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403(b) Retirement Plan Disclosures and Notices

There are a number of required participant disclosures and notices that must be distributed each year on a timely basis. Is your plan in compliance?

Required disclosures and notices have increased exponentially since the passage of ERISA in 1974 and the issuance of the regulations under 403(b) in 2009. In recent years, a number of new disclosures and notices have become law and some have serious penalties for noncompliance. Others, while not legally required, constitute best practices to avoid liability. This article reviews some of the required and recommended disclosures and notices, timing and potential penalties for noncompliance related to 403(b) retirement plans.

Required Notices

<u>Universal Availability:</u> This notice informs employees that they are eligible to contribute elective deferrals to a 403(b) plan. While an annual notice is not a legal requirement, it is an important best practice for plan compliance.

<u>Summary Annual Report (SAR):</u> An SAR is a summary of the form 5500 and must be distributed to all employees each year. This must be done within 9 months after the close of the plan year.

<u>Participant Fee Disclosure:</u> Plan Sponsors are required to disclose certain plan information, investment performance and fees to all those eligible to participate in the plan and former participants annually. The notice must be delivered no later that 12 months from the prior year's notice. Additionally, any direct fees charged to a participant's account (i.e. loan fee, surrender charges, etc.) must be disclosed quarterly to the participant. Most vendors have changed their quarterly statement to include this information so further action may not be required.

<u>Qualified Default Investment Alternative Notice (QDIA Notice):</u> If your plan contains a Qualified Default Investment Alternative, a notice must be distributed to participants annually at least 30 days prior to the end of the plan year. This requirement is in addition to the notice that you must provide to participants upon initial eligibility to the plan.

<u>Safe Harbor Notice:</u> If your plan uses the IRS safe harbor to pass the matching test, a notice describing the rules of the safe harbor, including the formula used under the plan, must be distributed within a reasonable period before each year.

Potential Penalties

Failure to provide notices on a timely basis can result in serious consequences. For example, the Universal Availability rule is a very popular area of examination by the IRS. As noted above, a regulator may ask for evidence that all eligible employees were given an opportunity to contribute elective deferrals to your plan in according to the Universal Availability requirements. The annual notice and documentation that it was distributed to all eligible employees will be evidence of compliance with the Universal Availability rule.

What is the penalty for noncompliance with Universal Availability? If administered incorrectly and/or you are unable to show evidence of compliance, the penalty can be very onerous. In the worst case, you will need to make a corrective contribution to the plan for some or all employees who have not contributed elective deferrals. This amount is calculated by taking the average elective deferral percentage for those actually participating and giving half of the average percentage to ALL those deemed eligible to participate. This can amount to a very large financial penalty for the employer.

Next Steps

Perform an internal review to determine your compliance status. Take a close look at each required disclosure and notice. Is the content sufficient? Has distribution been timely? Do you have good documentation to show evidence of compliance?

If you have questions, contact your investment vendor, consultant or attorney that works with your plan. A little effort now can help avoid costly issues down the road.

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