

TITLE 26 > Subtitle A > CHAPTER 1 > Subchapter D > PART I > Subpart B > § 414

Prev
|
Next

§ 414. Definitions and special rules

Release date: 2005-08-31

(a) Service for predecessor employer

For purposes of this part—

- (1) in any case in which the employer maintains a plan of a predecessor employer, service for such predecessor shall be treated as service for the employer, and
- (2) in any case in which the employer maintains a plan which is not the plan maintained by a predecessor employer, service for such predecessor shall, to the extent provided in regulations prescribed by the Secretary, be treated as service for the employer.

(b) Employees of controlled group of corporations

For purposes of sections 401, 408 (k), 408 (p), 410, 411, 415, and 416, all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563 (a), determined without regard to section 1563 (a)(4) and (e)(3)(C)) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the applicable limitations provided by section 404 (a) shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations prescribed by the Secretary.

(c) Employees of partnerships, proprietorships, etc., which are under common control

For purposes of sections 401, 408 (k), 408 (p), 410, 411, 415, and 416, under regulations prescribed by the Secretary, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer. The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

(d) Governmental plan

For purposes of this part, the term "governmental plan" means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act (59 Stat. 669).

(e) Church plan**(1) In general**

For purposes of this part, the term "church plan" means a plan established and maintained (to the extent required in paragraph (2)(B)) for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501.

(2) Certain plans excluded

The term "church plan" does not include a plan—

- (A) which is established and maintained primarily for the benefit of employees (or their beneficiaries) of such church or convention or association of churches who are employed in connection with one or more unrelated trades or businesses (within the meaning of section 513); or
- (B) if less than substantially all of the individuals included in the plan are individuals described in paragraph (1) or (3)(B) (or their beneficiaries).

(3) Definitions and other provisions

For purposes of this subsection—

(A) Treatment as church plan

A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches.

(B) Employee defined

The term employee of a church or a convention or association of churches shall include—

- (i) a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of the source of his compensation;
- (ii) an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under section 501 and which is controlled by or associated with a church or a convention or association of churches; and
- (iii) an individual described in subparagraph (E).

(C) Church treated as employer

A church or a convention or association of churches which is exempt from tax under section 501 shall be deemed the employer of any individual included as an employee under subparagraph (B).

(D) Association with church

An organization, whether a civil law corporation or otherwise, is associated with a church or a convention or association of churches if it shares common religious bonds and convictions with that church or convention or association of churches.

(E) Special rule in case of separation from plan

If an employee who is included in a church plan separates from the service of a church or a convention or association of churches or an organization described in clause (ii) of paragraph (3)(B), the church plan shall not fail to meet the requirements of this subsection merely because the plan—

- (i) retains the employee's accrued benefit or account for the payment of benefits to the employee or his beneficiaries pursuant to the terms of the plan; or
- (ii) receives contributions on the employee's behalf after the employee's separation from such service, but only for a period of 5 years after such separation, unless the employee is disabled (within the meaning of the disability provisions of the church plan or, if there are no such provisions in the church plan, within the meaning of section 72(m)(7)) at the time of such separation from service.

(4) Correction of failure to meet church plan requirements**(A) In general**

If a plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 fails to meet one or more of the requirements of this subsection and corrects its failure to meet such requirements within the correction period, the plan shall be deemed to meet the requirements of this subsection for the year in which the correction was made and for all prior years.

(B) Failure to correct

If a correction is not made within the correction period, the plan shall be deemed not to meet the requirements of this subsection beginning with the date on which the earliest

failure to meet one or more of such requirements occurred.

(C) Correction period defined

The term “correction period” means—

- (i) the period, ending 270 days after the date of mailing by the Secretary of a notice of default with respect to the plan’s failure to meet one or more of the requirements of this subsection;
- (ii) any period set by a court of competent jurisdiction after a final determination that the plan fails to meet such requirements, or, if the court does not specify such period, any reasonable period determined by the Secretary on the basis of all the facts and circumstances, but in any event not less than 270 days after the determination has become final; or
- (iii) any additional period which the Secretary determines is reasonable or necessary for the correction of the default,

whichever has the latest ending date.

(5) Special rules for chaplains and self-employed ministers

(A) Certain ministers may participate

For purposes of this part—

(i) In general A duly ordained, commissioned, or licensed minister of a church is described in paragraph (3)(B) if, in connection with the exercise of their ministry, the minister—

- (I) is a self-employed individual (within the meaning of section 401 (c)(1)(B)), or
- (II) is employed by an organization other than an organization which is described in section 501 (c)(3) and with respect to which the minister shares common religious bonds.

(ii) Treatment as employer and employee For purposes of sections 403 (b)(1)(A) and 404 (a)(10), a minister described in clause (i)(I) shall be treated as employed by the minister’s own employer which is an organization described in section 501 (c)(3) and exempt from tax under section 501 (a).

(B) Special rules for applying section 403 (b) to self-employed ministers

In the case of a minister described in subparagraph (A)(i)(I)—

- (i) the minister’s includible compensation under section 403 (b)(3) shall be determined by reference to the minister’s earned income (within the meaning of section 401 (c)(2)) from such ministry rather than the amount of compensation which is received from an employer, and
- (ii) the years (and portions of years) in which such minister was a self-employed individual (within the meaning of section 401 (c)(1)(B)) with respect to such ministry shall be included for purposes of section 403 (b)(4).

(C) Effect on non-denominational plans

If a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry participates in a church plan (within the meaning of this section) and in the exercise of such ministry is employed by an employer not otherwise participating in such church plan, then such employer may exclude such minister from being treated as an employee of such employer for purposes of applying sections 401 (a)(3), 401 (a)(4), and 401 (a)(5), as in effect on September 1, 1974, and sections 401 (a)(4), 401 (a)(5), 401 (a)(26), 401 (k)(3), 401 (m), 403 (b)(1)(D) (including section 403 (b)(12)), and 410 to any stock bonus, pension, profit-sharing, or annuity plan (including an annuity described in section 403 (b) or a retirement income account described in section 403 (b)(9)). The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out

the purpose of, and prevent the abuse of, this subparagraph.

(D) Compensation taken into account only once

If any compensation is taken into account in determining the amount of any contributions made to, or benefits to be provided under, any church plan, such compensation shall not also be taken into account in determining the amount of any contributions made to, or benefits to be provided under, any other stock bonus, pension, profit-sharing, or annuity plan which is not a church plan.

(E) Exclusion

In the case of a contribution to a church plan made on behalf of a minister described in subparagraph (A)(i)(II), such contribution shall not be included in the gross income of the minister to the extent that such contribution would not be so included if the minister was an employee of a church.

(f) Multiemployer plan

(1) Definition

For purposes of this part, the term "multiemployer plan" means a plan—

- (A)** to which more than one employer is required to contribute,
- (B)** which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and
- (C)** which satisfies such other requirements as the Secretary of Labor may prescribe by regulation.

(2) Cases of common control

For purposes of this subsection, all trades or businesses (whether or not incorporated) which are under common control within the meaning of subsection (c) are considered a single employer.

(3) Continuation of status after termination

Notwithstanding paragraph (1), a plan is a multiemployer plan on and after its termination date under title IV of the Employee Retirement Income Security Act of 1974 if the plan was a multiemployer plan under this subsection for the plan year preceding its termination date.

(4) Transitional rule

For any plan year which began before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, the term "multiemployer plan" means a plan described in this subsection as in effect immediately before that date.

(5) Special election

Within one year after the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980, a multiemployer plan may irrevocably elect, pursuant to procedures established by the Pension Benefit Guaranty Corporation and subject to the provisions of section 4403(b) and (c) of the Employee Retirement Income Security Act of 1974, that the plan shall not be treated as a multiemployer plan for any purpose under such Act or this title, if for each of the last 3 plan years ending prior to the effective date of the Multiemployer Pension Plan Amendments Act of 1980—

- (A)** the plan was not a multiemployer plan because the plan was not a plan described in section 3(37)(A)(iii) of the Employee Retirement Income Security Act of 1974 and section 414(f)(1)(C) (as such provisions were in effect on the day before the date of the enactment of the Multiemployer Pension Plan Amendments Act of 1980); and
- (B)** the plan had been identified as a plan that was not a multiemployer plan in substantially all its filings with the Pension Benefit Guaranty Corporation, the Secretary of Labor and the Secretary.

(g) Plan administrator

For purposes of this part, the term “plan administrator” means—

- (1) the person specifically so designated by the terms of the instrument under which the plan is operated;
- (2) in the absence of a designation referred to in paragraph (1)—
 - (A) in the case of a plan maintained by a single employer, such employer,
 - (B) in the case of a plan maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who maintained the plan, or
 - (C) in any case to which subparagraph (A) or (B) does not apply, such other person as the Secretary may by regulation, prescribe.

(h) Tax treatment of certain contributions**(1) In general**

Effective with respect to taxable years beginning after December 31, 1973, for purposes of this title, any amount contributed—

- (A) to an employees’ trust described in section 401 (a), or
- (B) under a plan described in section 403 (a), shall not be treated as having been made by the employer if it is designated as an employee contribution.

(2) Designation by units of government

For purposes of paragraph (1), in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions.

(i) Defined contribution plan

For purposes of this part, the term “defined contribution plan” means a plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant’s account.

(j) Defined benefit plan

For purposes of this part, the term “defined benefit plan” means any plan which is not a defined contribution plan.

(k) Certain plans

A defined benefit plan which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of a participant shall—

- (1) for purposes of section 410 (relating to minimum participation standards), be treated as a defined contribution plan.
- (2) for purposes of sections 72 (d) (relating to treatment of employee contributions as separate contract), 411(a)(7)(A) (relating to minimum vesting standards), 415 (relating to limitations on benefits and contributions under qualified plans), and 401(m) (relating to nondiscrimination tests for matching requirements and employee contributions), be treated as consisting of a defined contribution plan to the extent benefits are based on the separate account of a participant and as a defined benefit plan with respect to the remaining portion of benefits under the plan, and

(3) for purposes of section 4975 (relating to tax on prohibited transactions), be treated as a defined benefit plan.

(I) Merger and consolidations of plans or transfers of plan assets

(1) In general

A trust which forms a part of a plan shall not constitute a qualified trust under section 401 and a plan shall be treated as not described in section 403 (a) unless in the case of any merger or consolidation of the plan with, or in the case of any transfer of assets or liabilities of such plan to, any other trust plan after September 2, 1974, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence does not apply to any multiemployer plan with respect to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which Title IV of the Employee Retirement Income Security Act of 1974 applies.

(2) Allocation of assets in plan spin-offs, etc.

(A) In general

In the case of a plan spin-off of a defined benefit plan, a trust which forms part of—

- (i) the original plan, or
- (ii) any plan spun off from such plan,

shall not constitute a qualified trust under this section unless the applicable percentage of excess assets are allocated to each of such plans.

(B) Applicable percentage

For purposes of subparagraph (A), the term “applicable percentage” means, with respect to each of the plans described in clauses (i) and (ii) of subparagraph (A), the percentage determined by dividing—

- (i) the excess (if any) of—
 - (I) the amount determined under section 412 (c)(7)(A)(i) with respect to the plan, over
 - (II) the amount of the assets required to be allocated to the plan after the spin-off (without regard to this paragraph), by
- (ii) the sum of the excess amounts determined separately under clause (i) for all such plans.

(C) Excess assets

For purposes of subparagraph (A), the term “excess assets” means an amount equal to the excess (if any) of—

- (i) the fair market value of the assets of the original plan immediately before the spin-off, over
- (ii) the amount of assets required to be allocated after the spin-off to all plans (determined without regard to this paragraph).

(D) Certain spun-off plans not taken into account

(i) In general A plan involved in a spin-off which is described in clause (ii), (iii), or (iv) shall not be taken into account for purposes of this paragraph, except that the amount determined under subparagraph (C)(ii) shall be increased by the amount of assets allocated to such plan.

(ii) Plans transferred out of controlled groups A plan is described in this clause if,

after such spin-off, such plan is maintained by an employer who is not a member of the same controlled group as the employer maintaining the original plan.

(iii) Plans transferred out of multiple employer plans A plan as described in this clause if, after the spin-off, any employer maintaining such plan (and any member of the same controlled group as such employer) does not maintain any other plan remaining after the spin-off which is also maintained by another employer (or member of the same controlled group as such other employer) which maintained the plan in existence before the spin-off.

(iv) Terminated plans A plan is described in this clause if, pursuant to the transaction involving the spin-off, the plan is terminated.

(v) Controlled group For purposes of this subparagraph, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m), or (o).

(E) Paragraph not to apply to multiemployer plans

This paragraph does not apply to any multiemployer plan with respect to any spin-off to the extent that participants either before or after the spin-off are covered under a multiemployer plan to which title IV of the Employee Retirement Income Security Act of 1974 applies.

(F) Application to similar transaction

Except as provided by the Secretary, rules similar to the rules of this paragraph shall apply to transactions similar to spin-offs.

(G) Special rules for bridge banks

For purposes of this paragraph, in the case of a bridge bank established under section 11(i) of the Federal Deposit Insurance Act (12 U.S.C. 1821 (i))—

(i) such bank shall be treated as a member of any controlled group which includes any insured bank (as defined in section 3(h) of such Act (12 U.S.C. 1813 (h)))—

(I) which maintains a defined benefit plan,

(II) which is closed by the appropriate bank regulatory authorities, and

(III) any asset and liabilities of which are received by the bridge bank, and

(ii) the requirements of this paragraph shall not be treated as met with respect to such plan unless during the 180-day period beginning on the date such insured bank is closed—

(I) the bridge bank has the right to require the plan to transfer (subject to the provisions of this paragraph) not more than 50 percent of the excess assets (as defined in subparagraph (C)) to a defined benefit plan maintained by the bridge bank with respect to participants or former participants (including retirees and beneficiaries) in the original plan employed by the bridge bank or formerly employed by the closed bank, and

(II) no other merger, spin-off, termination, or similar transaction involving the portion of the excess assets described in subclause (I) may occur without the prior written consent of the bridge bank.

(m) Employees of an affiliated service group

(1) In general

For purposes of the employee benefit requirements listed in paragraph (4), except to the extent otherwise provided in regulations, all employees of the members of an affiliated service group shall be treated as employed by a single employer.

(2) Affiliated service group

For purposes of this subsection, the term “affiliated service group” means a group consisting of a service organization (hereinafter in this paragraph referred to as the “first organization”) and one or more of the following:

- (A)** any service organization which—
 - (i)** is a shareholder or partner in the first organization, and
 - (ii)** regularly performs services for the first organization or is regularly associated with the first organization in performing services for third persons, and
- (B)** any other organization if—
 - (i)** a significant portion of the business of such organization is the performance of services (for the first organization, for organizations described in subparagraph (A), or for both) of a type historically performed in such service field by employees, and
 - (ii)** 10 percent or more of the interests in such organization is held by persons who are highly compensated employees (within the meaning of section 414(q)) of the first organization or an organization described in subparagraph (A).

(3) Service organizations

For purposes of this subsection, the term “service organization” means an organization the principal business of which is the performance of services.

(4) Employee benefit requirements

For purposes of this subsection, the employee benefit requirements listed in this paragraph are—

- (A)** paragraphs (3), (4), (7), (16), (17), and (26) of section 401 (a), and
- (B)** sections 408 (k), 408 (p), 410, 411, 415, and 416.

(5) Certain organizations performing management functions

For purposes of this subsection, the term “affiliated service group” also includes a group consisting of—

- (A)** an organization the principal business of which is performing, on a regular and continuing basis, management functions for 1 organization (or for 1 organization and other organizations related to such 1 organization), and
- (B)** the organization (and related organizations) for which such functions are so performed by the organization described in subparagraph (A).

For purposes of this paragraph, the term “related organizations” has the same meaning as the term “related persons” when used in section 144 (a)(3).

(6) Other definitions

For purposes of this subsection—

(A) Organization defined

The term “organization” means a corporation, partnership, or other organization.

(B) Ownership

In determining ownership, the principles of section 318 (a) shall apply.

(n) Employee leasing**(1) In general**

For purposes of the requirements listed in paragraph (3), with respect to any person (hereinafter

in this subsection referred to as the “recipient”) for whom a leased employee performs services—

- (A) the leased employee shall be treated as an employee of the recipient, but
- (B) contributions or benefits provided by the leasing organization which are attributable to services performed for the recipient shall be treated as provided by the recipient.

(2) Leased employee

For purposes of paragraph (1), the term “leased employee” means any person who is not an employee of the recipient and who provides services to the recipient if—

- (A) such services are provided pursuant to an agreement between the recipient and any other person (in this subsection referred to as the “leasing organization”),
- (B) such person has performed such services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, and
- (C) such services are performed under primary direction or control by the recipient.

(3) Requirements

For purposes of this subsection, the requirements listed in this paragraph are—

- (A) paragraphs (3), (4), (7), (16), (17), and (26) of section 401 (a),
- (B) sections 408 (k), 408 (p), 410, 411, 415, and 416, and
- (C) sections 79, 106, 117 (d), 120, 125, 127, 129, 132, 137, 274 (j), 505, and 4980B.

(4) Time when first considered as employee

(A) In general

In the case of any leased employee, paragraph (1) shall apply only for purposes of determining whether the requirements listed in paragraph (3) are met for periods after the close of the period referred to in paragraph (2)(B).

(B) Years of service

In the case of a person who is an employee of the recipient (whether by reason of this subsection or otherwise), for purposes of the requirements listed in paragraph (3), years of service for the recipient shall be determined by taking into account any period for which such employee would have been a leased employee but for the requirements of paragraph (2)(B).

(5) Safe harbor

(A) In general

In the case of requirements described in subparagraphs (A) and (B) of paragraph (3), this subsection shall not apply to any leased employee with respect to services performed for a recipient if—

- (i) such employee is covered by a plan which is maintained by the leasing organization and meets the requirements of subparagraph (B), and
- (ii) leased employees (determined without regard to this paragraph) do not constitute more than 20 percent of the recipient's nonhighly compensated work force.

(B) Plan requirements

A plan meets the requirements of this subparagraph if—

- (i) such plan is a money purchase pension plan with a nonintegrated employer contribution rate for each participant of at least 10 percent of compensation,
- (ii) such plan provides for full and immediate vesting, and

(iii) each employee of the leasing organization (other than employees who perform substantially all of their services for the leasing organization) immediately participates in such plan.

Clause (iii) shall not apply to any individual whose compensation from the leasing organization in each plan year during the 4-year period ending with the plan year is less than \$1,000.

(C) Definitions

For purposes of this paragraph—

(i) Highly compensated employee The term “highly compensated employee” has the meaning given such term by section 414 (q).

(ii) Nonhighly compensated work force The term “nonhighly compensated work force” means the aggregate number of individuals (other than highly compensated employees)—

(I) who are employees of the recipient (without regard to this subsection) and have performed services for the recipient (or for the recipient and related persons) on a substantially full-time basis for a period of at least 1 year, or

(II) who are leased employees with respect to the recipient (determined without regard to this paragraph).

(iii) Compensation The term “compensation” has the same meaning as when used in section 415; except that such term shall include—

(I) any employer contribution under a qualified cash or deferred arrangement to the extent not included in gross income under section 402 (e)(3) or 402 (h)(1)(B),

(II) any amount which the employee would have received in cash but for an election under a cafeteria plan (within the meaning of section 125), and

(III) any amount contributed to an annuity contract described in section 403 (b) pursuant to a salary reduction agreement (within the meaning of section 3121 (a) (5)(D)).

(6) Other rules

For purposes of this subsection—

(A) Related persons

The term “related persons” has the same meaning as when used in section 144 (a)(3).

(B) Employees of entities under common control

The rules of subsections (b), (c), (m), and (o) shall apply.

(o) Regulations

The Secretary shall prescribe such regulations (which may provide rules in addition to the rules contained in subsections (m) and (n)) as may be necessary to prevent the avoidance of any employee benefit requirement listed in subsection (m)(4) or (n)(3) or any requirement under section 457 through the use of—

- (1)** separate organizations,
- (2)** employee leasing, or
- (3)** other arrangements.

The regulations prescribed under subsection (n) shall include provisions to minimize the recordkeeping requirements of subsection (n) in the case of an employer which has no top-heavy plans (within the meaning of section 416 (g)) and which uses the services of persons (other than employees) for an

insignificant percentage of the employer's total workload.

(p) Qualified domestic relations order defined

For purposes of this subsection and section 401 (a)(13)—

(1) In general

(A) Qualified domestic relations order

The term "qualified domestic relations order" means a domestic relations order—

- (i) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
- (ii) with respect to which the requirements of paragraphs (2) and (3) are met.

(B) Domestic relations order

The term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which—

- (i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
- (ii) is made pursuant to a State domestic relations law (including a community property law).

(2) Order must clearly specify certain facts

A domestic relations order meets the requirements of this paragraph only if such order clearly specifies—

- (A) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
- (B) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,
- (C) the number of payments or period to which such order applies, and
- (D) each plan to which such order applies.

(3) Order may not alter amount, form, etc., of benefits

A domestic relations order meets the requirements of this paragraph only if such order—

- (A) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
- (B) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and
- (C) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(4) Exception for certain payments made after earliest retirement age

(A) In general

A domestic relations order shall not be treated as failing to meet the requirements of subparagraph (A) of paragraph (3) solely because such order requires that payment of benefits be made to an alternate payee—

- (i) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(ii) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of the benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(iii) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of clause (ii), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(B) Earliest retirement age

For purposes of this paragraph, the term "earliest retirement age" means the earlier of—

- (i) the date on which the participant is entitled to a distribution under the plan, or
- (ii) the later of—
 - (I) the date the participant attains age 50, or
 - (II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(5) Treatment of former spouse as surviving spouse for purposes of determining survivor benefits

To the extent provided in any qualified domestic relations order—

(A) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of sections 401 (a)(11) and 417 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(B) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 417 (d).

(6) Plan procedures with respect to orders

(A) Notice and determination by administrator

In the case of any domestic relations order received by a plan—

(i) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(ii) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(B) Plan to establish reasonable procedures

Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders.

(7) Procedures for period during which determination is being made

(A) In general

During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this paragraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(B) Payment to alternate payee if order determined to be qualified domestic relations order

If within the 18-month period described in subparagraph (E) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(C) Payment to plan participant in certain cases

If within the 18-month period described in subparagraph (E)—

- (i) it is determined that the order is not a qualified domestic relations order, or
- (ii) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(D) Subsequent determination or order to be applied prospectively only

Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in subparagraph (E) shall be applied prospectively only.

(E) Determination of 18-month period

For purposes of this paragraph, the 18-month period described in this subparagraph is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(8) Alternate payee defined

The term "alternate payee" means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(9) Subsection not to apply to plans to which section 401 (a)(13) does not apply

This subsection shall not apply to any plan to which section 401 (a)(13) does not apply. For purposes of this title, except as provided in regulations, any distribution from an annuity contract under section 403 (b) pursuant to a qualified domestic relations order shall be treated in the same manner as a distribution from a plan to which section 401 (a)(13) applies.

(10) Waiver of certain distribution requirements

With respect to the requirements of subsections (a) and (k) of section 401, section 403 (b), section 409(d), and section 457 (d), a plan shall not be treated as failing to meet such requirements solely by reason of payments to an alternative payee pursuant to a qualified domestic relations order.

(11) Application of rules to certain other plans

For purposes of this title, a distribution or payment from a governmental plan (as defined in subsection (d)) or a church plan (as described in subsection (e)) or an eligible deferred compensation plan (within the meaning of section 457 (b)) shall be treated as made pursuant to a qualified domestic relations order if it is made pursuant to a domestic relations order which meets the requirement of clause (i) of paragraph (1)(A).

(12) Tax treatment of payments from a section 457 plan

If a distribution or payment from an eligible deferred compensation plan described in section 457 (b) is made pursuant to a qualified domestic relations order, rules similar to the rules of section

402 (e)(1)(A) shall apply to such distribution or payment.

(13) Consultation with the Secretary

In prescribing regulations under this subsection and section 401 (a)(13), the Secretary of Labor shall consult with the Secretary.

(q) Highly compensated employee

(1) In general

The term "highly compensated employee" means any employee who—

- (A)** was a 5-percent owner at any time during the year or the preceding year, or
- (B)** for the preceding year—
 - (i)** had compensation from the employer in excess of \$80,000, and
 - (ii)** if the employer elects the application of this clause for such preceding year, was in the top-paid group of employees for such preceding year.

The Secretary shall adjust the \$80,000 amount under subparagraph (B) at the same time and in the same manner as under section 415 (d), except that the base period shall be the calendar quarter ending September 30, 1996.

(2) 5-percent owner

An employee shall be treated as a 5-percent owner for any year if at any time during such year such employee was a 5-percent owner (as defined in section 416(i)(1)) of the employer.

(3) Top-paid group

An employee is in the top-paid group of employees for any year if such employee is in the group consisting of the top 20 percent of the employees when ranked on the basis of compensation paid during such year.

(4) Compensation

For purposes of this subsection, the term "compensation" has the meaning given such term by section 415 (c)(3).

(5) Excluded employees

For purposes of subsection (r) and for purposes of determining the number of employees in the top-paid group, the following employees shall be excluded—

- (A)** employees who have not completed 6 months of service,
- (B)** employees who normally work less than 17 1/2 hours per week,
- (C)** employees who normally work during not more than 6 months during any year,
- (D)** employees who have not attained age 21, and
- (E)** except to the extent provided in regulations, employees who are included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and the employer.

Except as provided by the Secretary, the employer may elect to apply subparagraph (A), (B), (C), or (D) by substituting a shorter period of service, smaller number of hours or months, or lower age for the period of service, number of hours or months, or age (as the case may be) than that specified in such subparagraph.

(6) Former employees

A former employee shall be treated as a highly compensated employee if—

(A) such employee was a highly compensated employee when such employee separated from service, or

(B) such employee was a highly compensated employee at any time after attaining age 55.

(7) Coordination with other provisions

Subsections (b), (c), (m), (n), and (o) shall be applied before the application of this section.

(8) Special rule for nonresident aliens

For purposes of this subsection and subsection (r), employees who are nonresident aliens and who receive no earned income (within the meaning of section 911 (d)(2)) from the employer which constitutes income from sources within the United States (within the meaning of section 861 (a) (3)) shall not be treated as employees.

(9) Certain employees not considered highly compensated and excluded employees under pre-ERISA rules for church plans

In the case of a church plan (as defined in subsection (e)), no employee shall be considered an officer, a person whose principal duties consist of supervising the work of other employees, or a highly compensated employee for any year unless such employee is a highly compensated employee under paragraph (1) for such year.

(r) Special rules for separate line of business

(1) In general

For purposes of sections 129 (d)(8) and 410 (b), an employer shall be treated as operating separate lines of business during any year if the employer for bona fide business reasons operates separate lines of business.

(2) Line of business must have 50 employees, etc.

A line of business shall not be treated as separate under paragraph (1) unless—

(A) such line of business has at least 50 employees who are not excluded under subsection (q)(5),

(B) the employer notifies the Secretary that such line of business is being treated as separate for purposes of paragraph (1), and

(C) such line of business meets guidelines prescribed by the Secretary or the employer receives a determination from the Secretary that such line of business may be treated as separate for purposes of paragraph (1).

(3) Safe harbor rule

(A) In general

The requirements of subparagraph (C) of paragraph (2) shall not apply to any line of business if the highly compensated employee percentage with respect to such line of business is—

(i) not less than one-half, and

(ii) not more than twice,

the percentage which highly compensated employees are of all employees of the employer. An employer shall be treated as meeting the requirements of clause (i) if at least 10 percent of all highly compensated employees of the employer perform services solely for such line of business.

(B) Determination may be based on preceding year

The requirements of subparagraph (A) shall be treated as met with respect to any line of business if such requirements were met with respect to such line of business for the

preceding year and if—

- (i) no more than a de minimis number of employees were shifted to or from the line of business after the close of the preceding year, or
- (ii) the employees shifted to or from the line of business after the close of the preceding year contained a substantially proportional number of highly compensated employees.

(4) Highly compensated employee percentage defined

For purposes of this subsection, the term “highly compensated employee percentage” means the percentage which highly compensated employees performing services for the line of business are of all employees performing services for the line of business.

(5) Allocation of benefits to line of business

For purposes of this subsection, benefits which are attributable to services provided to a line of business shall be treated as provided by such line of business.

(6) Headquarters personnel, etc.

The Secretary shall prescribe rules providing for—

- (A) the allocation of headquarters personnel among the lines of business of the employer, and
- (B) the treatment of other employees providing services for more than 1 line of business of the employer or not in lines of business meeting the requirements of paragraph (2).

(7) Separate operating units

For purposes of this subsection, the term “separate line of business” includes an operating unit in a separate geographic area separately operated for a bona fide business reason.

(8) Affiliated service groups

This subsection shall not apply in the case of any affiliated service group (within the meaning of section 414 (m)).

(s) Compensation

For purposes of any applicable provision—

(1) In general

Except as provided in this subsection, the term “compensation” has the meaning given such term by section 415 (c)(3).

(2) Employer may elect not to treat certain deferrals as compensation

An employer may elect not to include as compensation any amount which is contributed by the employer pursuant to a salary reduction agreement and which is not includible in the gross income of an employee under section 125, 132 (f)(4), 402 (e)(3), 402 (h), or 403 (b).

(3) Alternative determination of compensation

The Secretary shall by regulation provide for alternative methods of determining compensation which may be used by an employer, except that such regulations shall provide that an employer may not use an alternative method if the use of such method discriminates in favor of highly compensated employees (within the meaning of subsection (q)).

(4) Applicable provision

For purposes of this subsection, the term “applicable provision” means any provision which specifically refers to this subsection.

(t) Application of controlled group rules to certain employee benefits**(1) In general**

All employees who are treated as employed by a single employer under subsection (b), (c), or (m) shall be treated as employed by a single employer for purposes of an applicable section. The provisions of subsection (o) shall apply with respect to the requirements of an applicable section.

(2) Applicable section

For purposes of this subsection, the term "applicable section" means section 79, 106, 117 (d), 120, 125, 127, 129, 132, 137, 274 (j), 505, or 4980B.

(u) Special rules relating to veterans' reemployment rights under USERRA**(1) Treatment of certain contributions made pursuant to veterans' reemployment rights**

If any contribution is made by an employer or an employee under an individual account plan with respect to an employee, or by an employee to a defined benefit plan that provides for employee contributions, and such contribution is required by reason of such employee's rights under chapter 43 of title 38, United States Code, resulting from qualified military service, then—

(A) such contribution shall not be subject to any otherwise applicable limitation contained in section 402 (g), 402 (h), 403 (b), 404 (a), 404 (h), 408, 415, or 457, and shall not be taken into account in applying such limitations to other contributions or benefits under such plan or any other plan, with respect to the year in which the contribution is made,

(B) such contribution shall be subject to the limitations referred to in subparagraph (A) with respect to the year to which the contribution relates (in accordance with rules prescribed by the Secretary), and

(C) such plan shall not be treated as failing to meet the requirements of section 401 (a)(4), 401 (a)(26), 401 (k)(3), 401 (k)(11), 401 (k)(12), 401 (m), 403 (b)(12), 408 (k)(3), 408 (k)(6), 408 (p), 410 (b), or 416 by reason of the making of (or the right to make) such contribution.

For purposes of the preceding sentence, any elective deferral or employee contribution made under paragraph (2) shall be treated as required by reason of the employee's rights under such chapter 43.

(2) Reemployment rights under USERRA with respect to elective deferrals**(A) In general**

For purposes of this subchapter and section 457, if an employee is entitled to the benefits of chapter 43 of title 38, United States Code, with respect to any plan which provides for elective deferrals, the employer sponsoring the plan shall be treated as meeting the requirements of such chapter 43 with respect to such elective deferrals only if such employer—

(i) permits such employee to make additional elective deferrals under such plan (in the amount determined under subparagraph (B) or such lesser amount as is elected by the employee) during the period which begins on the date of the reemployment of such employee with such employer and has the same length as the lesser of—

(I) the product of 3 and the period of qualified military service which resulted in such rights, and

(II) 5 years, and

(ii) makes a matching contribution with respect to any additional elective deferral made pursuant to clause (i) which would have been required had such deferral actually been made during the period of such qualified military service.

(B) Amount of makeup required

The amount determined under this subparagraph with respect to any plan is the maximum

amount of the elective deferrals that the individual would have been permitted to make under the plan in accordance with the limitations referred to in paragraph (1)(A) during the period of qualified military service if the individual had continued to be employed by the employer during such period and received compensation as determined under paragraph (7). Proper adjustment shall be made to the amount determined under the preceding sentence for any elective deferrals actually made during the period of such qualified military service.

(C) Elective deferral

For purposes of this paragraph, the term “elective deferral” has the meaning given such term by section 402 (g)(3); except that such term shall include any deferral of compensation under an eligible deferred compensation plan (as defined in section 457 (b)).

(D) After-tax employee contributions

References in subparagraphs (A) and (B) to elective deferrals shall be treated as including references to employee contributions.

(3) Certain retroactive adjustments not required

For purposes of this subchapter and subchapter E, no provision of chapter 43 of title 38, United States Code, shall be construed as requiring—

- (A) any crediting of earnings to an employee with respect to any contribution before such contribution is actually made, or
- (B) any allocation of any forfeiture with respect to the period of qualified military service.

(4) Loan repayment suspensions permitted

If any plan suspends the obligation to repay any loan made to an employee from such plan for any part of any period during which such employee is performing service in the uniformed services (as defined in chapter 43 of title 38, United States Code), whether or not qualified military service, such suspension shall not be taken into account for purposes of section 72 (p), 401 (a), or 4975 (d)(1).

(5) Qualified military service

For purposes of this subsection, the term “qualified military service” means any service in the uniformed services (as defined in chapter 43 of title 38, United States Code) by any individual if such individual is entitled to reemployment rights under such chapter with respect to such service.

(6) Individual account plan

For purposes of this subsection, the term “individual account plan” means any defined contribution plan ^[1] (including any tax-sheltered annuity plan under section 403 (b), any simplified employee pension under section 408 (k), any qualified salary reduction arrangement under section 408 (p), and any eligible deferred compensation plan (as defined in section 457 (b)).

(7) Compensation

For purposes of sections 403 (b)(3), 415 (c)(3), and 457 (e)(5), an employee who is in qualified military service shall be treated as receiving compensation from the employer during such period of qualified military service equal to—

- (A) the compensation the employee would have received during such period if the employee were not in qualified military service, determined based on the rate of pay the employee would have received from the employer but for absence during the period of qualified military service, or
- (B) if the compensation the employee would have received during such period was not reasonably certain, the employee’s average compensation from the employer during the 12-month period immediately preceding the qualified military service (or, if shorter, the period of

employment immediately preceding the qualified military service).

(8) USERRA requirements for qualified retirement plans

For purposes of this subchapter and section 457, an employer sponsoring a retirement plan shall be treated as meeting the requirements of chapter 43 of title 38, United States Code, only if each of the following requirements is met:

- (A) An individual reemployed under such chapter is treated with respect to such plan as not having incurred a break in service with the employer maintaining the plan by reason of such individual's period of qualified military service.
- (B) Each period of qualified military service served by an individual is, upon reemployment under such chapter, deemed with respect to such plan to constitute service with the employer maintaining the plan for the purpose of determining the nonforfeitability of the individual's accrued benefits under such plan and for the purpose of determining the accrual of benefits under such plan.
- (C) An individual reemployed under such chapter is entitled to accrued benefits that are contingent on the making of, or derived from, employee contributions or elective deferrals only to the extent the individual makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the individual would have been permitted or required to contribute had the individual remained continuously employed by the employer throughout the period of qualified military service. Any payment to such plan shall be made during the period beginning with the date of reemployment and whose duration is 3 times the period of the qualified military service (but not greater than 5 years).

(9) Plans not subject to title 38

This subsection shall not apply to any retirement plan to which chapter 43 of title 38, United States Code, does not apply.

(10) References

For purposes of this section, any reference to chapter 43 of title 38, United States Code, shall be treated as a reference to such chapter as in effect on December 12, 1994 (without regard to any subsequent amendment).

(v) Catch-up contributions for individuals age 50 or over

(1) In general

An applicable employer plan shall not be treated as failing to meet any requirement of this title solely because the plan permits an eligible participant to make additional elective deferrals in any plan year.

(2) Limitation on amount of additional deferrals

(A) In general

A plan shall not permit additional elective deferrals under paragraph (1) for any year in an amount greater than the lesser of—

- (i) the applicable dollar amount, or
- (ii) the excess (if any) of—
 - (I) the participant's compensation (as defined in section 415 (c)(3)) for the year, over
 - (II) any other elective deferrals of the participant for such year which are made without regard to this subsection.

(B) Applicable dollar amount

For purposes of this paragraph—

(i) In the case of an applicable employer plan other than a plan described in section 401 (k)(11) or 408 (p), the applicable dollar amount shall be determined in accordance with the following table:

For taxable years beginning in:	dollar amount is:
2002	\$1,000
2003	\$2,000
2004	\$3,000
2005	\$4,000
2006 and thereafter	\$5,000.

(ii) In the case of an applicable employer plan described in section 401 (k)(11) or 408 (p), the applicable dollar amount shall be determined in accordance with the following table:

For taxable years beginning in:	dollar amount is:
2002	\$500
2003	\$1,000
2004	\$1,500
2005	\$2,000
2006 and thereafter	\$2,500.

(C) Cost-of-living adjustment

In the case of a year beginning after December 31, 2006, the Secretary shall adjust annually the \$5,000 amount in subparagraph (B)(i) and the \$2,500 amount in subparagraph (B)(ii) for increases in the cost-of-living at the same time and in the same manner as adjustments under section 415 (d); except that the base period taken into account shall be the calendar quarter beginning July 1, 2005, and any increase under this subparagraph which is not a multiple of \$500 shall be rounded to the next lower multiple of \$500.

(D) Aggregation of plans

For purposes of this paragraph, plans described in clauses (i), (ii), and (iv) of paragraph (6) (A) that are maintained by the same employer (as determined under subsection (b), (c), (m) or (o)) shall be treated as a single plan, and plans described in clause (iii) of paragraph (6)(A) that are maintained by the same employer shall be treated as a single plan.

(3) Treatment of contributions

In the case of any contribution to a plan under paragraph (1)—

- (A) such contribution shall not, with respect to the year in which the contribution is made—
 - (i) be subject to any otherwise applicable limitation contained in sections 401 (a)(30), 402 (h), 403 (b), 408, 415 (c), and 457 (b)(2) (determined without regard to section 457 (b)(3)), or
 - (ii) be taken into account in applying such limitations to other contributions or benefits under such plan or any other such plan, and
- (B) except as provided in paragraph (4), such plan shall not be treated as failing to meet the requirements of section 401 (a)(4), 401 (k)(3), 401 (k)(11), 403 (b)(12), 408 (k), 410 (b), or 416 by reason of the making of (or the right to make) such contribution.

(4) Application of nondiscrimination rules

(A) In general

An applicable employer plan shall be treated as failing to meet the nondiscrimination requirements under section 401 (a)(4) with respect to benefits, rights, and features unless the plan allows all eligible participants to make the same election with respect to the additional elective deferrals under this subsection.

(B) Aggregation

For purposes of subparagraph (A), all plans maintained by employers who are treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as 1 plan, except that a plan described in clause (i) of section 410 (b)(6)(C) shall not be treated as a plan of the employer until the expiration of the transition period with respect to such plan (as determined under clause (ii) of such section).

(5) Eligible participant

For purposes of this subsection, the term “eligible participant” means a participant in a plan—

- (A) who would attain age 50 by the end of the taxable year,
- (B) with respect to whom no other elective deferrals may (without regard to this subsection) be made to the plan for the plan (or other applicable) year by reason of the application of any limitation or other restriction described in paragraph (3) or comparable limitation or restriction contained in the terms of the plan.

(6) Other definitions and rules

For purposes of this subsection—

(A) Applicable employer plan

The term “applicable employer plan” means—

- (i) an employees’ trust described in section 401 (a) which is exempt from tax under section 501 (a),
- (ii) a plan under which amounts are contributed by an individual’s employer for an annuity contract described in section 403 (b),
- (iii) an eligible deferred compensation plan under section 457 of an eligible employer described in section 457 (e)(1)(A), and
- (iv) an arrangement meeting the requirements of section 408 (k) or (p).

(B) Elective deferral

The term “elective deferral” has the meaning given such term by subsection (u)(2)(C).

(C) Exception for section 457 plans

This subsection shall not apply to a participant for any year for which a higher limitation applies to the participant under section 457 (b)(3).

[1] So in original. There is no closing parenthesis.