

Legal Alert: DOL Issues 403(b) Guidance

July 25, 2007

In conjunction with the publication of final tax regulations under Section 403(b), the Labor Department has issued a field assistance bulletin considering the interaction of ERISA with these final regulations. Click [here](#) for a copy of Field Assistance Bulletin 2007-2. Section 403(b) provides for retirement savings through annuity contracts and mutual fund custodial accounts for employees of public schools and tax-exempt organizations and retirement income accounts for church employees and certain certain ministers.

At issue is whether employers (other than governments and churches) that make Section 403(b) contracts and accounts available to their employees can satisfy the new requirements imposed in the tax regulations and still qualify under the DOL safe harbor for Section 403(b) programs (29 CFR §2510.3-2(f)). The safe harbor excludes such arrangements from ERISA provided (i) they are funded solely with employee contributions, (ii) participation is voluntary, (iii) all rights under the contracts or accounts are enforceable solely by the employee or beneficiary or their authorized representative, and (iv) the employer restricts its involvement to certain specified activities (including limiting the number of product providers so long as employees are afforded a reasonable choice under all the circumstances) and receives no consideration or compensation other than, at most, reimbursement for the expense incurred in implementing salary reduction agreements.

In FAB 2007-2, the DOL reaches the following conclusions:

- The ERISA safe harbor allows the employer to engage in a range of activities to facilitate the operation of the Section 403(b) program. Given the “significant flexibility” regarding the employer’s functions allowed under the final tax regulations, compliance with those regulations will not necessarily result in failure to satisfy the safe harbor or coverage of the program under ERISA.
- The safe harbor subsumes certain tax compliance activities on the part of the employer. Under prior guidance, these permitted activities include development of compliance procedures; discrimination testing; enforcement of contribution limitations; administrative review of the program structure and operation for tax

- compliance defects; fashioning and proposing corrections of any defects; obtaining the cooperation of third parties involved in the program to correct tax defects; and recordkeeping of its activities. FAB 2007-2 adds to that list of permitted activities certification by the employer to a product provider of facts within the employer's knowledge as employer (e.g., employee addresses, attendance records and compensation levels) and transmittal to a product provider of certifications provided by other parties (e.g., a doctor's certification of an employee's physical condition).
- In the expectation that the "written plan" required by the tax regulations will consist largely of the annuity contracts and custodial agreements supplied by the insurance companies, trustees and custodians, the employer's development and adoption of a single document to coordinate administration among issuers and to address tax matters that apply (e.g., universal availability) without reference to a particular contract or account would not put the arrangement outside the safe harbor. The employer may also periodically review the documents making up the "written plan" for conflicting provisions and for tax compliance.
 - In conformity with the tax regulations, the "written plan" may limit transfers among investments by current employees either (i) only to those providers that have adopted the "written plan," provided that those providers are offering under the program a sufficiently wide variety of products to afford employees the "reasonable choice" required by the safe harbor, or (ii) any provider offering a tax compliant product that agrees to the plan's allocation of compliance responsibilities among the employer, provider and participant. The "written plan" may also limit transfers from the program by a former employee only to the Section 403(b) program of his or her current employer.
 - A decision by the employer to terminate a Section 403(b) program in compliance with tax requirements would not cause that program to fail the safe harbor.
 - It would, however, be inconsistent with the safe harbor for the employer to have responsibility for or make discretionary decisions in administering the program, e.g., with respect to plan-to-plan transfers, processing of distributions, QDRO or hardship distribution determinations, satisfying qualified joint and survivor annuity requirements, and eligibility for and enforcement of loans. To stay within the safe harbor, the "written plan" should allocate responsibility for such discretionary determinations to the insurance company, trustee or custodian, participant (although the tax regulations limit the responsibilities that may be assigned to the participant), or a third party selected by the product provider or participant. Negotiation with a

product provider to change the terms of its arrangement for other than tax compliance purposes – e.g., regarding the conditions for hardship withdrawals – would also exceed the safe harbor.



If you have any questions regarding this alert, or the services we provide, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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