

**MetLife**



# Universal Availability and 403(b) Plans

**Meeting IRS Requirements Entails  
Proactive Employer Involvement**

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# why MetLife Resources prepared this paper on Universal Availability

The Internal Revenue Service issued final regulations for 403(b) plans in July of 2007. This was the first comprehensive update of the rules applicable to 403(b) plans in many years. The new rules make 403(b) plans look more like 401(k) plans; however, there are still important differences between 403(b) and 401(k) plans. One of these differences is the Universal Availability requirement, which is the subject of this white paper.

At MetLife, we're committed to providing you with ongoing communications to help you make decisions regarding your 403(b) plan. We have prepared an in-depth discussion on the "Universal Availability" requirement as it impacts an employer's 403(b) plan. We hope this white paper will assist you in maintaining your 403(b) plan in conformance with the new regulations that generally went into effect January 1, 2009.

For more information, please contact your local MetLife representative.

## About The Author

Robert C. Sproule, Esq., serves as Senior Counsel for MetLife with focused knowledge on laws relating to employee retirement benefits for government and nonprofit employees. He holds a BS from Cornell University, an MBA from Lehigh University and a JD from Indiana University School of Law where he graduated Summa Cum Laude.

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## **Plan Communication**

Public schools and other non-profit employers can offer their employees an important employee benefit designed to assist employees with their retirement savings goals — an employer-sponsored 403(b) plan. It's important, however, that employers understand the 403(b) eligibility rules to avoid tax issues that may arise if their plan's eligibility rules do not comply with the Universal Availability requirement. In addition, there are communication requirements related to 403(b) plans that an employer must meet. The Universal Availability rule is designed to ensure that employees understand their eligibility and are aware of the benefit in a consistent manner.

The Universal Availability requirement generally provides that if any employee of an employer is permitted to make elective salary deferrals to a 403(b) plan, then all employees of that employer (with certain exceptions and exclusions) must be permitted to make such elective deferrals. The tax deferral status of the employer's entire 403(b) plan may be jeopardized if the plan does not comply with the Universal Availability requirement. The operative word here is "may" since the final regulations restate and clarify that there are permitted exceptions to the Universal Availability requirement.

## Two Aspects of Universal Availability

The Universal Availability requirement is made up of two key components: effective opportunity and eligibility.

- Effective opportunity** concerns the practical ability of an employee to participate in the employer’s 403(b) plan. An employer will not be treated as providing all employees with an effective opportunity to participate in the 403(b) plan unless the employer notifies eligible employees of their ability to make or change an election to contribute to the 403(b) plan at least once per calendar year. There are several tools available that would help an employer meet this communication requirement, such as a group meeting or an intranet posting. [See Illustration 1.0]. Regardless of the method, the communication must take place at least annually.

**Illustration 1.0: Effective Communication Tools**



- Eligibility** concerns a determination of which employees are permitted to make elective salary deferrals to the employer’s 403(b) plan. For example, a 403(b) plan may permit all employees to make elective salary deferral contributions or it may exclude certain permitted groups of employees. [See Illustration 2.0]. In the case of a 403(b) plan that covers the employees of more than one non-government employer, the requirement of universal eligibility applies separately to each common law employer. In the case of a 403(b) plan that covers the employees of more than one government employer, eligibility applies separately to each employer that is not part of a common payroll.

**Illustration 2.0: Examples of Employee Eligibility**

Eligible	Ineligible
Clerk	Independent Contractor
Custodian	Leased Employee
Nurse	Board of Education Member
Principal	State Retirement System Staff
Teacher	

## Permitted Exceptions

As mentioned earlier, the Universal Availability requirement permits certain exceptions. A 403(b) plan may continue to exclude the following groups from participating in the 403(b) plan, provided the exclusion is uniformly applied to all employees:

- Employees who worked less than 1,000 hours the previous year, or new employees who are expected to work less than 1,000 hours in the current year
- Employees eligible to participate in a 401(k), 457(b) or another 403(b) plan of the same employer
- Nonresident aliens with no U.S. source of income
- Students performing services under a work-study program

It's important to note that each of these exclusions is optional. For ease of ongoing compliance, an employer may elect to allow all employees to participate in the 403(b) plan. Also, if an exclusion is used, it must be applied uniformly to all similar employees. For example, a school employer cannot permit all part-time employees to participate, but then exclude substitute teachers. The 1,000 hour part-time permitted exclusion generally applies to the employer's annual work period, such as an academic year in this example. An employer whose 403(b) plan excludes part-time employees must keep records of actual hours worked. In addition, an employer may elect to use a number of hours that is less than 1,000 hours for the purpose of excluding part-time employees.

One last point to keep in mind about the Universal Availability requirement is that it applies only to common law employees paid directly by the employer. For example, if an employer has outsourced certain services to another organization or has independent contractors, those individuals are not eligible to participate in the employer's 403(b) plan. In this situation, the Universal Availability requirement would not apply.

**For ease of ongoing compliance, an employer may elect to allow all employees to participate in the 403(b) plan.**

**Final regulations eliminate some familiar exceptions to the Universal Availability requirement.**

## Exceptions No Longer Permitted

The Universal Availability requirement is not new. It existed before the final 403(b) regulations were issued. However, the final regulations made important changes to the Universal Availability requirement by eliminating some familiar exceptions that could have been used previously by an employer. Beginning January 1, 2009, a 403(b) plan generally may no longer exclude the following employees:

- Employees covered by a collective bargaining agreement
- Certain visiting professors
- Employees who make a one-time election to participate in a governmental plan, instead of the 403(b) plan
- Employees of a religious order who have taken a vow of poverty

It's important to note that employers that previously excluded employees covered by collective bargaining agreements or that previously excluded visiting professors were, under certain circumstances, allowed to continue to exclude such persons until December 31, 2010. Effective January 1, 2011, employees covered by collective bargaining agreements, as well as visiting professors, may not be excluded from the Universal Availability requirement.

## Application of Universal Availability

The Universal Availability requirement only applies with respect to elective salary deferrals and Roth after-tax contributions to a 403(b) plan. For example, if any employee is permitted to make after-tax Roth contributions to a 403(b) plan, then all of the employees of the employer must be permitted to do so.

No rights or benefits may be made a condition of making elective salary deferrals to a 403(b) plan. As an example, an employer should not condition participation in an employer-provided group insurance benefit on the participant electing to make salary deferrals to a 403(b). There is, however, one exception: an employer may require a participant to make elective salary deferrals in order to receive matching contributions.

The Universal Availability requirement does not prevent a 403(b) plan from excluding some groups of employees from receiving matching or other employer contributions. A non-government employer's 403(b) plan that excludes employees from receiving employer contributions must still comply with other 403(b) plan rules to ensure such exclusions do not favor highly compensated employees.

Lastly, an employer can require an employee who participates in a 403(b) plan to make contributions of at least \$200 annually.

**Failure to respond to an IRS inquiry may result in an audit.**

## **Conclusion**

In the past, public schools and other tax-exempt employers often asserted limited responsibility for proactively communicating the 403(b) benefit to its eligible employees. Moreover, permitted exclusions and eligibility rules may not have been closely monitored.

The final regulations provide clearer guidance on some key areas related to the Universal Availability requirement, and make important changes. Employers must become knowledgeable of the rules, changes and effective dates to ensure the 403(b) plan operates in accordance with current regulations. Doing so will help reduce its exposure to plan operational deficiencies that may be uncovered during an IRS audit.

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