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Labor and Employment Alert: Are Individually Designed Retirement Plans an Endangered Species? Impact of Changes to the IRS Determination Letter Program

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In January 2017, the last regular determination letter applications will be filed for sponsors of individually designed retirement plans. After that last Cycle A determination letter application, individually designed plans will no longer be able to get a ruling from the IRS that the plan terms comply with law (except for the initial ruling on formation of the plan and a final ruling at plan termination), although the IRS may specify other ruling opportunities in the future.

Individually designed plans have historically been used where plans have unusual terms that simply can't fit within the pre-approved structure of a prototype or volume submitter plan document.

The IRS will continue to issue opinion letters to prototype and volume submitter plans. The drastic change to the determination letter program means that there may be some incentives for plan sponsors to move onto a pre-approved plan.

Why did plan sponsors file determination letter applications?

Determination letters are not "mandatory" but they provided several benefits for plan sponsors:

1. The determination letter process allowed a plan to identify and retroactively fix plan text that an IRS agent believes does not comply with the statutory and regulatory requirements. Otherwise the plan could only be amended prospectively and would technically be disqualified during the interim period.
2. A determination letter had been a pre-condition to use of the EPCRS correction program.
3. Many auditors, lenders and other third parties with whom transactions are being negotiated have historically asked for a representation the plan has a valid determination letter. This bypassed extensive diligence regarding the potential

disqualification risk.

Timing for plan amendments

The IRS rules apply different deadlines for plan amendments depending on the type of amendment:

- Amendments that prospectively eliminate a benefit generally must be adopted before the benefit would be earned.
- “Discretionary” amendments generally must be adopted before the last day of the plan year in which the change was implemented.
- Amendments required to comply with changes in law generally had a longer “remedial amendment period.” Under the prior process, these amendments needed to be adopted before the expiration of the determination letter review cycle. The new amendment deadline is described in the Annual Process Changes discussion below.

Annual Process Changes

Each year, the IRS will issue two lists: (1) a “*Required Amendments List*” and (2) an “*Operational Compliance List*.”

The Required Amendments List will list the applicable changes in law. Under the new process, a plan sponsor must amend its plan to comply with the new requirement no later than the end of the second calendar year following the calendar year in which the amendment first appears on the Required Amendments List. If a plan amendment is adopted that does not comply with law, the plan sponsor must adopt a revised amendment correcting the issue no later than the end of the second calendar year after the later of the dates the amendment is adopted or effective.

Even though the documentation of some amendments may be delayed, the plan is required to operate in compliance with law changes from the effective date of the rule change. The annual “*Operational Compliance List*” will identify changes in qualification requirements that are effective during a calendar year.

Action Steps for Plan Sponsors of Individually Designed Plans

As a result of the IRS’ changes to its determination letter program, we recommend plan sponsors take the following actions:

- Ensure that an annual review is performed for all retirement plans to confirm compliance with the IRS’ *Required Amendment List* and *Operational Compliance List*. Document the annual review in the plan administrator minutes; amend the plans as required, and conduct operational audits to document your diligence. If the Plan Sponsor delegates this task to their third party administrator or plan consultant, they should ensure that they receive an annual report documenting that all steps have been timely completed.
- Carefully scrutinize all proposed amendments to the plan for potential issues. You will no longer be able to clean up problematic language during the determination letter process.

- Consider whether a pre-approved plan can satisfy the plan's design and legal requirements. [Note that there are frequently errors in translating individually designed plan terms onto a pre-approved plan structure, so it is important to carefully review the document (including any base document) to make sure there aren't any impermissible plan changes made].
- In transactions, you may see a resurgence of a demand that the sponsor obtain an opinion letter regarding the qualified status of any individually designed plan.