

[T.D. 6937, 32 FR 16396, Nov. 30, 1967]

§ 1.457-1 General overviews of section 457.

Section 457 provides rules for non-qualified deferred compensation plans established by eligible employers as defined under § 1.457-2(d). Eligible employers can establish either deferred compensation plans that are eligible plans and that meet the requirements of section 457(b) and §§ 1.457-3 through 1.457-10, or deferred compensation plans or arrangements that do not meet the requirements of section 457(b) and §§ 1.457-3 through 1.457-10 and that are subject to tax treatment under section 457(f) and § 1.457-11.

[T.D. 9075, 68 FR 41234, July 11, 2003]

§ 1.457-2 Definitions.

This section sets forth the definitions that are used under §§ 1.457-1 through 1.457-11.

(a) *Amount(s) deferred.* *Amount(s) deferred* means the total annual deferrals under an eligible plan in the current and prior years, adjusted for gain or loss. Except as provided at §§ 1.457-4(c)(1)(iii) and 1.457-6(a), amount(s) deferred includes any rollover amount held by an eligible plan as provided under § 1.457-10(e).

(b) *Annual deferral(s)*—(1) *Annual deferral(s)* means, with respect to a taxable year, the amount of compensation deferred under an eligible plan, whether by salary reduction or by nonelective employer contribution. The amount of compensation deferred under an eligible plan is taken into account as an annual deferral in the taxable year of the participant in which deferred, or, if later, the year in which the amount of compensation deferred is no longer subject to a substantial risk of forfeiture.

(2) If the amount of compensation deferred under the plan during a taxable year is not subject to a substantial risk of forfeiture, the amount taken into account as an annual deferral is not adjusted to reflect gain or loss allocable to the compensation deferred. If, however, the amount of compensation deferred under the plan during the taxable year is subject to a substantial risk of forfeiture, the amount of com-

penensation deferred that is taken into account as an annual deferral in the taxable year in which the substantial risk of forfeiture lapses must be adjusted to reflect gain or loss allocable to the compensation deferred until the substantial risk of forfeiture lapses.

(3) If the eligible plan is a defined benefit plan within the meaning of section 414(j), the annual deferral for a taxable year is the present value of the increase during the taxable year of the participant's accrued benefit that is not subject to a substantial risk of forfeiture (disregarding any such increase attributable to prior annual deferrals). For this purpose, present value must be determined using actuarial assumptions and methods that are reasonable (both individually and in the aggregate), as determined by the Commissioner.

(4) For purposes solely of applying § 1.457-4 to determine the maximum amount of the annual deferral for a participant for a taxable year under an eligible plan, the maximum amount is reduced by the amount of any deferral for the participant under a plan described at paragraph (k)(4)(i) of this section (relating to certain plans in existence before January 1, 1987) as if that deferral were an annual deferral under another eligible plan of the employer.

(c) *Beneficiary.* *Beneficiary* means a person who is entitled to benefits in respect of a participant following the participant's death or an alternate payee as described in § 1.457-10(c).

(d) *Catch-up.* *Catch-up* amount or *catch-up* limitation for a participant for a taxable year means the annual deferral permitted under section 414(v) (as described in § 1.457-4(c)(2)) or section 457(b)(3) (as described in § 1.457-4(c)(3)) to the extent the amount of the annual deferral for the participant for the taxable year is permitted to exceed the plan ceiling applicable under section 457(b)(2) (as described in § 1.457-4(c)(1)).

(e) *Eligible employer.* *Eligible employer* means an entity that is a State that

establishes a plan or a tax-exempt entity that establishes a plan. The performance of services as an independent contractor for a State or local government or a tax-exempt entity is treated as the performance of services for an eligible employer. The term *eligible employer* does not include a church as defined in section 3121(w)(3)(A), a qualified church-controlled organization as defined in section 3121(w)(3)(B), or the Federal government or any agency or instrumentality thereof. Thus, for example, a nursing home which is associated with a church, but which is not itself a church (as defined in section 3121(w)(3)(A)) or a qualified church-controlled organization as defined in section 3121(w)(3)(B)), would be an eligible employer if it is a tax-exempt entity as defined in paragraph (m) of this section.

(f) *Eligible plan.* An *eligible plan* is a plan that meets the requirements of §§1.457-3 through 1.457-10 that is established and maintained by an eligible employer. An *eligible governmental plan* is an eligible plan that is established and maintained by an eligible employer as defined in paragraph (l) of this section. An arrangement does not fail to constitute a single eligible governmental plan merely because the arrangement is funded through more than one trustee, custodian, or insurance carrier. An *eligible plan of a tax-exempt entity* is an eligible plan that is established and maintained by an eligible employer as defined in paragraph (m) of this section.

(g) *Includible compensation.* *Includible compensation* of a participant means, with respect to a taxable year, the participant's compensation, as defined in section 415(c)(3), for services performed for the eligible employer. The amount of includible compensation is determined without regard to any community property laws.

(h) *Ineligible plan.* *Ineligible plan* means a plan established and maintained by an eligible employer that is not maintained in accordance with §§1.457-3 through 1.457-10. A plan that is not established by an eligible employer as defined in paragraph (e) of this section is neither an eligible nor an ineligible plan.

(i) *Nonelective employer contribution.* A *nonelective employer contribution* is a contribution made by an eligible employer for the participant with respect to which the participant does not have the choice to receive the contribution in cash or property. Solely for purposes of section 457 and §§1.457-2 through 1.457-11, the term *nonelective employer contribution* includes employer contributions that would be described in section 401(m) if they were contributions to a qualified plan.

(j) *Participant.* *Participant* in an eligible plan means an individual who is currently deferring compensation, or who has previously deferred compensation under the plan by salary reduction or by nonelective employer contribution and who has not received a distribution of his or her entire benefit under the eligible plan. Only individuals who perform services for the eligible employer, either as an employee or as an independent contractor, may defer compensation under the eligible plan.

(k) *Plan.* *Plan* includes any agreement or arrangement between an eligible employer and a participant or participants (including an individual employment agreement) under which the payment of compensation is deferred (whether by salary reduction or by nonelective employer contribution). The following types of plans are not treated as agreements or arrangements under which compensation is deferred: a bona fide vacation leave, sick leave, compensatory time, severance pay, disability pay, or death benefit plan described in section 457(e)(11)(A)(i) and any plan paying length of service awards to bona fide volunteers (and their beneficiaries) on account of qualified services performed by such volunteers as described in section 457(e)(11)(A)(ii). Further, the term *plan* does not include any of the following (and section 457 and §§1.457-2 through 1.457-11 do not apply to any of the following)—

(1) Any nonelective deferred compensation under which all individuals (other than those who have not satisfied any applicable initial service requirement) with the same relationship with the eligible employer are covered under the same plan with no individual

variations or options under the plan as described in section 457(e)(12), but only to the extent the compensation is attributable to services performed as an independent contractor;

(2) An agreement or arrangement described in §1.457-11(b);

(3) Any plan satisfying the conditions in section 1107(c)(4) of the Tax Reform Act of 1986 (100 Stat. 2494) (TRA '86) (relating to certain plans for State judges); and

(4) Any of the following plans or arrangements (to which specific transitional statutory exclusions apply)—

(i) A plan or arrangement of a tax-exempt entity in existence prior to January 1, 1987, if the conditions of section 1107(c)(3)(B) of the TRA '86, as amended by section 1011(e)(6) of the Technical and Miscellaneous Revenue Act of 1988 (102 Stat. 3700) (TAMRA), are satisfied (see §1.457-2(b)(4) for a special rule regarding such plan);

(ii) A collectively bargained nonelective deferred compensation plan in effect on December 31, 1987, if the conditions of section 6064(d)(2) of TAMRA are satisfied;

(iii) Amounts described in section 6064(d)(3) of TAMRA (relating to certain nonelective deferred compensation arrangements in effect before 1989); and

(iv) Any plan satisfying the conditions in section 1107(c)(4) or (5) of TRA '86 (relating to certain plans for certain individuals with respect to which the Service issued guidance before 1977).

(l) *State.* *State* means a State (treating the District of Columbia as a State as provided under section 7701(a)(10)), a political subdivision of a State, and any agency or instrumentality of a State.

(m) *Tax-exempt entity.* *Tax-exempt entity* includes any organization exempt from tax under subtitle A of the Internal Revenue Code, except that a governmental unit (including an international governmental organization) is not a tax-exempt entity.

(n) *Trust.* *Trust* means a trust described under section 457(g) and §1.457-8. Custodial accounts and contracts described in section 401(f) are treated as trusts under the rules described in §1.457-8(a)(2).

[T.D. 9075, 68 FR 41234, July 11, 2003; 68 FR 51446, Aug. 27, 2003]

§ 1.457-3 General introduction to eligible plans.

(a) *Compliance in form and operation.* An eligible plan is a written plan established and maintained by an eligible employer that is maintained, in both form and operation, in accordance with the requirements of §§1.457-4 through 1.457-10. An eligible plan must contain all the material terms and conditions for benefits under the plan. An eligible plan may contain certain optional features not required for plan eligibility under section 457(b), such as distributions for unforeseeable emergencies, loans, plan-to-plan transfers, additional deferral elections, acceptance of rollovers to the plan, and distributions of smaller accounts to eligible participants. However, except as otherwise specifically provided in §§1.457-4 through 1.457-10, if an eligible plan contains any optional provisions, the optional provisions must meet, in both form and operation, the relevant requirements under section 457 and §§1.457-2 through 1.457-10.

(b) *Treatment as single plan.* In any case in which multiple plans are used to avoid or evade the requirements of §§1.457-4 through 1.457-10, the Commissioner may apply the rules under §§1.457-4 through 1.457-10 as if the plans were a single plan. See also §1.457-4(c)(3)(v) (requiring an eligible employer to have no more than one normal retirement age for each participant under all of the eligible plans it sponsors), the second sentence of §1.457-4(e)(2) (treating deferrals under all eligible plans under which an individual participates by virtue of his or her relationship with a single employer as a single plan for purposes of determining excess deferrals), and §1.457-5 (combining annual deferrals under all eligible plans).

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§ 1.457-4 Annual deferrals, deferral limitations, and deferral agreements under eligible plans.

(a) *Taxation of annual deferrals.* Annual deferrals that satisfy the requirements of paragraphs (b) and (c) of this section are excluded from the gross income of a participant in the year deferred or contributed and are not includible in gross income until paid to