

FINAL 403(b) REGULATIONS

On July 26, 2007 the IRS published the final regulations for 403(b) plans in the Federal Register. Although the general effective date for the regulations is January 1, 2009, several key provisions have transitional effective dates based upon a date 60 days from the publication date. One such change dealing with 90-24 exchanges follows this summary.

1. The general effective date of the final regulations will be January 1, 2009. However, 403(b) programs that are maintained pursuant to a collective bargaining agreement *ratified and in effect on July 26, 2007* must comply with the final regulations by the *earlier of July 26, 2010* or the expiration date of the bargaining agreement.
2. After December 31, 2008 all 403(b) programs must be maintained pursuant to a written plan documentation. The regulations suggest that employers that have multiple 403(b) investment products utilize a single plan document. The IRS will issue model plan language for public school employers, prior to the effective date (January 1, 2009), which will satisfy this requirement.
3. The 403(b) plan must comply in both "form and operation" to the plan document and regulations. The employer and the vendors providing investment products under the plan must adhere to the terms of the plan as written.
4. Under the written plan, administration and compliance responsibilities may be allocated between the employer and/or third parties, such as the product providers and third party administrators, but may not be assigned to employees.
5. Transfers and exchanges from one investment provider to another will be permitted, but with limitations. After January 1, 2009, plans may permit exchanges from one investment product to another so long as the investment company receiving the transferred amount establishes a relationship with the employer (or its representative) to exchange information necessary for compliance. The current ruling known as "90-24 transfers" that allows employees to transfer without employer involvement will be repealed 60 days after July 26, 2007 (see below).
6. Transfers and exchanges for former employees would be permitted. The proposed regulations had restricted transfers and exchanges to active employees only.
7. Post employment contributions may not be made for a former employee after the month in which the former employee dies. For this purpose, the former employee's considered compensation is determined to be 1/12 of the employee's compensation over his final year of service.

8. Under the regulations, access to employer contributions would be restricted to disability, severance from service, or a stated age.
9. A Universal Availability requirement is included in the final regulations. All employees must be eligible to participate in the 403(b) plan unless they are eligible to participate in another salary reduction program (like a 457(b) plan), are unwilling to contribute at least \$200 per year to the 403(b) plan, or normally work fewer than 20 hours per week for the employer. *Employers may not exclude groups of employees by classification, such as substitute teachers, bus drivers, summer help or similar groups of employees.*
10. Employees must receive "meaningful" notice of their right to participate in the 403(b) plan and such notice must be provided at least annually. Similarly, they must be given the right to enroll, change their investment instructions (for new contributions) and stop making contributions at least annually. These are minimum requirements and employers may certainly permit more frequent changes.
11. Life insurance is not permitted as part of a 403(b) program unless issued before September 24, 2007.
12. Consequences of failing to meet the new requirements are as follows:
 - a. *All contracts (and accounts) under the employer's 403(b) plan are disqualified if:*
 - i. the employer is not eligible to offer a 403(b) program,
 - ii. the employer fails to maintain a written plan
 - iii. the employer fails to meet the universal availability requirements
 - iv. the problem is not an "operational" problem. An operational problem is one that arises because the plan did not follow the terms of the plan document.
 - b. Operational defects that occur within one product provider's contract will disqualify ALL contracts held for that employee under the plan. There are two minor exceptions to this consequence for vesting failures and excess contribution failures.
 - i. Non-vested contributions and
 - ii. Contributions that exceed the Section 415(c) contribution limits will not disqualify the entire contract or account so long as the product provider maintains separate accounts for the such amounts. For 2007 this is the lesser of \$45,000 or 100% of compensation.

90-24 Exchanges

Prior to the new regulations being issued on July 26, 2007, participants in a school district's 403(b) program had the ability to transfer their account among any other approved investment vendor of the district or a vendor of their own choosing without any employer involvement through a process known as a "90-24 transfer." The new 403(b) regulations have ended that practice. After September 24th the IRS has revoked the provisions under 90-24 and will no longer allow any transfers under this rule. This does not mean that future exchanges among vendors are not permitted. It does mean that all future exchanges will be permitted but under certain rules:

1. The 403(b) written Plan Document will allow such exchanges.
2. There is no reduction in the account value after the exchange, in other words the account value must be the same as before the exchange.
3. The receiving investment vendor's plan must have the same distribution restrictions as the sending vendor's plan.
4. The employer (or their representative) and the vendor receiving the exchange must have an information sharing agreement in place that permits the exchange of information for compliance purposes and the employer has ratified the exchanges that have taken place in the interim period between September 25, 2007 and January 1, 2009 (the time when the Plan Document must be in place).
5. After December 31, 2008 exchanges are only permitted among vendors authorized in the Plan Document.

Because of these changes, after September 24, 2007 employees moving account values from one company to another may be at risk if the receiving investment vendor does not have an information sharing agreement in place with the school district employer (or their representative) and is not included in the 403(b) Plan Document subsequently adopted by the school district employer by December 31, 2008.

Should there be any changes or modifications to these rules, we will up date this information as soon as we are aware of these changes.

Paul H. Gonzalez
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