

IRS Updates LRMs for 403(b) Plans

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The IRS recently issued an updated Listing of Required Modifications and Information Package (known as the “LRMs”) for 403(b) plans. These LRMs contain quite a few changes, from simple clarifications and explanatory notes, to more substantive revisions to plan language reflecting changes arising from the PATH, SECURE and CARES Acts. While the LRMs are intended for 403(b) plans that use “pre-approved” plan documents, sponsors of individually designed 403(b) plans also frequently look to the LRMs for insight into what the IRS views as acceptable plan language. We point out some of the more noteworthy changes in the latest LRMs below.

This release is timely, as the second six-year filing cycle for pre-approved 403(b) plans opens shortly, on May 2, 2022. To support the filing, the IRS previously issued Rev. Proc. 2021-37, containing guidance on this Cycle 2, and also recently released the Form 4461-C, *Application for Approval of Standardized or Nonstandardized 403(b) Pre-Approved Plans*.

Changes of General Application

- Plan language has been added or revised regarding:
 - Qualified birth or adoption distributions (“QBADs”)
 - Coronavirus-related distributions and loans
 - Federally declared disasters and loans
 - Lifetime Income Investment Distributions
 - Updated limits to reflect cost-of-living adjustments
- The language for required minimum distributions (“RMDs”) has been shortened to a cross-reference to Code section 401(a)(9). Presumably, this would result in incorporating the applicable rules of the recently proposed RMD regulations (once finalized), without making any useful clarification to those regulations. However, an explanatory note to the RMD language does confirm that the value of a qualifying

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longevity annuity contract (“QLAC”) is not included in a participant’s accumulated benefit for purposes of RMD calculations.

- The LRM for hardship distributions has been revised to reflect the 2019 revised hardship rules for 401(k) plans, as applicable to 403(b) plans. Under those rules, a 403(b) plan is no longer able to provide for a six-month suspension of elective deferrals as a condition of obtaining a hardship distribution, and a participant is no longer required to take any available loan under the plan prior to becoming eligible for a hardship. The note explains that the Bipartisan Budget Act of 2018, which added Code section 401(k)(14)(A) allowing a hardship distribution from a 401(k) plan to include investment earnings, qualified nonelective contributions and qualified matching contributions, did not include parallel amendments to Code sections 403(b)(7) or 403(b)(11), so no earnings attributable to elective deferrals under those 403(b) plans may be distributed on account of hardship.
- The LRMs clarify the measuring period for determining eligibility for an employee normally working less than 20 hours per week/1000 hours per year under the universal availability requirement, by adding a definition of “Exclusion Year” for that purpose.
- A new LRM has been added to address a pre-approved document provider’s amendment authority under the plan, including limits on the provider’s authority. The LRM also adds a list of certain types of amendments that may be adopted by the employer without affecting the ability of the employer to rely on a pre-approved 403(b) plan document opinion letter.
- Notes to the vesting LRM confirm that a nonstandardized pre-approved 403(b) plan that is not subject to ERISA, such as a governmental plan, will not be required to provide that employer contributions vest at least as rapidly as would be required under the ERISA/general Code section 411 vesting rules.
- The LRMs now expressly allow a participant to change his or her compensation reduction election under certain circumstances associated with an amendment to a safe harbor arrangement.
- The new LRMs add a requirement (only applicable to plans with pre-approved plan documents) that each adopting employer indicate in the adoption agreement, for nondiscrimination purposes, if it is a church, a governmental plan, a QCCO, a Non-QCCO or a minister.
- New LRM language adds a specific statement that all section 403(b)(1) contracts, 403(b)(7) custodial accounts and 403(b)(9) retirement income accounts purchased by an employer for a participant are treated as one section 403(b) annuity contract for purposes of applying the limitations of Code section 415.
- Notes to the RMD, direct rollover, hardship, and DRO/QDRO LRMs reflect the extension of spousal rights to same-sex spouses, in accordance with the decision in *U.S. v Windsor*, 570 U.S. 12 (2013).
- A new explanatory note reflects the PATH Act changes that permit a rollover of non-Roth amounts to a SIMPLE IRA after a participant has participated in an employer’s SIMPLE IRA plan for two years.

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Church Plan Changes

- The LRMs add several provisions to reflect that employees of Qualified Church-Controlled Organizations (“QCCOs”) and Nonqualified Church-Controlled Organizations (“Non-QCCOs”) are now expressly permitted to participate in 403(b)(9) retirement income account plans. A 403(b)(9) retirement income account plan may allow these employees to participate retroactively to July 1, 2020, the beginning of the IRS’s second remedial amendment cycle for pre-approved 403(b) plans.
- The LRMs update the definition of “Employee” for church plans to include language regarding self-employed ministers and chaplains, providing that a 403(b)(9) retirement income account can include such ministers and chaplains.
- A new LRM is added to provide rules for plan-to-plan transfers or mergers between a church 403(b) plan and another church plan (e.g., a 401(a) plan or another 403(b) plan).
- Another new LRM contains explanatory notes reflecting the PATH Act’s allowance of automatic contribution arrangements for church plans, cross-referencing the LRM providing general (e., non-church) automatic contribution arrangement language.

Governmental Plan Changes

- The revised definitions of “Employee” and “Related Employer” confirm that Notice 89-23 remains the source of the reasonable, good faith standard to apply to governmental entities and public schools for determining the controlled group for purposes of 403(b) plan non-discrimination testing.

If you have any questions about the revised LRMs, please contact the authors or your regular Groom attorney.

