Legal Alert: 403(b) Compliance Deadline is Approaching

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If you are a sponsor of a 403(b) Plan (*aka* Tax-Sheltered Annuity or Tax-Deferred Annuity), you are probably aware of the December 31, 2008 deadline to bring your plan into compliance with the Regulation issued by the IRS last year. If you miss this deadline, then, effective January 1, your "tax sheltered annuities" will no longer be tax-sheltered, meaning that your employees will no longer be able to make contributions on a pre-tax basis, and, more importantly, will be taxed on the value of their accounts.

The most significant change for most employers is that all 403(b) plans must now be evidenced by a written plan document (or documents). Employers who have not had a plan document until now (many 403(b) plans have not needed one), must adopt plan documents that satisfy all of the applicable requirements of the law and the Regulation. If you already have a plan document, it will almost certainly require amendments in order to continue to comply with the Regulation. For example, permissible eligibility requirements have been changed, so you may have to extend plan eligibility to previously ineligible employees. In either case, regardless of whether you already have a plan document, if you have not yet addressed this issue, time is short.

You also need to review all of your annuity contracts (or custodial accounts) in order to ensure that the terms of those contracts are consistent with the terms of your plan documents, or *vice versa*. In addition, the Regulation requires that certain provisions be contained in an annuity contract in order for it to be used to fund a 403(b) plan; although you will not be able to amend the annuity contract yourself, you will have to ensure that the insurance company does so, or, alternatively, you will have to transfer funds from a non-compliant contract to one that complies with the Regulation.

If you use more than one vendor (insurance company or custodian), you will have to determine who will administer any discretionary plan features, such as participant loans, hardship withdrawals, etc., that require dealing with a participant's plan account as a whole. In addition, all contract-level information (e.g., participant balances) will have to be furnished by multiple vendors to a single party who can combine it into plan-level information. This can be a particular problem if your employees have funds invested with vendors with whom you, as employer, no longer actively deal, or perhaps with whom you have never dealt, or of whom you are not even aware. You may be required to enter into an "Information Sharing Agreement" ("ISA") with any such vendor, also by December 31, in order for your plan to remain compliant. Finally, beginning January 1, 2009, your plan will no longer be able to satisfy the 403(b) nondiscrimination tests by relying on the current "safe harbor" or "reasonable good-faith compliance" standards. This will require that

periodic discrimination testing actually be performed, and, if the plan is "discriminatory," related changes (e.g., contribution rates) will have to be made. If you have any questions about the Regulation, your 403(b) plans, or your responsibilities with respect to compliance, please contact Jeffrey Ashendorf, jashendorf@fordharrison.com, 212-453-5926 or Katherine Hoekman, khoekman@fordharrison.com, 202-719-2059, or the Ford & Harrison attorney with whom you usually work.