



*This article presents general guidelines for Ohio nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.*

## Retirement Benefits for Non-Profits: Keys to Structuring and Maintaining a 403(b) Plan

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Non-profit organizations constantly compete to attract and retain talented employees, and retirement plans are one tool that can be used to win that competition. While non-profits can sponsor other types of plans, such as 401(k) plans, the most common type for them to sponsor is a 403(b) plan. A 403(b) plan can be set up only for employees to make deferrals or for the employer to contribute as well. This article discusses several topics that we see non-profits struggle with understanding when creating or administering their 403(b) plans.

### Universal Availability

If a non-profit employer sponsors a 403(b) plan, all employees must be provided with an effective opportunity each year to make an election to contribute to the 403(b) plan with few exceptions. This rule, known as the universal availability rule, provides that the only employees which may be excluded are: (i) employees with opportunities to defer into other defined contribution plans; (ii) non-resident aliens; (iii) student employees (but only if the employer is also the educational institution where the student is attending); and (iv) part-time employees who normally work less than 20 hours per week. Although this rule limits the flexibility employers have in who they can exclude from a retirement plan, 403(b) plans are not required to perform the annual ADP testing<sup>1</sup> that is required of many other defined contribution plans. To satisfy the universal availability rule, employers must provide a notice to new employees upon hire and annually to all employees notifying them of their right to make elective deferrals to the 403(b) plan.

### Written Plan Document and Restatement Opportunity

Since 2009, all 403(b) plans have been required to have a written plan document. Unfortunately, at that time, employers had nothing to rely upon to ensure that their 403(b) plan document was compliant with the law. To aid employers, the IRS established a program that allows eligible employers to restate their written plan on a document approved by the IRS. Under this program, not

<sup>1</sup> The IRS prohibits plans from discriminating in favor of highly compensated employees. The Actual Deferral Percentage (ADP) test measures the deferral percentage of highly compensated employees and non-highly compensated employees, and if the deferral percentages of the two groups are not within a certain range, the plan must make either corrective contributions or corrective distributions.



only will employers gain assurance that their plan document is compliant with the law going forward, but employers will be permitted to retroactively amend their plan, giving them assurance that their written plan document has been compliant with the law going back as early as 2010. But, the **absolute deadline** to restate a plan document under the program is **March 31, 2020**.

## Timely Depositing Plan Assets

Employers are responsible for timely transmitting deferrals and loan repayments to 403(b) plans. If the employer does not make timely deposits of employee deferrals, the error may result in an operational failure, giving rise to potential plan disqualification (i.e., losing its tax deferred nature), and excise taxes from the IRS. If the 403(b) plan is also subject to ERISA, which most are unless sponsored by a church or government organization or the employer has very limited involvement, the Department of Labor (“DOL”) could also assess penalties.

For small plans (fewer than 100 participants), elective deferrals and plan loan repayments deposited within seven business days following the date that they are withheld from participants’ wages will be considered timely by the DOL. Unfortunately for large plans, no similar safe harbor exists, and employers must transmit employee contributions to the trust on the earliest date that it reasonably could happen.

So, what do you do if you have a delay? Correct the error as quickly as possible by transmitting the employee contributions to the plan as soon as you discover the error. In addition, you will need to pay lost earnings to the affected participants’ accounts on these contributions for the period of delay. Late deferrals must be reported on Form 5500, if a plan must file a Form 5500. The DOL does have a Voluntary Fiduciary Correction Program that a plan sponsor may wish to consider if they have late deferrals, which provides relief from penalties if proper correction was taken.

## Annual Returns

There is a lot of confusion around when a plan is required to file an annual return. The DOL requires all 403(b) plans subject to ERISA to file a Form 5500, which must be filed within seven (7) months after the end of each plan year (July 31 for calendar year plans). Large plans with over 100 participants are also required to obtain and submit an independent audit with its annual filing. Plans eligible to file Form 5500-SF (eligible plans are those with fewer than 100 participants and plans with less than 121 participants at the beginning of the plan year that were eligible to file as a small plan in the previous year) are exempt from the audit requirement.

Filing Form 5500 is critically important for 403(b) plans because the penalties can be severe. The DOL penalties can be up to \$2,194 per day (as adjusted for inflation for penalties assessed after



January 23, 2019) for failure to file, **with no maximum**, and penalties may be assessed for missing items such as auditor's reports, financial reporting items, and other required items even if the Form 5500 is timely filed. In addition to the DOL penalties, the IRS is also authorized to impose sanctions of \$250 per day (up to \$150,000) for failure to file Form 5500. Employers that have not timely filed part or all of Form 5500 can reduce these penalties by participating in the DOL's Delinquent Filer Voluntary Compliance Program.

Retirement benefits will show that your non-profit organization is committed to its employees and may help you recruit and retain better talent. If your non-profit organization is considering offering a retirement benefits, a 403(b) plan provides a fantastic option. But, as this article highlights, making this commitment to your employees requires attentive administration.

## Need Legal Advice?

If you are a PBPO client and have questions regarding the content of this article, or have questions regarding any stage in the life of a 403(b) plan, please contact us at [info@pbpohio.org](mailto:info@pbpohio.org) or (513) 977-0304.

If you are not a client but would like to apply, please contact us at [info@pbpohio.org](mailto:info@pbpohio.org) or (513) 977-0304.

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