

Chapter 4

Church Plans, Government and Single-Employer Collectively Bargained Plans

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**INTERNAL REVENUE SERVICE
TAX EXEMPT AND GOVERNMENT ENTITIES**

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Church Plans

Overview

Introduction

Under ERISA, the non-electing church plan is exempt from meeting various requirements in order to be a qualified plan under Code section 401(a) and a tax-exempt trust under Code section 501(a), unless the plan sponsor elects otherwise. The purpose of this section is to discuss the non-electing church plan. The discussion will focus on the definition of churches and rules concerning church plans prior to the changes made by the Multiemployer Pension Plan Amendments Act of 1980 (MPPA), the advantages of non-electing church plans, the changes made by the MPPA and current developments.

The chapter contains some republished material from the 1981 CPE text on church plans, in addition to new and updated material that has occurred. This previous material is included to provide background and continuity. Since many church plans have been adopted pre-ERISA, this historical perspective is needed to show how they have evolved along with the issuance of IRS Code and regulatory material.

What is a Church Plan

Basic Definition Under Code section 414(e) added by ERISA, a church plan was defined as a plan established and maintained by a church or a convention or association of churches that is exempt from tax under Code section 501(a).

General Rule If a plan met this definition, it was permanently exempt from meeting certain requirements which other retirement plans had to satisfy in order to be qualified under Code section 401(a).

Special Temporary Rule In addition to the definition and the general rule, Code section 414(e)(3)(A) provided a special temporary rule for plans which were maintained for the benefit of employees of certain agencies of churches. Under this rule, such plans were treated as church plans until plan years beginning after December 31, 1982, if the plan was in existence on January 1, 1974, and it was established and maintained by a church for the employees of the church and the employees of one or more agencies of the church. Each of the agencies participating in the plan had to be tax-exempt under Code section 501(a).

As you will see later, as a result of the passage of the MPPA, this special rule for agencies of churches has been incorporated into the general rule for church plans. Under MPPA, a church is now deemed to be the employer of an employee of an agency of a church if the agency is associated with the church. In addition, the requirement that the plan be in existence on January 1, 1974 has been eliminated.

Examples of Church Plans Typical examples of the types of plans that have inquired as to their status as church plans have been plans maintained to cover employees of hospitals or schools run by orders of nuns of the Catholic Church.

Advantages of Non-Electing Church Plans

**Choice of
ERISA
Compliance**

The major advantage derived by a plan that qualifies to be a church plan is that it allows the plan sponsor a choice whether the plan sponsor to comply with the participation, vesting and funding requirements imposed by Title II of ERISA. See also Code sections 410(c)(1)(B), 411(e)(1)(B) and 412(h)(4).

As well as being exempt from certain provisions of the Code, church plans are exempt from Titles I and IV of ERISA.

**Non-Electing
Church Plan**

If the plan sponsor chooses not to comply with ERISA, the plan must satisfy the pre-ERISA coverage and participation, vesting and funding requirements that were in effect on September 1, 1974, in order to be a qualified plan. These plans are known as “non-electing church plans.” Most church plans are non-electing church plans.

In addition to the exemptions just mentioned, the last paragraph of Code section 401(a) exempts plans to which Code section 411 is not applicable from having to comply with certain requirements of Code section 401(a), among them:

- Joint and Survivor Annuities, section 401(a)(11)
- Mergers and Transfers of Assets and Liabilities, section 401(a)(12)
- Assignment or Alienation of Benefits exclusive of QDRO’s *, section 401(a)(13)
- Commencement of Benefit Requirements, section 401(a)(14)
- Reductions in Benefits due to Social Security Increases, section 401(a)(15)
- Forfeiture of Mandatory Contributions, section 401(a)(19)

*Note that an unusual situation exists with regard to QDRO’s in church plans. If the plan provides that benefits are wholly unassignable, and such a provision is enforceable under state law, it is possible that the plan would be prohibited from paying plan assets to anyone other than the plan participant. In contrast, in plans subject to ERISA and Code section 401(a)(13) such a state law would be preempted and the plan would be required to contain language permitting the assigning of benefits pursuant to QDRO’s.

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Advantages of Non-Electing Church Plans, Continued

Prohibited Transactions

Non-electing church plans are also exempted from the prohibited transaction provisions of Code section 4975 pursuant to Code section 4975(g).

Compliance Note

Although a non-electing church plan is exempt from complying with those requirements listed above, it still must comply with the other requirements of Code section 401(a) in order to qualify under Code section 401(a).

Additional Exemptions

**Pension Benefit
Guaranty
Corporation
(PBGC)**

Under Title IV of ERISA which established and governs the role of the PBGC, section 4021(b)(3) of ERISA provides that the Title does not apply to a plan which is a church plan as defined in Code section 414(e) unless the plan has made an election under Code section 410(d) not to be treated as a church plan and notified the PBGC of the election.

At the present time, PBGC has not issued or published any definition of what constitutes a church plan for their purposes. For more information on PBGC, go to www.pbgc.gov.

**Department of
Labor (DOL)**

Under Title I of ERISA, , church plans are again given an exemption from meeting certain of the requirements imposed by Title I. Section 4(b) of ERISA states that Title I does not apply to any employee benefit plan if the plan is a church plan which has not elected under Code section 410(d) not to be treated as a church plan.

The definition of a church plan in §3(33) of Title I of ERISA is a mirror image of the definition of church plan set out in Code section 414(e) as amended by ERISA.

DOL has not issued either regulations or interpretations concerning the definition of what constitutes a church plan. To date, they have only issued an information release that indicates that DOL is awaiting further development of the IRS regulations prior to issuing any of their own regulations. A number of Advisory Opinions, however, have been issued pursuant to ERISA Procedure 76-1, that provide interpretative guidance for §3(33) of ERISA as it relates to certain employee benefit arrangements. For more information on DOL, go to www.dol.gov.

Electing Church Plans

Election not to be treated as a Church Plan If a church that maintains a church plan desires, it can make an election under Code section 410(d) to have the plan treated as though it were not a church plan.

Qualification Requirements If the election is made, then the plan will be required to meet all of the requirements of Code section 401(a) in order to be qualified, including the vesting, participation and funding requirements imposed by ERISA. The election may be made under Regulation §1.410(d)-1(c) by filing a statement to that effect either (i) with an annual return or (ii) with a request for a determination letter under Code section 401(a).

Election Status Once such an election is made, it is **irrevocable** with respect to that plan, unless such election is made as part of a request for favorable determination. In that case, the election would be revocable. I.T. Reg. §1.401(d)-1(c)(4).

Amendments Made To Church Plans By The MPPA

Reason for the Amendments Under the MPPA, the provisions of the Code on church plans have been significantly amended. The main reason given by Congress for the changes was the belief “that plans maintained by churches should be allowed to cover all employees of related tax-exempt agencies”. See Senate Floor Explanation (Congressional Record page 510130, July 29, 1980.)

The Committee Report further stated that:

The bill would permit a church plan to cover employees of a tax-exempt agency controlled by or affiliated with a church or a convention or association of churches. This would include a convention or association of churches. This would include ministers and other clerical employees as well as employees of the church agency.

Change in Law Accordingly, the MPPA added Code section 414(e)(3)(B), which provides that an employee of a church shall include an employee of an organization, whether a civil law corporation or otherwise, which is:

- exempt from taxation under Code section 501 and
 - controlled by or associated with a church or a convention or association or churches.
-

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Amendments Made To Church Plans By The MPPA, Continued

Rationale of change

The purpose of this change was to treat employees of church-controlled organizations on the same basis as individuals employed directly by a church.

In General Counsel Memorandum 39793 (July 6, 1989), the IRS explained the rationale as follows:

Because of the passage of the Multiemployer Pension Plan Amendments Act of 1980 (MPPA), P.L. 96-364 (September 26, 1980), church plan status no longer hinges on whether an organization is a “church.”

Under section 414(e)(3)(A) and (D), a plan now qualifies as a “church plan” if it is maintained by an organization, whether a civil law corporation or otherwise, which is “controlled by or associated with” a church or convention or association of churches in that it “shares religious bonds and convictions” with that church or convention or association of churches.

Prior to the passage of MPPA, the term “church plan” did not include a plan which was maintained by more than one employer if one or more of the employers of the plan was not a church (or convention or association of churches) which was exempt from tax under section 501. See Treas. Reg. §1.414(e)-1(c)(1) (published March 28, 1980).

However, with respect to a plan in existence on January 1, 1974, if the plan applied on that date to employees of any tax exempt agency of a church (or convention or association of churches) which established and maintained the plan, the employees of the agency were to be treated as employees of the church (or convention or association of churches). The special transition rules for church agencies were effective until December 31, 1983. ERISA §3(33)(C).

A church agency is defined as an organization which is exempt from tax under section 501 and which is either controlled by or associated with a church. Treas. Reg. §1.414(e)-1(d)(2).

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Amendments Made To Church Plans By The MPPA, Continued

**Changes Made
by the MPPA**

The basic definition of church plan has not changed except that the special rule for agencies of churches was incorporated into the general rule for church plans.

The definition of a church plan still excludes a plan maintained by a church primarily for the benefit of employees of an unrelated trade or business. The guidelines provided by the regulations are still applicable for defining such a plan.

Several new definitions pertaining to church plans have been added by the MPPA. Code section 414(e)(3)(B) now defines an employee of a church to include:

- i. a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry, regardless of his source of compensation, or
- ii. an employee of an organization, whether a civil law corporation or otherwise, which is exempt from tax under Code section 501 and which is controlled by or associated with a church.

These two categories are important because under Code section 414(e)(3)(C), a church as a convention or association of churches which is exempt from tax under Code section 501 is deemed to be the employer of an individual if he or she fits either of these definitions.

An organization described in Code section 414(e)(3)(D) of the Code is considered to be associated with a church if it shares common religious bonds and convictions with that church. This is similar to the definition for religious orders contained in the regulations. Under this definition most agencies of churches will be brought within the church plan rules.

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Amendments Made To Church Plans By The MPPA, Continued

Special Rule on Participant Separation Code section 414(e)(3)(E) provides a special rule to cover instances where a plan participant separates from the service of the church. Under this rule, the church plan will not fail to qualify under Code section 414(e) if, in the case of such an employee, the plan

- (i) retains the employee's accrued benefit or account to provide for the payment of benefits to the employee or his or her beneficiary according to the terms of the plan, or
- (ii) receives contributions on behalf of the employee after his or her separation, but for no longer than five years.

Failure to Qualify Code section 414(e)(4)(A) provides that if a plan established for the benefit of its employees by a tax exempt church:

- fails to meet one of the requirements to qualify as a church plan and
- corrects the failure within the "correction period",

the plan will be deemed to qualify as a church plan for the year in which the correction is made and for all prior years.

If the correction is not made within the correction period, Code section 414(e)(3)(B) provides that the plan is deemed not to qualify starting with the date the earliest failure occurred.

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Amendments Made To Church Plans By The MPPA, Continued

**Correction
Period**

What is the correction period? Code section 414(e)(3)(C) defines it as the later of:

1. the period ending 270 days after the date the IRS mails a notice of default with respect to the plan's failure to meet one of the requirements;
 2. any period set by a court after it makes a final determination that the plan fails to qualify, or if it does not set a period, any reasonable period set by the Secretary, but it cannot be less than 270 days after the final determination; or
 3. any additional period that the IRS feels is reasonable or necessary for correction of the default.
-

Plans That Do Not Qualify As A Church Plan

MPPA Prior to the passage of the MPPA, a plan could only be a church plan within the meaning of Code section 414(e) if it covered employees of the church or church agencies.

Regulations under 414(e) Final regulations on church plans were issued on March 28, 1980.

Unrelated Trade or Business Pre-final regulations Under Code section 414(e)(2) prior to final regulations, a plan could not qualify as a church plan if it was established and maintained primarily for employees of a church who were employed in connection with one or more unrelated trades or businesses (within the meaning of Code section 513).

Example An example of the type of plan that could not qualify as a church plan due to this rule was a publishing house run by a church. The publishing house supplied printed material for use by the church. However, the majority of the material printed was sold to the public. The plan did not qualify as a church plan because it was maintained primarily for employees who were employed in connection with an unrelated trade or business.

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Plans That Do Not Qualify As A Church Plan, Continued

Impact of final regulations

One of the principal areas the regulations focused upon dealt with unrelated businesses. Under Code section 414(e), a plan does not qualify as a church plan unless it is established and maintained primarily for the benefit of employees who are not engaged in an unrelated trade or business. A plan will satisfy this requirement under Regulation §1.414(e)-1(b)(2) if, on the date the plan is established, the number of employees employed in connection with the unrelated trades or businesses eligible to participate is less than 50% of the total number of employees eligible to participate. This rule pertains to the year in which the plan is established.

A plan is considered maintained primarily for employees of the church, for plan years after September 2, 1974, if in four of its last five plan years (i) less than 50% of the plan participants consist of, and in the same year (ii) less than 50% of the total compensation paid by the employer during the plan year to plan participants is paid to, employees employed in an unrelated trade or business.

Even if a plan does not satisfy the above requirements, it can still be considered to be maintained primarily for the benefit of employees of the church if it can demonstrate this using a facts and circumstances test. Some of the factors to look at in making this determination include:

1. the margin by which the plan failed the numerical tests given above, and
2. whether the failure to satisfy these requirements was due to a reasonable mistake as to what constituted an unrelated trade or business.

Definition of unrelated trade or business

An employee is considered employed in connection with an unrelated trade or business if a majority of his or her duties in the employ of the church are directly or indirectly related to the carrying on of the trade or business.

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Plans That Do Not Qualify As A Church Plan, Continued

Maintained by more than one employer Under Code section 414(e)(2) prior to its final regulations, a plan could not qualify as a church plan if it was maintained by more than one employer, and if one or more of the employers was not a church which is tax-exempt under Code section 501.

Multiemployer Plan An example of the type of plan that could not qualify as a church plan due to this rule would be where four churches together establish a defined benefit pension plan for the benefit of their employees, and one of the churches has lost its status as an exempt organization under Code section 501(a) because it engaged in political activity. Such a plan would fail to satisfy this definition of church plan because one of the employers was no longer a tax-exempt church.

This has been eliminated by the MPAA.

Two or More Employers Part of the regulations under section Code 414(e) dealt with church plans maintained by two or more churches. This part has since been deleted by the MPAA. The term church plan will now not include a plan which, during the plan year, is maintained by two or more employers unless (i) each of the employers is a church that is exempt from tax under Code section 501(a) and (ii) with respect to the employees of each employer, the plan is not established and maintained primarily for employees of an unrelated trade or business. Reg. §1.414(e)-1(c). Therefore, a single employer could jeopardize the status of the entire plan as a church plan unless that employer ceases maintaining the plan for all plan years beginning after the plan year in which it receives a final notification from the IRS.

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Plans That Do Not Qualify As A Church Plan, Continued

**Special
Temporary
Rule**

Under Regulation §1.414(e)-1(d)(2), an agency of a church is defined as an organization which is exempt from tax under Code section 501 and which is either controlled by or associated with a church. An organization is considered to be associated with a church if it shares common religious bonds and convictions with that church.

Regulation §1.414(e)-1(e) states that the term church includes a religious order or a religious organization if the order or organization is:

- i. an integral part of a church, and
- ii. engaged in carrying out the functions of a church.

As discussed above, Code section 414(e), as enacted by ERISA, contained a special rule for church plans that covered employees of agencies of churches. This rule was amended by the MPPA. Agencies of churches have now been incorporated under the general church plan rule. However, the regulations on this point do provide guidelines for plans maintained for the benefit of employees of agencies affiliated with religious orders.

Determination Case Processing

**Private Letter
Ruling and
Determination
Submissions**

For an employee benefit plan to be viewed as a church plan depends upon whether the entity maintaining that plan is viewed as being a church or a convention or association of churches which is exempt from tax under Code section 501(a). The determination of whether a plan is or is not a church plan within the meaning of Code section 414(d) is made on a case by case analysis of all the facts and circumstances.

The Employee Plans Technical Office issues Private Letter Rulings involving Code section 414(e) pursuant to Revenue Procedure 2003-4. (A private letter ruling is a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer's specific set of facts. A PLR is issued to establish with certainty the federal tax consequences of a particular transaction before the transaction is consummated or before the taxpayer's return is filed. A PLR is issued in response to a written request submitted by a taxpayer and is binding on the IRS if the taxpayer fully and accurately described the proposed transaction in the request and carries out the transaction as described. A PLR may not be relied on as precedent by other taxpayers or IRS personnel. PLRs are generally made public after all information has been removed that could identify the taxpayer to whom it was issued.)

The Manager, EP Determinations, will issue determination letters on the qualification of a church plan pursuant to Revenue Procedure 2003-6. (Note: the latest versions of these Revenue Procedures are contained in Internal Revenue Bulletin 2003-1, issued January 6, 2003).

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Determination Case Processing, Continued

Application For Determination You will typically be able to determine if a plan is a church plan through the following materials:

1. Name of plan sponsor
2. Name of plan
3. Question on Form 5300 series application – Is this a non-electing church plan?
4. Person signing the application form
5. General eligibility requirements
6. Cover letter
7. Prior determination letter including caveats*
8. Explanation of controlled group status
9. Explanation of other qualified plans maintained
10. Plan provision

*Note that prior to Announcement 2001-77, a special church plan caveat was included on the favorable determination letter.

Mandatory Assignment and Case Grade At this time, all church plans are to be considered mandatory assignment cases. Church plans are considered a complicating factor that may increase the grade of a case.

Nondiscrimination Rules

Notices 2001-46 and 2001-9 Notice 2001-46 provides that church plans will be deemed to satisfy the regulations under Code sections 401(a)(4), 401(a)(5), 401(l) and 414(s) until further notice, but in no case earlier than the first plan year beginning on or after January 1, 2003. For plan years beginning before that effective date, nonelecting church plans must be operated in accordance with a reasonable, good faith interpretation of these statutory provisions until the time such notice is provided.

Remedial Amendment Period

GUST Remedial Amendment Period-general rule In accordance with Revenue Procedure 2000-27, the remedial amendment period for nongovernmental plans for GUST ended on the last day of the first plan year beginning on or after January 1, 2001. This was also the end of the remedial amendment period for TRA '86 for nonelecting church plans (which includes subsequent legislation through UCA '92 and OBRA '93).

Remedial amendment period extended to Feb 28 for all plans Due to the September 11, 2001 terrorist attack on the United States, the GUST remedial amendment period was extended for **all** plans to February 28, 2002, if the period would otherwise end before then. Note that as stated in News Release IR-2002-9, the deadline for a fiscal year plan may be later – the last day of the fiscal year beginning in 2001, and for most master, prototype, and volumes, the date is 12/31/2002, or later. Rev. Proc. 2001-55.

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Remedial Amendment Period, Continued

Additional extension to June 30, 2002

An additional extension to June 30, 2002, was approved for plans that were directly affected (IRS approval required if not located in Manhattan south of 14th street) by the September 11, 2001, terrorist attack on the United States.

In cases of substantial hardship resulting from the Terrorist Attack the Service may grant additional extensions of the GUST remedial amendment period to particular plans up to December 31, 2002.

This extension applies with respect to all disqualifying provisions of new plans adopted or effective after December 7, 1994, and with respect to all plan amendments adopted after December 7, 1994, that would cause an existing plan to fail to be qualified. Rev. Proc. 2001-55.

Additional extensions

Additional extensions of the GUST remedial amendment period may be available for employers who, by the end of the GUST remedial amendment period (determined without regard to the extension), have adopted a pre-approved plan (that is, a master or prototype or volume submitter plan) or certified their intent to adopt such a plan. See Revenue Procedure 2000-20

Late amenders

Some late amenders may follow the streamlined procedure established in Rev. Proc. 2002-35 to avoid disqualification for GUST. However, an application for determination letter must have been filed by September 3, 2002 in order to be eligible.

Extension for non-electing church plans

One final extension of the RAP was granted pursuant to Rev. Proc. 2002-73 for a non-electing church plan that qualifies for extension of the GUST RAP under Rev. Proc. 2000-20. If the requirements are met under section 19 of Rev. Proc. 2000-20, as modified, the GUST RAP for the employer's plan will not end before the later of September 30, 2003, or the end of the 12th month beginning after the date on which the Service issues a GUST opinion or advisory letter for the pre-approved plan. This extension also applies to the TRA '86 RAP.

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Remedial Amendment Period, Continued

Defining GUST Note that the term GUST refers to the following:

- The Uruguay Round Agreements Act, Pub. L. 103-465;
 - The Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353;
 - The Small Business Job Protection Act of 1996, Pub. L. 104-188;
 - The Taxpayer Relief Act of 1997, Pub. L. 105-34;
 - The Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206; and
 - The Community Renewal Tax Relief Act of 2000, Pub. L. 106-554.
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Conclusion with respect to Church plans

Summary

Prior to the passage of the MPPA and final regulations, there was little activity in the Internal Revenue Service regarding church plans. When ERISA was first enacted, several requests for rulings were received as to whether certain plans qualified as church plans. At that time, the Service had to take a no-ruling position. Now that the final regulations have been issued and the definition of church plan has been clarified by the MPPA, a substantial increase in ruling request activity has occurred.

If a plan is determined to be a non-electing church plan within the meaning of Code section 414(e), it will be relieved from meeting various requirements imposed by Titles I, II and IV of ERISA. While such a plan will generally receive the same type of determination letter as is received by other retirement plans seeking qualification under Code section 401(a), the non-electing church plan is specifically exempted from compliance with many provisions applicable to qualified plans. Thus, a non-electing church plan may enjoy the advantages of being a qualified plan while not having to comply with many of the ERISA requirements of such a plan.

GOVERNMENT PLANS

Overview

Introduction

This chapter provides a summary of the governmental plan area, with emphasis on the definition under section 414(d) of the Internal Revenue Code. Through the use of examples, guidance is provided to aid in determining the applicability of the section to an employee benefit plan. The effects of being a governmental plan are also discussed. Finally, the criteria used for defining governmental plans and the roles of both the Pension Benefit Guaranty Corporation (PBGC) and the Department of Labor (DOL) are explored. However, for purposes of this section of the chapter, we will not be covering section 403(b) plans (tax sheltered annuities) or section 457 plans (non-qualified deferred compensation arrangements) – only qualified plans under Code section 401(a).

Note that this section of the chapter contains some republished material from the 1981 CPE text on government plans, in addition to new and updated material that has occurred in the interim. This previous material is included to provide background and continuity. Since many governmental plans have been adopted pre-ERISA, this historical perspective is needed to show how they evolved along with the issuance of IRS Code and regulatory material.

Internal Revenue Code Section 414(d)

Definition Code section 414(d) of the Code provides, in part, that a 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. See also §3(32) of ERISA.

Also included in the definition is any plan to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions under that Act, and any plan of an international organization that is exempt from taxation by reason of the International Organizations Immunities Act.

Regulations At present, there are no regulations interpreting this Code section.

When Is A Plan Considered A Governmental Plan

Rev. Rul. 89-49 Whether a plan is a governmental plan depends on whether the entity maintaining the plan is a governmental entity, as determined under Rev. Rul. 89-49.

Under Rev. Rul. 89-49, one of the most important features in determining whether an organization constitutes an agency or instrumentality of the United States or any state within the meaning of section 414(d) is the degree of control the Federal or state government has over the organization's everyday operations.

Additional factors include:

1. whether there is specific legislation creating the organization;
2. the source of funds for the organization;
3. the manner in which the organization's trustees or operating board members are appointed or elected; and
4. whether the state considers employees of the organization to be employees of the state.

Continued on next page

When Is A Plan Considered A Governmental Plan, Continued

Example

This is an example which demonstrates a sufficient degree of affiliation between the entity and the state and/or political subdivision so that the entity's pension plan is considered to be a governmental plan within the meaning of Code section 414(d):

1. The taxpayer, a municipal hospital, was created pursuant to a city ordinance in accordance with powers granted to the city by state law.
2. The hospital is operated by a board of trustees, as provided for in the creating legislation. The members of this board are elected for fixed terms by the city council and approved by the Mayor. A majority of the trustees are municipal employees.
3. Primarily its own revenues finance the hospital. However, the city ordinance requires the city to make up any revenue shortfalls.
4. The comptroller of the state considers the employees of the hospital to be employees of the city.

**Insufficient
Affiliation**

A plan will not be considered a governmental plan merely because the sponsoring organization has an affiliation with a governmental unit or some quasi-governmental power. Otherwise, an abusive situation might exist with private organizations establishing contractual relationships with the state or local governments in order to take advantage of the less restrictive governmental plan requirements.

Continued on next page

When Is A Plan Considered A Governmental Plan, Continued

**Example-
Insufficient
Affiliation**

This is an example which demonstrates an insufficient degree of affiliation between the entity and the state and/or political subdivision so that the entity's pension plan is not considered to be a governmental plan within the meaning of Code section 414(d):

1. The taxpayer, a volunteer fire department, was organized by the residents of a town to provide fire protection services.
2. Some years after the formation of the volunteer fire department, the state passed legislation providing for the incorporation of such volunteer fire departments within the state. More recently, state legislation has resulted in volunteer firefighters being eligible for coverage by state worker's compensation laws.
3. A self-perpetuating board of trustees, whose members are retired officers of the department and are elected by the department's active membership, governs the fire department. The town does not exercise control over the department's daily operations.
4. The fire department's revenues are primarily derived from donations raised by fund raising activities. .

Advantages Of Being A Government Plan

General

An employee benefit plan that is considered to be a governmental plan is relieved, upon initial determination of qualified status and then in operation, from meeting various requirements imposed on other qualified plans by the Code. That is, while such a plan will generally receive the same type of determination letter as is received by other retirement plans seeking qualification under Code section 401(a), the governmental plan is specifically exempted from compliance with many of the provisions applicable to qualified plans.

A governmental plan is also exempt from Title I and Title IV of ERISA (those titles cover fiduciary duties, reporting and disclosure requirements, and Termination Insurance (PBGC)). See sections 4(b)(1) and 4021(b)(2) of ERISA.

Non-Applicable Code Provisions

A government plan will be exempt from the minimum participation requirements and minimum vesting standards pursuant to Code sections 410(c)(1)(A) and 411(e)(1)(A), respectively.

In addition to the exemptions just mentioned, flush language in the middle of Code section 401(a) exempts plans to which Code section 411 is not applicable from having to comply with certain requirements of Code section 401(a), among them:

- Joint and Survivor Annuities, section 401(a)(11)
- Mergers and Transfers of Assets, section 401(a)(12)
- Assignment or Alienation of Benefits (exclusive of QDRO's*), section 401(a)(13)
- Commencement of Benefit Requirements, section 401(a)(14)
- Reductions in Benefits due to Social Security Increases, section 401(a)(15)
- Forfeiture of Mandatory Contributions, section 401(a)(19)
- PBGC Notice, section 401(a)(20)

Continued on next page

Advantages Of Being A Government Plan, Continued

Prohibited Transactions

Government plans are also exempted from the prohibited transaction provisions of Code section 4975 pursuant to Code section 4975(g).

Top Heavy

The top-heavy provisions do not apply to a governmental plan. Code section 410(a)(10)(B)(iii) and Regulation §1.416-1, T38.

Funding

The minimum funding standards provided by Code section 412 do not apply to a governmental plan. Code section 412(h)(3). Governmental plans are subject to the pre-ERISA funding standards.

Chart

See chart at the end of this chapter for a more detailed breakdown of applicable exemptions from Code provisions.

Other Governmental Agencies

General

Both PBGC and DOL make determinations of when an employee benefit plan is a governmental plan.

For information on PBGC, go to www.pbgc.gov.

Department of Labor

While the IRS has jurisdiction over various types of qualified and non-qualified retirement plans, DOL has jurisdiction over a much wider variety of plans. Under Title I of ERISA, employee benefit plans include sickness, accident, disability, health, vacation and retirement plans. Under this title, government plans are given an exemption from meeting certain of the requirements imposed by Title I. Section 4(b) of ERISA states that Title I does not apply to any employee benefit plan if the plan is a government plan.

The definition of a government plan in §3(32) of Title I of ERISA is substantially identical to the definition of government plan set out in Code section 414(d).

For more information on DOL, go to www.dol.gov.

Case Processing

Application for Determination

You will typically be able to determine if a plan is intended to be a government plan through the following materials:

1. Name of plan sponsor
 2. Name of plan
 3. Question on Form 5300 series application – Is this a government plan?
 4. Person signing the application form
 5. General eligibility requirements
 6. Cover letter
 7. Prior determination letter including caveats (Note that prior to Announcement 2001-77, a government plan caveat was included on the favorable determination letter)
 8. Explanation of other qualified plans maintained
 9. Plan provision
-

Private Letter Ruling and Determination Submissions

The Employee Plans Technical Office issues Private Letter Rulings involving Code section 414(d) per Revenue Procedure 2003-4. A private letter ruling is a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer's specific set of facts. A PLR is issued to establish with certainty the federal tax consequences of a particular transaction before the transaction is consummated or before the taxpayer's return is filed.

A PLR is issued in response to a written request submitted by a taxpayer and is binding on the IRS if the taxpayer fully and accurately described the proposed transaction in the request and carries out the transaction as described. A PLR may not be relied on as precedent by other taxpayers or IRS personnel. PLRs are generally made public after all information has been removed that could identify the taxpayer to whom it was issued.

The Manager, EP Determinations, will issue determination letters on the qualification of a governmental plan pursuant to Revenue Procedure 2003-6. (Note: the latest versions of these Revenue Procedures are contained in Internal Revenue Bulletin 2003-1, issued January 6, 2003).

Continued on next page

Case Processing, Continued

Mandatory Assignment and Case Grade At this time, all governmental plans are to be considered mandatory assignment cases. Governmental plans at the state level are considered a complicating factor that may increase the grade of a case.

Nondiscrimination Rules

Nondiscrimination rules for State and Local plans Section 1505 of TRA'97 added Code section 401(a)(5)(G) to provide that the nondiscrimination rules do not apply to State and local governmental plans – in particular, Code sections 401(a)(3), 401(a)(4) and 401(a)(26). Section 1505 of TRA'97 also provided that State and local governmental plans shall be treated as meeting the requirements of Code section 401(k)(3). Section 1505(a)(3) of TRA '97 amended Code section 410(c) to provide that governmental plans shall be treated as meeting the requirements of 410 for purposes of 401(a). The amendment to Code section 410(c) is not limited to State and local governmental plans but applies to all governmental plans within the meaning of Code section 414(d).

Nondiscrimination rules for governmental plans other than State and Local plans The Service and Treasury intend to issue regulations that will provide further guidance on the application of the nondiscrimination requirements of the Internal Revenue Code for governmental plans within the meaning of section 414(d), other than for plans of State and local governments or political subdivisions, agencies or instrumentalities. It is anticipated that those regulations will provide that governmental plans will be deemed to satisfy section 401(a)(4), 401(a)(26), 401(k)(3) and 401(m) of the Code until the first day of the first plan year beginning on or after the date final regulations are issued.

In addition, the notice requests comments on how the nondiscrimination requirements should be applied to governmental plans under the regulations. Notice 2003-6, which modifies Notice 2001-46.

GUST Remedial Amendment Period

**RAP-
governmental
plans**

In accordance with Rev. Proc. 2000-27, governmental plans now have a single amendment deadline for all GUST and TRA '86 plan amendments (which includes subsequent legislation through UCA '92 and OBRA '93).

**Extension to
February 28,
2002**

Due to the September 11, 2001 terrorist attack on the United States, the GUST remedial amendment period, Revenue Procedure 2001-55 extended the GUST RAP for **all** plans to February 28, 2002, if the period would otherwise end before then (as stated in News Release IR-2002-9. Note, the deadline for a fiscal year plan may be later – the last day of the fiscal year beginning in 2001, and for most master and prototype, and volumes the date is 12/31/2002, or later).

However, for governmental plans within the meaning of Code section 414(d), the GUST RAP ends on the latest of

- (i) February 28, 2002,
- (ii) the last day of the first plan year beginning on or after January 1, 2001, or
- (iii) the last day of the first plan year beginning on or after the “20000 legislative date” (that is, the 90th day after the opening of the first legislative session beginning after December 31, 1999, of the governing body with authority to amend the plan, if that body does not meet continuously).

This is also the end of the TRA '86 remedial amendment period for governmental plans.

**Additional
extension to
June 30, 2002**

Also, an additional extension to June 30, 2002, was approved for plans that were directly affected (IRS approval required if not located in Manhattan on or south of 14th street) by the September 11, 2001, terrorist attack on the United States.

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GUST Remedial Amendment Period, Continued

Service may grant additional extensions

In cases of substantial hardship resulting from the Terrorist Attack, the Service may grant additional extensions of the GUST remedial amendment period to particular plans up to December 31, 2002. This extension applies with respect to all disqualifying provisions of new plans adopted or effective after December 7, 1994, and with respect to all plan amendments adopted after December 7, 1994, that would cause an existing plan to fail to be qualified. Rev. Proc. 2001-55.

Additional extensions of the GUST remedial amendment period may be available for employers who, by the end of the GUST remedial amendment period (determined without regard to the extension), have adopted a pre-approved plan (that is, a master or prototype or volume submitter plan) or certified their intent to adopt such a plan. See Rev. Proc. 2000-20.

Late amenders

Some late amenders may follow the streamlined procedure established in Rev. Proc. 2002-35 to avoid disqualification for GUST. However, an application for determination letter must have been filed by September 3, 2002 in order to be eligible

Final extension

One final extension of the RAP was granted pursuant to Rev. Proc. 2002-73 for a governmental plan that qualifies for extension of the GUST RAP under Rev. Proc. 2000-20. If the requirements are met under section 19 of Rev. Proc. 2000-20, as modified, the GUST RAP for the employer's plan will not end before the later of September 30, 2003, or the end of the 12th month beginning after the date on which the Service issues a GUST opinion or advisory letter for the pre-approved plan. This extension also applies to the TRA '86 RAP.

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GUST Remedial Amendment Period, Continued

Defining GUST Note that the term GUST refers to the following:

- the Uruguay Round Agreements Act, Pub. L. 103-465;
 - the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353;
 - the Small Business Job Protection Act of 1996, Pub. L. 104-188;
 - the Taxpayer Relief Act of 1997, Pub. L. 105-34;
 - the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206; and
 - the Community Renewal Tax Relief Act of 2000, Pub. L. 106-554.
-

Popular Plans

Introduction We have been seeing an increase in requests for determination letters from government plans due to the expiration of the remedial amendment period.

In particular, two types of plans have been received in large numbers – the Code section 414(h) Pick-Up plan and the Deferred Retirement Option Plan (DROP).

Another feature being added to governmental plans permits employees to purchase service credit.

Continued on next page

Popular Plans, Continued

DROPs

A DROP is a provision Recent cases have included plans covering teachers, police officers and fire fighters. A DROP is a feature in a defined benefit plan under which a participant who otherwise is eligible for retirement (either early or normal) on a deemed retirement date agrees to continue working for a specified number of years.

Instead of continuing to accrue benefits under the defined benefit plan the participant receives a sum each year in a defined contribution-type account. The sum paid into the account each year is typically the amount of the annual annuity which would have been paid to the participant if the participant had retired on the deemed retirement date. The account is usually credited with earnings. When the participant actually retires he or she receives both an annuity calculated as of the deemed retirement date and the value of the separate account, usually payable as a single sum.

A similar plan design is often called a "back-DROP," under which a participant makes a retroactive election at the actual retirement date as to the form of benefit payment. This enables a participant to receive part of the benefit in a single sum.

Example of a DROP

State A maintains Plan X, under which a participant can retire at age 55 after 25 years of service with 40% of final average pay, and with 50% of final average pay after 30 years of service.

A participant age 55 earning \$60,000 with 25 years of service would receive an annual pension of \$24,000. After 30 years, the participant would receive \$30,000, assuming no increase in compensation.

Under Plan X's DROP feature, the participant elects to defer retirement for an additional five years and to have the plan allocate \$2,000 each month (a total of \$24,000 each year) to a separate account, where it will earn interest at a rate of 5%, compounded.

When the participant actually retires 5 years later, after 30 years of service, he receives an annual annuity of \$24,000 plus a lump sum of the value of the account - \$136,579 (assuming monthly contributions of \$2,000, plus 5% compound interest.)

Continued on next page

Popular Plans, Continued

Pick up plan

A Pick-Up plan is one in which the governmental sponsor has elected to shift the status of the contributions to the plan from being after-tax “employee” contributions to before-tax “employer” contributions, even though the contributions continue to be deferred from the employees’ regular pay. This election makes the plan more attractive to employees at no cost to the employer. Recent cases have included universities, cities and municipalities. In order for an employer to have reliance on whether the Pick-Up Contributions comply with Code section 414(h)(2), the employer must obtain a private letter ruling from the Internal Revenue Service. See Rev.Rul. 81-36 and Rev. Rul. 81-35, criteria on valid pick-ups::

- i. the employer must specify that the contributions, although designated as employee contributions, are being paid by the employer in lieu of contributions by the employee, and
- ii. the employee must not be given the option of choosing to receive the contributed amounts directly instead of having them paid by the employer to the pension plan.

Example of a pick up plan

P is employed by State A whose statutes require that employees contribute 10% of salary to the State plan, which is qualified under Code section 401(a). In 2003 State A amends the plan to provide that it will "pick up" contributions to the plan.

The amendment specifies that the contributions are being paid by the employer in lieu of contributions by the employee, and that they will be paid directly into the plan. The employee will not be given an option of choosing instead to receive the contributed amounts.

P's salary is \$30,000, and P contributes \$3,000 to the plan. Although the contribution of \$3,000 is designated under the plan as an employee contribution, it will be treated under Code section 414(h)(2) as an employer contribution. Accordingly, the \$3,000 "picked-up" contribution is not includible in P's current gross income until distributed from the plan.

Continued on next page

Popular Plans, Continued

415 limitations-introduction As noted elsewhere in this chapter, the section 415 limitations on benefits and contributions are one of the few qualification provisions that apply to governmental plans. Code section 415(n) provides a special rule for satisfying the 415 limitations for payments to a governmental plan to purchase additional service credit.

Section 415(n)(1) Code section 415(n)(1), which was enacted in TRA '97, provides, in general, that if an employee makes one or more contributions to a defined benefit governmental plan to purchase permissive service credit, then the limitation under either paragraph (b) or paragraph (c) of Code section 415 must be met.

For this purpose:

- the limitation under Code section 415(b) is met by treating the accrued benefit derived from all such contributions as an annual benefit derived from all such contributions as an annual benefit, and
- the limitation under Code section 415(c) is met by treating all such contributions as annual additions

Effect of section 415(n) Under section 1.415-3(d)(1) of the regulations, after-tax contributions to a defined benefit plan are required to satisfy the Code section 415(c) limitations.

The effect of section 415(n) is to allow after-tax contributions to defined benefit plans that are governmental plans, and that meet the requirements of Code section 415(n), to satisfy the easier Code section 415(b) limitations.

Continued on next page

Popular Plans, Continued

**Defining
permissive
service credit-
415(n)(3)**

Under Code section 415(n)(3), permissive service credit means service credit:

- (i) recognized by the plan for purposes of calculating the participant's benefit,
- (ii) which the participant has not previously been credited under the plan, and
- (iii) which the participant can receive only by making an additional, voluntary (i.e. after-tax) contribution not in excess of the amount necessary to fund the benefit attributable to the service credit.

No more than 5 additional years of service credit can be purchased. In addition, a plan may not allow employees who have participated in the plan for at least 5 years to purchase additional service credit.

**How
participants
could purchase
extra service
credit-
EGTRRA
changes**

Prior to 2001, participants could purchase extra service credit only with their own after-tax funds, and could not use rollover distributions from other tax-favored retirement plans to make the purchase.

In 2001, EGTRRA amended the Code to provide that amounts paid from 403(b) plans and 457 plans pursuant to trustee-to-trustee transfers could be used to purchase service credit. See Code sections 403(b)(13) and 457(e)(16), and section 1.457-10(b)(6) of the regulations.

It is not yet clear if rollovers, whether direct or indirect, may be used to purchase additional service credit under section 415, and specialists who encounter such a plan provision should contact EP Technical for guidance on the matter.

Continued on next page

Popular Plans, Continued

Example of purchase of service credit

Plan X is a defined benefit governmental plan maintained by County Y, which is part of State S, for its employees.

- Plan X provides for distributions only in the event of death, an unforeseeable emergency, or severance from employment (including retirement) with Y.
- Plan S is a governmental section 457 plan maintained by State T for its employees.

Employee A is an employee of Y and a participant in Plan X. Employee A was previously an employee of State T and is still entitled to benefits under Plan S.

Plan S includes provisions allowing participants in Plan X to transfer assets to Plan S for the purchase of past service credit under Plan S, and does not permit the amount transferred to exceed the amount necessary to fund the benefit resulting from the past service credit.

Plan X includes provisions allowing employees such as A to transfer assets to Plan S to provide past service credit under Plan S.

Note that Code section 415(n) applies only to contributions made to purchase additional **service** credit. It does not apply to contributions made to purchase enhanced benefits, even if the contributions otherwise satisfy Code section 415(n).

Example of purchase that fails section 415(n)

State plan A provides for a voluntary purchase, using after-tax contributions, of enhanced benefits equal to 2% for each year of service, up to 80% of compensation. This purchase fails to satisfy Code section 415(n)(3)(A)(ii) because the enhanced benefits relate to service already credited to the participant under the plan.

Conclusion with respect to governmental plans

Summary

In this section of the chapter, we have demonstrated both the way in which a determination is made as to whether an employee benefit plan is a governmental plan and the significance this determination has concerning that plan's compliance with the various Titles of ERISA.

If a plan is determined to be a government plan within the meaning of Code section 414(d), it will be relieved from meeting various requirements imposed by Titles I, II and IV of ERISA. While such a plan will generally receive the same type of determination letter as is received by other retirement plans seeking qualification under Code section 401(a), the government plan is specifically exempted from compliance with many provisions applicable to qualified plans. Thus, a government plan may enjoy the advantages of being a qualified plan while not having to comply with many of the ERISA requirements of such a plan.

PLANS OF STATE OR LOCAL GOVERNMENTS-Chart of Code Section Applicability

(INCLUDING POLITICAL SUBDIVISIONS OR INSTRUMENTALITIES THEREOF)

Introduction

The following chart lists the applicable code sections, and provides whether these sections apply to state or local government plans. The following chart also provides the authority for the particular code section applying or not applying.

Entities and plans to which the chart does NOT apply

- This chart does not apply to non-State government or non-local government entities (such as political subdivisions or instrumentalities of the Federal government).
- This chart also does not apply to Code section 403(b) or 457 plans (which are often called governmental plans). The Service does not issue determination letters on Code section 403(b) or 457 plans.

<i>Code Section</i>	<i>Applicable or Not Applicable</i>	<i>Authority/Comment</i>
401(a)(1)	Applicable	Basic §401(a) definitions and written program requirement
401(a)(2)	Applicable	Exclusive benefit rules
401(a)(3)	Not Applicable	See §410(c); ERISA §4(b); ERISA §201
401(a)(4)	Not Applicable*	§401(a)(5)(G); P.L. 105-34 Sec. 1505(d)(2)
401(a)(5)	Applicable	Provides 401(a)(4) is not applicable
401(a)(6)	Not Applicable	Not a form requirement – relates to 410(b) which is n/a
401(a)(7)	Not Applicable	Pre-ERISA §401(a)(7) must be satisfied. See §411(e)
401(a)(8)	Applicable	Forfeitures must not increase benefits in a defined benefit plan
401(a)(9)	Applicable	Distribution rules
401(a)(10)	Not Applicable	Refers to §416 – top-heavy. See § 410(B)(iii)
401(a)(11)	Not Applicable	Joint and Survivor See Note 1
401(a)(12)	Not Applicable	Merger rules See Note 1
401(a)(13)	Not Applicable	Assignment or alienation rules See Note 1
401(a)(14)	Not Applicable	Benefit commencement See Note 1
401(a)(15)	Not Applicable	Benefit decrease due to Social Security See Note 1
401(a)(16)	Applicable	Certain modified § 415 limits
401(a)(17)	Applicable	Compensation limit effective 1-1-96. See Regulation §1.401(a)(17)-1(d)(4)(i) and (ii) for special transitional rules.
401(a)(18)	N/A	Section was repealed
401(a)(19)	Not Applicable	Withdrawal of mandatory contributions See Note 1
401(a)(20)	Not Applicable	PBGC notice See Note 1
401(a)(21)	N/A	Section was repealed
401(a)(22)	➔	Employer stock – n/a

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PLANS OF STATE OR LOCAL GOVERNMENTS-Chart of Code Section Applicability, Continued

Chart of applicable/not applicable code sections (continued)

<u>Code Section</u>	<u>Applicable or Not Applicable</u>	<u>Authority/Comment</u>
401(a)(23)	→	Employer stock – n/a
401(a)(24)	Applicable	Group trusts may hold governmental plan assets
401(a)(25)	Applicable	Actuarial assumptions must be specified
401(a)(26)	Not Applicable*	401(a)(26)(H)
401(a)(27)	Applicable	Applies to profit sharing plans
401(a)(28)	→	Employer stock – n/a
401(a)(29)	→	Probably not applicable since §412 generally does not apply
401(a)(30)	→	Limits on elective deferrals – may apply to pre-5/6/1986 (grandfathered 401(k) plans)
401(a)(31)	Applicable	Direct rollover rules
401(b)	Applicable	See Notice 2003-6 for end of RAP
401(h)	Applicable	Retiree health benefit rules
401(k)	Not Applicable*	§401(k)(4)(B)(ii) – Not eligible for 401(k) plan. (See special rule – pre 5/6/1986 government plans that have a cash or deferred arrangement are exempt from 401(k))
401(m)	Not Applicable	Does not apply since 401(a)(4) is not applicable
401(n)	Applicable	Applies certain QDRO rules
402	Applicable	Tax consequences of disqualification apply
410	Not Applicable	See §410(c); ERISA §4(b); ERISA §201
411	Modified	Must meet pre-ERISA 411 rules – See Note 2
412	Modified	Must meet pre-ERISA 412 rules
413	Applicable	Multiemployer and multiple employer rules
414(h)	Applicable	Pick up plan rules
414(l)	Not Applicable	Merger rules See Note 1
414(q)	Applicable	HCE definition – limited applicability
414(r)	Applicable	QSLOB rules – limited applicability
414(s)	Not Applicable	Compensation requirements for nondiscrimination testing
415	Applicable	Modified limits
416	Not Applicable	§401(a)(10)(B)(iii)
417	Not Applicable	Joint and Survivor See Note 1

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**PLANS OF STATE OR LOCAL GOVERNMENTS-Chart of Code
Section Applicability, Continued**

**Additional
points about
applicability**

Note 1- The final paragraph of section 401(a) of the Code states: “Paragraphs (11), (12), (13), (14), (15), (19), and (20) shall apply only in the case of a plan to which section 411 (relating to minimum vesting standards) applies without regard to subsection (e)(2) of such section.”

*This section may be different for a plan of a Federal government entity. The applicability of the law in these areas for plans other than state and local governments is not be clear. See Notice 2003-6.

Note 2 – Prior to ERISA 401(a)(7) provided that “A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, upon its termination or upon complete discontinuance of contributions, under the plan, the rights of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the amounts credited to the employees’ accounts are nonforfeitable. This paragraph shall not apply to benefits or contributions which, under provisions of the plan adopted pursuant to regulations prescribed by the Secretary or his delegate to preclude the discrimination prohibited under paragraph (4), may not be used for designated employees in the event of early termination of the plan.

SINGLE-EMPLOYER COLLECTIVELY-BARGAINED

Overview-

Introduction

Collectively bargained plans are plans established or maintained pursuant to one or more collective bargaining agreements between one or more employers and employee representatives (Unions). Although these types of plans are very similar to the other plans qualified under Code section 401(a), there are some special rules.

Collectively bargained plans can be multiemployer plans or single employer plans. They also need to be distinguished from the similarly sounding, but very different, multiple employer plan.

A multiple employer plan is a plan maintained by two or more employers who are not related under Code sections 414(b) (controlled groups), 414(c) (trades or businesses under common control), or 414(m) (affiliated service groups). Employers related under sections 414(b), (c), or (m) of the Code are treated as a single employer for determining the number of employers maintaining a multiple employer plan. Multiple employer plans are governed by the rules in IRC 413(c).

The rules of Code section 413(c) do not apply to collectively bargained multiemployer plans described in Code section 413(b) and Regulation §1.413-1(a). A multiemployer plan involves one or more collective bargaining agreements to which more than one employer is required to contribute.

The single employer collectively bargained plan is a single plan, or portion of a plan, involving one or more collective bargaining agreements to which a single employer is required to contribute.

This section of the chapter will focus solely on the single employer collectively bargained plan, while providing you with an awareness of the multiple employer plan and the multiemployer plan.

General Provisions-collectively bargained plans

Introduction A collectively bargained plan, and each trust which is part of such plan, is a plan maintained pursuant to an agreement, which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives, and one or more employers. See Code section 413(b) and Regulation §1.413-1.

Special rules apply to collectively bargained plans If a plan meets this definition, special rules will apply with regard to:

- participation,
- discrimination,
- exclusive benefit,
- vesting,
- top-heavy,
- funding,
- liability for funding tax and deduction limitations.

Note that Code section 413(b), while applicable to single-employer collectively bargained plans, is more relevant to the operation of multiemployer plans.

Defining the term “employee representative” In determining whether there is a collective bargaining agreement between employee representatives and one or more employers, the term employee representatives will not include any organization more than one-half of the members of which are employees who are owners, officers or executives of the employer.

Bona fide agreement required An agreement will not be treated as a collective bargaining agreement unless it is a bona fide agreement between bona fide employee representatives and one or more employers. Code section 7701(a)(46) and Regulation §1.410(b)-6(d)(2)(i).

Continued on next page

General Provisions-collectively bargained plans, Continued

Defining a collectively bargained employee

A collectively bargained employee is an employee who is included in a unit of employees covered by an agreement that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers. In addition, with respect to the agreement, there must be evidence that retirement benefits were the subject of good faith bargaining between employee representatives and the employer or employers.

It is important to note that an employee is still considered a collectively bargained employee regardless of whether the employee benefits under any plan of the employer, as long as benefits were the subject of good faith bargaining between employee representatives and one or more employers. Regulation §1.410(b)-6(d)(2).

According to the Labor-Management Relations Act of 1947 (LMRA), benefits are a mandatory subject to collective bargaining. The certification of the unit as a collectively bargained unit could be jeopardized, and the employer could be subject to sanctions, if this is not followed.

For this purpose, it is irrelevant that there are in form two or more separate plans or agreements. Regulation §1.413-1(a)(2).

Mandatory Disaggregation for Nondiscrimination Testing

If there are participants in the plan other than collectively bargained employees, the plan will benefit both collectively and non-collectively bargained employees. Therefore, the Plan is mandatorily disaggregated into two separate plans: one for collectively bargained employees and one for non-collectively bargained employees. Regulation §1.410(b)-7(c)(4)(ii)(B). A plan that benefits solely collectively bargained employees for a plan year, such as the disaggregated population of collectively bargained employees just mentioned, will be automatically deemed to satisfy coverage under Code section 410(b) and Regulation §1.410(b)-2(b)(7).

Special Provisions-Collectively bargained plans

Participation Code section 410 (minimum participation standards), is applied as if all employees of each of the employers who are parties to the collective bargaining agreement and who are subject to the same benefit computation formula under the plan are employed by a single employer. Code section 413(b)(1) and Regulation §1.413-1(b).

However, a plan that benefits solely collectively bargained employees for a plan year will be automatically deemed to satisfy Code section 410(b) and Regulation §1.410(b)-2(b)(7).

Discrimination Sections 401(a)(4) (prohibited discrimination) and 411(d)(3) (vesting required on termination, partial termination or discontinuance of contributions), are applied as if all participants who:

- are subject to the same benefit computation formula and
- are employed by employers who are parties to the collective bargaining agreement

are employed by a single employer. Code section 413(b)(2) and Regulation §1.413-1(c) (which also provides five examples).

However, a plan that benefits solely collectively bargained employees for a plan year will be automatically deemed to satisfy Code section 401(a)(4) and Regulation §1.401(a)(4)-1(c)(5).

Exclusive Benefit For purposes of Code section 401(a) (plan qualification), in determining whether the plan of an employer is for the exclusive benefit of the employees and their beneficiaries, all plan participants shall be considered to be the employer's employees. Code section 413(b)(3) and Regulation §1.413-1(d).

Continued on next page

Special Provisions-Collectively bargained plans, Continued

Vesting Code section 411 (minimum vesting standards other than subsection (d)(3), as indicated above) shall be applied as if all employers who have been parties to the collective bargaining agreement constituted a single employer. However, the application of any rules with respect to breaks in service shall be made under regulations prescribed by the Secretary of Labor. Code section 413(b)(4).

Therefore, all the hours that an employee worked for each employer in a collectively bargained plan would be aggregated in computing the employee's hours of service under the plan. Regulation §1.413-1(e).

Funding The minimum funding standards provided by Code section 412 shall be determined as if a single employer employed all participants in the plan. Code section 413(b)(5) and proposed Regulation §1.413-1(f).

Liability for Funding Tax This refers to the excise tax for failure to meet the minimum funding standards under Code section 4971. In general, for each taxable year of an employer who maintains a plan to which the minimum funding standards of Code section 412 apply, an excise tax is imposed on the amount of the accumulated funding deficiency under the plan, determined as of the end of the plan year ending with or within such taxable year. An additional tax will be imposed if the initial tax is not corrected within the taxable period.

In a collectively bargained plan, the liability is to be determined in a reasonable manner not inconsistent with regulations prescribed by the Secretary of the Treasury:

- first on the basis of their respective delinquencies in meeting required employer contributions under the plan, and
- then on the basis of their respective liabilities for contributions under the plan.

Code section 413(b)(6), proposed Regulation §1.413-1(g) and proposed Regulation 54.4971-3(b).

Continued on next page

Special Provisions-Collectively bargained plans, Continued

**Deduction
Limitations**

The applicable limitation will be determined as if a single employer employed all of the participants in the plan. Note that amounts contributed to or under the plan by each employer who is a party to the collective bargaining agreement, for the portion of the taxable year that is included within such plan year, shall be considered not to exceed such a limitation if the anticipated employer contributions for such plan year do not exceed such limitation.

If such anticipated contributions exceed such a limitation, the portion of each such employer's contributions that is not deductible under Code section 404 shall be determined in accordance with IRS regulations. Code section 413(b)(7).

Top-Heavy

The vesting and minimum benefit requirements will not apply to any employee included in a unit of employees covered by a collective bargaining agreement if there is evidence that retirement benefits were the subject of good faith bargaining in reaching the agreement (this exemption is not available if more than one-half of the employees in the unit are officers, owners or executives). Code section 416(i)(4) and Regulation §1.416-1. See also Question 1(a) on Worksheet 7 and the related Explanation.

Employees of Labor Unions

Treatment

Employees of employee representatives will be treated as employees of an employer maintaining a collectively bargained plan if such employee representatives meet the requirements of Code sections 401(a)(4) and 410 without regard to the special discrimination and participation provisions described above. Code section 413(b)(8).

Plans Covering Professional Employees

Treatment of plans covering professional employees

In the case of a plan that covers any professional employee, the plan must satisfy all of the nondiscrimination requirements, including Code section 410, and not just the participation rules of paragraph (a) of that section. Code section 413(b)(9).

Employees not considered covered if more than 2% of employees are “professionals”

Under Code section 413(b)(9), an employee is not considered included in a unit of employees covered by a collective bargaining agreement for a plan year for purposes of determining who is covered by a collective bargaining agreement if, for the plan year, more than two percent of the employees who are covered pursuant to the agreement are professionals as defined in Regulation §1.410(b)-9. If that occurs, all of the employees are treated as non-union employees for coverage testing purposes. Regulation §1.410(b)-6(d)(2)(iii)(B).

Defining “professionals”

Professionals for this purpose are highly compensated employees who, on any day of a plan year, perform professional services for the employer as an actuary, architect, attorney, chiropractist, chiropractor, dentist, executive, investment banker, medical doctor, optometrist, osteopath, podiatrist, psychologist, certified or other public accountant, stockbroker, or veterinarian.

Retroactive Qualification

Conditions for retroactive qualification

According to Code section 401(i), a trust created pursuant to a union-negotiated pension plan that has been determined to be qualified under Code section 401(a) and to be exempt from tax under Code section 501(a), for a period beginning after contributions were first made, will be considered as having qualified retroactively if it can be shown to the Secretary of the Treasury's satisfaction that:

- i. such trust was created pursuant to a collective bargaining agreement between employee representative and one or more employers,
- ii. any disbursements of contributions, made to or for such trust before the time as of which the Secretary determined that the trust constituted a qualified trust, substantially complied with the terms of the trust, and the plan of which the trust is a part, as subsequently qualified, and
- iii. before the time as of which the Secretary determined that the trust constitutes a qualified trust, the contributions to or for such trust were not used in a manner that would jeopardize the interests of its beneficiaries.

Retroactive Qualification Period

The period of retroactive qualification begins on the date on which contributions were first made to or for such trust and ending on the date such trust first constituted (without regard to this special provision) a qualified trust under Code section 401(a). Code section 401(i).

Multiple Employer Plans

Definition A multiple employer plan is a plan maintained by more than one employer. As with single employer collectively bargained plans, there are some special rules that apply with regard to participation, exclusive benefit, vesting, funding, liability for funding tax, deduction limits, allocations and top-heavy. See Code section 413(c), Regulation §1.413-2 and Proposed Regulation §§1.413-2 and 1.416-1 for additional information. See also EP Quality Assurance Bulletin 2002-1 at the end of the section.

Definition Multiemployer plan means a plan:

- i. to which more than one employer is required to contribute,
- ii. which is maintained pursuant to one or more collectively bargaining agreements between one or more employee organizations and more than one employer, and
- iii. which satisfies such other requirements as the Secretary of Labor may prescribe by regulation.

A plan that provides benefits for an entire industry, region or area a multiemployer plan. Multiemployer plans are subject to a very different set of rules established by ERISA. See the Multiemployer Pension Plan Amendments Act of 1980 of ERISA and ERISA §§3(37), 4201 – 4225. See also Code section 414(f) and Regulation §1.414(f)-1. See IRM 4.72.14, Multiemployer Examination Guidelines, for detailed guidance on multiemployer plans.

The Multiemployer Audit Program recently prepared a fact sheet for use by agents working determination letter applications from multiemployer plans that has been approved for use by Quality Assurance Staff. A copy is attached at the end of this section.

Conclusion

Summary

In this section of the Chapter, we have covered the single employer collectively bargained plan. This type of collectively bargained plan must meet almost all of the requirements for qualification pursuant to section 401(a) of the Code, with some variations. You will know that the plan you are reviewing is a collectively bargained plan within the meaning of Code section 413 by the language in the cover letter or plan document, the box(es) checked on the application form, or the presence of a collectively bargained agreement in the file.

Finally, since a very different set of rules applies when working with multiple employer plans or multiemployer plans, this section provides you with a set of working definitions, along with sources for obtaining additional information.

Multiple employer plans determination procedures

EP DETERMINATIONS QUALITY ASSURANCE BULLETIN

FY-2002 No. 1

Date: October 30, 2001

MULTIPLE EMPLOYER PLANS: DETERMINATION PROCEDURES

Multiple employer determination letter applications present special procedural challenges to the Employee Plans determination specialist and to the EP determinations organization. The purpose of this bulletin is to address some of these special issues especially in light of the centralization of the determination processing function and the centralization of the EP determinations quality assurance function. This bulletin does **not** address the determination application processing of multiemployer plans under IRC 413(b) (collectively bargained plans).

I. Background

- Definition

A multiple employer plan is a plan maintained by two or more employers who are not related under IRC 414(b) (controlled groups), 414(c) (trades or businesses under common control), or 414(m) (affiliated service groups). Employers related under sections 414(b), (c), or (m) of the Code are treated as a single employer for determining the number of employers maintaining a multiple employer plan. Multiple employer plans are governed by the rules in IRC 413(c). The rules of IRC 413(c) do not apply to collectively bargained multiemployer plans described in Reg. 1.413-1(a).

- Distinctive Qualification Requirements/Characteristics

- A. **Single Plan.** A multiple employer plan is a single plan as defined in Reg. 1.414(l)-1(b)(1). (See Reg. 1.413-2(a)(2) and then Reg. 1.413-1(a)(2).) A single plan is a plan under which all of the assets, on an ongoing basis, "are available to pay the benefits to employees who are covered by the plan and their beneficiaries".

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Multiple employer plans determination procedures, Continued

Single Employer. Under a multiple employer plan some qualification requirements are applied as if all employees of each employer are employed by a single employer, e.g. sections 410(a), eligibility to participate; 411, vesting; and 401(a), exclusive benefit requirement. For instance, service with one employer is treated as service with the other employers for determining if an employee is eligible to participate.

Separate Employers. Under a multiple employer plan other qualification requirements are applied to each participating employer as if that employer maintained a separate plan, e.g. sections 410(b), coverage; 401(a)(4), nondiscrimination; and 416, top-heavy. For example, the coverage requirements of IRC 410(b) are applied to a multiple employer plan on an employer-by-employer basis. Each unrelated employer performs separate coverage testing with respect to its portion of the plan. The employers do not have to use the same testing rules. (See Reg. 1.413-2(a)(3)(ii) and Reg. 1.410(b)-7(c)(4)(i)(A) & (c)(4)(ii).)

Each employer's portion of the multiple employer plan must be taken into account, along with any other plans of that employer, in applying the top-heavy requirements of section 416 and the limitations of section 415. Additionally, with respect to a participant of an employer maintaining a multiple employer plan described in section 413(c), benefits or contributions and compensation received from all of the employers maintaining the plan must be taken into account when applying the section 415 limits (Reg. 1.415-1(e)).

- Special Disqualification Requirement

Under the section 413 regulations the failure of one participating employer or the failure of the plan itself to satisfy an applicable qualification requirement will result in disqualification of the multiple employer plan for all participating employers (for all "employers maintaining the plan"). Reg. 1.413-2(a)(3)(iv). For example, the failure of any participating employer to satisfy the top-heavy rules disqualifies the entire multiple employer plan for all of the employers maintaining the plan. (See Reg. 1.416-1, Q&A G-2.)

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Multiple employer plans determination procedures, Continued

II. Processing Procedures

- Traditional Determination Application Procedures

Multiple employer plans file one complete determination application (Form 5300) on behalf of the plan in the name of one employer (sometimes referred to as the "lead" employer) and a separate Form 5300 completed through Line 8 for each other employer maintaining the plan.

Under the revised determination letter application procedures described in Announcement 2001-77, each employer may now request a determination letter that considers the form of the plan only or both the form of the plan and compliance with the requirements of sections 401(a)(4), 401(a)(26), and/or 410(b). Therefore, each separate employer in a multiple employer plan may elect to submit (a) coverage data (Line 13 of Form 5300 (Rev. 9/2001)) for the section 410(b) ratio percentage test; and/or (b) the information regarding participation, coverage, and nondiscrimination requirements on Schedule Q. The individual determination letter for each separate employer may be relied upon to the extent of the relevant information and demonstrations submitted for each separate employer and retained by the employer.

See Section 10 of Rev. Proc. 2001-6 and Announcement 2001-77.

"Simplification" Option Announcement 2001-77 also provides a streamlined and simplified choice for multiple employer plans under which a letter is issued for the form of the plan only and under which an application is filed on behalf of one employer (out of all of the employers maintaining the multiple employer plan).

All employers maintaining a multiple employer plan filed under this option can rely on a favorable determination letter **issued for the plan** except with respect to the requirements of sections 401(a)(4), 401(a)(26), 401(l), 410(b), 414(s), and, if the employer maintains or has ever maintained another plan, sections 415 and 416. See Section III of Announcement 2001-77 for details under this option.

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Multiple employer plans determination procedures, Continued

- Additional Application Procedures

Powers of Attorney--Form 2848. Each separate employer maintaining the multiple employer plan submits its own individual Form 2848. The Instructions to Line 1 of Form 2848, Taxpayer Information, require the plan name, EIN of the plan sponsor, three-digit plan number, and business address of the plan sponsor. The separate employers participating in a multiple employer plan are not related by ownership or a substantial service relationship. (A controlled group of employers is treated as one separate employer under a multiple employer plan.) Therefore, each separate employer is the plan sponsor as to its own adoption of the multiple employer plan and is responsible for executing its own Form 2848. Because these employers are not related, they do not have the authority to execute Forms 2848 for each other.

Who Signs the Application? The Instructions to Form 5300 (Rev. 9/2001) provide that "The application must be signed by the employer, plan administrator or authorized representative". If one representative signs the Forms 5300 for multiple employers, each separate employer must execute its own Form 2848 as to that one representative. If a plan administrator signs the Forms 5300 for multiple employers, the employee plans specialist should obtain a copy of the authorizing document, i.e. the written instrument specifically empowering the plan administrator to sign the determination letter application forms for the respective employers. (See IRC 414(g) for definition of plan administrator.)

EDS Establishment. Since October, 2000 the Service has established each separate employer for multiple employer plans on EDS as a separate entity module with its own case number and file folder number. The current EDS entity screen data on each employer indicates "M" for multiple employer plans under "Entity Type" (from Line 7 of Form 5300).

While the "lead" employer for a multiple employer plan was previously assigned a plan number of 333, this is no longer necessarily true. Currently lead employer plan numbers will only be 333 if designated as such on Form 5300 by the lead employer.

Determination Letter Design and Generation. Each separate employer receives its own determination letter which is individually designed or created on its own EDS module. This allows the Service to retain a record of the determination letter for each employer for future retrieval if necessary. The caveats used for each employer may differ depending on various circumstances, e.g. receiving additional information to change the scope of reliance, differing plan and amendment execution dates.

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Multiple employer plans determination procedures, Continued

The 835 determination letter does not explicitly indicate that the employer is participating in a multiple employer plan. *To facilitate this identification, we recommend use of the following new caveat (EDS caveat #98) on all multiple employer determination letters:*

"Based on the information you have supplied, you are a participating employer in a multiple employer plan under section 413(c) of the Code."

E. **Separate Case Files.** A separate case file should be maintained for each employer in order to clearly document and account for each Form 5300, each form Form 2848, the various levels of reliance among the employers, and the differing determination letters.

III. Quality Assurance Staff Review of Multiple Employer Plans

Multiple employer plans present a logistical challenge for a centralized quality assurance function. A multiple employer plan with numerous participating employers will most likely have at least one of its members selected for review by the TEQMS program upon case closing. Some multiple employer groups may be subject to mandatory review, e.g. because of interested party comments. The resulting shipment of cases is time consuming and cumbersome. When Quality Assurance finds it necessary to issue Reviewers' Memoranda, the problems increase. Generating and printing corrected letters is very time consuming.

To address these issues, EP Determinations Quality Assurance will implement a different approach to traditional review procedures as they apply to certain multiple employer plans. Effective with the date of this bulletin, agents who are assigned multiple employer plans with 50 or more participating employers should contact the Manager, EP Determinations Quality Assurance **before** beginning plan review. Discussions at this point on the facts and circumstances of the specific multiple employer plan will focus on tailoring an individualized "review strategy" for the multiple employer plan. This review strategy may involve in-depth pre-review of the case files with and/or by a Quality Assurance reviewer either on-site or off-site. This pre-review could involve agreement as to which items and amendments will be requested in the agent's 1196 letter to the plan sponsor/POA. The review strategy could also involve a plan for continued monitoring of the case's progress and the approach to handling the end-stage TEQMS or mandatory review evaluations.

This quality assurance approach partially unifies the working of the case and its review. The purpose is to minimize the number of contacts with the group of employers and POA(s) and to streamline the review process through front-end participation by the Quality Assurance Staff.

If you have any questions, please contact Deborah Komar, Senior EP Reviewer, at (513) 263-3424. The Manager, EP Determinations Quality Assurance Staff may be contacted at (513) 263-3567.

MULTIEMPLOYER PLAN DETERMINATION FACT SHEET

Multiemployer plans are subject to the same requirements as other plans including but not limited to provisions relating to eligibility, vesting, joint & survivor and distributions rules. However, some rules, such as vesting and section 415, apply differently.

1. Plan amendments. Collectively bargained plans, including multiemployer plans, often have later effective dates for required plan provisions. The remedial amendment period, however, is usually the same as for other plans. In the case of GUST, the only provision for which collectively bargained plans have different effective dates is the amendment to the vesting schedule required for multiemployer plans described below at item no. 2. The GUST RAP for multiemployer plans is the same as for other plans.
2. Vesting schedules. Multiemployer plans were allowed the continued use of a ten-year cliff-vesting schedule subsequent to January 01, 1989, but only for participants covered under the plan pursuant to a collective bargaining agreement (CBA). Plan participants not covered pursuant to a CBA were required to be subject to a vesting schedule that satisfies section 411(a)(2) of the Code; i.e., a regular TRA'86 vesting schedule. Multiemployer plans must amend their plans to provide a vesting schedule that satisfies section 411(a)(2) of the Code effective for plan years beginning on or after the earlier of:
 - (1) the later of –
 - (A) January 1, 1997, or
 - (B) the date the last CBA signed before SBJPA was enacted (8/20/96) terminates, or
 - (2) January 1, 1999.

The new schedule does not apply to employees who do not have more than one hour of service under the plan on or after the effective date. It may be necessary to request copies of CBA to verify that a delay in the effective date is warranted.

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MULTIEMPLOYER PLAN DETERMINATION FACT SHEET,

Continued

3. Top-heavy. All plan language requirements apply to multiemployer plans. However, a collectively bargained plan (whether a single-employer plan or a multiemployer plan) is not required to contain top-heavy language if, 1) the plan covers only collectively bargained employees or employees of the sponsoring union (employees of related funds are included in this category), and 2) the plan in operation is not top-heavy. See 1.416-1, T-38. Check the plan document to see if it permits noncollectively bargained employees to participate. If it does, verify whether any noncollectively bargained participants have benefits or account balances under the plan that may cause the plan to be top-heavy.
4. Incorporating terms of CBA by reference. In accordance with Quality Assurance Bulletin 2002-1, incorporation by reference of the Code and Regulations is not permitted unless specifically authorized by the Code, Regulations or other authority. No language may be incorporated if there is a choice to be made.

If a multiemployer plan attempts to incorporate by reference those parts of the CBA that describe the contribution rate and the class of covered employees, specialists should request that these provisions be made a part of the plan document by means of an appendix to the plan. Failure to include the benefit formula may cause the plan to fail to satisfy the “definite written program” requirements of I.T. Reg. 1.401-1(a)(2).

5. Side agreements. Noncollectively bargained employees can only participate in a multiemployer plan if the plan provides for it, either specifically in the plan or by delegating to the trustees the discretion to enter into some other agreement (a “participation” or “side” agreement). If the plan provides for participation of non-collectively bargained employees by execution of a side agreement, the applicable agreements should be secured and reviewed. Side agreements should indicate the contribution rate, who is eligible to participate, and which of the plan benefit formulas the eligible participants benefit under.
6. Reciprocity agreements. Multiemployer plans may permit workers who are not covered by the plan to participate if the plan trustees have entered into a reciprocity agreement with the worker’s home plan that is also a multiemployer plan in the United States. Reciprocity agreements do not violate the exclusive benefit rule.
7. Defined Contribution Plan. A defined contribution plan must designate whether it is a profit sharing or money purchase plan. Section 401(a)(27)(B) of the Code requires that a profit-sharing plan must be so designated in order to be qualified.

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MULTIEMPLOYER PLAN DETERMINATION FACT SHEET,

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8. Credit for vesting and for accruals or allocations. A pension plan (including a money purchase plan) should not condition the crediting of service and/or an allocation to a participant on the employer's payment of the contribution. A plan provision that has language withholding an accrual or allocation on account of delinquent contributions violates the definitely determinable benefit rule and should be deleted. See Rev. Rul. 85-130, 1985-2 C.B. 137. If service credit is also withheld on account of delinquent contributions the plan provision violates the requirement that all years of service with the employers maintaining the plan be taken into account for participation and vesting purposes. See DOL reg. 2530.210.
9. Accrual rules. Although a pension benefit is negotiated it still needs to be in compliance with one of the three benefit accrual rules of IRC Section 411(b)(1). The document needs to be checked accordingly.
10. Amendments adding permitted forfeitures. If a plan is amended to provide any permitted forfeiture under 411(a), (e.g. the forfeiture of accruals attributable to pre-participation service upon the employer's withdrawal from the plan) the amendment does not violate 411(d)(6) even though it takes away a right previously protected under the plan.
11. Retroactive Plan Amendments. Section 412(c)(8) of the Code provides that, in the case of a multiemployer plan, any amendment applying to a plan year that (a) is adopted no later than two years after the close of such plan year, (b) does not reduce the accrued benefit of any participant determined as of the beginning of the first plan year to which the amendment applies, and (c) does not reduce the accrued benefit of any participant determined as of the time of adoption except to the extent required by the circumstances, shall, at the election of the plan administrator, be deemed to have been made on the first day of such plan year.
12. Suspension of benefits. Review the plan's suspension of benefit provisions to determine if they satisfy section 411(a)(3)(B) and DOL reg. 2530.203-3. If a multiemployer plan provides that a participant's benefit will be suspended on account of reemployment that does not meet the DOL reg. the provision is a prohibited forfeiture under 411(a).

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MULTIEMPLOYER PLAN DETERMINATION FACT SHEET,

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Examples of suspension provisions that do not satisfy 2530.203-3:

1. A plan provides that a participant's benefit will be suspended as soon as he or she works one hour of non-union service. This is violation of the requirement that benefits not be suspended for less than 40 hours per month of reemployment.
2. A plan provides that a participant will lose service credit toward an early retirement benefit if he or she engages in 40 or more hours per month of non-union employment. This violates the regulations because only benefit payments can be suspended, not service credit.

Suspension cannot begin until the plan notifies the employee that payment of benefits will be suspended. The period of suspension lasts only while the employee is engaged in service with the new employer; however, the amount withheld during that period is permanently lost to the participant. See DOL Reg. 2530.203-3(b).

13. Delayed Retirement. Pension plans that allow for a delayed commencement of pension benefits past normal retirement age need to provide for actuarial adjustment unless the plan provides the participant's benefit will be suspended in accordance with plan terms that satisfy the requirements of the DOL reg. 2530.203-3.

Plans that containing language requiring a participant to file a claim for benefit payments before payment of benefits will commence, should also contain language to provide for actuarial adjustment to distributions that commence past normal retirement date.

14. COLAs/Post-retirement accruals. A plan amendment that reduces or eliminates a benefit that was granted to participants after retirement is a violation of 411(d)(6) because benefits granted post-retirement are also accrued benefits under 411(a)(7). The Service is currently litigating this issue so this answer is not final.

Plans that adopt ad hoc COLAs for several years in a row may violate 411(d)(6) in the first year that they fail to adopt an ad hoc COLA (i.e. a one time benefit increase for retirees in pay status). See 1.411(d)-4, Q&A-1(c)(1). Ask the plan sponsor to submit copies, or a list, of any ad hoc COLA amendments to the plan that might not otherwise be included in the restated plan. If the plan has offered an ad hoc COLA for at least three years and then fails to offer a COLA in the subsequent year, the plan may have violated 411(d)(6).

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MULTIEMPLOYER PLAN DETERMINATION FACT SHEET,

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15. Limitations of section 415 of the Code. There are several special rules when applying section 415 limits to multiemployer plans. The following are some common provisions:

- 1) Section 1.415-1(e) of the regulations provides 2 alternatives for applying the IRC 415 limits to participants in a multiemployer plan:
 - a) Under the first alternative, for purposes of applying the limitations of IRC 415 with respect to a participant of an employer maintaining the plan, benefits or contributions attributable to the participant from all of the employers maintaining the plan must be taken into account. The total compensation received by the participant from all of the employers maintaining the plan may be taken into account.
 - b) Under the second alternative, only the benefits or contributions, and the compensation, provided by the employer of the participant are taken into account. The benefit provided by the employer equals the excess of the plan benefit over the plan benefit computed as if the participant had no covered service with that employer.
- 2) Multiemployer plans are not aggregated with other multiemployer plans for determining the benefits limited under section 415. A multiemployer plan is aggregated with a non-multiemployer plan for purposes of section 415, however, to the extent that benefits under the multiemployer plan are provided by an employer with respect to a participant in both plans. See section 415(f)(3), which codified the existing IRS position stated in section 1.415-8(e) of the regulations.