What Does it Take to be a Non-ERISA 403(b) Plan?

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A 403(b) plan is a retirement plan that is maintained for employees of:

- certain governmental employers (like hospitals and public schools),
- churches, and
- 501(c)(3) tax-exempt organizations.

Most defined contribution and defined benefit plans are subject to the Employee Retirement Income Security Act (ERISA). ERISA is a federal law that sets standards intended to provide protection for the participants of private retirement plans. ERISA consists of four Titles. Title I of ERISA addresses the "Protection of Employee Benefit Rights" and sets minimum standards for funding, vesting, participation, and benefit accruals; requires certain reporting and disclosures; and describes fiduciary responsibilities for those who control plan assets.

403(b) plans sponsored by **governmental and public education** employers are exempt from ERISA. 403(b) plans sponsored by **religious organizations** are also exempt from ERISA, but may elect ERISA coverage.

Private sector (nongovernmental) 403(b) plans established by 501(c)(3) tax-exempt organizations that meet certain requirements may be exempt from ERISA. *It is important to note that these plans are NOT automatically non-ERISA plans.*

Based on the Department of Labor (DOL) Safe Harbor, a private sector 403(b) plan will not be subject to Title I of ERISA if, among other requirements, employees participate in the 403(b) on a voluntary basis; all rights under the annuity contract or custodial account are enforceable solely by the employee or beneficiary; there are no company contributions and the employer maintains very limited involvement with the 403(b) plan; and the employer receives no compensation, other than a reasonable amount to cover expenses related to the employer's duties under the contracts. This limited involvement encompasses activities such as depositing contributions, allowing vendors to explain their products, and providing investment choices.

Plan sponsors who wish to maintain non-ERISA plans may not process distributions, approve hardship distributions or loan requests, review qualified domestic relations order (QDRO) requests received by the plan, authorize plan-to-plan transfers or otherwise make any discretionary determinations regarding plan administration. The DOL has determined that

handling these functions internally will make the plan subject to ERISA. Field Assistance Bulletin 2010-01 explains that while an annuity provider or other responsible third party selected by a person other than the employer can make these types of administrative decisions, if a Third Party Administrator (TPA) is retained **by the employer** to provide these services to the plan, the plan will no longer be a non-ERISA plan.

One of the key requirements for a non-ERISA 403(b) plan is that there cannot be any employer contributions. To circumvent this requirement, some employers set up a separate qualified plan to hold matching contributions that are based on the deferrals being deposited into the 403(b) plan. DOL Advisory Opinion 2012-02A states that this type of arrangement will cause a 403(b) to fail to meet the requirements of a non-ERISA plan because the employee contributions were not completely "voluntary" since by making them the employee could receive a match and also by making the match, the employer did not have "limited" involvement.

There are advantages to being a non-ERISA 403(b) plan. Some of the advantages are:

- A non-ERISA plan does not need to provide a Summary Plan Description (SPD) to participants.
- Form 5500 and related schedules do not need to be filed.
- A non-ERISA plan with over 100 participants does not require an annual audit.
- A non-ERISA plan is not subject to the strict ERISA fiduciary standards regarding exclusive benefits, prudent care, and diversification, but it is subject to state law and other standards.

A plan sponsor must carefully review the plan design and operation when making a decision to be a non-ERISA plan because if facts and circumstances determine that the plan truly is an ERISA 403(b) plan and Form 5500 filings and other disclosure and reporting requirements are missed, the corrections could be costly.

When a plan sponsor is determining whether or not its 403(b) plan falls under ERISA, it is important that all aspects of plan operation be considered. An ERISA attorney familiar with the plan can assist with this determination.