403(b) Checklist

Overview of the 403(b) Final Regulations

The final 403(b) regulations outline certain requirements that must be satisfied for a 403(b) program to qualify for the exclusion from income available under §403(b) of the Code. One of these requirements is that the employer sponsoring the 403(b) plan must establish and maintain a written plan that includes all material terms and conditions relating to eligibility, contributions into the plan, benefits of the plan, distributions from the plan and products available under the plan. Other plan features are optional and may or may not be included under the written plan document. This checklist identifies key elements to be considered when evaluating a 403(b) program and creating a plan document. It includes a checklist of common 403(b) plan features and is intended to provide information needed to make informed decisions and establish priorities.

Checklist of Plan Features

Feature	Mandatory or Optional	IRS Model Plan	Comments
Eligibility for salary reduction contributions.	Mandatory	Includes all common law employees except student workers and employees that work less than 1,000 hours per year.	Recommend that all common law employees are eligible to participate in the plan. If employees are excluded, the plan may not exclude classifications of employees, such as substitute teachers or transportation workers. The only employees that can be excluded are those that do not work 1,000 hours during the year, those that are participating in another salary reduction plan (such as a 457(b) or 401(k) plan) and student workers.
Eligibility for Roth 403(b) Contributions	Optional	Does not have any provisions for Roth 403(b) contributions.	If the employer wishes to include Roth 403(b) contributions, which are after tax employee contributions, then all material terms relating to such contributions must be included in the plan document. If Roth 403(b) contributions are included, then they must be made available to all employees on the same basis as pre-tax employee salary reduction contribution described above.
Eligibility for employer contributions	Optional	Does not have any provisions for employer contributions	Recommend adding provision to permit employer contributions as required under applicable employment agreements.
Automatic Enrollment	Optional	Requires all employees to make 5% deferral contributions.	Recommend no automatic enrollment feature. It is too complicated and, unless the employer is subject to ERISA, imposes liabilities under state law on the employer.
Normal contribution limits	Mandatory	Includes the required contribution limits	Recommend including citations to Code sections that impose limitations such as IRC §402(g) for deferral contribution limits and IRC §415(c) for total contributions to the plan because the annual contribution limits increase based on cost of living adjustments. Also recommend adding requirement to remove excess deferrals from the plan by the next April 15th to avoid potential disqualification of entire year's deferral contribution.

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Higher Catch Up Contribution Limits 1. Aged 50 + 2. 15 years of service	Optional	Includes both catch up contribution limits	Recommend that age 50+ catch up be included in the plan. The 15 years of service catch up option is riskier as it requires a calculation based on at least 15 years of 403(b) contributions and many employees and/or vendors do not have the records available to do the calculation properly.
Roth 403(b) contributions (After-tax employee contributions)	Optional	Has no provisions for Roth 403(b) contributions.	If the employer already permits Roth 403(b) contributions, then they should continue under the new plan. However, Roth 403(b) contributions require different payroll procedures by the employer and the plan would have to include many provisions unique to Roth programs. This feature may increase administrative costs. In addition, special education must be provided to employees to understand the differences between Roth and regular 403(b) contributions.
Timing of Deferral Elections	Mandatory	Permits deferral elections and investment changes at any time without restriction	Recommend that employees be permitted to participate at any time (but at least quarterly). Changes should also be permitted at any time (but at least quarterly).
Investment and Vendor Options	Mandatory and Optional	Authorized vendors must be identified in the plan document. The IRS model plan permits multiple vendors as listed by the employer.	Recommend sufficient number of vendors to offer all employees choice and control over their retirement investments. Vendors should be willing to exchange information with the employer, other vendors and/or a TPA, should agree to keep employee information confidential and not use for other purposes and should agree to sign a service agreement listing their administrative responsibilities. A “hold harmless” or indemnification agreement is strongly suggested.
Distributions from the Plan	Mandatory and Optional	Authorizes distributions upon death, disability separation from service, age 59½, and financial hardship. Requires distributions upon later of age 70½ or termination of employment.	The plan must include restrictions on distributions prior to death, disability or separation from service. The plan may permit distributions upon age 59½ and financial hardship. The plan must require distributions upon a participant’s age 70 ½ unless the participant is still an active employee of the plan sponsor. Recommend age 59½ permissive distributions as they are easy to administer. Do not recommend hardship distributions (unless a TPA is used) as they are difficult to administer and increase compliance liabilities (i.e. standards of proof of hardship and 6 month deferral suspension requirements).
Other Distributions	Optional	Plan includes mandatory distributions of small account balances (under $5,000) and distributions from Rollover Accounts.	Recommend not permitting these distributions as they increase administrative responsibilities (and costs if TPA is used) and are very difficult to enforce.
Loans	Optional	Permits unrestricted loans	Recommend loans if TPA is used or if ALL vendors will agree to be responsible for loan compliance and sharing of required information. Otherwise, loans are complex and difficult to administer.

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Exchanges	Optional	Permits exchanges between vendors authorized under the plan and any other vendor that will sign an information sharing agreement with the employer.	Recommend exchanges between vendors that have active payroll relationship with employer and are named in the plan document. Exchanges to outside vendors may be permitted if the vendors sign an information sharing agreement and agree to adhere to the terms of the employer's 403(b) plan. Caution should be exercised to control the number of vendors with whom the employer must maintain a relationship that requires sharing of information.
Transfers in and out of the employer's 403(b) plan	Optional	Permits transfers into the plan from other employer's 403(b) plans and out of the plan to 403(b) plans of other employers, but only for entire "classifications" of employees, not for individual employees.	Recommend no transfers. Employees can generally accomplish the same by using a rollover into the plan. Rollovers are administratively easier.
Rollovers into a 403(b) plan	Optional	Permits rollovers into the plan	Recommend rollovers into the plan so long as the rollover is deposited with one of the authorized vendors named under the plan. Otherwise, the employer should have to have an information sharing agreement with any vendor holding assets.
Rollovers from the 403(b) plan	Mandatory	Permits rollovers from the plan.	Provisions that permit rollovers out of the plan are required so long as the employee has experienced a "distributable event." Rollovers, like transfers, provide employees with the opportunity to combine various 403(b) accounts under their current employer's plan.
Administrative Features	Optional	Has some "quirky" administrative requirements	Recommend that the plan be written to conform to the recommendations of the TPA, if one is being used, the practices of the vendors and the practices of the employer. For example, the model IRS plan requires each employee to designate a beneficiary on the elective deferral enrollment form. Most forms do not include this provision and it can create complications if the employee changes his or her investment elections and then files an inconsistent designation or fails to complete a new designation. Most products have a "default" beneficiary if the employee fails to designate a beneficiary under the plan.
Plan termination	Optional	Permits the employer to terminate the plan.	Recommend that the plan have no provision to terminate. Under current IRS rules it is impossible for an employer to terminate its 403(b) plan unless all of the 403(b) accounts are held in group annuity contracts owned by the employer. Until this rule is changed, the plan should not include provisions that allow the plan to be terminated since it cannot be accomplished in accordance with the requirements. It and when that rule is changed, the plan can be amended to permit its termination. Note, "plan termination" does not refer to eliminating a particular vendor. This refers to terminating the entire 403(b) program.