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There's a Lot to Consider When Designing and Operating Deferred Compensation Plans for Executives of Tax Exempt Organizations—Part 1

SCOTT E. GALBREATH

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Tax exempt organizations have unique considerations when it comes to compensating executives. The most obvious is the fact that they are not motivated by getting a tax deduction for compensation paid or contributions made to employee benefits plans as are for-profit employers. Tax exempt organizations generally do not pay income tax. Therefore, a deduction is worthless to them. These organizations are motivated by other factors, such as competing with private employers for available human capital in the workforce. In addition, being tax-exempt, they cannot offer equity in the organization as compensation (such as restricted stock, stock options, or phantom stock) to tie an employee's performance and remuneration to the performance of the employer. As a result, a primary purpose of a deferred compensation plan for these organizations is to provide compensation to the employee in the future and avoid it being taxed currently.

Likewise, many tax exempt organizations (i.e., section 501(c)(3) charitable organizations, section 501(c)(4) social welfare organizations and section 501(c)(6)

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IN THIS ISSUE...

Celebrating Excellence: Mary Powell Named Among Top 50 Women Leaders in Law for 2023

Women We Admire recently revealed their list of the Top 50 Women Leaders in Law for 2023, acknowledging women who have made significant contributions to their organizations and the legal field at large.

We are proud to share that our colleague Mary Powell, a Director at Trucker Huss based in San Francisco, California, is among the Top 50 Women Leaders in Law. With over two decades of experience, Mary specializes in employee benefits, focusing on critical legislation like the Consolidated Appropriations Act, 2021 (CAA), and the Patient Protection and Affordable Care Act (ACA). She is well-versed in executive compensation and nonqualified deferred compensation plans, providing essential guidance to employers.

Mary Powell is particularly adept at navigating benefit plans during mergers and acquisitions, serving a diverse range of clients, including large publicly held companies and complex multi-entity healthcare organizations. Her expertise extends to offering insights through lectures on employee benefit topics.

Recognized for her achievements, Mary has been consistently listed as a Top-Rated Employee Benefits Attorney by Northern California Super Lawyers since 2017. Her academic accomplishments include an LLM in taxation from Georgetown University Law Center, a JD with honors from Golden Gate University, and a BA in rhetoric and philosophy from Willamette University.

Mary Powell's recognition as one of the Top 50 Women Leaders in Law for 2023 underscores her remarkable contributions to employee benefits and her dedication to the legal profession. She serves as an inspiration for aspiring legal professionals, showcasing the significant impact women can have in the field of law.

trade associations) must be concerned with the Internal Revenue Code's (Code) prohibition against private inurement which is a requirement for their exempt status. Additionally, charitable organizations and social welfare organizations may be subject to excise taxes if compensation paid to any one individual is deemed excessive under the excess benefit transactions rules of Code section 4958. Further, under Code section 4960, a 21% excise tax is imposed on any organization that is tax-exempt under Code section 501(a) on the amount of "excess compensation" paid to a "covered employee" in any one year. Excess compensation is compensation above $1,000,000. A covered employee is one of the top 5 highest paid employees.

When looking at providing deferred compensation for executives of tax exempt organizations the starting point is Internal Revenue Code section 457 (Section 457). Section 457 is one of the most interesting and complex sections of tax law due to its breadth, nuances, and history. Addressing the tax consequences of unfunded deferred compensation of employees of both State and local governmental entities and tax exempt organizations, yet treating them differently, adds to its complexity. Likewise, providing for the favorable tax consequences for "eligible" plans that meet the requirements under Code section 457(b), as well as the less favorable consequences for "ineligible" plans that fail to meet such requirements that are taxed under Code section 457(f), demonstrates its breadth. The fact that "ineligible" plans are also subject to Code section 409A only adds to the complexity.

Part 1 of this article will discuss many of the requirements for eligible 457(b) plans sponsored by tax exempt organizations and how they differ from 457(b) plans sponsored by state or local governmental entities. It will also discuss areas where mistakes can easily be made. To read about common mistakes in 457 plans, see my article on *The Benefit of Benefits* blog: "Ten Common Mistakes In 457 Plans of Tax Exempt Organizations" Part 1. Part 2 of this article will take a closer look at ineligible 457(f) plans and how they must comply with Code section 409A. It will also discuss the application of the excess benefit transaction rules and Code section 4960 excise tax to deferred compensation.

To (b) or To (b) — There Is No Question!

Section 457 generally separates deferred compensation of eligible employers into two classifications, eligible plans known as "457(b)" plans (457(b) Plans) and plans that are not eligible plans, known as "457(f)" plans (457(f) Plans). As one would suspect, 457(b) Plans generally have better tax consequences than 457(f) Plans.

In addition, Section 457 generally provides that there are two types of eligible employers: a State, political subdivision of a State, and any agency or instrumentality of a State or political subdivision of a State (State & Local governments, referred to below as S&L); and any other organization, other than a governmental unit, exempt from tax (Exempt Organization, referred to below as EO).

Code section 457(b) sets forth the definition of an "eligible deferred compensation plan." It begins with the precondition that it must be a plan maintained by an "eligible employer" and then sets forth numerous conditions of eligibility, such as a requirement that participants must only be individuals providing services to the employer, limitations on the amount that can be deferred, required minimum distribution requirements, etc. An S&L 457(b) Plan is much closer to a 401(k) plan in that it can cover all employees, its assets must be held for the exclusive benefit of the employees, it can have age 50 catch-up contributions, participant loans, in-service distributions, Roth deferrals, and it can permit rollovers to and from other types of plans. EO 457(b) Plans cannot have any of these provisions.

Take It to the Limit

There is also a dollar limit on the amount that can be credited to an employee for a year under a 457(b) Plan regardless of whether it is from employee salary reduction elective deferrals or from nonelective employer contributions. Currently, that amount is $22,500 for 2023, but the limit is adjusted upward for inflation, similar to the limit on 401(k) deferrals. Some EOs wish to provide executives with deferred compensation above the annual limit allowed under a 457(b) Plan. For example, the contribution limit may not be enough to provide sufficient replacement retirement income for a well-paid executive. In such case, a 457(f) Plan can be used to supplement the 457(b) Plan. Compensation deferred into an EO 457(b) Plan will only be taxed to the executive when paid or otherwise made available. However, Section 457(f) provides that compensation deferred under a plan not meeting the requirements of Section 457(b) will be taxed to the participant on the later of when the legal right to such compensation arises or when such right is no longer subject to a substantial risk of forfeiture (or vested). A plan that permits deferred compensation in excess of the annual limit for a 457(b) Plan would be an ineligible plan subject to Section 457(f).

The fact that an employee can be fully vested in contributions to a 457(b) Plan and not pay income tax until actually receiving the deferred compensation makes the tax consequences of the 457(b) Plan better than that of a 457(f) Plan. Therefore, a 457(b) Plan should always be adopted to provide these better tax consequences up to the annual limit. The executive could participate in the 457(b) Plan up to its limit on deferrals and participate in a 457(f) Plan for amounts above the annual limit. In designing a deferred compensation plan, an EO must decide whether to have just a 457(b) Plan or also a 457(f) Plan. However, it is highly recommended that an EO never establish a 457(f) Plan alone without establishing a 457(b) Plan first to defer the annual limit. That is, an EO could maintain a 457(b) Plan alone but should not only have a 457(f) Plan.

Get Your Top Hat On

A major difference between S&L 457(b) Plans and EO 457(b) Plans is that an S&L 457(b) Plan must be funded with a trust, custodial account, or annuity contract for the exclusive benefit of the employees, similar to a 401(k) plan. On the other hand, Section 457 requires that the title to the assets of an EO 457(b) Plan must remain in the name of the employer and subject to its creditors. If the assets are made available to the participant, by being set aside in an exclusive benefit trust, it will be taxable to the participant.

Additionally, because EO 457(b) Plans are subject to Title I of the Employee Retirement Income Security Act of 1974 (ERISA), such a plan must be a "top hat" plan that is designed primarily for a "select group of management or highly compensated employees."[1] Top hat plans avoid the requirement of Title I that the assets of a retirement plan must be held in an exclusive benefit trust. Thus, the only way for an EO 457(b) Plan to meet both the requirement that plan assets remain owned by the employer and also comply with Title I of ERISA is to be a top hat plan for a select top hat group. It cannot allow all employees of the organization to participate.

Election Time

Unlike a 401(k) plan, elective deferrals under an EO 457(b) Plan are only valid for a given month if the deferral election was made by the participant in writing prior to the beginning of the month. This means one cannot make an annual deferral election for the year in January before the first payroll and have it effective for January. Such an election would not be valid until February. In order to make it valid for January, it would have to be executed in December of the prior year. The SECURE 2.0 Act eliminated this requirement for S&L 457(b) Plans but not those sponsored by EOs. This is an area where mistakes can be made with annual election forms. An "evergreen" annual election that remains in force until changed is permitted, but it won't be effective until the month following the month made. The same is true for any changes to the election.

Vesting

Contributions to a 457(b) Plan only count against the annual contribution limit in the year they are vested. Employee elective deferrals are always fully vested. This can be a trap if the plan provides for employer contributions subject to a vesting schedule (e.g., no vesting until 100% vested after 5 years) because it may cause an excess deferral in the year of vesting. For example, if an employee receives an annual contribution of $10,000 which doesn't vest until year 5 if still employed — and in year 5, $50,000 vests — this amount will likely be over the contribution limit for year 5, and the excess will have to be distributed back to the executive.

The Sky's the Limit

Importantly, contributions to a 457(b) or 457(f) Plan are not subject to the contribution limit under Code section 415 like other plans, currently $66,000 in 2023. Thus, to the extent the employer also maintains a 401(k) or 403(b) plan, which are subject to the 415 limits, 457 plan contributions will not reduce the annual additions available under those plans. Additionally, the total amount of compensation that may be taken into account under a 457 plan in a year is not capped by the Code like it is for a 401(k) plan, currently $330,000 for 2023. However, as mentioned above, both elective deferrals and employer contributions are subject to a single annual contribution limit ($22,500 in 2023) for a 457(b) Plan.

A Rabbi Can Provide Some Security

Though the assets of an EO 457(b) Plan must be titled in the employer and subject to its creditors, the assets can be held in a Rabbi Trust to help secure the benefits of participants by preventing the employer from using such assets for other purposes while it is solvent. It is called a "rabbi" trust simply because the first IRS ruling approving the tax consequences of the technique involved the deferred compensation plan o f a rabbi established by his synagogue. Basically, a Rabbi Trust is an irrevocable grantor trust of the employer whereby the trustee holds the assets of the trust and can only use the assets for two purposes: first, to pay benefits under the plan when they become due; second, should the employer become insolvent, the trustee must stop paying any benefits under the plan and hold the assets to be distributed to the creditors of the employer, if necessary. Thus, provided the employer is solvent, the participant(s) in the plan will get their benefits. The trust prevents the employer from using the plan assets for other purposes, such as to pay other expenses or for expansion projects while solvent. However, since the assets are still subject to the employer's creditors, the contributions to the trust are not taxable to the employee.

But Wait, There's More

Part 1 of this article has introduced the considerations EOs must think about in designing deferred compensation plans for executives and discussed the unique characteristics of 457(b) Plans. Part 2 of this article, which will be issued in October, will discuss 457(f) Plans in more detail, including how they must comply with Code section 409A. It will also discuss how the Code section 4958 excess benefit transaction rules, and Code section 4960 excise tax, apply to deferred compensation.

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1 It is important to note that for Top Hat group purposes the term "highly compensated employees" is not the same as the defined term for qualified plan purposes under Code section 414(q), which provides employees earning compensation over a specific dollar threshold will be considered highly compensated. For Top Hat group purposes, to be highly compensated one must be one of the highest paid employees in the organization when comparing compensation to all other employees. This is another area that can cause operational errors.

Long-Term Part-Time Workers: More Questions than Answers for Defined Contribution Plans?

NICOLAS D. DEGUINES

SEPTEMBER 2023

On December 29, 2022, the SECURE 2.0 Act of 2022 ("SECURE 2.0") was signed into law. SECURE 2.0 builds upon the retirement improvements made by the Setting Every Community Up for Retirement Enhancement Act ("SECURE 1.0"). One of SECURE 2.0's main goals is to expand retirement coverage and increase retirement savings.

[Please see our article titled "SECURE 2.0 Provisions Impacting Employer-Sponsored Retirement Plans" for an overview of SECURE 2.0.]

Part-time workers are becoming increasingly prevalent in today's job market and have, historically, faced challenges in accessing employer-sponsored retirement benefits comparable to those of their full-time counterparts. In 2019, Congress noticed that "[f]or long-term part-time workers who work for a number of years with the same employer but do not reach the 1,000 hours of service requirement to become eligible to participate in their employer's qualified retirement plans ("LTPT employees"), present law can prevent, or limit, such employees' ability to save for retirement in an employer-sponsored plan." (*See* H.R. 1994 House Ways & Means Committee Report). To expand coverage to more employees, SECURE 1.0 added a new maximum service requirement for certain LTPT employees to be eligible to participate in their employer-sponsored 401(k) Plan. Specifically, employees who complete at least 500 hours of service in each of three consecutive 12-month periods must be eligible for a 401(k) Plan. SECURE 2.0 continues the trend that SECURE 1.0 started by accelerating the timeline for LTPT employees to gain access to employer-sponsored retirement plans. In doing so, SECURE 2.0 has placed a significant responsibility on plan sponsors, who must quickly identify which provisions apply to their retirement plans.

This article provides an overview of the LTPT rule and identifies outstanding questions that require additional guidance from the Department of Labor (DOL) and the Internal Revenue Service (IRS).

Background

Historically, under the Employee Retirement Income Security Act of 1974, as amended (ERISA), a retirement plan could not require an employee to attain an age greater than 21 to become a participant in the plan. (*See* Internal Revenue Code (IRC) §410(a)(1)(A)(i)/ERISA §202(a)(1)(A)(i)). Further, a plan could not require more than one year of service to become eligible for the plan unless it provides for immediate vesting, in which case it could require two years of service. (*See* IRC §410(a)(1)(A)(ii)/ERISA §202(a)(1)(A)(ii)).

To expand retirement plan coverage to more employees, Section 112 of SECURE 1.0 amended IRC §410(a) by adding a new maximum service requirement for certain LTPT employees, requiring that if employees complete 500 or more hours of service in each of three 12-month consecutive periods, they must be eligible to participate in the plan.

Section 125 of SECURE 2.0: LTPT

SECURE 2.0 expands SECURE 1.0's requirement even further by reducing, from three years to two, the maximum number of years an employer may require a part-time employee to work before they are eligible to contribute to a retirement plan. Pre-2021 service is also disregarded for purposes of vesting of employer contributions, just as such service is disregarded for eligibility purposes under SECURE 1.0. SECURE 2.0 also extends this LTPT coverage rule to ERISA-governed 403(b) plans.

The effective date for this provision is for plan years beginning ***after*** December 31, 2024; however, the clarification that pre-2021 service may be disregarded for vesting purposes is effective for plan years beginning after December 31, 2020, because it is treated as part of SECURE 1.0.

Under SECURE 1.0, 401(k) plans could choose to implement hours-based participation exclusions until an employee worked at least 500 hours per year with the employer for at least three consecutive years and met the minimum age requirements of the plan by the end of the three-year consecutive period. This reduction from three to two years reflects Congress's belief that SECURE 1.0 did not go far enough to enhance retirement security for LTPT workers. We note that tracking LTPT employees is challenging; therefore, some employers have amended their plans to provide immediate eligibility for their part-time employees.

It should be noted that once an LTPT employee enters the plan, the employee continues to be eligible if his or her hours drop below 500 in future years. This issue is no different than the rules that apply under the 1-year of service requirement. If a participant is eligible to participate in the plan, they remain eligible (unless there is a break in service).

It also should be noted that these rules do not apply to eligibility for employer matching or non-elective contributions. Plan amendments will be necessary to reflect the new eligibility requirements.

Examples

1. When is an employee eligible to enter a calendar year 401(k) plan if the employee has 500 hours in 2021, 500 in 2022, and 450 in 2023?

   Answer: The employee would enter the 401(k) plan on January 1, 2025. Under SECURE 1.0, this employee does not meet the 3-year rule as of the end of 2023; therefore, the employee is not eligible to participate as of January 1, 2024. Under SECURE 2.0, effective for plan years beginning on and after January 1, 2025, the 3-year rule is reduced to two years; therefore, this employee has satisfied the new rules for eligibility (based on performing at least 500 hours of service in 2021 and 2022), and will become eligible for participation as of January 1, 2025.

   Note: For 401(k) plans, service performed prior to 2021 is excluded. For 403(b) plans, service performed before 2023 is excluded. The LTPT rule under SECURE 1.0 does not apply to 403(b) plans. SECURE 2.0 extended the LTPT rule to 403(b) plans. Therefore, if the plan in the above example were a 403(b) Plan, the employee would not be eligible for the plan, as service performed under a 403(b) plan prior to 2023 is excluded for purposes of the LTPT rule.

2. When is an employee eligible to enter a calendar year 401(k) plan if the employee performs 500 hours of service for the employer in 2022 and 2023, and 450 hours of service in 2024?

   Answer: Under SECURE 2.0, the employee is eligible to enter the 401(k) plan on January 1, 2025, since the employee has performed at least 500 hours of service in two consecutive plan years as of the end of 2023. .

3. When is an employee eligible to enter a calendar year 401(k) plan if the employee has 500 hours in 2023, 450 hours in 2023, and 500 hours in 2024?

   Answer: The employee is not eligible for the 401(k) plan, because the employee has not performed at least 500 hours of service in two consecutive plan years.

New 401(k) Audit Rule for Form 5500

A primary concern many plan sponsors had with SECURE 2.0's new LTPT rule was that it would force many small businesses to become "large plans" (a plan with 100 or more participants as of the beginning of the plan year), thus requiring them to file an audit report with their Form 5500, a significant additional cost that could be a deterrent to offering an employer-sponsored plan.

However, on February 23, 2023, the DOL announced significant changes in the methodology for counting employees for determining the audit requirement. This change allows plans to count fewer participants when determining the need for an audit. Under the current method, 401(k) plans count all eligible participants, regardless of whether they have an account balance. Effective for plan years beginning on or after January 1, 2023, plans must take into account only participants with an account balance. This means that if an LTPT employee elects not to make salary deferrals, they can be excluded for purposes of determining whether the plan is a "large plan" and, therefore, is subject to the audit requirement.

The "80–120 Participant Rule" remains, which allows plans with between 80 and 120 participants at the beginning of the plan year to file the Form 5500 in the same category ("large plan" or "small plan") as the prior year filing. The rule allows plans with fewer than 121 participants to be considered a small plan for the year if they were considered a small plan for the prior year.

A Number of Questions Remain

Plan sponsors continue to wait for guidance from the IRS and DOL to clarify certain aspects of the new LTPT rules. The following are the common questions we have encountered in our practice:

1. How will vesting for an employer contribution work if a LTPT employee who is a participant in the plan becomes eligible to receive the match under a regular plan provision? This issue was identified in connection with SECURE 1.0. We are still waiting for relevant IRS guidance.

2. If a plan excludes certain categories of employees, are the excluded employees nonetheless eligible to participate in the plan if they satisfy the LTPT rules? This issue was identified in connection with SECURE 1.0. We are still waiting for relevant IRS guidance.

3. How do the LTPT provisions impact the universal availability requirement that applies to 403(b) plans? Again, we are awaiting guidance from the IRS on this issue. The LTPT provisions do not replace the existing universal availability rules (and therefore apply in conjunction with those rules). This issue could impact plans using the universal availability exclusion for employees who normally work less than 20 hours per week.

Conclusion

While we await additional guidance from the IRS and DOL on the new LTPT rules, it is important to keep in mind that SECURE 1.0's three-year rule applies to plan years beginning in 2024, while SECURE 2.0's two-year rule applies to plan years beginning in 2025. Therefore, plan sponsors should start the hours tracking process sooner rather than later to ensure accurate counts and timely employee access to plan participation.

We will continue to keep you advised on any guidance released by the IRS or the DOL. We are also available to consult with you on the application of any of SECURE 2.0's provisions to your retirement plan programs and to advise you on any steps needed to properly implement the new law.

FIRM NEWS

Clarissa Kang began her role as an Employer/Management co-chair of the ABA Labor and Employment Law Section in September. As part of her 2-year tenure, she is a program co-chair responsible for organizing and hosting the ERISA Basics National Institute Virtual Meeting, which will take place on October 11–13, 2023. Clarissa will offer Welcoming Remarks and will also present on *ERISA Basic Concepts — Statutory Overview*. These Trucker Huss attorneys will also present: **Robert Gower** speaking on *Spousal Rights under ERISA Plans: QDROs and QMCSOs;* **Angel Garrett** speaking on *Benefit Claims: Administrative Procedures* as well as *Benefit Claims: Litigation Overview*; and **Sarah Kanter** speaking on *Cafeteria Plans and Other Fringe Benefits*.

Robert Gower was elected President of the San Francisco Chapter of the Western Pension & Benefits Council. His two-year term commenced in September, 2023.

On September, 2023, **Robert Gower** served on the faculty for the 2023 FIS Advanced Pension Conference, speaking on changes to the Form 5500, establishing qualified plans in the wake of state mandates, and ERISA cybersecurity best practices. He was also a speaker on ERISA litigation trends for the Institutional Investor Retirement Plan Advisors Summit–West.

On September 21, **Katuri Kaye** spoke at the opening session of the California Minority Counsel Program (CMCP) Annual Business Conference. The session, *Plenary and Desk of the General Counsel*, included Katuri and GCs from Hewlett-Packard Company, PG&E and The Presidio Trust, discussing their DEI initiatives and the adjustments they believe need to be made in legal and corporate governance in order to successfully address DEI.

On September 29, **Joe Faucher** will be speaking at the ESOP Association California-Nevada Conference regarding fiduciary responsibilities of ESOP Trustees.

On October 17, **Robert Gower** and **Zachary Isenhour** will present a Trucker Huss Webinar: *Demonstrating Effective Qualified Plan Governance*. They will discuss trends and recommendations in fiduciary oversight of retirement plans. Register here

On October 20, **Scott E. Galbreath** will be co-presenting at the Western Benefits Conference in Scottsdale, Arizona on *SECURE 2.0 Has Made Correcting Plan Failures Easy… Not…Yet Anyway!*

On October 22–25, **Robert Gower** will present on the subject of ethics in employee benefits and fiduciary considerations in plan design at the ASPPA Annual 2023.

On October 25, **Robert Gower** will present a Strafford webinar, *Cybersecurity and ERISA Retirement Plans*.

On October 31, **Scott E. Galbreath** will present a Trucker Huss Webinar: *Deferred Compensation Plans for Tax Exempt Organizations—The Tricks and Treats of 457 Plans.* This webinar will explore the unique rules and considerations when designing and operating 457 plans, as well as areas where organizations could make costly errors. Register here

On November 11, **Clarissa Kang** will be speaking on a panel, *Employee Benefits Update for Labor Lawyers*, at the ABA's Annual Labor and Employment Law Conference in Seattle.

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