

WHAT MAKES A 403(b) PLAN SUBJECT TO ERISA AND WHAT ARE THE CONSEQUENCES?

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law containing detailed rules that plan sponsors and other fiduciaries must comply with when setting up and operating retirement and other employee benefit plans. ERISA requires plan sponsors to file government reports, provide information to participants, protect plan assets and deliver benefits to participants.

403(b) PLANS SUBJECT TO ERISA

- Most 403(b) plans, like other employee benefit plans, are subject to ERISA if they are sponsored by private tax-exempt employers.
- You can generally assume that your 403(b) plan is subject to ERISA unless it qualifies for one of the exemptions listed in the right column.
- If you are a private employer, you might make your supplemental elective deferral only 403(b) plan (“TDA” plan) subject to ERISA if you become too involved in plan administration by taking such actions as:
 - Determining which employees qualify for loans or hardship distributions, or
 - Denying fund sponsors reasonable access to participants.
 - See third bullet point in the right column for more information on the ERISA exemption for TDA plans sponsored by private tax-exempt organizations.

403(b) PLANS EXEMPT FROM ERISA

Some types of 403(b) plans are exempt from ERISA:

- Governmental plans (e.g., plans sponsored by a state, county, or municipality or one of their agencies, schools, or instrumentalities).
- Church plans, unless the plan sponsor has voluntarily elected to have the plan covered by ERISA.
- Supplemental 403(b) elective deferral arrangements (TDA plans) sponsored by private tax-exempt organizations, if certain Department of Labor requirements are satisfied:
 - Plan participation is completely voluntary;
 - The only form of plan contributions allowed is employee elective deferrals (pretax or Roth);
 - Participants are offered a reasonable choice of investment options (the DOL has informally indicated that there should be at least two different vendors’ products available);
 - Employees are provided with information on plan investment options;
 - Employer involvement in plan administration is limited to optional activities related to administering elective deferral agreements and does not involve discretionary determinations (such as hardship determinations);
 - The employer does not attempt to intervene in disputes between employees and fund sponsors or third-party administrators; and



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- The employer does not receive compensation for performing administrative duties for the plan (other than reimbursement of actual expenses).

Note: Just having a written plan document, as required by final 403(b) regulations, will not make an otherwise exempt TDA plan subject to ERISA.

Governmental and non-electing church plans are exempt from ERISA whether they have employer contributions, employee elective deferrals, or both. These organizations are exempt because they are governmental or church organizations, not because of the kind of contributions made to their plans.

BENEFITS?

The benefits of ERISA coverage for 403(b) plans are:

- State laws and regulations generally do not apply.
- Employers can take control over the design, operation and assets of the plan making compliance problems less likely.
- The employer is protected from liability for investment losses arising from participant investment decisions, if the plan satisfies ERISA Section 404(c) standards for investment diversification, participant transfer rights, and participant financial education.
- Employees' benefits and rights will be eligible for ERISA protection.

DRAWBACKS?

The main drawbacks of ERISA coverage for 403(b) plans are ERISA's reporting and disclosure requirements:

- Form 5500 must be filed with the DOL each year:
 - For the 2008 plan year (due by July 31, 2009 for calendar year plans) 403(b) plans are not required to file the full Form 5500.
 - Starting with Form 5500 filings for 2009 plan years (due by July 31, 2010 for calendar year plans), 403(b) plans will be subject to the same Form 5500 filing requirements as qualified plans, including financial schedules, vendor compensation information and copies of plan audit reports (for plans with more than 100 participants).

- Summary Annual Report (SAR). A summary of the information included in the Form 5500 filing must be provided to participants within nine months of the end of the plan year.
- Summary Plan Description (SPD). A summary of plan provisions must be provided to all participants and beneficiaries when they first become eligible, on request, and at least once every five years.
- Summary of Material Modification (SMM). A summary of significant changes in plan provisions must be provided to participants and beneficiaries within 210 days of the end of a plan year in which the plan was amended, if a revised SPD has not been provided.
- Joint and Survivor Annuity Options must be provided if annuity contracts are used as funding vehicles.
- Nondiscrimination rules apply to employer contributions, if highly compensated employees are eligible for the plan. All TDA plans are subject to the universal availability requirement.
- Minimum participation standards apply to the waiting period for eligibility for employer contributions (generally the earlier of age 21 or one year of service).
- Vesting rules apply to employer contributions.
- Plan sponsors, administrators and other fiduciaries must comply with ERISA's fiduciary standards.
- Employers must comply with ERISA claims procedures, when handling benefit requests from participants and beneficiaries.

FURTHER INFORMATION

ERISA information, including a description of the major requirements and links to further information regarding plan documents, SPDs, and Form 5500 filing requirements, can be found on TIAA-CREF's Administrator Website at: tiaa-cref.org/administrators/compliance/ERISAinfo/index.html. Publications are available at tiaa-cref.org/administrators/resources/bookstore/index.html.

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