

# Is your 403(b) plan subject to the Employee Retirement Income Security Act of 1974 (“ERISA”) or exempt from ERISA?

## When is a 403(b) plan subject to ERISA?

All 403(b) plans are subject to Title I of ERISA unless an exemption applies. There are three scenarios by which a 403(b) plan can be exempt from ERISA – the 403(b) plan is maintained by 1) a government, 2) a church, or 3) by a 501(c)(3) organization that limits employer involvement in the administration of that 403(b) plan in accordance with a Department of Labor regulatory safe harbor. Plans that do not fall under Title I of ERISA do not have to comply with ERISA requirements relating to participation standards, minimum coverage, vesting, spousal consent, fee disclosure, reporting, summaries of plan information to participants, and funding requirements.

A “governmental plan” means a plan established or maintained for its employees by the government of a State, or political subdivision, agency or instrumentality therefore. By virtue of its governmental plan status, a 403(b) plan sponsored by a public school system is exempt from all provisions of Title I of ERISA.

A “church plan” means a plan established and maintained for its employees by a church or a convention or association of churches that is exempt from tax under Internal Revenue Code (“IRC”) Section 501 or an organization controlled by or associated with a church or convention or association of churches.

For those 403(b) plans sponsored by non-governmental/non-church organizations that are tax-exempt under IRC Section 501(c)(3), a safe harbor exemption from ERISA may apply if the employer maintains limited employer involvement by satisfying the following criteria as published by the Department of Labor under Regulation Section 2510.3-2(f):

- Participation is voluntary for employees (e.g., no negative election or automatic enrollment provisions).
- It is a salary reduction-only plan – that is, the only contributions permitted under the plan are elective salary reduction contributions. No employer contributions are allowed.

- All rights under the plan are enforceable only by the employee, beneficiary or authorized representative of the employee or beneficiary.
- There is limited employer involvement in the plan. Limited involvement for an employer means permitting providers to publicize their products, requesting and summarizing information regarding the available funds or products, collecting salary reduction contributions and forwarding the contributions to the provider(s), signing a group annuity contract with a provider and limiting the number of funds and products under the 403(b) plan. However, the employer must provide participants with a reasonable choice of investments. According to the DOL, an employer may limit the number of providers to which it will forward salary reduction contributions as long as employees may transfer all or a part of their funds to any provider whose annuity contract or custodial account complies with the Code requirements and who is willing to enter into an information sharing agreement with the employer. In the view of the DOL, a “reasonable choice of investments” is generally more than one 403(b) vendor and more than one investment product.
- The employer cannot receive compensation for performance of its duties under the plan other than compensation to cover reasonable expenses.

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### What factors may impact the limited employer involvement safe harbor referenced on the previous page?

The Internal Revenue Service's final 403(b) regulations indicate that more employer involvement may be required with respect to plan administration, and, as a result, may adversely impact certain 403(b) plans by causing them to fall outside of the limited employer involvement safe harbor exemption. The Department of Labor issued Field Advisory Bulletins ("FABs") 2007-02 and 2010-01 which provide guidance with respect to this safe harbor exemption. In the DOL's view, the limited employer involvement exemption remains a viable option under the IRS final 403(b) regulations by providing the employer with enough flexibility regarding the structure and operation of the plan. Thus, according to the DOL, compliance with the IRS 403(b) regulations will not necessarily cause 403(b) plans to fall under the auspices of ERISA. We encourage all 403(b) plans with an interest in the limited employer involvement safe harbor to review with their plan's legal counsel the guidance, which can be accessed via <http://www.dol.gov/ebsa/>

### In light of the DOL guidance can you provide information to perform and remain under the safe harbor, and thus exempt

#### These activities are considered ministerial, and therefore permitted under the safe harbor in accordance with DOL FAB 2007-02:

- Permitting annuity contractors and providers to publicize their products
- Requesting information concerning proposed funding media, products or annuity contractors
- Compiling information related to funding media
- Entering into and implementing salary reduction agreements, and retaining records of same
- Holding group annuity contracts
- Limiting funding media, products or annuity contracts to a number and selection designed to afford employees a reasonable choice in light of relevant circumstances
- Conducting administrative reviews of program structure and operation of tax compliance purposes
- Performing discrimination testing, including collecting, compiling and analyzing plan demographic data from vendors
- Confirming compliance with maximum contribution limitations
- Fashioning and proposing corrections
- Developing improvement to the plan's administrative processes to avoid tax defects, including entering into information sharing agreements
- Obtaining the cooperation of independent entities involved in the program needed to correct defects
- Keeping records of its activities
- Certifying to annuity providers statement of facts, including employee addresses, attendance records or compensation level, or physical condition
- Adopting a written plan (as required by the Internal Revenue Code); however, the DOL indicates that it would expect to see a compilation of documents (annuity contracts, procedures, salary reduction agreements, etc.) rather than a single document
- Choosing whether to include optional features such as loans and hardships in the 403(b) plan, provided that the vendor takes on the responsibility for discretionary determinations.

## regarding specific functions an employer can and cannot opt from ERISA?

**These activities are considered non-ministerial and therefore not permitted under the safe harbor in accordance with DOL FABs 2007-02 and 2010-01:**

- Authorizing plan-to-plan transfers
- Processing or authorizing distributions
- Satisfying applicable qualified joint and survivor annuity requirements
- Making hardship determinations
- Selecting optional plan features
- Determining and qualifying domestic relations orders
- Determining loan eligibility and enforcement
- Negotiating with annuity providers to change the terms of their products or other purposes, e.g, setting conditions for hardship withdrawals
- Selecting a TPA to perform administrative functions on behalf of the plan.

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## What does it mean to have a 403(b) plan subject to ERISA?

ERISA is a set of laws and regulations passed in 1974, which are enforced by the DOL to ensure the protection of employees covered by an employer-sponsored, tax-advantaged retirement or welfare benefit plan. In addition, ERISA imposes stringent duties and requirements on plan fiduciaries.

If a 403(b) plan is subject to ERISA, it must:

- Require its fiduciaries to act solely in the interest of participants and beneficiaries.
- Require that its fiduciaries diversify investments (note that a 403(b) plan fiduciary may minimize its liability by electing to operate the plan in accordance with ERISA Section 404(c)).
- Operate the plan in accordance with the plan documents, including applicable spousal rights/consent and vesting rules.
- Ensure that its fiduciaries are properly bonded.
- File an annual IRS Form 5500.
- Large 403(b) Plans (generally those with 100 or more participants) must be audited annually by an external auditor.
- Provide participants (and other interested parties) with summary plan descriptions, summaries of material modifications, and summary annual reports.
- Provide fee disclosure to participants (and beneficiaries and alternate payees with an account under the plan).



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