

Additional Guidance with Respect to Long-Term, Part-Time Employees, Including Guidance Regarding Application of Section 403(b)(12) to Long-Term, Part-Time Employees under Section 403(b) Plans

Notice 2024-73

I. PURPOSE

This notice provides guidance on discrete issues related to the application of the nondiscrimination rules of section 403(b)(12) of the Internal Revenue Code (Code) with respect to long-term, part-time employees under a plan that satisfies the requirements of section 403(b) (section 403(b) plan). Section 125(a)(2) of Division T of the Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4459 (2022), known as the SECURE 2.0 Act of 2022 (SECURE 2.0 Act), amended section 403(b)(12) of the Code. In addition, section 125(a)(1) of the SECURE 2.0 Act added section 202(c) of the Employee Retirement Income Security Act of 1974, P.L. 93-406, 88 Stat. 829, as amended (ERISA), to provide rules for including long-term, part-time employees in plans subject to ERISA (ERISA LTPT employees), and section 125(b) of the SECURE 2.0 Act added section 203(b)(4) of ERISA to provide a special vesting rule for ERISA LTPT employees. Section 125(a) and (b) of the SECURE 2.0 Act apply to plan years beginning after December 31, 2024.

This notice also (1) provides that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) anticipate issuing proposed regulations with respect to section 403(b)(12)(D) of the Code and guidance with respect

to sections 202(c) and 203(b)(4) of ERISA,¹ (2) announces that the final regulation that the Treasury Department and the IRS intend to issue related to long-term, part-time employees under section 401(k) plans (section 401(k) LTPT employees)² will apply no earlier than to plan years that begin on or after January 1, 2026, and (3) asks for comments on the content of this notice.

II. BACKGROUND

Section 403(b) of the Code sets forth requirements applicable to contributions to a section 403(b) plan made for employees who are performing services for a public school of a State or a local government, for employees of employers that are tax-exempt organizations under section 501(c)(3), and for ministers described in section 414(e)(5)(A).

Section 403(b)(12)(A)(i) provides that, with respect to contributions not made pursuant to a salary reduction agreement, a section 403(b) plan must satisfy the requirements under section 401(a)(4), (5), (17) and (26), the nondiscrimination requirements for matching and employee after-tax contributions under section 401(m), and the coverage requirements under section 410(b), in the same manner as if the section 403(b) plan were described in section 401(a).

Section 403(b)(12)(A)(ii) provides that, with respect to contributions made pursuant to a salary reduction agreement (elective deferrals), a section 403(b) plan must satisfy the “universal availability” requirement. Under the universal availability requirement, all employees of an employer maintaining a section 403(b) plan generally

¹ The Secretary of the Treasury has interpretive authority over sections 202 and 203 of ERISA pursuant to Reorganization Plan No. 4 of 1978, 5 U.S.C. App.

² The Treasury Department and the IRS issued a proposed regulation related to rules for section 401(k) LTPT employees on November 27, 2023 (88 FR 82796).

must be permitted to make elective deferrals if any employee of the employer is permitted to make elective deferrals. However, the flush language of section 403(b)(12)(A) provides that certain categories of employees may be excluded from making elective deferrals despite the universal availability requirement, including students performing services described in section 3121(b)(10) (student employees) and employees who normally work less than 20 hours per week (part-time employees).³

Section 403(b)(12)(A) provides that the student employee exclusion and the part-time employee exclusion are “[s]ubject to the conditions applicable under section 410(b)(4).” In turn, section 410(b)(4) provides that “if a plan (i) prescribes minimum age and service requirements as a condition of participation, and (ii) excludes *all* employees not meeting such requirements from participation, then such employees shall be excluded from consideration for purposes of this subsection.” (Emphasis added.) This section 410(b)(4) consistency requirement means that, if a plan imposes minimum age and service eligibility conditions, those conditions must be consistently applied and that failure to do so nullifies the ability to apply those eligibility conditions with respect to any employee.

Section 1.403(b)-5(b)(4)(i) interprets the phrase “[s]ubject to the conditions applicable under section 410(b)(4)” in section 403(b)(12)(A) as imposing a section 403(b) consistency requirement that is similar to the section 410(b)(4) consistency requirement for purposes of applying the student employee and part-time employee exclusions. For example, under this section 403(b) consistency requirement, if any employee who is described in the part-time exclusion may make elective

³ Section 1.403(b)-5(b)(4)(ii)(E) allows a plan to set a lower number of hours per week than 20 hours per week for purposes of defining a part-time employee under the part-time employee exclusion.

deferrals, then no employee who is described in the part-time employee exclusion may be excluded from making elective deferrals under the part-time exclusion.

Section 125(a)(1) of the SECURE 2.0 Act added section 202(c) of ERISA, which provides rules for ERISA LTPT employees. Section 202(c)(1) of ERISA provides, in part, that a salary reduction agreement (as described in section 403(b) of the Code) may not require, as a condition of participation in the agreement, that an employee complete a period of service with the employer maintaining the plan that extends beyond the close of the earlier of (A) the period permitted under section 202(a)(1) of ERISA (the completion of one year of service or the attainment of age 21) or (B) the first 24-month period consisting of two consecutive 12-month periods during each of which the employee has worked at least 500 hours of service, and by the close of which the employee has satisfied the minimum age requirement under section 202(a)(1)(A)(i) of ERISA (attainment of age 21). Section 401(k)(2)(D) of the Code provides similar rules for section 401(k) LTPT employees, which are the subject of a proposed regulation issued on November 27, 2023 (see footnote 2).

Section 125(a)(2) of the SECURE 2.0 Act made a conforming amendment to section 403(b)(12)(A) of the Code and added section 403(b)(12)(D). Section 403(b)(12)(D)(i) provides, in relevant part, that in the case of employees who are eligible to participate in a section 403(b) plan solely by reason of the eligibility rules for ERISA LTPT employees under section 202(c)(1)(B) of ERISA: (1) notwithstanding section 401(a)(4) of the Code, an employer is not required to make nonelective or matching contributions on behalf of ERISA LTPT employees even if nonelective or matching contributions are made on behalf of other employees eligible to participate in

the plan; and (2) the employer may elect to exclude ERISA LTPT employees from the application of sections 401(a)(4), 401(m)(2), and 410(b). Section 401(k)(15)(B)(i) provides similar rules with respect to section 401(k) LTPT employees.

Section 125(b) of the SECURE 2.0 Act added section 203(b)(4) of ERISA, which provides a special vesting rule for ERISA LTPT employees.⁴ Section 203(b)(4) of ERISA provides that in determining whether an ERISA LTPT employee has a nonforfeitable right to employer contributions, each 12-month period for which the employee has at least 500 hours of service is treated as a year of service. For purposes of section 203(b)(4) of ERISA, 12-month periods must be determined in the same manner as under the last sentence of section 202(a)(3)(A) of ERISA, except that 12-month periods beginning before January 1, 2023, are not taken into account. Section 203(b)(4) of ERISA uses different language from the special vesting rules of section 401(k)(15)(B)(iii) and (iv) of the Code with respect to section 401(k) LTPT employees.⁵

⁴ For a section 403(b) plan, section 403(b)(1)(C) of the Code requires that an employee's rights under a section 403(b) annuity contract be nonforfeitable. However, § 1.403(b)-3(d)(2) provides rules that treat unvested amounts as if they are under a separate annuity contract from the vested amounts and provides that the separate annuity contract for unvested amounts is subject to section 403(c).

⁵ For example, section 401(k)(15)(B)(iii) provides a special vesting rule that applies to employees described in section 401(k)(15)(B)(i) ("employees who *are* eligible to participate in the arrangement solely by reason of" the eligibility rules for section 401(k) LTPT employees under section 401(k)(2)(D)(ii)), and section 401(k)(15)(B)(iv) provides a separate rule for former section 401(k) LTPT employees that references the special vesting rule. (Emphasis added.) In contrast, section 203(b)(4) of ERISA applies to an "employee who *became* eligible to participate ... solely by reason of" the eligibility rules for ERISA LTPT employees under section 202(c)(1)(B) of ERISA, and section 203(b)(4) of ERISA does not include a separate rule for former ERISA LTPT employees. (Emphasis added.) As described in section VI of this notice, the Treasury Department and the IRS anticipate issuing guidance with respect to the vesting rules of section 203(b)(4) of ERISA.

III. GUIDANCE ON THE APPLICATION OF SECTION 403(b)(12) TO ERISA LTPT EMPLOYEES

Q-1: Do the eligibility rules for ERISA LTPT employees under section 202(c) of ERISA apply to a section 403(b) plan that is not subject to title I of ERISA?

A-1: No. Although section 125(a)(2)(B)(i) of the SECURE 2.0 Act provides a conforming amendment to section 403(b)(12)(A) of the Code that references section 202(c) of ERISA, the conforming amendment to the Code does not cause the eligibility rules for ERISA LTPT employees under section 202(c) of ERISA to apply to a section 403(b) plan that is not subject to title I of ERISA. Thus, for example, a governmental plan under section 3(32) of ERISA (which is not subject to title I of ERISA pursuant to section 4(b) of ERISA) is not subject to the eligibility rules for ERISA LTPT employees under section 202(c) of ERISA.

Q-2: Is a section 403(b) plan that is subject to ERISA required to provide the right to make elective deferrals to a part-time employee who qualifies as an ERISA LTPT employee?

A-2: Yes. The part-time employee exclusion is a statutory exclusion based on service and applies to employees who normally work less than 20 hours per week. A part-time employee who also qualifies as an ERISA LTPT employee (by meeting the standards under section 202(c) of ERISA) is covered by the eligibility rules for ERISA LTPT employees under section 202(c) of ERISA. Accordingly, unless another statutory exclusion applies, a section 403(b) plan that is subject to ERISA must provide the right to make elective deferrals to a part-time employee who qualifies as an ERISA LTPT employee. In contrast, a part-time employee who does not qualify as an ERISA LTPT employee (for example, because the employee has not worked 2 consecutive years of

500 hours) is not covered by the eligibility rules for ERISA LTPT employees under section 202(c) of ERISA.

Q-3: May a section 403(b) plan that is subject to ERISA continue to retain a part-time employee exclusion for part-time employees who do not qualify as ERISA LTPT employees?

A-3: Yes. A section 403(b) plan that is subject to ERISA may continue to retain a part-time employee exclusion for part-time employees who do not qualify as ERISA LTPT employees. Excluding part-time employees who do not qualify as ERISA LTPT employees will not cause the plan to violate the section 403(b) consistency requirement under § 1.403(b)-5(b)(4)(i), which prevents a plan from selectively applying the part-time employee exclusion to some, but not all, part-time employees. Because the eligibility rules for ERISA LTPT employees under section 202(c) of ERISA are new statutory requirements, plans would not be selectively applying the part-time employee exclusion by continuing to exclude from making elective deferrals part-time employees who do not qualify as ERISA LTPT employees.⁶ The Treasury Department and the IRS anticipate updating the section 403(b) consistency requirement under § 1.403(b)-5(b)(4)(i) in a manner consistent with this Q&A A-3.

Q-4: Is a section 403(b) plan that is subject to ERISA required to provide the right to make elective deferrals to a student employee who qualifies as an ERISA LTPT employee?

⁶ To retain a part-time employee exclusion and meet the section 403(b) consistency requirement, a plan must continue to exclude from making elective deferrals all part-time employees who do not qualify as ERISA LTPT employees.

A-4: No. The student employee exclusion in section 403(b)(12)(A) of the Code is a statutory exclusion based on a classification (students performing services described in section 3121(b)(10)), rather than on service.⁷ Therefore, a section 403(b) plan that is subject to ERISA may continue to exclude a student employee from making elective deferrals under the plan regardless of whether the individual qualifies as an ERISA LTPT employee.⁸

Q-5: May an employer with a section 403(b) plan that is subject to ERISA exclude ERISA LTPT employees for purposes of determining whether matching contributions satisfy the nondiscrimination requirements applicable to a section 403(b) plan under section 401(m)(2)?

A-5: Yes. Section 403(b)(12)(D)(i)(II) provides that an employer with a section 403(b) plan that is subject to ERISA may exclude ERISA LTPT employees from certain nondiscrimination requirements, including section 401(m)(2). Thus, an employer with a section 403(b) plan that is subject to ERISA may exclude ERISA LTPT employees for purposes of applying the actual contribution percentage (ACP) test under section 401(m)(2). Similarly, because ACP safe harbors under section 401(m)(11) and (12) are alternative ways of being treated as satisfying the ACP test under section 401(m)(2), this exclusion of ERISA LTPT employees from section 401(m)(2) also is treated as applying under section 401(m)(11) and (12). Accordingly, plans that

⁷ Although § 31.3121(b)(10)-2(d) provides that hours worked is a factor in determining whether an employee is a student, as well as providing an unsafe harbor if an employee normally works at least 40 hours per week (which is equivalent to 2,000 hours a year), the statutory student exclusion is not based principally on service.

⁸ Similarly, the nonresident alien exclusion and the exclusion for employees otherwise eligible under another section 403(b) plan, an eligible governmental section 457(b) plan, or a section 401(k) plan sponsored by the same employer are section 403(b)(12)(A) statutory exclusions based on classifications, rather than on service.

use the ACP safe harbor under section 401(m)(11) or (12) are not required to provide safe harbor contributions to ERISA LTPT employees.

Q-6: Can an employer use section 403(b)(12)(D) to continue to exclude an ERISA LTPT employee who later becomes eligible to participate in the plan for reasons other than the eligibility rules for ERISA LTPT employees under section 202(c)(1)(B) of ERISA (a former ERISA LTPT employee) from receiving nonelective or matching contributions or from the application of the nondiscrimination requirements in sections 401(a)(4), 401(m)(2), and 410(b) of the Code?

A-6: No. Section 403(b)(12)(D) applies to “employees who *are* eligible to participate in the [salary reduction] agreement *solely by reason of*” the eligibility rules for ERISA LTPT employees under section 202(c)(1)(B) of ERISA. (Emphasis added.) Thus, if an ERISA LTPT employee becomes a former ERISA LTPT employee for a year (for example, because the employee has worked 1,000 hours in the preceding year and is no longer a part-time employee under § 1.403(b)-5(b)(4)(iii)(B)), then section 403(b)(12)(D) of the Code no longer applies to that former ERISA LTPT employee. Accordingly, an employer cannot use section 403(b)(12)(D) to exclude a former ERISA LTPT employee from receiving nonelective or matching contributions or from the application of the nondiscrimination requirements under sections 401(a)(4), 401(m)(2), and 410(b).⁹

IV. APPLICABILITY DATE

This notice applies for plan years beginning after December 31, 2024.

⁹ If section 403(b)(12)(D) does not apply, then the general nondiscrimination rules for nonelective and matching contributions of section 403(b)(12)(A)(i) apply to a former ERISA LTPT employee.

V. APPLICABILITY DATE OF FINAL REGULATION FOR SECTION 401(k) LTPT EMPLOYEES

The final regulation related to section 401(k) LTPT employees will apply no earlier than to plan years that begin on or after January 1, 2026.

VI. FUTURE GUIDANCE FOR ERISA LTPT EMPLOYEES

The Treasury Department and the IRS anticipate issuing proposed regulations with respect to section 403(b)(12)(D) and guidance with respect to sections 202(c) and 203(b)(4) of ERISA. The Treasury Department and the IRS anticipate that the guidance generally will be similar to final regulations with respect to section 401(k) LTPT employees.

VII. COMMENTS

Comments are requested on the content of this notice, including the application of section 403(b)(12)(D) of the Code and section 125 of the SECURE 2.0 Act to section 403(b) plans. Additionally, comments are requested on any rules with respect to section 401(k) LTPT employees (including former section 401(k) LTPT employees) that should apply differently for ERISA LTPT employees under section 403(b) plans.

Comments should be submitted in writing on or before December 20, 2024 and should include a reference to Notice 2024-73. Comments may be submitted electronically via the Federal eRulemaking Portal at www.regulations.gov (type "Notice 2024-73" in the search field on the Regulations.gov home page to find this notice and submit comments). Alternatively, comments may be submitted by mail to:

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2024-73), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044.

The Treasury Department and the IRS will publish for public availability any comment submitted electronically or on paper to its public docket.

VIII. DRAFTING INFORMATION

The principal author of this notice is Patrick Gutierrez of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes).

For further information regarding this notice, please contact Mr. Gutierrez at (202) 317-4148 (not a toll-free number).