

employer are taken into account, except that the employer may treat a former employee described in paragraph (c)(2) through (c)(4) of this section as an excludable former employee. If any of the former employee exclusion rules under paragraphs (c)(2) through (c)(4) of this section is applied, it must be applied to all former employees for the plan year on a consistent basis.

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

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

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

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

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

(d) *Certain police or firefighters.* An employer may apply section 401(a)(26) separately with respect to any classification of qualified public safety employees for whom a separate plan is maintained. Thus, for purposes of test-

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

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

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

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

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

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

*Example.* Assume that an employer with 500 employees maintains two defined contribution plans. Plan A benefits 45 employees.

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

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

**§ 1.401(a)(26)-8 Definitions.**

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

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

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

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

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

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

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

*Employer.* *Employer* means the employer within the meaning of § 1.410(b)-9.

*ESOP.* *ESOP* means an employee stock ownership plan within the meaning of section 4975(e)(7) or a tax credit

employee stock ownership plan within the meaning of section 409(a).

*Former employee.* *Former employee* means a former employee within the meaning of § 1.410(b)-9.

*Highly compensated employee.* *Highly compensated employee* means an employee who is highly compensated within the meaning of section 414(q).

*Highly compensated former employee.* *Highly compensated former employee* means a former employee who is highly compensated within the meaning of section 414(q)(9).

*Multiemployer plan.* *Multiemployer plan* means a multiemployer plan within the meaning of section 414(f).

*Noncollectively bargained employee.* *Noncollectively bargained employee* means an employee who is not a collectively bargained employee.

*Nonhighly compensated employee.* *Nonhighly compensated employee* means an employee who is not a highly compensated employee.

*Nonhighly compensated former employee.* *Nonhighly compensated former employee* means a former employee who is not a highly compensated former employee.

*Plan.* *Plan* means plan as defined in § 1.401(a)(26)-2(c).

*Plan year.* *Plan year* means the plan year of the plan as defined in the written plan document. In the absence of a specifically designated plan year, the plan year is deemed to be the calendar year.

*Professional employee.* *Professional employee* means a professional employee as defined in § 1.410(b)-9.

*Section 401(k) plan.* *Section 401(k) plan* means a plan consisting of elective contributions described in § 1.401(k)-1(g)(3) under a qualified cash or deferred arrangement described in § 1.401(k)-1(a)(4)(i).

*Section 401(m) plan.* *Section 401(m) plan* means a plan consisting of employee contributions described in § 1.401(m)-1(f)(6) or matching contributions described in § 1.401(m)-1(f)(12), or both.

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