



# Understanding 403(b) Universal Availability

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# Your Presenter Today

## S. Derrin Watson

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- Facilitator:  
Chuck Gouge
- Question Board Moderator  
Joanne Pecina



# During the Webinar



- All attendees' lines are muted
- Question board available and monitored
- Mr. Watson will post answers to questions on ERISApedia.com
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# Agenda

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- Overview; scope
- Effective opportunity
- Permitted exclusions
  - Other deferrals
  - Nonresident alien
  - 20 hour/week rule
    - Once in always in
    - Student employee
- IRS enforcement



**Overview;  
scope**

# Code §403(b)(12)(A) Universal Availability



- “[A]ll employees of the organization may elect to have the employer make contributions of more than \$200 pursuant to a salary reduction agreement if any employee of the organization may elect to have the organization make contributions for such contracts pursuant to such agreement.”
  - If anyone can defer, everyone can defer
  - Employer can impose \$200 minimum
- Takes place of ADP test/coverage
- Cannot exclude based on job classification

# What employee groups are included in universal availability?



- Related employer rules do not apply to universal availability.
  - Each entity is a separate employer for the universal availability rules.
- If a 403(b) plan covers employees of more than one governmental entity, universal availability applies separately to each entity that is not part of a common payroll.
- An employer can treat “units” as separate employers for universal availability if:
  - Employer historically has treated one or more of its various units as separate for employee benefit purposes
  - Unit is operated independently on a day-to-day basis
  - The units are not located within the same “Standard Metropolitan Statistical Area (SMSA).”

# Scope

Right to defer includes right:

- To make Roth deferrals
  - If anyone can defer Roth, everyone can
- To make catch-up contributions, if eligible
  - Age 50
  - Qualified organization

Universal availability does not apply to

- Voluntary after-tax contributions
- Mandatory employee contributions

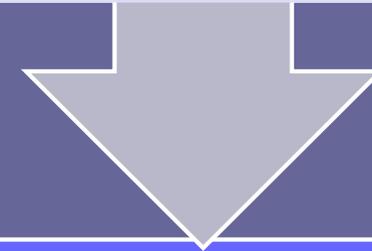
# Plan entry for deferrals

All employees means all employees

No age and  
service  
requirements

No entry  
dates

Walk in the  
door and you  
can defer



LRMs: Each Employee who is not excluded . . . may elect to have Elective Deferrals made on his or her behalf hereunder immediately upon becoming employed by the Employer



# Question on automatic enrollment

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- Is a plan in violation of the universal availability rules if the plan has auto enrollment after 60 days? Participants could elect to make a deferral prior to the 60 days, but if no election is made, the employer won't start deferrals until after 60 days.
- Short answer: No violation

# Helpful relief in LRMs



- A plan may allow for reasonable administrative procedures for plan entry for making elective deferrals, including a reasonable period for providing a participant notice of the right to defer and a reasonable election period, provided that [universal availability] is satisfied. A plan that provides notice of the right to defer no later than 30 days after commencement of employment, allows the participant to make an election up to 30 days after notice is provided, and provides that the participant's election will be effective as soon as administratively practicable will be treated as having reasonable administrative procedures that do not cause the plan to fail to satisfy [universal availability].



# Church exemption

- Churches are exempt from universal availability
  - Steeple church
  - K-12 church school
  - QCCO
- Non-QCCOs are subject to universal availability
  - Hospitals
  - Universities
- Governments are subject to universal availability



**Effective Opportunity |**

# All employees must have “effective opportunity” to defer

## Treas. Reg. §1.403(b)-5(b)(2)



- Whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including:
  - Notice of the availability of the election,
  - The period of time during which an election may be made, and
  - Any other conditions on elections.
- A section 403(b) plan satisfies the effective opportunity requirement . . . only if, at least once during each plan year, the plan provides an employee with an effective opportunity to make (or change) a cash or deferred election (as defined at §1.401(k)-1(a)(3)) between cash or a contribution to the plan

# IRS Interpretation: Employer must provide notice annually



- Comments on IRS webcast
  - “UA [universal availability] requires a minimum once-per-year effective opportunity notice be given to those employees that are covered, or should be covered, under the plan.”
  - “The [Information Document Request] may include a request for . . . examples of the notices and procedures used to provide effective opportunity and meaningful notice to the eligible employees, at least on an annual basis.”
  - “Just keep in mind that effective opportunity and notice are based on facts and circumstances, which include the plan provisions; how and when notice is provided; how and when employees may make or change an election. But at a minimum, there must be an opportunity and notice given once a year.”
  - To avoid errors “Set up procedures to provide notice and opportunity to participate for all employees, at least annually.”
  - “Ultimately, I'd say it's the employer's responsibility to give an effective opportunity notice annually to eligible employees. If we were to find an issue on examination, we'd hold the employer responsible for not meeting the requirement.”

# Flexible delivery



- No prescribed rules on delivery:
  - No requirement that the notice be given near the start of the plan year.
  - Nothing prohibits a plan from combining it with another notice, such as the annual fee disclosures required of participant directed plans subject to ERISA.
  - Electronic delivery is adequate
  - Arguably prominent posting on bulletin boards or employee web sites, or even well publicized vendor education meetings could suffice.
- Every 403(b) plan which is not exempt should be prepared to answer the question: How do you annually notify employees of their right to defer.



**Exclusions** |



# Plan can exclude from deferrals

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- Some or all employees in the following groups
  - Nonresident aliens without US source income
  - Employees eligible to defer to Employer's
    - 403(b) plan
    - 401(k) plan
    - Governmental 457(b) plan
- Permits multiple 403(b) plans

# Plan can exclude all student-employees



- If any student-employee excluded, all must be excluded
- Student-employee
  - Students who are attending a school and also performing services as an employee of the school (or a closely controlled affiliate)
  - Follows FICA rule
  - 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.

# Plan can exclude all employees who don't work 20 hours/week



- First year of employment:
  - Employer reasonable concludes that employee will have fewer than 1,000 HOS in first year
- Prior year rule
  - Employee didn't work 1,000 hours in a prior year
- Can set lower threshold than 1,000 hours
- Can base subsequent years on plan years or anniversaries of employment date

# Old IRS position: In and out; what have you done for me lately



- Regulations and 2007 IRS model plan take position that eligibility to defer depends on whether you had 1,000 last year
  - Example:
    - Jack hired 1/1/15, assumed to be 2 days/week
    - Jack works a lot of overtime; 2015 hours = 1,050
    - Jack enters 1/1/16
    - In 2016 Jack only works 800 hours
    - Jack ineligible to defer in 2017
- Problem: This violates ERISA
- IRS response: Maybe ERISA plan can't use 20-hour rule

# LRM Position: Once you're in, you're in (OIAI)



- An Employee normally works fewer than 20 hours per week if, for the 12-month period beginning on the date the Employee's employment commenced, the Employer reasonably expects the Employee to work fewer than 1,000 hours of service (as defined under section 410(a)(3)(C) of the Internal Revenue Code) in such period, and, for each Plan Year ending after the close of that 12-month period, the Employee has worked fewer than 1,000 hours of service in the preceding 12-month period.
- Under this provision, an Employee who works 1,000 or more hours of service in the 12-month period beginning on the date the Employee's employment commenced or in a Plan Year ending after the close of that 12-month period shall then be eligible to participate in the Plan.

# Notice 2018-95



- Interprets regs to have three requirements
  - First year rule
  - Prior year rule
  - OIAI: If you are eligible to defer under either first year rule or prior year rule, plan cannot exclude you under 20-hour exclusion
- OK for the past if done consistently
  - Relief period extends until “last day of last exclusion period that ends before December 31, 2019”
    - If calendar year plan bases exclusion rule on plan years, relief period ended 12/31/18
    - Fresh start rule covers you for 2019

# 403(b) document issues for OIAI



- If plan uses 20 hour rule, must state OIAI by March 31, 2020 (end of remedial amendment period)
  - Preapproved plans should be fine.
- No need for preapproved plan to be amended to address relief period
- No need for any plan to state fresh start rule



# Question: Effect of exclusion

- If an employee is excluded under the “regularly scheduled for less than 20 hours a week” rule, then they become a full-time employee, is vesting credit given retroactive to their original hire date (i.e., to include the time that they were excluded)?
- Short answer: Yes, count it



**IRS Enforcement** |

# K-12 EPCU project; 6,000 schools



- We discovered . . . phase that over ninety percent of schools offer employees the opportunity to defer salary to a 403(b) plan. Most appear to make the plan available with little restriction as to minimum deferral amounts required. The vast majority exclude substitute and part-time teachers as a group, usually because they are not considered regular employees or they receive pay on an irregular basis. Some schools allow excludable employees working under 20 hours to participate, effectively losing the option to exclude other part-time employees. Nearly half offered other deferral options like a 401(k) plan in addition to the 403(b). Some offering a 401(k) may not be eligible because it was adopted after the 1986 rules prohibiting most schools from maintaining this type of plan.

# University EPCU check



- The area with the largest possible future impact is the communication of the opportunity to begin regular elective deferrals, 48% of the entities did so only once at hire. In addition, only 30% communicated the opportunity to change regular elective deferrals only once at hire.

# Thank you!



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- [www.ERISApedia.com](http://www.ERISApedia.com)
- Home of Who's the Employer (7<sup>th</sup> edition)