

IRS ISSUES TRANSITION RELIEF FOR APPLICATION OF THE 403(B) PLAN “UNIVERSAL AVAILABILITY” RULE TO PART TIME EMPLOYEES

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On December 4, 2018, the IRS issued a notice offering transition relief to retirement plan sponsors who have incorrectly excluded part-time employees under the “universal availability” requirements of Code Section 403(b).

Tax exempt and educational organizations that sponsor 403(b) retirement plans must comply with the “universal availability” nondiscrimination requirement. Under this rule, all employees of the employer must be permitted to make elective deferrals, with the exception of the certain categories of employees, including those who normally work less than 20 hours per week. However, once such a part-time employee gains eligibility by working 1,000 hours in a plan year or anniversary year, the employee may not be excluded from making elective deferrals in a subsequent year on the basis that they did not work enough hours.

Many employers fail to conform to this Once-In-Always-In condition on 403(b) plan eligibility, excluding part-time employees from year to year based on the hours worked in any given plan year or anniversary year. In response to comments regarding the widespread nonconformity with the Once-In-Always-In condition, the IRS issued a notice providing transition relief for 403(b) plans that were not operated in accordance with the Once-In-Always-In condition, or lacked necessary plan language.

The transition relief is available to 403(b) plan sponsors who consistently applied an incorrect eligibility rule, excluding all part-time employees from year to year (plan year or anniversary year). The transition relief encompasses errors in both plan operations and plan language, and offers a “fresh start” when the transition period expires. The IRS defines a “Relief Period” as commencing after December 31, 2008 and expiring before December 31, 2019, depending on the last year the employer improperly excluded a part-time employee based on either plan year or anniversary year hours of service. For employers using the calendar year to measure hours of service, the Relief Period expires December 31, 2018.

During the Relief Period a 403(b) plan will not be treated as failing to satisfy the Once-In-Always-In condition merely because the plan was not operated in conformity with the rule. In addition, any 403(b) plan document which omits the

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Once-In-Always-In exclusion condition has until March 31, 2020 to be amended to include the required language. Finally, employers are allowed a “fresh start” for 2018 and may exclude a part-time employee who previously worked more than 1,000 hours, but did not do so in 2018. Thus, employers may act as though the Once-In-Always-In condition first became effective January 1, 2018.

A plan must conform to the Once-In-Always-In condition for plan years or anniversary years beginning on or after January 1, 2019. Sponsors of 403(b) plans should carefully examine their plan operations regarding the exclusion of part-time employees and ensure that any individually designed plans are amended appropriately during the remedial amendment period or restated on a pre-approved plan document. (*Notice 2018-95, 2018-52 IRB*)