

*This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.*

### **The SECURE Act and Your 403(b) Plan**

The Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) made numerous changes to retirement plans, many of which apply to 401(k) plans. However, many of those changes also apply to 403(b) plans of nonprofit organizations. This article highlights the SECURE Act provisions that may affect 403(b) plans and is intended to be read with “SECURE Act Highlights for Employers” ([https://www.nelsonmullins.com/idea\\_exchange/alerts/Comp-and-Benefits-Brief/all/secure-act-highlights-for-employers](https://www.nelsonmullins.com/idea_exchange/alerts/Comp-and-Benefits-Brief/all/secure-act-highlights-for-employers)). Discussion of any tax credits has been omitted on the assumption that nonprofits do not have taxable income that could be reduced by tax credits.

#### **SECURE Act Provisions Particular to 403(b) Plans**

##### *Portability Provisions*

Two new provisions assist participants of 403(b) plans when a plan is being terminated or discontinued. Previously, the 403(b) account of a participant would end with the 403(b) and the investments in the account would be distributable to the individual...and taxed. These new provisions allow the 403(b) account to continue until the participant actually starts payments.

If a 403(b) annuity plan is terminated or the lifetime income investment option (annuity) is discontinued, a plan participant would be charged a surrender fee and other charges before transferring the funds to another annuity. Under the SECURE Act, distribution of the annuity or transfer of the annuity account in a trustee-to-trustee transfer is permitted. This preserves the annuity investment and avoids surrender and other fees. This is effective January 1, 2020.

Some 403(b) plans are custodial account plans rather than annuity plans. The SECURE Act will permit termination of a 403(b) plan and transfer of the custodial accounts “in kind” to a participant or another custodial account to be held as “deferred” until amounts are actually paid out of the custodial account to the participant or beneficiary. This allows employers to terminate 403(b) plans without necessarily paying out each participant. Further guidance from the IRS is expected. With that, should come guidance for how this provision is effective retroactively to years beginning January 1, 2009.

#### **Provisions in Common with Other Retirement Plans**

##### *In-service withdrawals for Birth or Adoption*

The new SECURE Act provision allowing a participant to withdraw up to \$5000 for the birth or adoption of a child applies to 403(b) plans. The amount withdrawn would be taxable, there would not be a 10% early distribution excise tax and the participant can be permitted to repay the amount.

While this is effective January 1, 2020, there are many questions about its administration and most employers and plan providers are waiting for IRS guidance before implementing.

### *Required Distributions*

The SECURE Act made changes to the required minimum distribution rules, including allowing participants with birthdays on or after July 1, 1949 to delay by an additional year to age 72, starting their distribution. Also, when the participant dies, the SECURE Act requires the account balance to be distributed within 10 years, with some exceptions for a surviving spouse, minor child or disabled or chronically ill beneficiary. These rules apply to 403(b) plans. Note that a participant working after age 72 is not required to take a required minimum distribution until he or she stops working.

### *Retroactive Adoption of Plan*

While technically, an employer can adopt a pension, profit sharing or annuity plan after the end of a tax year under the SECURE Act, there is no way to permit retroactive employee contributions to that plan. So, the expanded permission may not be practical for nonprofit employers adopting 403(b) plans unless the contributions are employer contributions for the first plan year.

### *Small Employer Tax Credits*

For nonprofit organizations that do not pay corporate income taxes, the introduction of small employer tax credits under the SECURE Act provide no real benefit.

### *Eligibility for Long-term Part-time Employees*

403(b) plans are subject to the universal availability rules that have their own exclusions, including for employees working fewer than 20 hours per week. The SECURE Act provisions apply to qualified cash or deferred arrangements under Code Section 401(k). It does not appear that the SECURE Act is intended to change the universal availability rules for 403(b) plans unless the IRS issues guidance that interprets the exclusion of part-time employees.

### *Open Multiple Employer Plans (MEPs)*

The SECURE Act permits “Open MEPs” beginning in 2021. These plans allow a number of employers to offer employees common plan benefits under a single “pooled plan provider” without requiring a common interest among the employers. These provisions apply only to individual account plans under Code Section 408 [IRAs] and Code Section 401(a). It does not appear that Open MEPs may be offered to nonprofits for 403(b) plans.

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Prepared by: Nelson Mullins Riley & Scarborough LLP

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