

DOL Issues Form 5500 Relief for 403(b) Plans

Beginning with the 2009 plan year, ERISA-covered 403(b) plans sponsored by public schools and tax exempt organizations will be subject to more extensive annual reporting requirements on Form 5500. Among other things, ERISA-covered 403(b) plans with 100 or more participants will have to file audited financial statements with their Forms 5500. Because the statements will require a comparison with information from the end of the prior plan year (i.e., the 2008 plan year), many plan sponsors are beginning to prepare now for the new filing requirements.

One concern in this regard has been the availability of certain financial information. Historically, employers have often treated 403(b) plans as collections of individual contracts between employees and insurers that have required little or no administrative involvement by the employer or plan administrator. For this reason some employers have worried that they may not be able to identify and obtain financial information relating to pre-2009 contracts and custodial accounts to which they no longer contribute, but which may be needed to satisfy the new Form 5500 requirements.

The Department of Labor has now put many of these fears to rest. In Field Assistance Bulletin 2009-02, the Department has announced the following transition relief:

- Annuity contracts and custodial accounts need not be treated as part of the ERISA-covered 403(b) plan or as plan assets for annual reporting purposes if the following requirements are met:
 1. The contract or account was issued to a current or former employee before January 1, 2009.
 2. The employer ceased to contribute and to have an obligation to contribute under the contract or account before January 1, 2009.
 3. All rights and benefits under the contract or account are legally enforceable against the insurer or custodian by the individual owner of the contract or account, without any involvement by the employer. This would include rights under an individual certificate under a group annuity contract held in the employer's name, if the certificate gives the individual the ability to enforce all contract or account rights without involvement by the employer.
 4. The individual owner is fully vested in the contract or account.
- Current or former employees who have only contracts or accounts that meet these four conditions need not be counted as participants for Form 5500 purposes.
- The Department will not reject a Form 5500 because of a "qualified," "adverse" or disclaimed accountant's opinion if the accountant expressly states that the only reason for such an opinion was the failure to cover such pre-2009 contracts in the audit or to include them in the plan's financial statements.

The DOL also notes in FAB 2009-02 that there may be financial reporting impediments unrelated to pre-2009 contracts. In those cases the Department encourages plan administrators to act reasonably, prudently, and in the interest of participants and beneficiaries in determining whether to use plan assets to pursue or reconstruct records that may not readily be available.

This relief may not resolve all of the difficulties employers may face in satisfying the new reporting requirements. But it offers some assurance that the DOL is willing to address the realities of the 403(b) world and to remove some of the more daunting obstacles to compliance.

If you have questions or would like additional information about the new Form 5500 requirements for 403(b) plans, please feel free to contact Brian Dougherty at (215) 587-5919 or bdougherty@postschell.com.

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