

403(b) Documents—Who Can Sign on the Dotted Line?

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The new 403(b) regulations (Treasury Decision 9340 http://www.irs.gov/irb/2007-36_IRB/ar13.html) require employers sponsoring 403(b) arrangements to adopt a written plan document by January 1, 2009, in most cases. The plan document must specify how the employer will operate the 403(b) plan. 403(b) plan documents will contain many of the same elements that are found in 401(k)-type plan documents, such as conditions for eligibility, types of contributions, applicable limitations, investment options available under the plan, and the timing and form of distributions. The plan may also contain certain optional features (e.g., hardship withdrawals, loans, transfers, etc.).

To answer the need for a written plan document, the IRS has made available model plan language in Revenue Procedure 2007-71 (<http://www.irs.gov/pub/irs-drop/rp-07-71.pdf>). Alternatively, 403(b) plan sponsors may use documents prepared by industry vendors. Once an employer selects a document solution, it must ensure the 403(b) plan document is properly adopted. Specifically, the 403(b) plan sponsor must ascertain who is legally authorized to execute the plan document. The answer to this question may be more troublesome than it appears because of the nature of 403(b)-eligible employers (i.e., educational, governmental, church, and tax-exempt entities).

As a general rule, the governing body of an entity has the authority to execute contracts and bind the employer to various obligations. This general rule applies to 403(b)-eligible employers as well. The question then becomes who or what is the governing body? Take public schools, for example, in some instances the governing body is the school board, which means a representative of the school board would have the legal authority to execute the 403(b) plan documents. However, the Retirement Learning Center has found that, in some states, schools are governed by local city governments and various city officials, such as a treasurer. In these situations, state law would require the representative of the appropriate governing entity (e.g., the city treasurer) to execute contracts such as 403(b) plan documents.

Typically, a governing body, if permitted by state law, may appoint a delegate to execute contracts on its behalf. For example, if the school board is considered the governing entity, it may pass a resolution authorizing an individual, such as a superintendent or business manager, to sign plan documents.

The bottom line is in order to have properly executed plan documents for 403(b) plan sponsors, it is essential to identify the appropriate representative of the governing entity with the authority to sign contracts. We recommend a 403(b) plan sponsor review its by-laws and/or applicable state statutes to clearly identify its governing body and the representative with signature authority. If an individual is not clearly identified, the organization, if permitted, may pass a resolution appointing a delegate to handle legal tasks (such as execute 403(b) plan documents) on the entity's behalf. The resolution should carefully note the scope of the delegate's authority.