

Covering Coverage A - Z

Please note that the answers provided are being given as an accommodation to attendees of the webcast and are not intended, nor should they be, considered to be, legal advice.

1. Can you explain how to determine who must be added when you fail this test? What is it based on?

There are two possibilities. One is that your plan has “fail safe” language and it tells you who to add back. As I mentioned in the session, you need to look carefully for this. It may be in the basic plan document and there may or may not be a “turn on” switch for this provision in the adoption agreement.

If your plan is not subject to a fail safe provisions, you may select at the employer’s election whom to benefit in the plan. However, you need to (a) do an amendment – likely retroactive under Treas. Reg. 1.401(a)(4)-11(g)(3), where you outline who is getting special treatment and how that works; and (b) make sure that the people you are bringing back in are not considered to be “of no effect” – for example, you could not bring back into the plan and give contributions to 5 guys who all terminated employment before you do the amendment and left before vesting. This is because, even if you have to contribute for them, they will get no benefit due to the vesting, so it’s of no real effect. You may also need to consider employee morale issues: “What do you mean you are giving HER more contributions? She’s gone and I’m a loyal employee and I’m getting nothing!”

2. Please review, If union people are included in the plan with non-union people, are they included in coverage?

If a plan covers both union and nonunion employees, they are parts of a mandatory disaggregation group. So, you test coverage for the nonunion folks separately from the union folks. The union folks are excludable employees in the nonunion coverage test. The nonunion folks are excludable employees in the union coverage test AND the union coverage test is deemed to pass. See 1.410(b)-2(b)(7).

3. If the entities of the Controlled Group have different eligibility rules, can you still use statutory eligibility of 21/12/semi-annual to perform the 410(b) test?

There are a couple of choices:

- If there are two plans, you can test each plan separately. In that case, you use the eligibility requirements (or the separate testing for otherwise excludables) separately in each test.
- If you aggregate the plans or if it’s one plan with multiple eligibility requirements, you would do one test. The “normal” test would consider anyone who has not met the “lowest eligibility requirements” (i.e., the ones easiest to meet) to be excludable from the test. Anyone who meets the lowest eligibility requirements but does not receive a contribution because they are in the part of the plan that requires the higher (harder to meet) eligibility requirements is *includable in the test, but considered to be nonbenefiting*.
- If you aggregate the plans or if it’s one plan, you could do separate testing of the aggregated plan by then disaggregating the otherwise excludables based on the statutory eligibility and entry date requirements. In the regular part of the test, you would have one eligibility

requirement now – 1 year, age 21. In the disaggregated otherwise excludable part, you would have some folks who got contributions and some who didn't, but who cares, because they are likely to be all NHCEs.

So, to be short, the answer is YES.

4. What if the plan has different eligibility requirements for different contribution types? Do you use the least strict requirements for testing coverage on all sources?

I believe that, if the different contribution types are parts of disaggregation groups (i.e., you have one eligibility requirement for deferrals, one eligibility requirement for match, and one eligibility requirement for profit sharing contributions), you would include in your test only those folks that are eligible for that contribution source (i.e., the other folks are excludable for not meeting age/service).

This is because the definition of "plan" for the testing is the disaggregated group. See 1.410(b)-7(c). See also 1.410(b)-7(c)(4).

5. If the entities of the Controlled Group have different eligibility rules, can you still use statutory eligibility of 21/12/semi-annual to perform the 410(b) test?

See #3 above.

6. When one is in the beginning stages of a plan setup and plan design session, other than a valid up-to-date census, what are some other things or key questions (or information) that one should ask for?

Without a doubt, ask if any of the owners or the company itself owns any other companies (other than relatively small stock holdings in publicly traded companies). Ask if the company is owned by another company. Also, it's a good idea to ask if they plan to buy/sell anything. And, remind your clients over and over again (I recommend it be in your engagement agreement, as well as your annual data request) that they should tell you if they do have any transactions and remind them over and over and over again that the options for what to do are vastly broader before the transaction than after, so they should talk to you before the transaction if they are smart.

7. How does coverage testing work when you have Davis Bacon contribution and PS contributions with allocation conditions?

I am not a Davis Bacon guru and would have to do some research, but they are not a separate disaggregation group. So, if they are in the same plan as your other employees, you could potentially have a coverage problem if the Davis-Bacon people benefitted without any end-of-year or hours requirements, but other employees had such requirements. Of course, if all D-B employees are NHCEs, having them get higher benefits than other folks will help the coverage testing pass.

8. Can you exclude employees by name as long as you pass the ratio percentage test under coverage?

Yes. The reasonable classification requirement that causes the problems with naming people is part of the ABT only. See 1.410(b)-4(b).

9. Is it possible to remove an HCE to pass coverage, rather than bring in other NHCEs?

Before accruals happen, yes. Once the HCE has accrued a benefit, NO, it would be a 411(d)(6) violation.

10. For slide 56, For Defined Benefit plan, if the plan is deemed to pass coverage, does the plan also pass 401a26 minimum participation?

Plans covering no HCEs or former HCEs is deemed to pass 401(a)(26) if it is not aggregated with any other plan of the employer to satisfy coverage or nondiscrimination testing. 1.401(a)(26)-1(b)(i).

Plans (or portions of the plan) covering union employees are permissively disaggregated from plans that don't for 401(a)(26). See 1.401(a)(26)-2(c)(2).

There does not appear to be any exception for plans that cover only HCEs.

11. What is the option if you don't discover the coverage failure until after the 9 1/2 months?

VCP. Self-correction is not available to fix demographic errors, which is what a 410(b) error is. So, self-correction evaporates after the 9-1/2 month period of Treas. Reg. 1.401(a)(4)-11(g)(3) ends.

12. FYI - the audio issue seems to be random... two co-workers had no audio so left the webinar...
but it worked fine for me with a few minor cut-outs only

Good to know. We're working on it.

13. If you provide a QNCE to pass ADP test, does the QNCE satisfy the gateway contribution for non-elective contribution?

Yes. The gateway rule (1.401(a)(4)-8(b)(vi) says "allocations and allocation rates are determined under §1.401(a)(4)-2(c)(2). If you refer to that, it says, "The allocation rate for an employee for a plan year equals the sum of the allocations to the employee's account for the plan year." The next paragraph says, "The amounts taken into account for determining allocation rates for a plan year include all employer contributions and forfeitures that are allocated or treated as allocated to the account of an employee under the plan for the plan year ..." It then excludes from that amounts that are earnings, which, of course, are not contributions or forfeitures. You gotta be amazed at what the IRS decides to be explicit about, don't you?

14. To add to the audio issues: I had an issue with being unable to hear in joining through Google Chrome, but no issue with Internet Explorer. That might be the issues for others as well.

Again, good to know. Thank you.