



Pension Analyst

# Compliance Bulletin

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## **DOL provides additional exemption guidance for non-ERISA 403(b) plans**

IRS regulations requiring 403(b) arrangements to have written plan documents raised concerns among employers that have traditionally made non-ERISA 403(b) plans available to their employees. Historically, these employers have not adopted or maintained formal plan documents. To alleviate these concerns, the Department of Labor (DOL) published [Field Assistance Bulletin \(FAB\) 2007-02](#), which concludes that it is still possible to offer non-ERISA 403(b) plans under the new IRS rules.

FAB 2007-02 confirmed that a section 403(b) plan would not be treated as a plan maintained by the employer for purposes of ERISA Title I reporting and disclosure requirements (including the Form 5500 filing requirement) simply because the employer adopts formal plan documents, as long as it satisfies the safe harbor exemption requirements. Under the [safe harbor exemption](#), an employer must have only limited involvement with the plan.

During the past three years, the DOL received a number of questions from employers concerning the scope of this exemption. In response to these inquiries, the DOL has now issued [FAB 2010-01](#). This new guidance appears to be effective immediately.

### **FAB 2010-01**

#### **Loans and hardships**

To be treated as a non-ERISA 403(b) plan, the basic safe harbor exemption prohibits an employer from making discretionary administrative decisions such as:

- Making hardship withdrawal determinations; or
- Determining eligibility for or enforcing plan loan provisions.

The DOL has now clarified that a safe harbor non-ERISA 403(b) plan may offer optional features, such as loans or hardship withdrawals provided the governing documents allocate to the 403(b) annuity provider and not the employer all responsibility for making any discretionary determinations involving these transactions to the 403(b) annuity provider, rather than the employer.

In addition, an employer may refuse to include in its plan any 403(b) contracts or custodial accounts that include such optional features if the exclusion is intended:

- To reduce the employer's expenses in offering the 403(b) plan; or
- To remove optional features that in operation could result in the employer making determinations that would exceed the level of involvement permitted under the safe harbor exemption.

#### **Third party administrators**

Somewhat surprisingly, the new guidance provides that an employer's selection of a third-party administrator to make discretionary decisions regarding loans and hardship withdrawals would also exceed the safe harbor limits on employer involvement. The DOL expects that the plan, contract and related documents supplied by annuity providers, account trustees and custodians will:

- Identify the parties that are responsible for various administrative functions;
- Correctly describe the employer's limited role; and

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- Allocate discretionary activities to the annuity providers or other selected third parties.

To qualify for the safe harbor exemption, an employer may limit providers to those where the 403(b) contracts or accounts or other related governing documents prepared by the provider state that the provider or another appropriate third party is responsible for making discretionary determinations related to loans and hardship distributions.

### Reasonable choice of 403(b) providers and investment products

The safe harbor exemption requires the employer to offer a reasonable choice of more than one 403(b) annuity contractor and more than one investment product. However, the DOL recognizes that the cost of permitting employees to make contributions may be affected by the number of 403(b) contractors to which the employer must remit contributions. As a result, the new guidance allows an employer to forward salary reduction contributions to just one provider, as long as employees are allowed to make transfers or exchanges of their account balances to other providers' 403(b) contracts or accounts.

The DOL also recognizes that there may be circumstances where the increased administrative burdens and costs to an employer in offering a number of contractors under a plan could cause the employer to stop collecting and remitting payroll deduction contributions altogether. In such cases, an employer may provide just one contractor offering a wide variety of investment products that provide employees a reasonable choice. For example, an employer may limit the available contractor to:

- A single insurance company's 403(b) compliant arrangement that offers employees access to a broad range of affiliated investment products; or
- A single 403(b) compliant "open architecture" custodial account platform that gives employees access to a broad range of unaffiliated mutual fund investment products.

However, if an employer limits the availability of 403(b) providers, the plan must fully disclose the limitations on or costs or assessments associated with the employee's ability to transfer or exchange contributions to another provider's contract or account before the employee makes a decision to participate in the plan.

An employer that chooses to so limit the number of contractors should be prepared to demonstrate to the DOL, on request, that offering a number of contractors under a plan could cause the employer to stop collecting and remitting payroll deduction contributions altogether.

### Plan document terms

The new guidance allows a 403(b) plan to remain within the safe harbor exemption if its written plan documents contain a provision discontinuing the remittance of salary deferrals to a provider that does not comply with the 403(b) requirements. As long as the purpose of such a provision is to maintain compliance with the Internal Revenue Code requirements, then including it in the plan documents will not take the plan outside the safe harbor exemption.

### Employer control

To qualify for the safe harbor exemption, a plan may not authorize the employer to change 403(b) providers and unilaterally move employee funds from one provider to another provider's contracts or accounts. The DOL explains that discretionary authority to exchange or move employee funds would be inconsistent with the safe harbor exemption requirements, even though an employer may limit the number of providers offered under the plan.

### DOL compliance assistance

To assist employers and 403(b) plan administrators, the DOL has recently created a new Web page that specifically covers 403(b) issues. The new page includes relevant Field Assistance Bulletins, DOL publications and links to the DOL's voluntary corrections program. The new page is located at <http://www.dol.gov/ebsa/403b.html>.



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