

*Your Retirement Plan Partner...Helping You Win and Retain Business!*



## The Universal Availability Requirement for 403(b) Plans

After completely revamping the regulations applicable to tax sheltered annuity plans under Section 403(b) of the Internal Revenue Code, those plans look and operate more like 401(k) plans than ever before. One major difference, however, are the nondiscrimination rules pertaining to employee deferrals. 401(k) plans are subject to a mathematical annual test known as the average deferral percentage, or ADP, test. On the other hand, 403(b) plans are not required to pass any mathematical test for employee deferrals; rather they are required to make the right to defer universally available.

### What Is Universal Availability?

Eligibility to defer (including Roth) to a 403(b) plan is known as "universal availability" and must generally be available to everyone. There is no age or service requirement permitted. The individual must be expected to defer at least \$200 a year. The universal availability requirement applies to all 403(b) plans, except for church plans.

An employee's right to defer is not universally available unless the employee is provided an effective opportunity to defer. Whether an employee has an effective opportunity is determined based on all the relevant facts and circumstances, including notice of the availability of the election, the period of time during which an election may be made, and any other conditions on elections. Notice of the right to defer must be provided at least annually, as

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must the right to make or change elections. The opportunity applies to part-time employees (subject to limited exclusion as discussed below) as well as full-time employees. An effective opportunity is not considered to exist if there are any other rights or benefits (other than matching contributions) that are conditioned upon an employee making or failing to make a cash or deferred election with respect to a contribution to a 403(b) plan.

There are, however, limited exclusions to this rule.

**Allowable exclusions.**

If an employee is eligible to defer under another plan sponsored by the employer, such as a 401(k) plan, governmental 457(b) plan or another 403(b) plan, they do not have to be offered a deferral option in any other 403(b) plan.

Non-resident aliens who receive no earned income from the United States can be excluded from participation.

Students who work for a school in which they are enrolled and regularly attending classes do not have to be offered the right to defer.

Employees who normally are expected to work fewer than 20 hours per week do not have to be included in the plan. However to be within this category, the employer must, as of the hire date, reasonably expect that the employee will work less than 1,000 hours in their first 12 months of employment. In addition, for each succeeding plan year (or subsequent 12 month anniversary if the plan provides), the employee must have actually worked less than 1,000 hours in the preceding year.

**Former exclusions that no longer apply.**

- Collectively bargained employees. Note that this differs from 401(k) and other qualified plans that permit the exclusion of union employees.
- Employees who make a one-time election to participate in a governmental qualified plan, instead of a section 403(b) plan.
- Professors who are providing services on a temporary basis to another public school for up to one year; and
- Employees who are affiliated with a religious order and who have taken a vow of poverty.

**Applying the rules.**

The rules apply separately to each organization covered by a 403(b) plan even if they are part of a controlled group of related organizations. The rules may also apply separately to any separate operating unit not in the same geographic area. Finally, each governmental entity that has its own payroll is treated as a separate organization.

retirement@bcgbenefits.com  
or call directly at 800-524-401k, option 3.



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**Transition rules.**

Plan that excluded collective bargaining employees prior to July 26, 2007, have until the first day of first tax year beginning after July 26, 2010, to remove the exclusion.

Plans that, as of July 26, 2007, excluded visiting professors, employees on a vow of poverty or employees who made a one-time election to participate in a governmental plan, have until the first day of the first tax year beginning after Dec. 31, 2009, to remove the exclusions.

Finally, a 403(b) plan that need to have their plan amendment approved by a legislative body that meets in legislative session has until the earlier of: (i) the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after January 1, 2009; or (ii) January 1, 2011.

**Checking for compliance.**

If you have not already so, check for compliance with these rules and conform your plan's operations to the new rules if necessary. If corrections need to be made because of operational non-compliance, the IRS offers a correction program to bring the plan back into compliance.

**2010 IRS COLA Limits**

This year the retirement plan limits stayed the same!

- 401(k) Deferrals - \$16,500
- 401(k) Catch-up Contributions - \$5,500
- SIMPLE Deferral Limit - \$11,500
- SIMPLE Catch-Up Contributions - \$2,500
- Maximum Defined Contribution Plan Limit (415) - \$49,000
- Maximum Compensation - \$245,000
- Social Security Wage Base - \$106,800

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