

## TAX-EXEMPT ENTITIES

### *Counting Hours for Adjunct Professors for Eligibility and Vesting*

*Whether identified as tax-exempt under Code Section 501(c)(3) or a public educational institution, colleges and universities have faced challenges in making certain employment and benefits-related determinations. As we enter into the inaugural approval phase for pre-approved 403(b) plans, the IRS may have provided a solution to this conundrum, but not by way of the plan document.*

BY SUSAN D. DIEHL

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#### What Is an Adjunct Professor?

In post-secondary education, there is a momentum toward hiring adjunct professors, also referred to as adjunct lecturers or adjunct instructors. Ranked below the highest level of professorship, an adjunct is hired on a part-time, contractual basis rather than being given tenure and a permanent position. Just like regular faculty members, however, adjuncts must fulfill basic educational requirements before they can teach, and many of them are very well-educated and talented people.

The use of adjunct positions has grown in many colleges and universities in response to decreased funding. Universities will hire adjunct professors because they are flexible and more economical to

maintain than traditional full-time faculty members. As schools are forced to make sometimes difficult choices between hiring full-time staff or discontinuing a program, they often see using more adjuncts as a middle ground.

#### Eligibility Concerns and the Universal Availability Rule

*FACT: Adjunct faculty are employees of the school.*

It has been a common practice for universities to operate their 403(b) plans to exclude adjunct professors as a class of employees. Of course, this is a violation of the universal availability rule, which provides that the only exclusions permitted from the elective deferral portion of a 403(b) plan are:

1. Employees participating in another deferral plan;
2. Employees who normally work fewer than 20 hours per week (defined to be 1000 hours per year);
3. Nonresident aliens with no US source of income;
4. Collectively bargained employees; and
5. Certain students meeting the definition of Section 3121 of the Internal Revenue Code.

[Treas. Reg. § 1.403(b)-5(b)(4)]

If not corrected, a universal availability failure can affect the entire 403(b) plan, subjecting all participants to possible taxation of their accounts.

*FACT: Employers cannot exclude adjunct professors by class from participating in the elective deferral portion of a 403(b) plan.*

## The Patient Protection and Affordable Care Act May Have the Answer!

Counting hours is critical not only to ensuring the plan is compliant with the universal availability requirement with regard to the 403(b) plan but also for compliance with the Patient Protection and Affordable Care Act (PPACA), which requires certain employers to provide health care benefits to employees who work at least 30 hours per week. And, it is the PPACA regulations to which we can turn for guidance on our adjunct faculty conundrum.

In February 2015, the IRS issued final regulations regarding the employer shared responsibility provisions of the PPACA. Those regulations note the difficulty of measuring hours for adjunct faculty and require use of a reasonable method to determine hours of service worked and not merely consider time spent teaching a course at the school. The preamble to the regulations provides one specific method of measurement (although not the only one) on which an employer *may* rely until further guidance is issued in this area. Under this method an employer would credit:

- 2.25 hours of service per week for each hour of teaching or classroom time, plus
- 1.0 hour of service per week for each additional hour of service outside the classroom performing required duties (e.g., office hours, department meetings).

[Treas. Reg. § 54.4980H]

Note that the factor of 2.25 in this formula is intended to provide credit to the adjunct faculty member for work performed outside the classroom such as preparing for a lecture or grading papers.

Let's look at an example that demonstrates how this method works.

The Main University maintains a 403(b) Plan that excludes employees that normally work fewer than 20 hours per week. Professor Peterson, an adjunct faculty member, works eight hours per week of scheduled classroom time and maintains office hours for five hours each week. Her credited hours of service under the above method are determined as follows:

8 hours of classroom time  $\times$  2.25 = 18 credited hours of service per week

5 hours of office time  $\times$  1 = 5 credited hours of service per week

Total = 23 credited hours of service per week

Since the credited work hours exceed 20 per week, Professor Peterson is eligible for the Main University 403(b) Plan.

The IRS does not require this method be used for determining adjunct faculty hours; rather, it provides that this is one "reasonable" method that, if utilized, will not be open to IRS challenge.

In a Webinar entitled *Understanding the Universal Availability Rules in a 403(b) Retirement Plan*, presented in May of this year by the IRS Tax Exempt and Government Entities division (the division that includes Employer Plans), the IRS confirmed that this methodology is acceptable for use by 403(b) plans as well as PPACA compliance. We are also aware that some 403(b) sponsors have used this method for universal availability compliance with respect to adjunct faculty and had it accepted by IRS auditors. The same methodology may be applied in determining how many hours of service the employee has worked for purposes of crediting a year of service for vesting purposes (often defined as 1,000 hours of service during a plan year).

## Prototype/Volume Submitter 403(b) Plan Document Cannot Include This Methodology

In an effort to coordinate the 403(b) plan world with this IRS rule under PPACA, we conferred with individuals associated with the pre-approved plan program with IRS. We asked whether this methodology could be memorialized in the new pre-approved 403(b) plan documents, with (at the very least) a cross reference to the final PPACA regulations. The IRS acknowledged this special situation and evaluated whether specific language needs to be in the plan document. Ultimately, however, even though IRS auditors have accepted this methodology for 403(b) plans (and apparently will continue to do so), the Service will not permit such language to be part of a pre-approved plan document.

## Miscellaneous Impact

Counting of hours for vesting and eligibility for these types of special employees can impact not only the tax-exempt employer 403(b) plan, but also a 401(k) or other 401(a)-type plan. And, while this column is primarily focused on adjunct professors, there are other types of special employees impacted by the

determination of hours worked. In the medical field, for example, this would include employees referred to as “PRNs” (Pro re nata), which are registered nurses who work for an agency to fill hospital staffing needs on an “on-call” or “as needed” basis. The preamble to the PPACA regulations requires that such employees get some credit for being “on-call” in addition to their actual working hours.

### **What Do Employers Do Now?**

It is clear from the IRS Webinar on universal availability and from the group auditing 403(b) plans that a “reasonable” determination of hours of service for

adjunct professors is acceptable under an audit. The far-sighted approach may be to proceed with caution since the pre-approved plan program does not permit language describing the PPACA methodology described in this column. Current IRS auditors have indicated that they will review the plan’s administrative procedures in this area since it is not addressed in the plan document. Will this be challenged in the future? We hope not! But for now, 403(b) sponsors should be sure the plan’s procedures contain the method of determining hours of service for adjunct professors and that such method, based on facts and circumstances, is “reasonable.” ■