

403(b) documents ftwilliam.com

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Agenda



- Topics / 403(b) requirements
 - 403(b)s vs qualified plans
 - Plan Sponsor types
 - Effective dates / “due dates”
 - 402(g) and 415 limits
 - Non-discrimination
 - Funding vehicles
 - Distribution requirements
 - Other FAQs
- Ftwilliam.com 403(b) document features
- ERISA / Non-ERISA plans
- Questions

403(b)s vs qualified plans



● Differences

- 403(b) plans are not “qualified”
- no pre-approval process for 403(b)s - yet
- some qualified plan rules (IRS rules) do not apply to 403(b)s

● Similarities

- IRS rules – if they apply, they work the same

403(b) plan Sponsor Types



- Public schools (governmental)
- Nonprofit – 501(c)(3)
 - Private nonprofits
 - Churches
 - Church related org (Code 414(e)(3))
 - “FICA Church” (Code 3121(w)(3))
 - Governmental nonprofit (example: County hospital)
- For the benefit of a minister

Effective dates



- Notice 2009-3 delayed the final regulation **adoption** date deadline: 12/31/09
- Plans should be effective 1/1/09 (and operate accordingly)
- Old plan that is newly in writing is being restated
- Effective date exceptions
 - church-related organization for which the authority to amend the plan is held by a church convention (per IRC 414(e)): 1/1/10 eff date deadline
 - plans subject to CBA
 - transition rules (universal avail, etc)

402(g) and 415 limits



- 402(g) limit
 - Age 50 catch-up
 - 403(b) special catch-up (\$3,000 max) for qualified orgs only
- 415 limit works differently
 - \$49,000 (2009), or
 - 100 percent of ***includible compensation.***

415 limit – includible comp



- includible compensation:
 - W-2 wages (w/o regard to section 911), plus deferrals for most recent year of service.
 - continues up to 5 years post-severance for **employer** contributions
- year of service:
 - full year (employer's work period), full time = 1 year of service
 - add together fractional years of service (example: person working 50% for two years and earning \$20,000 per year has \$40,000 in includible comp)
 - Publication 571 has examples of how to calculate

Minister's housing allowance (IRC 107)



- Excluded from income tax: **not** includible compensation
- If only income is housing allowance, annual addition limit = \$0 (under general 415 rule)
- BUT see 415(c)(7):
 - \$10,000 annual addition limit (\$40k lifetime limit)
 - similar special rule for foreign missionaries (\$3k/\$17k)

Compensation for allocation purposes



- ftwilliam document provides 415 compensation definition options
 - post-severance comp
 - post year-end comp
- Note that this does **not** affect the 415 rules – only for allocation purposes

Non-discrimination



- 403(b) nondiscrimination rules
 - Universal Availability (“UA” - no ADP test in 403(b))
 - 401(a)(17) (comp limits)
 - 401(a)(4), (5), (17); 401(m) (ACP); 410(b)
- Which rules apply depends on plan sponsor:
 - Governmental plans (UA and 401(a)(17))
 - FICA Church plans (none)
 - Nonprofit (including church-related orgs) (all)
- If a rule applies, works same as qualified plan (full scope plan has full array of safe harbor options)

Universal Availability



- Notice given at least once per year of right to elective deferral
- limited exclusions allowed:
 - Employees eligible for another 403(b), 457(b) or 401(k) plan
 - NRAs
 - students performing 3121(b)(10) services (school, college, university)
 - less than 20 hours per week (employer “reasonably expects” less than 1,000 HOS in 12 months)
- may no longer be excluded:
 - CBA employees
 - Employees who make a one-time election to participate in a governmental plan described in section 414(d)
 - Professors on sabbatical
 - Religious organization employees who have taken a vow of poverty

Funding Vehicles



- All ftwilliam 403(b) docs support all available funding arrangements
 - Custodial accounts
 - Annuity Contracts
 - Retirement Income Account (RIA)
 - DC program estab. by a church-related org (Code Sec 414(e)(3)(A))
 - separate accounting
 - investment performance is based on gains and losses on those assets
 - exclusive benefit of Participants
 - Treated as Annuity Contracts (can be custodial accts or other investment)
 - All plans established by Church-related organizations are RIAs in ftwilliam.com 403(b) docs (affirmatively stated in Section 9.01)
- Trust is NOT required under 403(b)

Distributions



- Elective deferrals / Custodial Accounts
 - Severance from Employment,
 - death,
 - disability,
 - age 59 1/2
 - Hardship (not permitted from Custodial Accounts that are not Elective Deferrals)
- Annuity contracts
 - Severance from Employment,
 - other event (stated age, disability, fixed number of years, hardship)
- Required minimum distribution rules apply (works like qualified plan)

Other FAQs...



Employer with 401(k) and 403(b) plan



- 402(g) limits are combined
- Age 50 catch-up limits are combined
- 415 limits generally **not** combined (see webinar Q&As #9)
- 403(b) can exclude employees eligible for a 401(k) and still meet universal availability

Do I need a Document?



- Yes....
- Unless “FICA Church” (IRC 3121(w)) **and**
 - plan only invests in annuity contracts and/or custodial accounts
 - Does not invest in RIAs

Sick/vacation time as 403b contribution upon severance



- if post-severance
 - must be an employer contribution
 - can be spread out over up to 5 years
- if employee has the option of whether to take cash or 403(b) contribution, then it is an elective deferral (and 402(g) limits apply)

Plan Termination vs. plan freeze



- Plan Termination

- Must distribute accumulated benefits under the plan “as soon as administratively practicable”
- All of the contracts issued under the plan must satisfy the requirements of final regulations
- May immediately/concurrently start 401(k) plan

- Freezing a plan

- must still maintain a document
- must still file 5500s if subject to ERISA

What is a ... Transfer?...

Exchange?... Rollover?



- Transfer:
 - Participant is an Employee or former Employee of the Plan Sponsor
 - with/without the consent of the affected Employees
 - distribution restrictions as stringent as those in the transferor plan
 - both plans must allow for transfer
 - permissive service credit transfers - gov't DB plan only
- Exchange:
 - fund not specifically approved by the Employer
 - distribution restrictions as stringent as those in the transferor plan
 - information sharing agreement required
 - **at discretion of admin in full scope; always permitted in limited scope if meet requirements**
- Rollover in/out:
 - rollovers in need not be allowed under the plan
 - at option of Participant at distributable event
 - rollovers in: eligible plans can be restricted (403b, IRAs, all eligible plans)
 - Direct/mandatory rollover rules apply (out)

When is an ISA required?



- (ISA = Information Sharing Agreement)
- Regulations require ISA for contract exchange on/after 9/24/07
- Rev Proc 2007-71 covers exchanges before 9/24/07 (Section 8)
- Formal ISA is NOT required:
 - between plan sponsor and approved vendors
 - transfers

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Full Scope
Limited Scope



Full Scope Plan



- ERISA or non-ERISA (govt/Churches) option
- Elective deferrals (including Roth)
- Voluntary contributions
- Matching contributions
- Nonelective Contributions
- Loans, Hardship and other in-service withdrawals
- Other features:
 - QACA / traditional automatic enrollment
 - EACA
- Uses model language and 401k volume submitter language (fav letter) whenever possible/appropriate

Limited Scope Plan



- Non-ERISA only
- Elective deferrals (including Roth)
- Loans, Hardship and other in-service withdrawals
- “Individual Agreement” with vendor
- State law rules
- Other features:
 - Traditional automatic enrollment
 - EACA
- Based very closely on IRS model document

403(b) and ERISA coverage



What are some ERISA requirements?



- 5500 filing requirement
- SPD
- fiduciary requirements
- Plan-specific requirements: QJSA, retirement age restrictions, some vesting restrictions, etc.
- claims requirements
- state law preemption

ERISA rules – not IRS rules

Application of ERISA (ERISA Section 4)



- ERISA applies to any employee benefit plan which is “***established and maintained***” by an employer...
- “The provisions of this title shall not apply to any employee benefit plan if...
 - such plan is a governmental plan (as defined in section 3(32));
 - such plan is a church plan (as defined in section 3(33)) with respect to which no election has been made under section 410(d) of the Internal Revenue Code of 1986” [non-electing church plan]
- ERISA is administered by DOL (not IRS)

Is the Plan subject to ERISA?



- Governments and Church Plans exempt (Church plans can elect to be covered – 410(d))
- Non-profits must not “establish” or “maintain” a 403(b) plan to be exempt (guidance: 29 CFR 2510.3-2(f) and FAB 2007-02)
 - 29 CFR 2510.3-2(f) non-ERISA 403(b) safe harbor issued in 1979
 - New final regs (July 2007) – does the safe harbor still apply? FAB 2007-02: yes, with some clarifications

Non ERISA option for Nonprofits

29 CFR 2510.3-2(f) safe harbor



- Participation “completely voluntary” for employees
- Right enforceable solely by employees
- Employer receives no compensation/consideration for offering plans
- Employer involvement limited:
 - Permitting vendors to publicize products to employees, Summarizing/compiling info re vendors avail
 - Collecting salary reductions and remitting to vendors
 - Holding group annuity contracts in the employer's name
 - Limiting vendors available to employees (to a number and selection designed to afford employees a reasonable choice in light of all relevant circumstances, listed factors)

FAB 2007-02 interpretation of 29 CFR 2510.3-2(f)



Employers can:

- perform duties as necessary to ensure tax compliance (nondisc, max contrib limits),
- adopt a 403(b) plan,
- perform information collection and compilation duties,
- terminate a plan

... and still meet the safe harbor

FAB 2007-02 interpretation of 29 CFR 2510.3-2(f) cont.



The employer can NOT:

- “have responsibility for, or make, discretionary determinations in administering the program.” This includes (as examples):
 - authorizing plan-to-plan transfers,
 - processing distributions,
 - satisfying applicable joint and survivor annuity requirements,
 - making determinations regarding hardship distributions,
 - making determinations regarding QDROs, and
 - eligibility for or enforcement of loans
- Negotiate with vendors “to change the terms of their products... such as setting conditions for hardship withdrawals”

Allocation of discretion permitted:

- “The documents should correctly describe the employer’s limited role and allocate discretionary determinations to the annuity provider...” or other third party

ERISA documents and ERISA: limited (no ER contribs) vs full scope



- Churches/governmental plans may use either document and select that the plan is not subject to ERISA (unless church elects coverage under 410(d))
- Nonprofits (not govt, not church)
 - may use full scope only if the plan is subject to ERISA
 - may use limited scope if they meet the safe harbor requirements (limited involvement)

Plan Admin duties in limited scope doc for 501(c)3 plan (not govt, not church)



- Administrator is assigned a number of discretionary duties
- In general, Administrator may not be the Plan Sponsor
- Administrator may be the vendor, TPA, or other “for whom a substantial portion of their duties are admin of the plan.”



For a complete discussion of ERISA coverage of private nonprofit plans, see:

<http://www.ftwilliam.com/articles/403BNonProfit20081209.html>

Notice 2008-62; 457(f) and 409A: recurring part-year compensation



- No 457(f) or 409A deferred compensation if:
 - no pay deferred beyond the last day of the 13th month following the beginning of service period
 - Pay deferred from one taxable year to another is not greater than 402(g) limit (\$15,500 2008)
 - must agree to defer before the service period begins
- Example: 8/1/08 - 5/31/09 school year w/ \$186,000 salary
 - Earn: \$93,000 in 2008 and 2009 (5 months in each year)
 - Pay: \$77,500 in 2008 and \$108,500 in 2009
 - \$15,500 paid in 2009 that is earned in 2008