



One Minute Memo®

403(b) Plan Document Deadline Approaching

Final Treasury Regulations issued under Internal Revenue Code (“Code”) Section 403(b) generally require all 403(b) arrangements to be maintained pursuant to a written plan document. Originally required to be in place by December 31, 2008, in late 2008 the IRS extended the documentation deadline to December 31, 2009. Accordingly, employers that maintain a 403(b) plan or otherwise make such an arrangement available to their employees should confirm that their 403(b) documentation is in compliance immediately.

Similar to tax-qualified retirement plans (e.g., 401(k), profit sharing, pension plans), Section 403(b) arrangements must now be maintained pursuant to a written plan document or documents that meet the requirements of Code Section 403(b) and include, for example, all material terms and conditions for eligibility, benefits, applicable limitations, the contracts available under the plan, and the time and form of distributions. In addition, the plan document must describe any optional provision that applies, such as loans, hardship withdrawals, plan-to-plan transfers and acceptance of rollovers.

This plan document requirement applies equally to so-called “non-ERISA” 403(b) arrangements. These non-ERISA arrangements involve little if any employer involvement other than granting a 403(b) vendor access to employees to market the retirement savings vehicle. Historically, employers making such non-ERISA 403(b) arrangements available to employees avoided having their names or logos placed on the vendor’s materials, much less establishing a formal plan document, for fear that such action would subject the arrangement to ERISA. The Department of Labor, however, has stated that developing a plan document solely for purposes of complying with Code Section 403(b) requirements will not subject an otherwise non-ERISA arrangement to ERISA.

Note that certain exceptions may exist to the full written plan documentation requirement for 403(b) arrangements frozen to new contributions between the period January 1, 2005 and December 31, 2008. A company that has such a frozen 403(b) arrangement should evaluate whether they meet relevant conditions which exempt them from the written documentation requirement. Notwithstanding this, even if exempt from the full plan documentation requirement, such arrangements may still need to comply with the “information sharing” requirements of the final Section 403(b) regulations.

In response to this new written plan document requirement, many 403(b) vendors have offered to provide a plan document. Such plan documents should be reviewed for compliance with the Code’s requirements, as well as for language that is protective of both the employer and employee participants. In addition, complications can arise when a 403(b) plan utilizes multiple annuity contract or custodial contract providers.

Given the upcoming deadline, immediate action may be required to protect your organization’s interests, as well as the interests of the plan participants.

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