

# RetirementManager

Compliance Essential

Final 403(b) Regulations Compliance Manual - Supplement for Private Tax-Exempt Organizations

Solutions for Private Tax-Exempt 403(b) Organizations

## 403(b) Compliance Manual

### Supplement for Private Tax-Exempt Organizations Updated for the Final 403(b) Regulations

In addition to the general requirements for 403(b) plans, including the new requirements under the final 403(b) regulations, discussed in the Compliance Manual, there are additional considerations for plan sponsors of 403(b) plans for private tax-exempt entities specific to whether or not the plan is subject to and operated in accordance with the Employee Retirement Income Security Act (ERISA) of 1974, as amended.

#### PLANS EXEMPT FROM TITLE I OF ERISA

##### Administration

For private tax-exempt employers that sponsor voluntary-only plans it is important to note that the final 403(b) regulations do not mandate that such plans now comply with Title I of ERISA. The Department of Labor regulations permit certain voluntary-only 403(b) arrangements to be exempt from the requirements of Title I of ERISA, provided that there is very limited employer involvement in the plan. Plan sponsors seeking to take advantage of this exemption will need to exercise caution to avoid assuming responsibilities which, though permitted and even encouraged under the final 403(b) regulations, would constitute too much employer involvement and forfeit that employer's reliance on the plan's non-ERISA status. As noted by the Department of Labor, such determinations are necessarily fact-specific. The DOL's Field Assistance Bulletin on this subject was issued on the same day that final 403(b) regulations were published. The burden to demonstrate whether the exemption applies generally will fall upon the plan sponsor asserting that it does apply.

##### Plan Documents

One significant change for sponsors of non-ERISA voluntary-only 403(b) plans is the requirement that all 403(b) plans, including non-ERISA voluntary-only plans maintained by private tax-exempt sponsors, must be maintained in accordance with the terms of a plan document. The final regulations permit the written plan requirement to be satisfied in a number of ways, depending on what works best for the plan sponsor. Further, certain of the written plan requirements may be satisfied by the written terms of the providers' contracts and need not be replicated in the employer's plan documents. A collection of documents could potentially constitute the written plan as long as the collection of documents include all of the required provisions for a plan document as provided in the regulations and subsequent guidance. Employers can expect many of their providers, and other parties as well, to offer up sample plan documents. NOTE: Any references to "prototype 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. In any case, the requirement to have a written plan document should not of itself be a significant burden. In most instances, it should require nothing more than the one-time adoption of a document, then occasional updates for changes in tax law.

One frequent question is whether the adoption of a written plan would subject the plan to Title I of ERISA. In general, the DOL Field Assistance Bulletin expressed the DOL's view that an employer could satisfy the requirements of the final 403(b) regulations while still preserving the plan's exemption from Title I of ERISA, provided that care was taken to avoid the creation of employer discretionary authority, such as making decisions about withdrawals or loans, or otherwise exercising or limiting the exercise of a participant's rights under the investment product they had selected. A document may require, among other things, that providers under the plan coordinate the exchange of information with respect to certain transactions, including loans and financial hardship withdrawals, for those participants maintaining accounts with more than one provider under the plan. It is important when addressing compliance functions under the terms of the plan document to ensure that any assignment of such functions will not be construed as an exercise of discretion in and of itself (i.e., the centralized compliance model whereby one centralized data repository is charged with overseeing all plan compliance functions). A plan sponsor should consult with its legal counsel to develop a plan document to best suit its needs.

## PLANS SUBJECT TO TITLE I OF ERISA

### Administration and Nondiscrimination

Many 403(b) plans maintained by tax-exempt employers are already maintained as ERISA plans. The final regulations do not change that and certain parties associated with the plan are fiduciaries and subject to appropriate duties and responsibilities in accordance with the requirements of ERISA. As discussed in Section 2 of the Compliance Manual, 403(b) plans of private sector employers are subject to additional rules to prevent discrimination. These rules apply to contributions other than elective deferrals (which are subject to Universal Availability rules). For these additional contributions, additional nondiscrimination testing may be required, depending on plan design. For example, employer matching contributions are generally required to have run each year an Actual Contribution Percentage, or ACP, test. This test compares the contribution rates for highly compensated employees against the rates for nonhighly compensated employees. Other tests apply for basic or discretionary employer contribution

sources. For some of these nondiscrimination tests, prior IRS guidance provided certain safe harbors, under IRS Notice 89-23. Many of those safe harbors have been eliminated by the final 403(b) regulations. If you have contributions to your plan other than employee elective deferrals, you should check with your legal counsel or other service provider about these testing requirements and the application of previous safe harbors.

### Plan Documents

The final 403(b) regulations require that all 403(b) plans be operated in accordance with a plan document. The plan document requirement applies whether the plan consists of employer contributions, employee deferrals or a combination. Of course, if your plan is subject to ERISA, you should already have a written plan, and thus you may already be satisfying this requirement. However, you should review your plan to ensure that it meets any new requirements imposed by the final regulations. The final regulations permit the written plan requirement to be satisfied in a number of ways, depending on what works best for the plan sponsor. So, for example, an employer could maintain separate plan documents for employee deferrals and employer contributions. It is important to note that each plan would be considered separate and distinct for applicable reporting and disclosure rules. Further, certain of the written plan requirements may be satisfied by the written terms of the providers' contracts and need not be replicated in the employer's plan documents. A collection of documents could potentially constitute the written plan so long as the collection of documents includes all required provisions as well as any optional provisions in accordance with the regulations. Employers can expect many of their providers, and other parties as well, to offer up sample plan documents. NOTE: Any references to "prototype 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. In any case, the requirement to have a written plan document should not of itself be a significant burden. In most instances, it should require nothing more than the one-time adoption of a document, then occasional updates for changes in tax law.

In addition to the plan document requirement under the final regulations, remember that ERISA requires communication of plan document provisions and amendments to employees. You probably have already provided a Summary Plan Description (SPD) to your employees. With the amendment of your plan you should ensure that either an updated Summary Plan Description or a Summary of Material Modifications is provided to your employees. Please note that if you maintain multiple ERISA plans, you must comply with applicable reporting and disclosure requirements (i.e., Form 5500 reporting and SPDs, etc.) for each plan, respectively.

## Annual Regulatory Filings

Employee benefit plans subject to ERISA are required to file an annual return, Form 5500. This requirement is not new for 403(b) plans. However, effective with the 2009 plan years the Department of Labor, Employee Benefits Security Administration has announced a change that may have a significant impact on many 403(b) plans. Under the current Form 5500 instructions, a 403(b) plan adheres to limited filing requirements. For example, no financial information is included on the return and no independent auditor's report is required. Beginning with the 2009 years 403(b) plans will be subject to the same financial reporting requirements of other plan types. For plans with 100 or more participants, this will include an independent auditor's opinion.

The IRS has indicated, in Revenue Procedure 2007-71, that a transfer to an unapproved product (i.e., not in the plan, and no information sharing agreement) after September 24, 2007, and before January 1, 2009, generally can be corrected by re-transferring to an approved product by June 30, 2009. The IRS has also provided additional guidance regarding accounts of former employees and beneficiaries, as well as accounts of current employees, with previously deselected providers. Employers should be aware that the DOL guidance for Form 5500 preparation does not appear to recognize these rules. As a result, subject to further DOL guidance, 403(b) plan assets held by former providers should also be included in the financial statements. While many employers may already have been coordinating with these former providers, for some employers this may pose some important new challenges. Employers should consult with their accountant or legal counsel to discuss these requirements more fully.

## Spousal Consent Requirements

Depending on the plan design, plans subject to ERISA Title I may be required to distribute benefits in the form of a Qualified Joint and Survivor Annuity (QJSA). A QJSA is an annuity that provides a life annuity to the participant and survivor annuity to the spouse. The survivor annuity must be no greater than 100% or less than 50% of the annuity paid during the participant's life. Defined benefit pension plans and money purchase pension plans must include this requirement. For profit sharing and 403(b) plans, the QJSA is not required if the plan meets the following:

- The death benefit of the plan is payable in full to the surviving spouse unless the spouse has consented to another beneficiary;
- A life annuity option cannot be elected in the plan or the participant does not elect into the plan's life annuity options; and
- The benefit is not the result of a direct transfer from another plan which was required to provide a QJSA.

If required, payment must be in this form unless the participant elects otherwise. Further, if the participant is married the spouse must consent to the distribution.

**Please understand that these materials are not intended as legal advice and should not be applied in that fashion. Circumstances can differ and can require different conclusions. Employers should always consult legal counsel for assistance with questions about their benefit plans. However, we hope these materials will help you take a fresh look at some important questions about 403(b) programs and what you can do, today.**

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