

**§ 1.401(a)(26)-6 Excludable employees.**

(a) *In general.* For purposes of applying section 401(a)(26) with respect to either employees, former employees, or both employees and former employees, as applicable, all employees other than excludable employees described in paragraph (b) of this section, all former employees other than excludable former employees described in paragraph (c) of this section, or both, as the case may be, must be taken into account. Except as specifically provided otherwise in this section, the rules of this section are applied by reference only to the particular plan and must be applied on a uniform and consistent basis.

(b) *Excludable employees.* An employee is an excludable employee if the employee is covered by one or more of the following exclusions:

(1) *Minimum age and service exclusions*—(i) *In general.* If a plan applies minimum age and service eligibility conditions permissible under section 410(a)(1) and excludes all employees who do not meet those conditions from benefiting under the plan, then all employees who fail to satisfy those conditions may be treated as excludable employees with respect to that plan. An employee is treated as meeting the age and service requirements on the date any employee with the same age and service would be eligible to commence participation in the plan, as provided in section 410(b)(4)(C).

(ii) *Plans benefiting otherwise excludable employees.* An employer may treat a plan benefiting otherwise excludable employees as two separate plans, one for the otherwise excludable employees and one for the other employees benefiting under the plan. The effect of this rule is that employees who would be excludable under paragraph (b)(1) of this section (applied without regard to section 410(a)(1)(B)), but for the fact that the plan does not apply the greatest permissible minimum age and service conditions, may be treated as excludable employees with respect to the plan. This treatment is only available if each of the following conditions is satisfied:

(A) The plan under which the otherwise excludable employees benefit also

benefits employees who are not otherwise excludable.

(B) The plan under which the otherwise excludable employees benefit satisfies section 401(a)(26), both by reference only to otherwise excludable employees and by reference only to employees who are not otherwise excludable.

(C) The contributions or benefits provided to the otherwise excludable employees (expressed as percentages of compensation) are not greater than the contributions or benefits provided to the employees who are not otherwise excludable under the plan.

(D) No highly compensated employee is included in the group of otherwise excludable employees for more than one plan year.

(iii) *Examples.* The following examples illustrate some of the minimum-age-and-service exclusion requirements:

*Example 1.* Employer X maintains a defined contribution plan, Plan X, under which employees who have not completed 1 year of service are not eligible to participate. Employer X has six employees. Two of the employees participate in Plan X. The other four employees have not completed 1 year of service and are therefore not eligible to participate in Plan X. The four employees who have not completed 1 year of service are excludable employees and may be disregarded for purposes of applying the minimum participation test. Therefore, Plan X satisfies section 401(a)(26) because both of the two employees who must be considered are participants in Plan X.

*Example 2.* Employer Y has 100 employees and maintains two plans, Plan 1 and Plan 2. Plan 1 provides that employees who have not completed 1 year of service are not eligible to participate. Plan 2 has no minimum age or service requirement. Twenty of Y's employees do not meet the minimum service requirement under Plan 1. Each plan satisfies the ratio test under section 410(b)(1)(B). In testing Plan 1 to determine whether it satisfies section 401(a)(26), the 20 employees not meeting the minimum age and service requirement under Plan 1 are treated as excludable employees. In testing Plan 2 to determine whether it satisfies section 401(a)(26), no employees are treated as excludable employees because Plan 2 does not have a minimum age or service requirement.

(2) *Certain air pilots.* An employee who is excluded from consideration under section 410(b)(3)(B) (relating to certain

air pilots) may be treated as an excludable employee.

(3) *Certain nonresident aliens*—(i) *In general.* An employee who is excluded from consideration under section 410(b)(3)(C) (relating to certain nonresident aliens) may be treated as an excludable employee.

(ii) *Special treaty rule.* In addition, an employee who is a nonresident alien (within the meaning of section 7701(b)(1)(B)) and who does receive earned income (within the meaning of section 911(d)(2)) from the employer that constitutes income from sources within the United States (within the meaning of section 861(a)(3)) is permitted to be excluded, if all of the employee's earned income from the employer from sources within the United States is exempt from United States income tax under an applicable income tax convention. This paragraph (b)(3)(ii) applies only if all employees described in the preceding sentence are so excluded.

(4) *Employees covered pursuant to a collective bargaining agreement.* When testing a plan benefiting only noncollectively bargained employees, an employee who is excluded from consideration under section 410(b)(3)(A) (exclusion for employees included in a unit of employees covered by a collective bargaining agreement) may be treated as an excludable employee. This rule may be applied separately to each collective bargaining agreement. See § 1.401(a)(26)-8 for the definitions of the terms “collective bargaining agreement”, “collectively bargained employee,” and “covered pursuant to a collective bargaining agreement”.

(5) *Employees not covered pursuant to a collective bargaining agreement.* When testing a plan that benefits only employees who are included in a group of employees who are covered pursuant to a collective bargaining agreement, an employee who is not included in the group of employees who are covered by the collective bargaining agreement may be treated as an excludable employee.

(6) *Examples.* The following examples illustrate the excludable employee rules that relate to employees covered pursuant to collective bargaining agreements. For purposes of these ex-

amples assume that no other exclusion rules are applicable.

*Example 1.* Employer W has 70 collectively bargained employees and 30 non-collectively bargained employees. Employer W maintains Plan W, which benefits only the 30 non-collectively bargained employees. The 70 collectively bargained employees may be treated as excludable employees and thus may be disregarded in applying section 401(a)(26) to Plan W.

*Example 2.* Assume the same facts as *Example 1*, except that the Commissioner has determined that the employee representative is not a bona fide employee representative under section 7701(a)(46) and thus there are no “collectively bargained employees.” In this case, all employees of W must be considered in determining whether section 401(a)(26) is met.

*Example 3.* Employer X has collectively bargained employees and 70 noncollectively bargained employees. Employer X maintains Plan X, which benefits only the 30 collectively bargained employees. Employer X may treat the non-collectively bargained employees as excludable employees and disregard them in applying section 401(a)(26) to the collectively bargained plan.

*Example 4.* Assume the same facts as *Example 3*, except that the Commissioner has determined that the employee representative is not a bona fide employee representative under section 7701(a)(46) and thus there is no recognized collective bargaining agreement. In this case, Employer X may not treat the non-collectively bargained employees of X as excludable employees.

*Example 5.* Assume the same facts as *Example 3*, except that 3 percent of the 30 collectively bargained employees are professionals. In this case, Employer X may not treat the non-collectively bargained employees of X as excludable employees.

*Example 6.* Employer Y has 100 collectively bargained employees. Thirty of Y's employees are represented by Collective Bargaining Unit 1 and covered under Plan 1. Seventy of Y's employees are represented by Collective Bargaining Unit 2 and covered under Plan 2. For purposes of testing Plan 1, the employees of Collective Bargaining Unit 2 may be treated as excludable employees. Similarly, for purposes of testing Plan 2, the employees of Collective Bargaining Unit 1 may be treated as excludable employees.

(7) *Certain terminating employees*—(i) *In general.* An employee may be treated as an excludable employee for a plan year with respect to a particular plan if—

(A) The employee does not benefit under the plan for the plan year,

(B) The employee is eligible to participate in the plan,

(C) The plan has a minimum period of service requirement or a requirement that an employee be employed on the last day of the plan year (last-day requirement) in order for an employee to accrue a benefit or receive an allocation for the plan year,

(D) The employee fails to accrue a benefit or receive an allocation under the plan solely because of the failure to satisfy the minimum period of service or last-day requirement,

(E) The employee terminates employment during the plan year with no more than 500 hours of service, and the employee is not an employee as of the last day of the plan year (for purposes of this paragraph (b)(7)(i)(E), a plan that uses the elapsed time method of determining years of service may use either 91 consecutive calendar days or 3 consecutive calendar months instead of 500 hours of service, provided it uses the same convention for all employees during a plan year), and

(F) If this paragraph (b)(7) is applied with respect to any employee with respect to a plan for a plan year, it is applied with respect to all employees with respect to the plan for the plan year.

(ii) *Hours of service.* For purposes of this paragraph (b)(7), the term “hour of service” has the same meaning as set forth in 29 CFR 2530.200b-2 under the general method of crediting service for the employee. If one of the equivalencies set forth in 29 CFR 2530.200b-3 is used for crediting service under the plan, the 500-hour requirement must be adjusted accordingly.

(8) *Employees of qualified separate lines of business.* If an employer is treated as operating qualified separate lines of business for purposes of section 401(a)(26) in accordance with § 1.414(r)-1(b), in testing a plan that benefits employees of one qualified separate line of business, the employees of the other qualified separate lines of business of the employer are treated as excludable employees. See §§ 1.414(r)-1(c)(3) and 1.414(r)-9 (separate application of section 401(a)(26) to the employees of a qualified separate line of business). The rule in this paragraph (b)(8) does not apply to a plan that is tested under the

special rule for employer-wide plans in § 1.414(r)-1(c)(3)(ii) for a plan year.

(c) *Former employees—(1) In general.* For purposes of applying section 401(a)(26) with respect to former employees, all former employees of the employer are taken into account, except that the employer may treat a former employee described in paragraph (c)(2) through (c)(4) of this section as an excludable former employee. If any of the former employee exclusion rules under paragraphs (c)(2) through (c)(4) of this section is applied, it must be applied to all former employees for the plan year on a consistent basis.

(2) *Employees terminated before a specified date.* The employer may treat a former employee as excludable if—

(i) The former employee became a former employee either prior to January 1, 1984, or prior to the tenth calendar year preceding the calendar year in which the current plan year begins, and

(ii) The former employee became a former employee in a calendar year that precedes the earliest calendar year in which any former employee who benefits under the plan in the current plan year became a former employee.

(3) *Previously excludable employees.* The employer may treat a former employee as excludable if the former employee was an excludable employee (or would have been an excludable employee if these regulations had been in effect) under the rules of paragraphs (a) and (b) of this section during the plan year in which the former employee became a former employee. If the employer treats a former employee as excludable pursuant to this paragraph (c)(3), the former employee is not taken into account with respect to a plan even if the former employee is benefiting under the plan.

(4) *Vested accrued benefits eligible for mandatory distribution.* A former employee may be treated as an excludable former employee if the present value of the former employee’s vested accrued benefit does not exceed the cash-out limit in effect under § 1.411(a)-11(c)(3)(ii). This determination is made in accordance with the rules of sections 411(a)(11) and 417(e).

(d) *Certain police or firefighters.* An employer may apply section 401(a)(26) separately with respect to any classification of qualified public safety employees for whom a separate plan is maintained. Thus, for purposes of testing a separate plan covering a class of qualified public safety employees, all employees who are not in that classification are treated as excludable employees. Also, such employees need not be taken into account in determining whether or not any other plan satisfies section 401(a)(26). For purposes of this paragraph (d), *qualified public safety employee* means any employee of any police department or fire department organized and operated by a State or political subdivision if the employee provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of a State or political subdivision.

[T.D. 8375, 56 FR 63416, Dec. 4, 1991, as amended by T.D. 8794, 63 FR 70338, Dec. 21, 1998; T.D. 8891, 65 FR 44682, July 19, 2000]

#### § 1.401(a)(26)-7 Testing methods.

(a) *Testing on each day of the plan year.* A plan satisfies section 401(a)(26) for a plan year only if the plan satisfies section 401(a)(26) on each day of the plan year. An employee benefits on a day if the employee is a participant for such day and the employee benefits under the plan for the year under the rules in § 1.401(a)(26)-5.

(b) *Simplified testing method.* A plan is treated as satisfying the requirements of paragraph (a) of this section if it satisfies section 401(a)(26) on any single plan day during the plan year, but only if that day is reasonably representative of the employer's workforce and the plan's coverage. A plan does not have to be tested on the same day each plan year.

(c) *Retroactive correction.* If a plan fails to satisfy section 401(a)(26) for a plan year, the plan may be retroactively amended during the same period and under the same conditions as provided for in § 1.401(a)(4)-11(g)(3) through (g)(5) to satisfy section 401(a)(26). A plan merger that occurs by the end of the period provided in § 1.401(a)(4)-11(g)(3)(iv) is treated solely for purposes of section 401(a)(26) as if it were effective as of the first day of the

plan year. The rule of this paragraph (c) may be illustrated by the following example.

*Example.* Assume that an employer with 500 employees maintains two defined contribution plans. Plan A benefits 45 employees. Plan B benefits 50 employees. Immediately before the end of the period provided for in § 1.401(a)(4)-11(g)(3)(iv), the employer expands coverage under Plan A to benefit 20 more employees retroactively for the plan year. Thus, Plan A satisfies paragraph (a) of this section for the plan year. Alternatively, before the end of the period provided for in § 1.401(a)(4)-11(g)(3)(iv), or later if a later period is applicable under section 401(b), the employer could merge Plan A with Plan B to satisfy section 401(a)(26).

[T.D. 8375, 56 FR 63418, Dec. 4, 1991]

#### § 1.401(a)(26)-8 Definitions.

In applying this section and §§ 1.401(a)(26)-1 through 1.401(a)(26)-9 the definitions in this section govern unless otherwise provided.

*Collective bargaining agreement.* *Collective bargaining agreement* means an agreement that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and the employer that satisfies § 301.7701-17T. Employees described in section 413(b)(8) who are employees of the union or the plan and are treated as employees of an employer are not employees covered pursuant to a collective bargaining agreement for purposes of section 401(a)(26) unless the employees are actually covered pursuant to such an agreement.

*Collectively bargained employee.* *Collectively bargained employee* means a collectively bargained employee within the meaning of § 1.410(b)-6(d)(2).

*Covered by a collective bargaining agreement.* *Covered by a collective bargaining agreement* means covered by a collective bargaining agreement within the meaning of § 1.410(b)-6(d)(2)(iii).

*Defined benefit plan.* *Defined benefit plan* means a defined benefit plan within the meaning of § 1.410(b)-9.

*Defined contribution plan.* *Defined contribution plan* means a defined contribution plan within the meaning of § 1.410(b)-9.

*Employee.* *Employee* means an employee, within the meaning of § 1.410(b)-9.