited optional exclusions). Higher education organizations include:

- academies,
- universities,
- colleges,
- seminaries,
- institutes of technology, and
- other college level organizations (e.g. vocational and trade schools) that award academic degrees or professional certifications.

The EPCU began sending [compliance check letters](#) in April to a national sample of over 300 higher education organizations. These letters contain the following attachments:

- [Instructions](#);
- [Form 886-A, Explanation of Items](#) - a compliance check containing 21 questions to help determine if employees have an effective opportunity to make salary deferrals;
- [Glossary](#) - commonly used terms; and
- [403\(b\) Informational Attachment #1](#) - a brief description of the 403(b) written program requirement and an example of the order in which excess salary deferral contributions are applied to a plan that permits both age 50 and 15-year [catch-up contributions](#).

An organization's failure to respond to the contact letter by providing the requested information could result in further action or examination of the plan.

Organizations that appear to comply with the universal availability rule will receive a closing letter. EPCU will follow up with organizations that appear non-compliant to help them analyze the problem and make necessary correction.

Organizations can self-correct their plan errors. Correction for a universal availability failure generally includes giving each excluded eligible employee the opportunity to participate. The organization must also make employer contributions to restore improperly excluded eligible employees' lost opportunity to make salary deferrals. An organization's failure to correct the error could result in the loss of favorable tax benefits for the plan and the employees.

We will report the finding from this project; describing responses and identifying areas where we can provide additional 403(b) guidance, education and outreach by:

- providing information to help focus enforcement efforts to address and avoid non-compliance in 403(b) plans sponsored by higher education organizations, and
- educating and encouraging voluntary compliance by giving organizations the chance to identify and self-correct problems with their plans.

Visit the [EPCU](#) Web page for more information on this and other projects.

We're Glad You Asked!

My ability to deduct traditional IRA contributions from my gross income depends on whether I'm "covered by an employer retirement plan." How do I know if I'm "covered"?

You're covered by an employer retirement plan for a tax year if your employer (or your spouse's employer) has a:

- Defined contribution plan (profit-sharing, 401(k), stock bonus and money purchase pension plan) and any contributions or forfeitures were allocated to your account for the plan year ending with or within the tax year;
- IRA-based plan (SEP, SARSEP or SIMPLE IRA plan) and you had an amount contributed to your IRA for the plan year that ends with or within the tax year; or
- Defined benefit plan (pension plan that pays a retirement benefit spelled out in the plan) and you are eligible to participate for the plan year ending with or within the tax year.

Box 13 on the [Form W-2](#) you receive from your employer should contain a check in the “Retirement plan” box if you are covered. If you are still not certain, check with your (or your spouse’s) employer.

These limits on the amount you can deduct don’t affect the amount you can contribute. However, you can never deduct more than you actually contribute.

Additional Resources:

[Publication 590](#), *Individual Retirement Arrangements (IRAs)*

We’re Glad You Asked!

Can each partner in our partnership maintain a separate Simplified Employee Pension plan?

No, only an employer can maintain and contribute to a SEP plan for its employees. For retirement plan purposes, each partner or member of an LLC taxed as a partnership is an employee of the partnership.

In addition to the partners, the partnership’s SEP plan must generally cover all employees who have:

- reached age 21,
- worked for the partnership in at least 3 of the last 5 years, and
- received at least \$550 of compensation in 2011 (subject to annual [cost-of-living adjustments](#)).

The plan may use less restrictive participation requirements to cover employees.

Under the SEP plan, the partnership contributes to each eligible employee’s SEP-IRA, which each employee owns and controls.

The partnership:

- deducts plan contributions for employees other than the partners as a business expense on Line 18 of [Form 1065](#), *U.S. Return of Partnership Income* ([instructions](#));
- reports plan contributions for partners in Box 13, using Code R, on each partner’s [Schedule K-1](#) (Form 1065), *Partner’s Share of Income, Deductions, Credits, etc.* ([instructions](#)).

Partners deduct plan contributions they make for themselves on Line 28 of their [Form 1040](#), *U.S. Individual Income Tax Return* ([instructions](#)).

If the partnership made a mistake by not including an otherwise eligible employee in the plan, it can correct that mistake (see the [SEP Fix-It Guide](#)).

Additional Resources:

- [SEP plan](#) Web pages
- [Publication 4333](#), *SEP Retirement Plans for Small Businesses*
- [Publication 560](#), *Retirement Plans for Small Business (SEP, SIMPLE, and Qualified Plans)*
- SEP Plan Pitfalls - Phone Forum (February 26, 2010) ([Audio](#), [Transcript](#) and [Handout](#))

Desk Side Chat With...Monika Templeman

Requesting, Reading and Monitoring Service Provider Reports

In each issue, 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 for discussion by emailing her at: RetirementPlanComments@irs.gov.

Monika, in your presentations you mention that plan sponsors are responsible for operating their plan according to the plan's terms. Does the plan's service provider have any responsibility?

The plan sponsor/employer is ultimately responsible for ensuring the plan complies with the law in both form and operation. Accordingly, the plan sponsor should be in frequent communication with the plan's service provider to ensure that all relevant data is provided timely and accurately. Also, it is critical to review the plan document annually to ensure the plan is operating according to its terms, and the plan sponsor should make the service provider and other relevant parties aware of any changes to the plan right away. It's important to develop a communication mechanism that meets the needs of each party. It's also important for the service provider to timely communicate with the plan sponsor to confirm the data is current, accurate and complete.

What does the employer need to provide to the service provider?

The employer needs to give the service provider accurate information regarding the retirement plan. It's important to share any changes made by plan amendments or restatements. For example, if the plan's definition of compensation is changed, the employer should communicate this amendment to the service provider and the people determining deferral amounts, performing nondiscrimination tests or allocating contributions. The employer also needs to provide the payroll information that relates to the compensation definitions in the plan document. The service provider can't deliver the correct reports if they don't have accurate participant compensation amounts. Using incorrect compensation for a participant can affect many plan operations and correcting these errors can be costly.

What are some reports plan sponsors may receive and how could they be used?

The service provider and employer should meet and discuss the reports needed for the plan. I'll mention a few examples of reports the service provider may deliver. The plan sponsor should communicate with the service provider to discuss these and other reports.

Contributions. Plan sponsors should have procedures in place to spot check plan provisions in operation, such as confirming that compensation and deferral limits are not exceeded.

Participant loans. This report shows outstanding participant loans and whether loan payments are current and lists loans in default. The plan sponsor would have to take action on any loans in default. The employer should also spot check new loans to ensure the participant's account balance was adequate to support the loan and the payroll deduction repayments commenced timely.

Hardship withdrawals. Employers should use this report to verify they have the necessary documentation to support the withdrawals in the plan records. Sometimes the service provider handles the hardship withdrawals. In these situations, the plan sponsor should periodically ask the service provider for copies of the hardship withdrawal documentation. The plan sponsor should also use this report to monitor payroll systems to ensure the employee who took a hardship withdrawal doesn't make elective deferrals for six months.

Required minimum distributions. Employers should receive a report from their service provider indicating the participants approaching their required beginning date for commencement of required minimum distributions.

What about updates to the plan document – what, if anything, does the plan sponsor need to do?

I would suggest the plan sponsor establish a practice of contacting their plan document provider to determine if any plan amendments are required. This contact should take place 2-3 months before the end of the plan year. To avoid mistakes, make sure the plan document and Summary Plan Description match.

What should plan sponsors do if they find an error?

Plan sponsors should alert their service provider of the error and may be able to use the Employee Plans Compliance Resolution System ([EPCRS](#)) to correct the error.

Do You Need Help with Your Retirement Plan?

The [Small Business Retirement Plan Resources](#) Web page can help you get answers to your retirement plan questions.

IRS has free information on retirement plan issues, including:

- [Webcast: Easy, Low-Cost Ways to Start Your Small Business Retirement Plan](#)
- [Retirement Plans Navigator](#)
Web guide to help choose a plan, maintain it and correct plan mistakes
- [Plan Maintenance Reminders](#)
Tips to help keep your plan running smoothly
- [Frequently Asked Questions](#)
Based on plan type, rollovers, plan design and operations, and correcting plan errors

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DOL News

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

Electronic Disclosure by Employee Benefit Plans

On April 7, DOL/EBSA published a [Request for Information](#) to solicit public comments to assist in determining whether and possibly how to expand or modify current rules regarding the electronic distribution of employee benefit plan information. Plan information, such as quarterly account statements, is required to be disclosed under ERISA.

The RFI sets forth 30 specific questions on a broad range of topics related to electronic distribution of benefit plan information. DOL/EBSA hopes to hear from plan participants and beneficiaries, employers and other plan sponsors; plan administrators, plan service providers, health insurance issuers, members of the financial community and the general public. In addition to the questions contained in the RFI, interested parties are encouraged to address any other relevant matters.

Comments are due by June 6. Written comments may be addressed to the U.S. Department of Labor, Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, 200 Constitution Ave., NW, Washington, DC 20210, Attn: Electronic Disclosure by Employee Benefit Plans RFI. Comments may also be submitted electronically by email to e-ORIdol.gov or through www.regulations.gov. [Comments received](#) to date are available on DOL/EBSA's website.

Proposed Definition of "Fiduciary" of Employee Benefit Plans

On October 22, DOL/EBSA published a [proposed rule](#) to update the definition of "fiduciary" to more broadly define the term as a person who provides investment advice to plans for a fee or other compensation.

The proposed amendment would update the definition to take into account changes in the marketplace and in the practices of investment advice providers.

As the proposal notes, the 1975 rule's approach to fiduciary status may inappropriately limit DOL/EBSA's ability to protect plan sponsors, plans, participants and beneficiaries from conflicts of interest that may arise from today's diverse and complex fee practices in the retirement plan services market. The 1975 regulation may leave many employers, participants and beneficiaries who expect to receive unbiased advice unaware of the potential conflicts of interest of those who provide investment advice for a fee.

The proposed rule, which more closely reflects the statutory definition, is designed to remedy this problem, and protect plan officials and participants who expect unbiased advice, by giving a broader and clearer understanding of when individuals providing such advice are subject to ERISA's fiduciary standards.

DOL/EBSA held a public hearing on March 1 and 2 on the proposed regulation. The [transcript](#) is posted on the dedicated Web page that has public comments, the hearing agenda and testimony. The public hearing record was extended for 15 days after the transcript was posted on DOL/EBSA's website in order to afford members of the public with an opportunity to comment on issues raised at the hearing. The extended comment period has now closed. [Comments](#) received after the hearing are available on the dedicated Web page as well.

Extension of Applicability Date of Fee Disclosure Regulation

On February 11, DOL/EBSA announced its intention to extend the applicability date for the new disclosure rules under ERISA §408(b)(2) to January 1, 2012.

DOL/EBSA published an [interim final regulation](#) on July 16, 2010, requiring certain service providers to employee pension benefit plans to disclose information to assist plan fiduciaries in understanding the reasonableness of the fees being charged for plan services and assess potential conflicts of interest that might

affect the quality of those services. The new requirements were previously scheduled to apply to plan contracts or arrangements for services in existence on or after July 16, 2011.

Going Forward, Year Two of Electronic Filing with EFAST2 – A Compliance Assistance Webcast

Now that the first year of electronic filing the Form 5500 is completed using the EFAST2 system, there are a few changes to be aware of when preparing to file for 2010. DOL/EBSA held a webcast on April 27 to address what has changed since the launch of EFAST2 through today. The webcast also discussed filer experiences, what to expect when filing the 2010 Form 5500 and considerations for the 2011 Form 5500 filing. Finally, the webcast provided an update on the Delinquent Filer Voluntary Compliance Program. The archive of this [webcast](#) is available on DOL/EBSA's website and the EFAST2 website.

Mark Your Calendar

Stay on top of your retirement plan's deadlines! Here are some important dates in the upcoming months for calendar-year plans; non-calendar-year plans must adjust these dates.

June 30: 401(k) or 403(b) plans with an eligible automatic contribution arrangement covering all eligible employees must distribute excess contributions and excess aggregate contributions to correct failed ACP tests (and ADP tests in 401(k) plans) to avoid the Code §4979 10% excise tax.

July 15: Defined benefit plan sponsors must make second quarterly employer contributions.

August 1: 2010 Form 5500 due

- [File with DOL/EFAST2:](#)
 - Form 5500, *Annual Return/Report of Employee Benefit Plan*
 - Form 5500-SF, *Short Form Annual Return/Report of Employee Benefit Plan*
- [File with IRS:](#)
 - Form 5500-EZ, *Annual Return of One-Participant (Owners and Their Spouses)*
 - Form 8955-SSA, *Annual Registration Statement Identifying Separated Participants with Deferred Vested Benefits*
 - Form 5558, *Application for Extension of Time to File Certain Employee Plan Return*, to request a 2 ½ -month extension

Also, visit our [Upcoming EP Educational Events](#) Web page.

Timing Is Everything

Rollover to a Roth IRA or a Designated Roth Account

Are you eligible to receive a distribution from your 401(k), 403(b) or governmental 457(b) retirement plan?

You can roll over [eligible rollover distributions](#) from these plans to a [Roth IRA](#) or to a [designated Roth account](#) in the same plan (if the plan allows rollovers to designated Roth accounts).

You may want to note the [differences](#) between Roth IRAs and designated Roth accounts before you decide which type of account to choose. For example, when you reach age 70 1/2, you may have to take [required minimum distributions](#) from designated Roth accounts, but not from Roth IRAs.

Roth IRAs and designated Roth accounts only accept rollovers of money that has already been taxed. You will likely have to pay income tax on the previously untaxed portion of the distribution that you rollover to a designated Roth account or a Roth IRA.

Withdrawals from a Roth IRA or designated Roth account, including earnings, will be tax-free if you:

- have held the account for at least 5 years, and
- are:
 - age 59½ or older;
 - disabled; or
 - deceased.

In addition, you can get a tax-free distribution after 5 years from a Roth IRA of up to \$10,000 to buy your first home.