

Legal Alert

Organizations with 403(b) Retirement Plans Must File Annual Returns (IRS Form 5500)

As a result of Department of Labor (“DOL”) regulations issued in 2007, tax-exempt employers who sponsor 403(b) plans are generally required to file annual returns for each 403(b) plan that they sponsor. The regulations became effective January 1, 2009. The annual return for a 403(b) plan is filed on a Form 5500. Employers who have failed to file Form 5500s for prior years face significant penalties. If this is your organization, don’t despair, this can be fixed. Organizations that have not filed Form 5500 can file past-due Form 5500s using the DOL’s Delinquent Filer Voluntary Correction Program (“Delinquent Filer Program” or “DFVCP”). As described below, the advantage of using DFVCP is that the late filing penalties are capped.

Background

Prior to 2009, there were limited annual return filing requirements for 403(b) plans (also known as tax-sheltered annuity plans or TSA plans), and many sponsors of 403(b) plans were unaware of them. However, that changed beginning January 1, 2009. As part of new regulations adopted by the DOL, 403(b) plans are now required a Form 5500 (Annual Return/Report of Employee Benefit Plan) each year. For a 403(b) plan with a calendar year fiscal year, the Form 5500 is due July 31 of the following year. The filing deadline may be extended to October 15 of the following year by filing an extension. For non-calendar year plans, the initial filing deadline is the last day of the seventh month following the close of the Plan year (a 403(b) plan now must also have a written plan document; the plan document will specify the plan year; most 403(b) plans are calendar year plans). The Department of Labor may assess civil penalties of up to \$1,000 per day against plan administrators that fail to file complete and timely Form 5500s. In addition, the IRS may assess penalties against plan administrators of up to \$25 per day, up to a maximum of \$15,000 per return for failing to file complete and timely Form 5500s. A 403(b) plan’s “plan administrator” is generally the sponsoring tax-exempt organization.

Delinquent Filer Voluntary Correction Program

Form 5500 returns/reports are administered by the Department of Labor. The DOL established the Delinquent Filer Voluntary Correction Program to encourage those responsible for administering retirement plans, including 403(b) plans, to file overdue Form 5500s.

Eligibility. If a tax-exempt organization has not filed past-due Form 5500 returns for its 403(b) plan(s), it may use the DFVCP to file delinquent returns at any time prior to the date on which the DOL notifies it in writing of a failure to timely file a Form 5500.

Reduced Penalties. As noted above, the principal advantage of filing past-due Form 5500s under the Delinquent Filer Program is the opportunity for reduced penalties:

Small Plan “Per filing” Cap. The maximum penalty for a single late Form 5500 for a small plan (generally, a plan with fewer than 100 participants at the beginning of the plan year – see below) is \$750.

Large Plan “Per filing” Cap. The maximum penalty for a single late Form 5500 for a large plan is \$2,000 per delinquent Form 5500.

“Per Plan” Cap. If a tax-exempt employer failed to file annual returns for a 403(b) plan for multiple years, there is also a “per plan” cap. The “per plan” cap for multiple filing failures is \$1,500 for a small plan and \$4,000 for large plans, regardless of how many late Form 5500s are being filed for that plan.

Special “Per Plan” Cap for Small Plans Sponsored by Section 501(c)(3) Organizations. A special “per plan” cap of \$750 applies to small plans sponsored by 501(c)(3) organizations no matter how many delinquent Form 5500s they file. However, the special rule does not apply if the one of the 501(c)(3) organization’s delinquent Form 5500s requires a large plan filing.

How to Participate in the DFVCP. Participation in the DFVCP is a two-step process:

1. For each year for which a Form 5500 is delinquent, complete and file a Form 5500 or Form 5500-SF. The delinquent Form 5500s must be filed with the DOL electronically using EFAST 2, the DOL’s electronic filing system. Information on filing delinquent Form 5500s with EFAST 2 is available at www.dol.gov/ebsa/faqs/faq-EFAST2.html.
2. Use the DOL’s online calculator at www.efast.dol.gov to determine the penalty amount. The penalty amount can also be paid electronically by following the screen prompts after the penalty amount has been calculated.

Which Form 5500 To File

Depending upon the number of participants in the 403(b) plan, the 403(b) plan’s sponsor will file a Form 5500-SF or a “regular” Form 5500:

Small Plans. A 403(b) plan with less than 100 participants as of the beginning of the plan year will generally be able to file a Form 5500-SF. It is fairly simple to fill out.

Large Plans. A 403(b) plan with 100 or more participants must file a regular Form 5500 each year. A regular Form 5500 is much more complicated but many 403(b) plan providers offer a Form 5500 preparation service. A large 403(b) plan must also include audited financial statements with its Form 5500. The audited financial statements must be certified by an independent public accountant.

Special Transition Rule. A 403(b) plan that filed as small plan for the prior year and did not cover more than 120 participants at the beginning of the plan year may also file as a small plan.

Who Is A Participant? A participant is (i) an employee who is eligible to participate in the 403(b) plan (even if the employee never makes deferrals or is not eligible for employer contributions), or (ii) a former employee or beneficiary of a participant who has a plan account.

Avoiding IRS Penalties as Well

As mentioned above, in addition to any DOL penalties for failing to file one or more Form 5500s for a 403(b) plan, the Internal Revenue Service (“IRS”) also has authority to impose penalties for delinquent annual reports. However, the IRS will generally waive late filing penalties for Form 5500 filers who complete the Delinquent Filer Program and who also file any missing Forms 8955-SSA (Annual Registration Statement Identifying Separated Participants With Deferred Vested Benefits). Form 8955-SSA notifies the IRS of plan participants who separated from employment with the 403(b) plan sponsor during the plan year but did not receive a complete distribution of the vested portion of their 403(b) accounts. The Form 8955-SSA was previously filed with each year’s Form 5500 but is now filed separately with the IRS. All delinquent Forms 8955 are filed with the IRS.

403(b) Plans That Do Not Have an Obligation to File Forms 5500

Certain 403(b) plans do not have a Form 5500 filing obligation. These include certain 403(b) plans in effect prior to 2009 where the 403(b) sponsor ceased making contributions to the 403(b) plan before January 1, 2009, and certain church-affiliated organizations. In addition, a 403(b) plan funded solely through salary reduction agreements or agreements to forego an increase in salary, generally will not have a Form 5500 filing requirement if:

- Participation of employees is completely voluntary,
- All rights under the annuity contract or custodial account are enforceable solely by the employee or beneficiary of such employee, or by an authorized representative of such employee or beneficiary,
- The employer’s involvement is limited to certain optional specified activities, and
- The employer receives no direct or indirect consideration or compensation in cash or otherwise other than reasonable reimbursements to cover 403(b) plan (i.e., the sponsoring employer does not receive any compensation from the 403(b) investment fund or annuity contract providers).

These are tough requirements to meet today and very few 403(b) plans are likely to meet this exception. Most 403(b) plans will have Form 5500 filing obligations. A 403(b) plan sponsor should undertake a careful analysis of its plan’s circumstances and consult with legal counsel before concluding that no Form 5500s need be filed.

For More Information

General information on the Delinquent Filer Program is available at

https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/0302fact_sheet.pdf

FAQs about the Delinquent Filer Program are available at:

<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/faq-dfvc.pdf>

Form 5500 forms are available at:

<https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-5500>

The Law Project thanks James C. Williams of Mayer Brown LLP for preparing this Legal Alert.

Questions?

Contact The Law Project, a project of the Chicago Lawyers' Committee for Civil Rights Under Law, Inc. or your attorney if you have questions. The Law Project matches eligible small businesses and not-for-profits with pro bono legal counsel. For additional information about issues involving small businesses and not-for-profits, please contact us at tlp@thelawproject.org or (312)939-3638, or visit us online at www.thelawproject.org.

This communication is provided by The Law Project as a public service solely for informational purposes, without any representation that it constitutes legal advice by The Law Project. This neither creates an attorney-client relationship between the recipient and any other person, nor constitutes an offer to create such a relationship. Consult an attorney if you have questions regarding the contents of this communication.