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For your information

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No 403(b) ERISA Safe Harbor Exemption When Employer Matches 403(b) Deferrals in Another Plan

The DOL issued Advisory Opinion 2012-02A confirming that a private sector tax-exempt organization's Section 403(b) program is not exempt from ERISA under the DOL's safe harbor if the employer makes contributions to a separate qualified defined contribution plan based on the level of employee salary deferrals made to the otherwise exempt 403(b) program.

Background

Public schools and organizations exempt from tax under Internal Revenue Code (Code) Section 501(c)(3) (generally entities organized for religious, charitable, scientific, literary, or educational purposes) are eligible to maintain a Code Section 403(b) program. Unless the 403(b) program is either a governmental plan or a non-electing church plan, or it meets the conditions of Department of Labor (DOL) safe harbor regulations, the 403(b) program is covered under Title I of the Employee Retirement Income Security Act (ERISA). Under the DOL safe harbor, a 403(b) program is not viewed as "established or maintained" by an eligible private sector tax-exempt organization, and thus is exempt from ERISA Title I, if the plan is funded entirely with employee salary deferrals and the employer is minimally involved in running the program.

To qualify for the safe harbor and exemption from Title I, a 403(b) program must satisfy four conditions:

- Participation of employees must be completely voluntary.
- All rights under the annuity contract or custodial account must be enforceable solely by the employee or beneficiary of such employee or by an authorized representative of such employee or beneficiary.
- The involvement of the employer must be limited to certain specified activities.
- The employer may not receive any direct or indirect consideration or compensation, in cash or otherwise, other than reasonable reimbursement to cover expenses properly and actually incurred in performing the employer's duties pursuant to the salary reduction agreements.

The employer is permitted to engage in activities such as allowing annuity contractors to publicize products to employees, entering into salary reduction agreements, and reasonably limiting the contractors and funding media available to employees.

Employer's Match Crosses the Line

In Advisory Opinion 2012-02A, the DOL considered a tax-exempt employer that made contributions to a money purchase plan qualified under Code Section 401(a) that were based on the level of employee salary deferrals to the 403(b) program (matching contributions). The DOL noted that the safe harbor is not lost merely because the employer maintains a separate plan qualified under 401(a). Nor is the safe harbor lost by considering employee participation in the 403(b) program (including employee salary deferrals) to ensure that employer contributions to the other plan meet tax qualification requirements. However, the DOL determined that conditioning employer contributions to the separate plan on the employee making salary deferrals to the 403(b) program would be inconsistent with the limited employer involvement permitted under the safe harbor and would also conflict with the requirement that employee participation in the 403(b) program be "completely voluntary."

Buck Can Help

- Meet with HR and the program's administrative committee to identify affected 403(b) programs, identify any compliance gaps, and determine the steps needed to close those gaps
- Examine savings plan designs that might be more suitable and less costly while still meeting employer objectives
- Establish procedures for ongoing program operations