

Derrin's Webcast – 403(b) Universal Availability

1 - Are 403(b) plans, that elect to have ERISA apply, allow to allow for distributions for any reason the employee requests? In other words, if they want to allow for distributions prior to age 59.5, can they?

Several points:

- A. Other than for churches, ERISA coverage is not something you elect.
- B. Distributable events are provided (or not) in the Code, not ERISA. In other words, ERISA coverage is irrelevant for this issue.
- C. Distributable events vary depending on contribution type and investment type. In short, elective deferrals have the same distributable events as 401k deferrals. Employer contributions in custodial accounts have the same distributable events except they cannot provide hardship distributions. Employer contributions in annuity contracts have essentially the same distributable events as profit sharing contributions. They are the only source that can pay in-service distributions before. 59.5 in most situations. See Section 10.1 of The 403(b) e Source for further details.

2 - Are there any special rules that apply on the termination of a 403b plan?

Yes. That is a lengthy topic. See section 10.3 of The 403b eSource. Also see Reg 1.403(b)-10(a) and Rev Rul 2011-7

3 - As 403(b) plans had limited Form 5500 reporting requirements in years prior to 2009, the Department of Labor (DOL) issued Field Assistance Bulletin No. 2009-02 (FAB 2009-02) providing guidance and transition relief on annual reporting requirements for 403(b) contracts issued prior to January 1, 2009.

Is the FAB 2009-02 relief still available?

Yes. FAB 2010-01, Q&A 11.

4 - Same company has 401k and 403(b) plan. Can the 403(b) only cover those employees who are scheduled to make more than 120K a year?

Yes, if you can draft both appropriately. That said, I am concerned that there may be operational hiccups with employees at the threshold.

5 - I have a couple of questions on the \$200 rule. If an employee defers less than \$200 for a given plan year, could the employer return those contributions? Is it a requirement to refund if the exclusion is written in the plan document?

I am hesitant to interpret a plan I didn't write, but you must follow plan terms. If the plan document clearly says that no participant may defer less than \$200/year, a reasonable correction for violating that rule would be to return the excess contributions.

6 - Could the Summary Annual report that is provided to everyone be considered the required notice?

No, because it does not discuss the right to make or change deferral elections or how to do it. But the universal availability notice could accompany the SAR.

7 - If a 403b plan is an ACP safe harbor plan would the safe harbor notice be sufficient to notify employees their ability to defer? Report that is provided to everyone be considered the required notice?

I think that would clearly satisfy any requirement of a universal availability notice.

8 - Does an employee who attends school during a normal school year but works for the 403(b) plan sponsor during the summer, can he be excluded?

This is one of many questions on student-employees. Let me answer them all by quoting the appropriate section of The 403(b) eSource:

8.5 PERMITTED EXCLUSIONS – STUDENT-EMPLOYEE

The universal availability rule allows a plan to exclude students who are attending a school and also performing services as an employee of the school (or a closely controlled affiliate). [Treas. Reg. §1.403(b)-5(b)(4)(ii)(D)] This exclusion cross-references an employment tax exclusion under which the Treasury has issued detailed regulations. [Code §3121(b)(10); Code §509(a)(3); Treas. Reg. §31.3121(b)(10)-2]. In a perfect world in which everyone paid their payroll taxes correctly one could ask “Do you withhold FICA from this student?” and if the answer is yes then the student cannot be excluded under the student-employee rule.

School includes colleges and universities. A school’s primary function is the presentation of formal instruction, it normally maintains a regular faculty and curriculum, and it normally has a regularly enrolled body of students in attendance at the place where its educational activities are regularly carried on. [Treas. Reg. §31.3121(b)(10)-2(c); ¶2.2.1]

The regulations carefully define “student.” [Treas. Reg. §31.3121(b)(10)-2(d)] A student’s employee services “must be incident to and for the purpose of pursuing a course of study,” such as a degree or credential. A full-time employee, including those whose work period is at least 40 hours per week while school is in session, cannot qualify as a student. [Mayo Foundation for Medical Education and Research v. United States, 562 U.S. 44 (U.S. 2011)]

As with the 20-hour rule, the student exclusion cannot be targeted. It must apply on an all or none basis. If any student-employee is allowed to defer, all must be allowed to defer. [Treas. Reg. §1.403(b)-5(b)(4)(i)]

Example 8.5.01 Doug attends Medfield College and is pursuing a bachelor’s degree. To help pay his educational expenses, Doug works as a janitor at the college 15 hours a week. Doug can be excluded under the student-employee exclusion.

Example 8.5.02 Continuing the last example, Doug changes jobs to performing part-time clerical services for the college alumni association. The association is a Charity separate from the college. The college formed and controls the association to assist it in carrying out its educational mission. The association is a closely controlled affiliate of the college. [Treas. Reg. §31.3121(b)(10)-2(a)(2)] Doug can be excluded under the student-employee exclusion.

Example 8.5.03 Elaine also attends Medfield College and plans to receive a teaching credential. Elaine works part-time as a secretary at Medfield Foundation, an independent Charity unaffiliated with the

college. The foundation cannot use the student-employee exclusion to prevent her from deferring to the foundation 403(b) plan. Elaine is not an employee of the college or a closely controlled affiliate.

Example 8.5.04 Fiona is a PhD candidate at Research University. She does not attend classes but is working on her dissertation. She works part-time in her department as a teaching assistant. Even though she is not attending classes, her research activities for her dissertation qualify her as a student. Fiona can be excluded under the student-employee exclusion.

Example 8.5.05 Gina is a medical resident at Teaching Hospital. She works 60 hours per week in anticipation of being licensed to practice medicine. The hospital is a teaching facility and she receives mentoring and education as a part of her work. Because she is a full-time employee, Gina cannot be excluded as a student-employee, even though there is an educational aspect to her work.

9 - An employer (such as a group home facility) has their residents work at the facility as part of a vocational training program. The residents receive a W-2 for their wages earned. Could they be excluded from the plan without regard to the number of hours worked?

No. Universal means universal.

10 - A summer intern, 40 hours / week for 10 weeks. I thought they too could be excluded under the 20-hour rule

If the plan elects the 20hour exclusion, then they are excluded. The statute says 20 hours but the regulations interpreting it say 1000 hours in a year.

11 - How can an employee who worked 1000 hours not already have immediate eligibility?

Remember, this is not a qualified plan. Under the regulations, if the plan elects the 20-hour exclusion you enter immediately on hire if the employer reasonably believes you will work 1000 hours in your first year. If you don't enter immediately under that rule, then you enter on the first day of the year following the year you first work 1000 hours.

12 - Employee excluded at hire under 20 hour rule and 3 months later moves to another position which is full-time do you have to immediately offer the deferral opportunity?

No, because when the participant was hired the employer reasonably concluded they would not have 1000 hours in the first year. After that prove it! Once you have a year with 1000 hours, you're in.

13 - Back in 2016 an ERISA attorney advised the firm I was at that if a 403(b) plan adopts the 20 hour rule and then an employee that was excluded under this rule works more than 1,000 hours, not only does this employee become eligible, but the entire class of employees now becomes eligible. In other words they must waive that rule in that plan year. I can see this on an individual basis as you have outlined, but don't understand why it would affect the entire class of employees that were excluded. Can you clarify?

What you quote the attorney as saying is not the law. If the plan uses the 20-hour rule, and you allow one participant to defer who does NOT satisfy the rule, then you can no longer use the rule.

14 - Once of the issues we always seem to have with our private colleges are adjunct professors. They don't track their hours so the college can't say whether or not the adjuncts met the 1,000 hours. What would be your suggestions?

Check your plan document. The preapproved plan I wrote allows the employer to use "any reasonable, consistent method of crediting Hours of Service" for the 20-hour rule. For an adjunct professor, I would estimate based on credit hours taught.

15 - Plan excludes < 20 hours per week employees. When we run 410b, it is showing as failing because it shows excluded ees as not benefitting. Isn't this incorrect because properly excluded employees should not be included in 410(b) testing as not benefitting?

While the student-employee and 20-hour exclusions are exclusions from deferring, the regulations allow you to use them in testing coverage for employer contributions. See Treas. Reg. 1.403(b)-5(a)(3). I cannot say why your software is not properly applying this provision.

16 - The one in, always in rule, does Rule of parity come into play and trump this rule when more than 5 years of breaks in service have occurred? Thanks!

No. Example: Jack worked 1000 hours in 2020 and entered the plan in 2021. Jack terminates employment in 2022 and is rehired in 2028. He is eligible to defer immediately upon rehire.

17 - Question: How does the 1,000 hours/20 per week apply to seasonal employees who work 40 hours for several months. So less than 1,000 in the year but over 20 in a week?

The regulations base it on 1000 hours a year, not 20 hours a week. If they don't have 1000 hours in a year, they don't defer.