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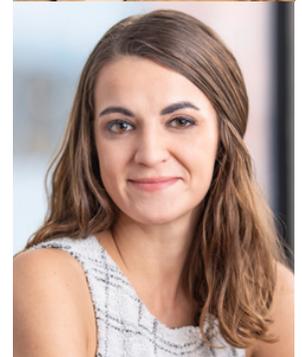
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## Internal Revenue Service Provides Transition Relief to Code Section 403(b) Plans for Violations of the Once-In-Always-In Rule

T. KATURI KAYE  
AND BRIANA B. DESCH

APRIL, 2019

The Internal Revenue Service (IRS) recently issued guidance providing transition relief to employers who have not correctly applied the "once-in-always-in" rule (the "OIAI rule") and, as a result, have wrongfully excluded part-time employees from participating in their Internal Revenue Code (Code) Section 403(b) plans. Under the OIAI rule, once an employee is eligible to make elective deferrals to a 403(b) plan, the employer may not exclude the employee from making elective deferrals to the plan in a later year on the basis that the employee works part-time. In response to information indicating that many employers have failed to properly administer the OIAI rule, the IRS issued Notice 2018-95 (the "Notice") to provide transition relief with respect to certain violations of that rule. This article addresses the scope of the transition relief and discusses what a 403(b) plan sponsor must do to take advantage of it. (Although the Notice also addresses a "fresh



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start opportunity” after the transition relief period ends, a discussion of that provision is beyond the scope of this article.)

## Background: The Universal Availability Rule

Code Section 403(b)(12)(A)(ii) provides a “universal availability” nondiscrimination requirement applicable to all 403(b) plans. Under this requirement, or the “universal availability rule,” if any employee is permitted to make elective deferrals to an employer’s 403(b) plan, then all employees of that employer must be permitted to make elective deferrals to the plan. However, the final Treasury Regulations under Code Section 403(b), which were issued in 2007, contain limited exceptions to the universal availability rule. One such exception permits an employer to exclude from participation any part-time employee who normally works fewer than 20 hours per week (the “part-time employee exclusion”).

Under the part-time employee exclusion, a part-time employee is treated as normally working fewer than 20 hours per week if two conditions are met. First, the employer must reasonably expect the employee to work fewer than 1,000 hours of service in the employee’s first year of employment — the “first year exclusion condition.” And second, for each plan year ending after the employee’s first year of employment, the employee must have actually worked fewer than 1,000 hours of service in the preceding 12-month period — the “preceding year exclusion condition.”

## OIAI Rule Violations and Transitional Relief

In the Notice, the IRS addressed the fact that several sponsors of 403(b) plans requested relief from violations of the OIAI rule, on the basis that they were not aware that the part-time employee exclusion was subject to the OIAI rule. Specifically, employers reported that they had applied the first year exclusion condition during a part-time employee’s first 12 months of employment and then applied the preceding year exclusion condition separately to each succeeding year, while never applying the OIAI

rule to prevent a part-time employee who did not satisfy both the first year and preceding year exclusion conditions from being excluded in all subsequent years. As a result, many employers conceded to having allowed a part-time employee to participate in an earlier year, and then excluding the same individual in a later year under the part-time employee exclusion. These employers expressed that they were not aware that this was a violation of the OIAI rule. The IRS responded to this situation by issuing transition relief for violations of the OIAI rule with respect to both operation and form.

### 1. Transition relief for plan operations

The Notice provides that during the transition “relief period,” a 403(b) plan will not be treated as failing to satisfy the conditions of the part-time employee exclusion merely because the plan was not operated in compliance with the OIAI rule. For these purposes, the relief period starts with tax years beginning after December 31, 2008 (i.e., the effective date of the 403(b) final regulations), and:

- *for plans with exclusion years based on plan years, ends for all employees on the last day of the last exclusion year that ends before December 31, 2019, or*
- *for plans with exclusion years based on an employee’s anniversary year, ends with respect to any employee on the last day of the employee’s last exclusion year that ends before December 31, 2019. (For example, if Employee A began employment on April 1, 2015, and Employee B began on July 20, 2015, the relief period for Employee A would end on March 31, 2019 and for Employee B would end on July 19, 2019.)*

The IRS makes clear that the transition relief does not provide relief from other conditions of the part-time employee exclusion (e.g., a failure to properly apply the first-year or the preceding-year exclusion conditions, etc.). Accordingly, a plan sponsor relying on the transition relief will not be treated as having violated the part-time employee exclusion exception to the universal availability rule, as a result of any operational violations of the OIAI rule that may have occurred during the relief period.

## 2. Transition relief for plan language

The Notice also provides transition relief for plan language failures that vary depending on whether an employer has adopted an IRS pre-approved 403(b) plan document or an individually designed plan document.

**Pre-Approved Plans.** All IRS pre-approved 403(b) plan documents contain language that applies the OIAI rule retroactive to 2009, in accordance with the 403(b) final regulations. As a result, if an employer who adopted an IRS pre-approved plan document failed to follow the OIAI rule in operation, its 403(b) plan also incurred an operational failure (since its operation did not match the terms of the plan document with respect to application of the OIAI rule). However, the Notice provides that an employer who adopts an IRS pre-approved plan document will not be treated as having failed to apply the part-time employee exclusion condition correctly, solely on the basis that the pre-approved plan document's language did not match the plan's operation with respect to the OIAI rule during the relief period. Therefore, the plan will not be treated as having incurred an operational failure in this regard. Accordingly, under the Notice a plan sponsor relying on the operational relief described above is not required to amend its IRS pre-approved plan document to reflect that the plan failed to apply the OIAI rule correctly.

**Individually Designed Plans.** Under the Notice, an employer who adopted an individually designed 403(b) plan has until March 31, 2020, to amend the plan document to correct any form defects with respect to the OIAI rule. This means that if, during the transition period, the plan sponsor did not properly apply the OIAI rule, the plan must be amended to reflect the plan's actual operation in this regard. The amendment will be treated as a correction of the form defect.

Once the remedial amendment period ends, the Notice provides that both individually designed and IRS pre-approved plan documents that provide for the part-time employee exclusion must include the OIAI rule. The Notice also references several IRS "listing of required modifications" (LRMs) — specifically LRM 17 of the 2013 LRMs and LRM 17 of the 2015 LRMs — as sample language for plan sponsors to use.

## Take-Aways

In light of the transition relief available under the Notice, we recommend that plan sponsors evaluate their 403(b) plan operations to determine whether the OIAI rule has been properly applied to all part-time employees. And, if an operational violation of that rule has occurred in a manner eligible for the transition relief, correction should be made and documented in accordance with the terms of the Notice. If the 403(b) plan document is based on an individually designed document, correction may include timely amending the plan to reflect the form relief available under the Notice (we recommend finalizing any such amendment in 2019).

The universal availability rule is a nondiscrimination requirement for all 403(b) plans. Therefore, if a 403(b) plan sponsor is relying on the part-time employee exclusion, it is imperative that it have in place practices and procedures to ensure that the OIAI rule is being properly followed in both form and operation.

Please contact the Trucker Huss attorney with whom you normally work if you need assistance in determining whether you have operated your 403(b) plan in compliance with the OIAI rule, and/or you have any questions about the relief provided under the Notice.

# U.S. Senate Committee Eyes Lack of Guidance on ERISA Cybersecurity

ROBERT R. GOWER and FREEMAN L. LEVINRAD

APRIL, 2019

It seems that every day, a new high-profile data breach is in the news. With increased reliance on the internet to transmit personal information, the potential for breaches has grown significantly. Defined contribution plans, which now hold over \$5 trillion in assets, are by no means immune from cyber-attacks. As the retirement industry works to utilize technology to enhance plan features, increase access to information, and provide for better participant control over savings and investment strategies, any vulnerabilities in electronic transmittal of information make attractive targets for cyber criminals. Social Security Numbers, birthdates, compensation, and direct deposit information are all subject to exposure. When a breach does occur, in addition to the risk of account theft, there may be significant costs associated with restoring security and the interruption to plan administration. With the retirement savings of participants at stake, plan sponsors should be considering steps they can take to protect their benefit plans.

There is no definitive answer to the question of whether the sponsor of a benefit plan is subject to the fiduciary standards of ERISA with respect to implementing cybersecurity measures to protect participants' financial data (in other words, whether a plan sponsor must act with the "care, skill, prudence and diligence under the circumstances then prevailing that a prudent [person] acting in like capacity and familiar with such matters would use" in such matters). Nevertheless, it seems that the prudent plan sponsor should act under the assumption that a court would apply the ERISA fiduciary standards in this context, especially given that participant financial data has actual market value: It can be bought and sold on the black market — and, moreover, if breached can be used by criminals to impersonate plan participants or beneficiaries and actually steal their plan assets. However, the actual steps and measures that a benefit plan sponsor should follow for cybersecurity are not always clear.

Acknowledging a complete lack of guidance, on February 12, 2019, the Senior Pensions Counsel for the Senate

Committee on Health, Education, Labor, and Pensions sent a [letter](#) to the U.S. Government Accountability Office (GAO) requesting guidance from the GAO on issues related to cybersecurity and the private retirement system. This letter explains that although retirement plan fiduciaries are responsible for designing and administering plans in the best interests of plan participants, current law applicable to retirement plans doesn't address a number of questions related to cybersecurity. The letter requests that GAO address a list of ten important questions about cybersecurity and retirement plans. Most importantly, the letter asks to what extent existing federal laws and regulations require plan sponsors, recordkeepers, and other retirement plan service providers to protect plan data and plan participants from cybersecurity risks.

The letter to the GAO demonstrates that there are numerous unanswered questions regarding cybersecurity and the responsibilities of a benefit plan fiduciary with respect to protecting the data and assets of its participants from cyberattacks. In June 2017, we [wrote](#) about cybersecurity



and certain best practices that retirement plan fiduciaries could follow given the current lack of guidance in this area. Since then, the importance of a strong cybersecurity strategy has only been reinforced as a result of high-profile breaches coming to light. Accordingly, it is worth revisiting and expanding on some best practices benefit plan fiduciaries should consider in order to protect their participants' financial data and plan benefits. Best practices include:

- Reviewing service providers' cybersecurity safeguards using audit reports under the standards established by the Spark Institute (these standards are described in detail in a whitepaper titled [Benefit Plan Cybersecurity Considerations: A Recordkeeper and Plan Perspective](#) );
- Ensuring that benefit plans are covered by cybersecurity insurance (note that many corporate general cybersecurity policies exclude benefit plans);
- Obtaining (and retaining) copies of service providers' information security policies and procedures, and understanding the contents of these documents. In so doing, plan sponsors should consider whether service providers should be subject to the plan sponsor's standard corporate information security policy, or, in turn, review service providers' information security policies for sufficiency. When negotiating service provider agreements, plan sponsors should consider including language as to a service provider's duties and liabilities — and the duties and liabilities of any subcontractors or agents of the service provider — with respect to implementing and following cybersecurity safeguards and notifying the plan sponsor of data breaches (similar to the business associate agreements that are required under HIPAA for health plans).
- Reviewing data transmittal policies and practices. Consider implementing policies that avoid sharing unnecessary participant data (for example, always using an employee identification number as opposed to a social security number in electronic transmittals), and ensure that all internal and/or third-party plan portals are secured.
- Developing procedures to respond to a breach should one occur, including communication strategies with participants, and practical steps that can be taken with service providers to mitigate the impacts of the breach and establish post-breach monitoring. Having such procedures will help establish fiduciary prudence in responding to a breach.

If you have any questions, please contact the authors of this article or the attorney with whom you normally work.

## FIRM NEWS

On March 6, **Marc Fosse** presented at a live webinar entitled *Section 457(f): Compensation Guide for Nonprofits*. Topics included a critical analysis of regulations, implications of tax reform, and guidance in structuring executive compensation plans for exempt organizations.

On March 14, **Joe Faucher** was co-moderator at the ABA Joint Committee on Employee Benefits Government Invitational in Baltimore. The session focused on Multi-Employer Plans and Association Retirement Plans and covered potential compliance challenges, proposed ARP guidance, and the future role and impact of MEPS.

On March 20, **Robert Gower** and **Katuri Kaye** conducted an online webinar entitled *Missing 401(k) Plan Participants: Gone But Not Forgotten*.

On March 27, **Marc Fosse** co-presented a live webinar sponsored by Clear Law Institute entitled *Tax-Exempt Organizations: Executive Compensation & Benefits One Year After Tax Reform*. The webinar will provide employee benefits and ERISA counsel with a thorough guide to executive compensation and benefit issues for tax-exempt organizations.

12 – 1:30 pm (PDT)

<https://clearlawinstitute.com/shop/webinars/tax-exempt-organizations-executive-compensation-benefits-one-year-after-tax-reform/>

On April 3, **Joe Faucher** spoke on *Hot Topics in ERISA Litigation* at the Employee Benefits Spring Update in Washington, D.C., sponsored by the American Bar Association Joint Committee on Employee Benefits.

[https://www.americanbar.org/content/dam/aba/events/employee\\_benefits/EBSpringUpdate/2019EBSU/EB040319EBSUBrochure\\_Feb21.pdf](https://www.americanbar.org/content/dam/aba/events/employee_benefits/EBSpringUpdate/2019EBSU/EB040319EBSUBrochure_Feb21.pdf)

On April 9, **Robert Gower** will participate on a panel at the 2019 NAPA 401(k) Summit in Las Vegas on *ERISA Plan Cybersecurity Concerns*.

8:45 am (PDT)

<https://napasummit.org/agenda2019/#1550170248566-e01e2504-963d>

On April 28, **Brad Huss** will be presenting *ERISA Litigation: What You Need to Know* at the 2019 NIPA Annual Forum & Expo (2019NAFE) in San Diego. Stop by the Trucker Huss exhibition booth and say hello.

April 28 - May 1, 2019

Loews Coronado Bay Resort

San Diego, California

<https://www.nipa.org/page/AnnualForumExpo>

Trucker Huss is pleased to announce...

- **T. Katuri Kaye** will serve on the Board of Directors for the East Bay Children's Law Offices, Inc. (EBCLO.org), an Oakland-based nonprofit child advocacy organization, providing legal representation to children and youth who are the subject of abuse and neglect proceedings, delinquency proceedings and probate guardianship proceedings in Alameda County Courts.
- **Katuri** was selected as one of the *Los Angeles Business Journal's* Most Influential Women Attorneys. 421 nominations were reviewed and 75 women were selected. The honorees were considered for exceptional legal skill and achievement across the full spectrum of responsibility, exemplary leadership as evidenced by the highest professional and ethical standards, and for contributions to the Los Angeles community at large.
- **Freeman L. Levinrad** was voted President of the San Francisco Bay Area Chapter of the National Institute of Pension Administrators, effective July, 2019.

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The Trucker ♦ Huss Benefits Report is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ♦ Huss web site ([www.truckerhuss.com](http://www.truckerhuss.com)).

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In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this *Benefits Report*.

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