ELIGIBILITY EXCLUSIONS
JANE ARMSTRONG
Jane Armstrong is a partner at Phelps Dunbar LLP, a regional law firm that is headquartered in New Orleans. She has practiced exclusively in the areas of employee benefits and executive compensation for over 30 years. Jane has been listed in all editions of the Best Lawyers in America and “Louisiana Super Lawyers,” and is listed in the Chambers U.S.A. as a leading practitioner in the employee benefits field. She is a frequent speaker and author on retirement plan issues. Jane graduated from Vanderbilt University School of Law, where she was elected to the Order of the Coif.
DEFINITIONAL CONCEPTS
401(a) PLANS
GOVERNING AUTHORITIES

• Code Sec. 401(a)(3)
  • Plan must comply with age and service requirements

• Code Sec. 410(a)
  • Statutory limits - Age 21 and 1 year of service
  • “Entry date” following

• Code Sec. 410(b)
  • Plan must satisfy ratio percentage or average benefits test
EXCLUDABLE and EXCLUDED

• Excludable
  • Classification in Treas. Reg. 1.410(b)-6
  • Must be specified in plan document
  • Need not be taken into account under 410(b)

• Excluded
  • Classification NOT LISTED in regulation that is otherwise permissible
  • Specified in plan document
  • Must be taken into account under 410(b)
EXCLUDABLE 401(a) PLANS
EXCLUDABLE EMPLOYEES

• 4 types:
  • Do not satisfy permitted age/service conditions
  • Not employed on last day and credited with 500 or less hours of service
  • Covered by collective bargaining agreement (CBA), under which benefits subject of good faith bargaining
  • Non-resident aliens with no U.S. source income
UNION EMPLOYEES

- Union employees excludable
  - Plan document exclusion
  - LMRA requires “bargained-for” benefits as a condition of collective bargaining
- Must be valid bargaining unit
  - Owners, officers and executives
  - Professionals
    - Treas. Reg. 1.410(b)-6(d)
    - May comprise not more than 2% of bargaining unit
UNION EMPLOYEES

• Dual status employees
  • Status on “snap shot” 410(b) testing date controls (Rev. Proc. 93-42)
  • Status of supervisors holding union membership
    • Facts and circumstances
  • Davis-Bacon employees – NOT union
NONRESIDENT ALIENS

- Common Fact Patterns:
  - Controlled group including foreign parent/subsidiary organizations
  - Cross border workers
    - Example, salesman resides in Canada; sells product for U.S. employer in both Canada and Michigan
    - Example, executive is president of Swiss subsidiary of U.S. company and also serves as COO of U.S. company
NONRESIDENT ALIENS

- See, IRS Pub. 515
  - Not U.S. citizen or resident alien
  - Resident alien =
    - Green card holder OR
    - Satisfy substantial presence test:
      - 31 days in current year and
      - 183 days in current year and 2 preceding years
    - Visa status MAY be relevant
SUBSTANTIAL PRESENCE TEST

- 7/1/2013 – Haitian employee promoted/transfers to U.S. (179 days)
- 1/1/2014–12/31/2014 - Employee returns to Haiti
- 8/1/2015-11/1/2015 - Employee returns to U.S. (90 days)
  - 31 days in current year? – YES
  - 183 days in current and two preceding years? NO
    - 90 days 2015
    - Credited with 30 days in 2013
NONRESIDENT ALIENS

• Other status issues:
  • Undocumented workers
  • Residents of U.S. possessions who are:
    • Bona fide residents, but not U.S. citizens/U.S. Nationals
    • Considered non-resident aliens
NONRESIDENT ALIENS

• Nonresident aliens can have no U.S. source income
  • Payment for personal services rendered outside U.S.
  • Certain income for U.S. services may be excluded under tax treaty
OTHER EXCLUSIONS

401(a) Plans
GENERAL RULES

- Exclusion must be clearly described in plan document
- Legitimate business classification
  - Supported by independent business reason
  - Objective (Rev. Rul. 74-466)
- Supported by regularly maintained business records
- Cannot act as “proxy” for impermissible age/service conditions
PART-TIME/SEASONAL

• Year of service under 410(a)
  • Considered exclusive exclusion based on hours worked
• IRS positions:
  • Before 7/1/2001, facts and circumstances
  • After 7/1/2001, no reliance on determination letter covering plan with part-time seasonal exclusion
• 2/1/2006
  • Quality Assurance Bulletin (QAB FY-2006-3)
  • Plan document cannot include an indirect service requirement
EXAMPLES IN QAB

• Part-time defined as working less than 1,000 hours – may be permissible
• Part-time defined as regularly scheduled to work less than 1,000 hours – impermissible
• Hourly-paid employees – facts and circumstances; must include some employees who customarily work more than 1,000 hours
COMMON EXCLUSIONS

• Independent contractors
  • Retroactive reclassification issues
• Shift workers
• Subsidiary, division or profit-center of the sponsor or sponsor’s controlled group
  • QSLOB may also apply
• Leased employees
  • Check language - exclusion covers only those workers described in 414(n)
COMMON EXCLUSIONS

• Davis-Bacon workers
  • Receive prevailing wage
  • Commonly, enhanced plan contributions
CORRECTION ISSUES

• Elimination of determination letter program
• Document includes Impermissible exclusion
  • Retroactively amend plan
    • SCP not available
  • Include otherwise eligible employees
CORRECTION ISSUES

• Fail to pass 410(b)
  • Penalty under Code Sec. 402(B)(4)
    • Vested balance of HCEs deemed distributed and taxed
  • Regulatory correction – Treas. Reg. 1.401(a)(4)-11(g)
    • Adopt corrective amendment within 9 ½ months
    • Expand NHCEs that benefit under plan or additional contribution (if average benefits % under 70%)
CORRECTION ISSUES

• Regulatory correction – Treas. Reg. 1.401(a)(4)-11(g)
  • Additional allocation (new contribution)
    • (k) plan – employer must make deferrals and match using average ADP of NHCEs
  • Amendment must have economic substance; can’t benefit only non-vested terminated employees
  • Amendment must benefit non-discriminatory group (separately satisfy 410(b))
CORRECTION ISSUES

• EPCRS – 410(b) Failure
  • Demographic failure
  • Must use VCP
  • SCP not available
COVERAGE AND EXCLUSIONS – OTHER THAN 401(a) PLANS
<table>
<thead>
<tr>
<th>TYPE OF PLAN/ ELIGIBLE EMPLOYER</th>
<th>INCLUSIONS/ EXCLUSIONS</th>
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<tbody>
<tr>
<td>403(b)</td>
<td>Must be a common law employee of eligible employer</td>
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<td>Church:</td>
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<td>403(b)</td>
<td>• Minister, even if self-employed for tax purposes</td>
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<td>403(b)</td>
<td>• Educational Orgs:</td>
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<td>403(b)</td>
<td>• Direct employees</td>
</tr>
<tr>
<td>403(b)</td>
<td>• Indirect employees involved in operation or direction (Rev. Rul. 73-607)</td>
</tr>
<tr>
<td>403(b)</td>
<td>• Elected officials NOT eligible</td>
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<tr>
<td>403(b)</td>
<td>• Trustees, regents NOT eligible</td>
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- Broad based plan maintained by:
  - 501(c)(3)
  - Church
  - Educational orgs
    Code Sec. 170(b)(1)(A)
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| • Universal availability under Code Sec. 403(b)(12)(A) – applies to deferral opportunity | • Not required for:  
  • Employee eligible for another 403(b) or governmental 457(b)  
  • Employees eligible to defer under (k) plan  
  • Nonresident aliens  
  • Students  
  • Part-time - less than 20 hours per week (NA if covered under ERISA) |
### SUMMARY OF COVERAGE AND EXCLUSIONS BY PLAN TYPE

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| 457(b) - Two basic structures: | • Government:  
| • Broad based, funded plan maintained by government | • State, political subdivision, agency, instrumentality  
| • Top-hat plan maintained by tax-exempt/government | • Any common law employee or independent contractor may participate  
| | • Tax exempt - any organization exempt from Federal income tax  
| | • Coverage must be limited to “top hat” group to avoid ERISA |
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<td>• Definition of “church” - Code Sec. 414(e):</td>
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<tr>
<td>• 401(a) plan sponsored by “church”</td>
<td>• Association/convention of churches</td>
</tr>
<tr>
<td>• Electing and non-electing plans</td>
<td>• Tax exempt entity controlled by or associated with church</td>
</tr>
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<td></td>
<td>• Common law employees of “church”</td>
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