FEBRUARY 7, 2017

Remedial Amendment Period for 403(b) Plans

In Revenue Procedure 2017-8, the IRS announced that the remedial amendment period ("RAP") for 403(b) plans would end on March 31, 2020. A RAP is a period in which a plan can be amended retroactively to comply with the requirements of Section 403(b) of the Internal Revenue Code and related IRS regulations and other guidance (collectively, the "403(b) Plan Rules"). This means that no later than March 31, 2020, 403(b) plan sponsors (such as many non-profit employers) can either adopt pre-approved 403(b) plans or amend their individually-designed 403(b) plans retroactively to January 1, 2010 (or the plan effective date, if later) to comply with the 403(b) Plan Rules.

In 2013, the IRS announced that it would establish a determination letter program for pre-approved 403(b) plans. Although the IRS has not yet issued any determination letters for pre-approved 403(b) plans, it is expected that it will do so soon and, at any rate, well in advance of the March 31, 2020 deadline to allow for 403(b) plan sponsors to adopt a pre-approved 403(b) plan.

The IRS has never offered a program for individually-designed 403(b) plans to obtain determination letters that plan documents are in compliance with the 403(b) Plan Rules, and has discontinued its regular determination letter program for individually-designed qualified plans, such as pension and 401(k) plans. Accordingly, it is unlikely that plan sponsors will be able to obtain IRS approval that individually-designed 403(b) plans are in compliance with the 403(b) Plan Rules.

The IRS previously required that a sponsor of a 403(b) plan adopt a written plan document on or before December 31, 2009 (or, if later, the effective date of the plan) *intended* to comply with the 403(b) Plan Rules. The new guidance does not change this requirement. Effective January 1, 2010, 403(b) plan documents will have to comply in full with the 403(b) Plan Rules rather than merely be intended to comply. Accordingly, the RAP allows for 403(b) plans to be amended retroactively to ensure technical compliance with the 403(b) Plan Rules effective January 1, 2010.

Although the RAP does not allow for the correction of a failure to adopt a written 403(b) plan by the January 31, 2009 deadline, a plan sponsor can correct a failure to timely adopt a written plan document under the Employee Compliance Resolution System (EPCRS). EPCRS is also available to correct other 403(b) plan compliance issues, such as a failure to comply with the 403(b) Plan Rules in operation or to satisfy nondiscrimination testing requirements.