

# DOL Issues Limited Transition Relief to 403(b) Erisa Plans Filing Form 5500

On July 20<sup>th</sup>, 2009, the Department of Labor (DOL) issued Field Assistance Bulletin (FAB) 2009-02 providing *limited* transition relief from the newly enhanced Form 5500 reporting requirements for 403(b) plans that are subject to Title I of ERISA, and with respect to contracts issued before January 1, 2009 that meet a specific set of criterion.

As the Form 5500 requirements are not applicable to plans that are not subject to Title I of ERISA, this guidance *does not* impact 403(b) plans of governmental entities, including public schools, non-electing church plans, and those that meet the ERISA-exemption safe harbor under DOL regulation 2510.3-2(f).

## **BACKGROUND**

In 2007 the DOL expanded the Form 5500 reporting requirements applicable to ERISA 403(b) plans effective for plan years beginning on or after January 1, 2009. This expanded reporting requirement includes providing detailed financial information, applicable schedules and an independent qualified auditors report. The specific plan reporting requirements are contingent upon plan size.

Prior to this time ERISA 403(b) plans were only required to report certain non-financial information, and were not required to prepare schedules or submit an independent qualified auditors report.

## **TRANSITION RELIEF**

For 403(b) plan administrators who make a good faith effort to transition to the newly enhanced and expanded Form 5500 reporting requirements, the administrator does not need to treat annuity contracts and custodial accounts as part for the employer's Title I plan or as plan assets for purposes of Form 5500 reporting provided that:

- the contract or account was issued to a current or former employee before January 1, 2009;
- the employer ceased to have any obligation to make contributions (including salary reduction contributions), and ceased making contributions to the contract or account before January 1, 2009;

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- all of the rights and benefits under the contract or account are legally enforceable against the insurer or custodial by the individual owner of the contract or account without any involvement by the employer. The fact that an individual's contract or account rights are reflected by an individual certificate under a group annuity contract held in the employer's name would not, for that reason alone, make the individual certificate ineligible for the transition relief described in this memorandum provided that the certificate gives the individual the ability to enforce all his or her contract or account rights without any involvement by the employer<sup>1</sup>; and
- the individual owner of the contract is fully vested in the contract or account

Secondly, current or former employees with only contracts or accounts that are excludible from the plan's Form 5500 under the above referenced guidelines do not need to be counted as participants covered under the plan.

Lastly, for those 403(b) plans that are required to attach an independent qualified auditors report, the DOL will not reject a Form 5500 on the basis of a qualified, adverse or disclaimed opinion if the accountant expressly states that the sole reason for such an opinion is a result of pre-2009 contracts that were not covered by the audit or included in the 403(b) plans financial statement.

### **LIMITED APPLICATION**

The transition relief is *limited* in nature and will require an analysis of a 403(b) plans' specific set of facts and circumstances; however there may be certain scenarios where such relief would have practical application.

For example, a Section 403(b) plan that was terminated prior to 2009 pursuant to Treasury Regulation 1.403(b)-10 and via the issuance of a fully paid individual insurance annuity contract may be able to avail itself of this transition relief.

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<sup>1</sup> Please note that rights under individual contracts and accounts generally reside with the participant, whereas rights under group annuity contracts or accounts can reside with either the participant or plan sponsor, depending on the terms of the particular contract.

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## APPLICABILITY CHECKLIST

1. Was the contract issued in connection with your ERISA 403(b) plan issued prior to January 1, 2009?  
  
\_\_\_\_\_ YES            *Continue w/ Applicability Check*  
  
\_\_\_\_\_ NO            *STOP - Transition Relief Not Applicable*
  
2. Has the employer ceased to have an obligation to make contributions (including salary reduction contributions), and has not made contributions to the contract or account on or after January 1, 2009?  
  
\_\_\_\_\_ YES            *Continue w/ Applicability Check*  
  
\_\_\_\_\_ NO            *STOP - Transition Relief Not Applicable*
  
3. Are all the rights and benefits under the contract or account legally enforceable against the issuer or custodial by the individual owner (current or former employee) of the contract or account without any involvement by the employer?  
  
\_\_\_\_\_ YES            *Continue w/ Applicability Check*  
  
\_\_\_\_\_ NO            *STOP - Transition Relief Not Applicable*
  
4. Is the individual owner (current or former employee) of the contract or account fully vested?  
  
\_\_\_\_\_ YES            *Continue w/ Applicability Check*  
  
\_\_\_\_\_ NO            *STOP - Transition Relief Not Applicable*

If you have answered NO to *any* of the above questions, transition relief with respect to 403(b) Form 5500 reporting is *not* available.

For additional information please see the DOL website: <http://www.dol.gov/ebsa/regs/fab2009-2.html>

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