

Discussion Points: Filing for a Determination Letter

The plan sponsor of a 401(k) retirement plan will make the ultimate decision whether to seek or not seek a determination letter from the IRS regarding the qualified status of the plan. Any such decision involves tax and other technical considerations, and as always GuideStone encourages the organization making such a decision to consult its own tax and legal advisers. GuideStone is not authorized to provide tax or legal advice but is glad to work with an organization's tax and legal advisers to provide information and assistance.

The following information provides an overview of key considerations that the Plan Sponsor could discuss with its tax and legal advisers. Given the particular facts and circumstances involving the 401(k) plan, there may be additional considerations that should be taken into account in making the decision whether to seek or not seek a determination from the IRS regarding the qualified status of the plan.

Considerations when obtaining a determination letter:

- It is not a legal requirement for any qualified plan to obtain IRS approval through a determination letter. However, it is standard practice with respect to most non-church plans. Some practitioners view obtaining a determination letter as a "best practice".
- The IRS does not currently allow employers eligible to participate in church plans that have not made a Code Section 410(d) election to be subject to the Employee Retirement Income Security Act of 1974 to participate in a volume submitter or prototype plan; thereby placing employers eligible for church plans under the individually designed plan determination letter filing process.
- IRS filing requires the collection of all plan documents and amendments from the initial plan document through the currently restated plan document and providing those documents to the IRS for review. (Even if the plan is not submitted, GuideStone recommends that the documents be gathered and reviewed to determine if there are "gaps" in documentation that may be correctible.)
- IRS filing would entail notice to the participants and certain other interested parties in the plan (a standard form of notice would be provided either by mail or by posting). This notice would be essentially the same "form notice" as provided participants in ERISA plans as they are amended from time to time to comply with applicable law.
- It appears that filings with the IRS would primarily be for the benefit of the participants in the plan. Participants in the plan could have the certainty of knowing the IRS has determined their plan to be a qualified plan with favorable tax features and thus it is less likely that the plan would later be disqualified, causing unwanted tax consequences.
- A 401(k) plan that is timely submitted to the IRS may, with IRS approval, retroactively amend certain plan provisions that do not comply with the qualification requirements of the Internal Revenue Code with respect to the current open filing period. A 401(k) plan that is not submitted to the IRS will not have IRS approval of retroactive amendments or any other aspect of its documentation.
- It is unclear whether the determination letter process could provide additional protection to the employer from claims by employees in the event they encountered adverse tax consequences related to the plan. A determination letter may protect the fiduciary from an assertion that the plan is defective in form. There is retroactive reliance on a determination letter that the IRS issues erroneously.

- There may be more certainty of protection of plan assets from creditors if the qualified nature of the plan and trust has been determined by the IRS.
- Certain IRS programs for correcting operational errors are available only to plans with prior IRS approval.

Considerations when not obtaining a determination letter:

- From an employer perspective, there are no employer tax deduction issues for not-for-profit employers, so one might argue that the need for a determination letter is less compelling.
- There could be less potential for IRS oversight and involvement (i.e., governmental entanglement that may be problematic for church organizations) if the employer does not pursue the determination letter process.
- If the plan has qualification defect(s) there are certain correction mechanisms that may not be available. However, this is less of an issue for frozen plans than on-going plans as operational errors may be less likely.
- The basic 401(k) plan document utilized by GuideStone is a preapproved plan document previously found by the IRS to be in compliance with all qualification requirements. GuideStone has modified the document to reflect church plan status while leaving intact its provisions that comply with qualification requirements.
- In the event the IRS were to find a form defect with a plan that does not have a determination letter, there is a special church plan rule that may permit a church plan to be retroactively corrected.
- There are some historical and long-standing positions with respect to existing church plans that seem inconsistent with requesting a determination letter from the IRS. For example, some church plans have determined that they can assure their qualified plan status without the IRS. In other words, some church plans have determined to forego the governmental involvement that obtaining a determination letter entails.

Conclusion:

Since determination letters are not technically required, it would appear that the employer has the latitude to make whatever decision it determines is appropriate. It is the understanding of GuideStone that certain large, long-established church qualified plans have not pursued determination letters. However, there are other church plans that have made the decision to file for a determination letter. It is an employer-specific determination based on that particular employer's assessment of the cost/benefit and risk/reward of filing with the IRS.