

The Budget Act Relaxes Hardship Withdrawal Rules, But Some Changes May Not Apply to 403(b) Plans

Employee Benefits & Executive Compensation Blog on **May 8, 2018**

On Feb. 9, 2018, Congress passed, and the president signed, the Bipartisan Budget Act of 2018 (the “Budget Act”). As we previously discussed [here](#), the Budget Act contains a number of provisions that affect qualified retirement plans. These changes include expanding the type of funds that can be distributed under Code Section 401(k) in the event of a hardship withdrawal, beginning with plan years commencing after December 31, 2018, to include not only a participant’s elective deferral contributions, but also qualified nonelective contributions, qualified matching contributions, and earnings on each of those three contribution sources. While this change applies to 401(k) plans, there is uncertainty whether it will apply to 403(b) plans.

The regulations under Code Section 403(b) provide that a hardship withdrawal under Code Section 403(b) has the same meaning, and is subject to the same rules and restrictions, as a hardship distribution under the regulations governing 401(k) plans. This would indicate that if the rules and restrictions applicable to hardship withdrawals for 401(k) plans change, the rules and restrictions applicable to hardship withdrawals for 403(b) plans would change as well. However, the regulations under Code Section 403(b) also state, “In addition, a hardship distribution is limited to the aggregate dollar amount of the participant’s section 403(b) elective deferrals under the contract (and may not include any income thereon)...” (Treas. Reg. Section 1.403(b)-6(d)(2)). Furthermore, Code Section 403(b)(11) provides that an annuity contract under a 403(b) plan cannot provide for distributions of any income attributable to a participant’s elective deferral contributions.

Reading these provisions together, it appears that while the intent may have been to allow 403(b) plans to take advantage of these relaxed rules regarding the types of funds that can be distributed in the event of a hardship withdrawal, Code Section 403(b) and the regulations governing Section 403(b) appears to limit the ability of a 403(b) plan to do so. Sponsors of 403(b) plans should watch for guidance on this issue.

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