

RetirementManager

Compliance Essential

403(b) Plan Documents Guide for ERISA-covered Plans

Solutions for Private Tax-Exempt 403(b) Organizations

403(b) Plan Documents Guide for ERISA-covered Plans

As a sponsor of a 403(b) plan subject to the requirements of Title I of ERISA, you have important decisions to make in light of the final 403(b) regulations. While it is important that you consult with your legal counsel as needed, the information in this guide will provide some key points for your consideration. This document is not intended to be all-inclusive, and other plan design considerations may come into play in your discussion with legal counsel and your plan document provider. For additional details regarding the changes of the regulations, please visit our dedicated Web site, 403bUniversity.com.

When must my plan be amended for the final regulations?

The provisions of the regulations generally become effective January 1, 2009, including the requirement for a written plan document. Because your plan is subject to ERISA, you probably have a plan document in place. If you have an existing plan document, it is important to review your document to ensure that it includes all required and optional plan provisions in accordance with the regulations. It is important that you amend your plan as needed to ensure the plan is compliant.

Where can I obtain an amendment?

Because your plan is subject to ERISA, you should have a plan document in place and you should contact your document provider for any required amendments. In addition, the IRS has provided sample plan language for public schools in Revenue Procedure 2007-71. While not directly applicable to ERISA-covered plans, this sample language may be helpful in identifying required provisions and drafting any necessary amendment(s).

Are there prototype 403(b) plan documents available?

Employers can expect many of their providers, and other parties as well, to offer up sample plan documents. Any references to "prototype 403(b) documents" would be inaccurate, as there is no program today for the IRS to approve prototype 403(b) documents. However, stay tuned, because that could change. Documents offered by providers and other parties should be vendor-neutral to work with multiple 403(b) contracts and accounts.

Will multiple documents satisfy the written plan requirement?

While the regulations anticipate a single document per plan, the regulations do provide that a collection of documents may potentially satisfy the written plan requirement as long as the documents include all required and optional plan provisions. However, when developing or amending your plan it is important to consult with your legal counsel to ensure that your plan meets the requirements of both the Code and ERISA.

Do I need to amend if I am freezing or terminating my plan?

Plans which are frozen do not receive future contributions, but they continue to be subject to all requirements under the Code, ERISA, and related regulatory guidance. For this reason, your frozen plan should be amended as necessary for the changes in the final regulations. With respect to plan terminations, the regulations permit the distribution of plan assets in the form of cash or distributed annuity contracts provided that other requirements provided under the regulations are met by the plan sponsor. It is probable that your existing document will require a termination amendment that includes certain requirements contemplated under the final regulations.

What plan design areas should I be prepared to address in the updated plan document or amendment?

- **Employees are eligible for elective deferrals under the plan**

The universal availability rules provide generally that with certain exceptions if any employee has an opportunity to defer, then all employees must be given the opportunity for elective deferrals, either to your ERISA 403(b) plan, or to another 403(b), 401(k) or 457(b) plan of the employer. There are some available exclusions. All employees eligible to make elective deferrals must be given notice of their opportunity to defer to the plan not less frequently than annually.

- **For purposes of elective deferrals, if your plan utilized other excluded classes under the rules of IRS Notice 89-23, those exclusions were impacted by the regulations**

A delayed effective date may be used for these classes of employees. Any class of employees excluded under the terms of IRS Notice 89-23 may be excluded for taxable years beginning before January 1, 2010, but must be included in the plan for taxable years beginning on or after January 1, 2010. Employees who are covered by a collective bargaining agreement have a delayed effective date dependent on the related collective bargaining agreement.

- **Excluded class rules applicable for employer contributions**

There are additional considerations for excluded classes for employer contributions, although for purposes of ERISA, consideration should be given to both sets of exclusions. The employer may choose to exclude certain classes of employees from participation in the employer contributions under the plan. In the event that there is a business need for excluded classes, careful consideration should be given to the additional costs of testing and the risk of failures of the coverage and nondiscrimination tests. A common request is for exclusion of part-time, temporary or PRN employees from participation. Excluding PRN or per diem employees from participation in ERISA-covered 403(b) arrangements with employer contributions may violate Code section 410(a) or section 202(a) of ERISA. Plan sponsors for whom this exclusion represents a legitimate business classification may wish to ensure that the document defines the excluded class in a manner that avoids specific or implied reference to service.

- **Transfers and exchanges**

Transfers and exchanges should only be permitted to providers who are either an approved provider under the plan or who have entered into an information sharing agreement with the plan. As a plan sponsor, you should decide if transfer and/or exchanges will be permitted, and if so to which providers. It is important to establish your transfer and exchange policies and communicate the policies with your providers. You must also identify all of your providers that are approved to receive plan contributions as well as certain former providers under the terms of your plan. The listing of providers should be included as a part of your written plan document.

- **Changes for distributions, including hardship distributions**

Although many 403(b) plans subject to ERISA provided restrictions on distributions of employer contributions invested in annuity contracts, such restriction was not required by previous guidance. Under the final regulations, employer contributions invested in annuity products may only be distributed upon a stated event identified under the terms of your plan document, such as severance from service, plan termination, or upon such other stated event (i.e., meeting an age and service requirement) identified in the plan document. If your plan document did not already provide for this restriction, the document should be amended.

For employer contributions currently invested in a custodial account, or which were previously invested in a custodial account, as well as elective deferral contributions, restrictions were previously applicable and the distribution rules changed only in that plan termination is now a distributable event. The plan should be amended to reflect this provision.

403(b) plans allowing hardship distributions are now officially subject to the 401(k) hardship distribution rules. Your plan document may need to be amended to reflect your decisions relating to hardships, including the former "403(b)" standard vs. the 401(k) rules, and determination of whether or not the safe harbor rules will be applied.

Contact your information source
on 403(b) regulations at
1-877-403(b)REG (2734)
or **403bUniversity.com**