

## Five Requirements for a 403(b) Written Plan

The final 403(b) regulations enacted many changes affecting 403(b) plans. Our pension consultants have compiled these valuable questions and answers to assist you in complying with the regulations affecting 403(b) plans.

**Q. Do the final regulations require a written plan document?**

**A.** Yes. The new regulations require a written plan. Although some IRS officials have indicated the plan could be a collection of written items, we doubt that approach will be sufficient to comply with all of the requirements and provide the necessary language to coordinate the administration of the plan. We believe the best approach will be for the employer to adopt a single plan document and that plan would incorporate by reference the annuity contracts and custodial agreements.

**Q. What is the deadline for adopting the written plan?**

**A.** The regulations generally require the written plan to be in effect on January 1, 2009. The regulations provide a later date for church plans and for plans maintained pursuant to a collective bargaining agreement.

**Q. What provisions should be included in the plan document?**

**A.** The written plan document should include provisions setting out the nine items required for contributions to a 403(b) plan to be excludible from gross income. The regulations also require the plan to identify the contracts and custodial agreements available under the plan. Furthermore, the plan should contain language: (1) allowing for transfers, (2) permitting plan termination, and (3) coordinating plan administration.

**Q. Do the new regulations require the employer sponsoring a 403(b) plan to engage a third party administrator?**

**A.** No. The regulations do not impose a requirement to hire a third party administrator. However, the new regulations do place a lot of responsibility on the employer. Therefore, if the employer is not able to oversee the plan and the investment vendor does not accept that responsibility, the employer may want to hire a third party administrator, advisor or consultant to assist them. This is particularly true of a tax-exempt employer that wishes to avoid having a deferral-only plan be subject to ERISA.

**Q. If a tax-exempt employer sponsors a deferral-only 403(b) plan, will the written plan requirement compromise its ERISA exemption?**

**A.** No. If an employer satisfies the safe harbor requirements the DOL has set out (DOL Reg. §2510.3-2(f)), the DOL will not consider a tax-exempt employer sponsoring a deferral-only plan as an ERISA plan. Concurrent with the issuance of the regulations, the DOL issued FAB 2007-02 in which it provided guidance under which an employer could comply with the written plan requirement without compromising its ERISA exemption. Under the guidance, the employer can engage in a number of activities without the DOL considering the employer to have established or to be maintaining a plan. The activities include: adopting a written plan, correcting plan provisions and operations to comply with the Code, and providing employee and employer information. However, the employer cannot have responsibility for, or actually make, discretionary determinations in administering the plan. For example, the employer could not authorize plan transfers, process distributions, satisfy joint and survivor annuity requirements, make hardship or QDRO determinations, or administer loans.

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