

403(b) Type Retirement Plans

One of the advantages of plans that offer salary deferrals to their employees under Internal Code Section 403(b) is that they are not subject to the nondiscrimination testing requirements of 401(k) plans. Instead, 403(b) plans must comply with the universal availability requirements. With few exceptions, plan sponsors must provide all employees the opportunity to defer compensation to the plan. Recently, the IRS indicated that universal availability, along with enforcement of a concept known as "effective opportunity to participate," would continue to be a primary focus area when conducting field examinations.

Universal Availability

Under a 403(b) plan, an employer must provide plan participation to all employees except for the following categories: 1) employees eligible to defer under another employer plan, 2) non-resident aliens, 3) student employees performing specified services, and 4) employees who normally work less than 20 hours per week. Under the universal availability standard, all other employees must be eligible to participate, and the plan may not impose other age and/or service restrictions as allowed in 401(k) plans.

Effective Opportunity

Once deemed eligible to participate, an employee must be provided an effective opportunity to defer. Similar to the requirements of 401(k) plans, this generally means that participants must have an understanding of the practicalities of how to make a salary deferral election on at least an annual basis. The definition in the Internal Revenue Code Regulations is as follows:

“Whether an employee has an effective opportunity is determined based on all the facts and circumstances, including notice of the availability of the election, the period of time during which the election can be made, and any other conditions on elections. A section 403(b) plan satisfies the effective opportunity requirements . . . only if, at least once during each plan year, the plan provides an employee with an effective opportunity to make (or change) a cash or deferred election. . . .”

While universal availability is usually accomplished through plan design, effective opportunity is a function of communication and plan administration to the employees. Both are something the 403(b) plan sponsor (generally the employer) is responsible for ensuring occur. Employees must be aware of the location of plan forms and how to make or change their elections. Since low participation plans tended to be the plans scrutinized by the Internal Revenue Service (IRS) it behooves employers to work closely with their plan provider to help

ensure all qualified employees are made aware of their ability to participate and the participation process.

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