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THE RIGHT RESPONSE AT THE RIGHT TIME

LEGAL ALERT



Legal Alert: IRS Provides 403(b) Relief

12/16/2008

On December 11, 2008, the IRS issued a notice (Notice 2009-3) extending the January 1, 2009 deadline by which 403(b) plans are required to have written plan documents that comply with applicable regulations.

Many public schools, colleges and universities, and other tax exempt organizations maintain retirement plans under Section 403(b) of the Internal Revenue Code of 1986 (often also referred to as Tax Sheltered Annuities, or Tax Deferred Annuities). Those plans may or may not be "employee pension plans" subject to ERISA, and, to the extent that the plan is not subject to ERISA, no formal written plan document has been required. However, the Treasury Regulations under Section 403(b) that were issued eighteen months ago (the "Regulations"), and that are scheduled to become fully effective on January 1, 2009, require that all such plans be evidenced by written plan documents that meet all applicable requirements, both in form and operation.

The IRS decided to extend the deadline for plan sponsors to adopt new written plan documents, or to amend existing plan documents, in order to satisfy the requirements of the Regulations because many plan administrators are incurring a great deal of difficulty in meeting the January 1, 2009 deadline. Although the extension does not actually delay the effective date of the revised rules, it gives plan sponsors additional time to put their new or revised plan documents in place.

The Notice states that the IRS will treat a plan as satisfying the requirements of Section 403(b) and the Regulations for 2009 so long as: By December 31, 2009, the sponsor of the plan adopts a written plan document that is intended to satisfy the requirements of Section 403(b) and the Regulations; During 2009, the plan is operated in accordance with a reasonable interpretation of Section 403(b) and the Regulations; and By December 31, 2009, the sponsor uses its "best efforts" to correct – including retroactively if necessary – any operational failure that occurs during the 2009 calendar year, and conforms the operation to the written plan document, under procedures based upon the general correction principles applicable to qualified plans under the Employee Plans Compliance Resolution System (the "EPCRS") .

The Notice also indicates that the IRS intends to issue further guidance relating to 403(b) plans, including (i) a "prototype" program for preapproval of 403(b) plans (including model plan language), (ii) a program under which employers can obtain IRS determination letters on individually-designed 403(b) plan documents, (iii) rules that would continue to allow retroactive remedial amendments to be made after 2009 similar to the rules that apply to qualified plans, and (iv) increased availability of the EPCRS to correct 403(b) plan failures.

If you have any questions regarding the Notice, or the provisions of Section 403(b) or the Regulations, Jeffrey Ashendorf, 212-453-5926, jashendorf@fordharrison.com, or any member of Ford & Harrison's Employee Benefits practice group.