



September 2009

**LEGAL ALERT: DEADLINE LOOMS FOR 403(B) WRITTEN PLAN DOCUMENT
AND FINANCIAL AUDIT/FORM 5500 COMPLIANCE**

Overview

Historically, unless a 403(b) program was subject to the Employee Retirement Income Security Act of 1974 (“ERISA”), it had no documentation requirements and, even if subject to ERISA, limited reporting obligations. In 2007, the Internal Revenue Service (“IRS”) and the Department of Labor (“DOL”) issued regulatory guidance¹ that, among other things, significantly change the documentation and reporting obligations for 403(b) programs. Employers that offer 403(b) programs now face approaching deadlines to implement these changes:

- Under IRS regulations, the material terms of all 403(b) programs must be described in written plan documents, whether or not the program is subject to ERISA. The written plan document must be adopted by December 31, 2009.²
- Under DOL regulations, ERISA 403(b) programs are subject to more detailed annual reporting requirements including, in some cases, a financial audit. These reporting requirements are effective for plan years beginning on and after January 1, 2009.

Written Plan Document

The IRS’s regulations under Section 403(b) of the Internal Revenue Code (the “Code”) contain new compliance requirements and consolidate guidance that has been issued over the past thirty years. The written plan document for 403(b) programs is the new requirement that arguably has had the most impact on employers. As noted above, both ERISA and non-ERISA 403(b) programs must have plan documents by the end of this year.

Which Programs are Subject to ERISA? ERISA generally applies to any plan, fund or program *established or maintained* by an employer. Although establishment and maintenance of an ERISA plan is a facts-and-circumstances analysis, the DOL has provided guidelines³ as to when a 403(b) program will be considered to be established or maintained by an employer. For example, the employer may not contribute its own funds to the 403(b) contracts or custodial accounts, and its permitted involvement is limited to a few enumerated tasks such as entering into salary deferral arrangements and forwarding salary deferral contributions to the 403(b) vendor. An employer that desires to make matching contributions must sponsor a 401(k) or an ERISA 403(b) plan.

¹ 72 F.R. 41128 and 72 F.R. 64710.

² IRS Notice 2009-3.

³ 29 CFR 2510.3-2(f).

The IRS aims to improve compliance with the Code Section 403(b) requirements through plan documentation and information sharing agreements between the employer and the issuer of the 403(b) contract or custodial account. In addition to documenting the allocation of responsibilities among such parties, the plan document serves as an information resource for employees. Specifically, the plan document has to describe the material terms for:

- eligibility,
- benefits,
- applicable limitations,
- the contracts available under the plan, and
- the time and form under which benefit distributions can be made.

Must the Plan Document Describe Every Contract that has been Issued to my Employees? No. In general, if an annuity contract or custodial account stopped receiving contributions before January 1, 2009, its inclusion in the plan document is not mandatory. However, if such contract or account was issued between December 31, 2004 and January 1, 2009, the employer must make a reasonable, good faith effort to include them in its plan. Good faith may be demonstrated by agreeing to share information with the vendor of the contract. Contact your benefits counsel for more information.

Employers may draft and adopt a single self-contained “plan document.” Alternatively, the “plan document” can be comprised of multiple documents and can incorporate by reference (such as provisions of the insurance policy or custodial account). If multiple documents are used, it is important to ensure that they do not conflict one another.

My Organization’s 403(b) Program is a non-ERISA Program. How do we Obtain a Plan Document? Although the employer is responsible under the 403(b) regulations for procuring a plan document, many providers of 403(b) contracts or custodial accounts offer model plan documents that the employer can adopt. We recommend, however, that the employer’s own counsel review the plan document to ensure that it is both legally compliant and that it protects the future interests of the employer and employees as these programs become more regulated.

Financial Audit/Form 5500 Requirements

403(b) programs had reporting obligations before 2009, but they were summary in nature. Starting with the 2009 plan year, sponsors of ERISA 403(b) programs have new reporting responsibilities, which vary based on the number of participants in the plan:

- plans with fewer than 100 participants generally file a simplified Form 5500 without audited financial statements.
- plans with 100 or more participants file a Form 5500 with audited financial statements.

As employers began giving consideration to engaging auditors and assembling records necessary to prepare their plans’ 2009 audited financial statements and Form 5500 filings, it became apparent that it would be difficult (sometimes impossible) for some employers to determine the location of all of the plan’s assets, balances in each contract, and the number of employees and

former employees in the 403(b) plan, due to lack of records. Recognizing this difficulty, the DOL recently modified the parameters of the 403(b) reporting obligations.⁴ A 403(b) plan's Form 5500 and financial audit now can exclude an annuity contract or custodial account issued to a current or former employee before January 1, 2009, if:

- the employer ceased to have any obligation to make contributions (including employee salary reduction contributions), and in fact ceased making contributions to the annuity contract or custodial account, before January 1, 2009;
- all of the rights and benefits under the annuity contract or custodial account are legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer; and
- the individual owner of the contract is fully vested in the annuity contract or custodial account.

Accordingly, if the issuer of 403(b) contracts or custodial accounts stopped receiving contributions from the employer before January 1, 2009, those contracts and custodial accounts, and the assets held thereunder, can be ignored for purposes of the Form 5500 reporting and audit requirements, assuming that the participant is 100% vested and his or her rights and benefits are enforceable against the issuer (not the employer). If any one of the requirements for exclusion are not met, however, the contract must be included in the audit; there is no good faith analogue to the plan document requirement in this respect.

In addition, current or former employees who hold only contracts or custodial accounts that are excludable, as described above, do not need to be counted as participants covered under the plan for Form 5500 annual reporting purposes.

Conclusion

Employers offering 403(b) programs should speak with their 403(b) vendors, benefits counsel and auditors to ensure that they are in timely compliance with the new written plan document requirement by year end, and the new reporting and disclosure requirements becoming applicable in 2009.

Resources

The IRS has posted 403(b) mini-courses for employers and employees on its website (www.irs.gov) under the "Retirement Plans Community" tab.

Lawyers Alliance appreciates the assistance of Kelly Poynter, an attorney at Seyfarth Shaw LLP in preparing this alert, which is meant to provide general information only, not legal advice. For additional information, please contact Judith Moldover at Lawyers Alliance for New York at 212-219-1800 ext.250.

⁴ Field Assistance Bulletin 2009-02.