

Distribution elections in non-governmental 457(b) plans

Participant election timing

Participants in 457(b) plans have much to consider when enrolling in a 457(b) plan. Unlike 401(k) or 403(b) plans where, in many circumstances, participants may leave their balances in the plan long after they leave the employer, 457(b) plans are required to specify a default payout structure for each event (time and form distribution election)—for example, a lump-sum payment 60 days following the participant's separation. While 401(k) and 403(b) plans generally require participant action to distribute balances, 457(b) plans generally require the election to be made up-front and participant action is required to *delay* payment.

The Internal Revenue Code provides 457(b) plan participants with two opportunities to make distribution elections.¹ First, upon enrollment, in order to avoid a plan-level default payment time and form, and second, if the account balance exceeds the plan's defined *de minimis* amount, any time between severance of employment and the previously elected payment date. Once a payment date is established, the *time* of the payout cannot be changed (delayed or accelerated). However, a participant may change the *form* of payment until the distributions commence. When the time to irrevocably delay payment expires, the balance is considered "made available" to participants, and the employer must issue payment to the participant. This payment is either based on the participant's election or, absent such election, the plan-level default distribution.

Example

- A participant enrolls in the plan on June 15, 2020, elects to defer 10% of pay and to receive a lump-sum payment at severance of employment.
- The participant severs employment on October 1, 2028.
- The employer must distribute the balance to the participant within 60 days following October 1, 2028.
- The participant has until the balance is distributed to irrevocably delay payment to any date in the future, up to age 72 (subject to the minimum distribution requirements under Treas. Reg. 1.401(a)(9)).
- Once the irrevocable election to delay has been made, the participant may not accelerate or further delay the payment start date but may change the form of payment up to the payment start date.²

Elective distributions

In addition to severance of employment discussed above, a participant may elect to receive a distribution of all, or a portion of, their 457(b) balance under the following conditions:

- The participant's total balance does not exceed \$5,000.
- The account has not received any contributions during the two-year period prior to the date of distribution.
- The participant has not received any other distributions from the plan.

Plan-to-plan transfers

Because nonqualified deferred compensation plan distributions cannot be rolled over to an IRA, 403(b) or 401(k) plan, participants in an eligible non-governmental 457(b) plan may, in certain circumstances, *transfer* their 457(b) balance to another eligible non-governmental 457(b) plan. Both plan documents must allow for "transfers between eligible plans," and both plan sponsors must agree to the transfer.

HEART Act distributions

The Hero's Earnings Assistance and Relief Tax (HEART) Act of 2008 allows for a participant who is on active duty in uniformed services for 30 or more days to receive a distribution from the plan as if the participant experienced a severance event. Following this distribution, the participant is prohibited from making deferrals or contributions to the plan for six months.

¹ See Treas. Regs. Section §1.457-6.

² The dates in the example are for illustrative purposes only and do not relate to a specific tax year.



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