§ 1.410(b)–1 Minimum coverage requirements (before 1994).

(a) In general. A plan is not a qualified plan (and a trust forming a part of the plan is not a qualified trust) unless the plan satisfies section 410(b)(1). For plan years prior to the applicable effective date set forth in § 1.410(b)–10, a plan satisfies section 410(b)(1) if it satisfies the requirements of paragraph (b)(1) or (b)(2) of this section. See also § 1.410(b)–2 for plan years beginning on or after the applicable effective date set forth in § 1.410(b)–10.

(b) Coverage tests—(1) Percentage test. A plan satisfies the requirements of this subparagraph if it benefits—

(i) Seventy percent or more of all employees, or

(ii) Eighty percent or more of all employees who are eligible to benefit under the plan if 70 percent or more of all the employees are eligible to benefit under the plan, excluding in each case employees who have not satisfied the minimum age and service requirements (if any) prescribed by the plan, as of the date coverage is tested, as a condition of participation and employees permitted to be excluded under paragraph (c) of this section. The percentage requirements of this subparagraph refer to a percentage of active employees, including employees temporarily on leave, such as those in the Armed Forces of the United States, if such employees are eligible under the plan.

(2) Classification test. A plan satisfies the requirements of this subparagraph if it benefits such employees as qualify under a classification of employees set up by the employer, which classification is found by the Internal Revenue Service not to be discriminatory in favor of employees who are officers, shareholders, or highly compensated. For purposes of this subparagraph, except as provided
by paragraph (c) of this section, all active employees (including employees who do not satisfy the minimum age or service requirements of the plan) are taken into account.

(c) Exclusion of certain employees. Under section 410(b)(2), for purposes of section 410(b)(1) and paragraph (b) of this section, there shall be excluded from consideration employees described in subparagraphs (1), (2), and (3) of this paragraph.

(1) Bargaining unit. Under section 410(b)(2)(A) and this paragraph, there may be excluded from consideration employees not included in the plan who are included in a unit of employees covered by an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, if the Internal Revenue Service finds that retirement benefits were the subject of good faith bargaining between such employee representatives and such employer or employers. For purposes of determining whether such bargaining occurred, it is not material that such employees are not covered by another plan or that the plan was not considered in such bargaining.

(2) Air pilots. Under section 410(b)(2)(B) and this paragraph there may be excluded from consideration, in the case of a plan established or maintained pursuant to an agreement which the Secretary of Labor finds to be a collective bargaining agreement between air pilots represented in accordance with title II of the Railway Labor Act and one or more employers all employees not covered by such agreement. Section 410(b)(2)(B) and this subparagraph do not apply to a plan if the plan provides contributions or benefits for employees whose principal duties are not customarily performed aboard aircraft in flight.

(3) Nonresident aliens. Under section 410(b)(2)(C) and this paragraph, there may be excluded from consideration employees who are nonresident aliens and who receive no earned income (within the meaning of section 911(b) and the regulations thereunder) from the employer which constitutes income from sources within the United States (within the meaning of section 861(a)(3) and the regulations thereunder).

(d) Special rules—(1) Highly compensated. The classification of an employee as highly compensated for purposes of section 410(b)(1)(B) and §1.410(b)–1(b)(2) is made on the basis of the facts and circumstances of each case, taking into account the level of the employee’s compensation and the level of compensation paid by the employer to other employees, whether or not covered by the plan. Average compensation levels determined on a local, regional, or national basis, are not relevant for this purpose. Further, the classification of an employee as highly compensated is not made solely on the basis of the number or percentage of employees whose compensation exceeds, or is exceeded by, the employee’s.

(2) Discrimination. The determination as to whether a plan discriminates in favor of employees who are officers, shareholders, or highly compensated is made on the basis of the facts and circumstances of each case, allowing a reasonable difference between the ratio of such employees benefited by the plan to all such employees of the employer and the ratio of the employees (other than officers, shareholders, or highly compensated) of the employer benefited by the plan to all employees (other than officers, shareholders, or highly compensated). A showing that a specified percentage of employees covered by a plan are not officers, shareholders, or highly compensated, is not in itself sufficient to establish that the plan does not discriminate in favor of employees who are officers, shareholders, or highly compensated.

(3) Multiple plans—(i) An employer may designate two or more plans as constituting a single plan which is intended to qualify for purposes of section 410(b)(1) and this section, in which case all plans so designated shall be considered as a single plan in determining whether the requirements of such section are satisfied by each of the separate plans. A determination that the combination of plans so designated does not satisfy such requirements does not preclude a determination that one or more of such plans,
considered separately, satisfies such re-
requirements.

(ii) Notwithstanding subdivision (i) of
this subparagraph, a plan which is sub-
ject to the limitations of section
410(a)(7) of the Code or section
301(d)(3) of the Tax Reduction Act of
1975 cannot be considered with any
other plan which covers any employee
covered by such plan.

(4) Profit-sharing plans. Employees
under a profit-sharing plan who receive
the amounts allocated to their ac-
counts before the expiration of a period
of time or the occurrence of a contin-
gency specified in the plan shall not be
considered covered by the plan. Thus,
in case a plan permits employees to re-
cieve immediately the amounts allo-
cated to their accounts, or to have
such amounts paid to a profit-sharing
plan for them, the employees who re-
cieve the shares immediately shall not
be considered covered by the plan.

(5) Certain classifications. See section
401(a)(5) and the regulations thereunder
for rules relating to classifications of
employees which are not considered to
be discriminatory per se for purposes of
section 410(b)(1)(B) and § 1.410(b)–1(b)(2).

(6) Integration with Social Security Act.
See section 401(a)(3) and the regula-
tions thereunder for rules relating to
integration of plans with the Social Se-
curity Act.

(7) Different age and service require-
ments—(i) Application. The rules of this
subparagraph (7) apply to a plan which
must satisfy the minimum age and
service requirements of section
410(a)(1)(A) in order to be a qualified
plan. Accordingly, the rules are inap-
licable to plans described in section
410(c)(1)(A) (see § 1.410(a)–1(c)(1)); plans
satisfying the alternative minimum
age and service requirements of section
410(a)(1)(B) but not satisfying the re-
quirements of section 410(a)(1)(A); and
plans which provide contributions or
benefits for employees, some or all of
whom are owner-employees (see sec-
tion 401(a)(10)).

(ii) General rules. A provision for dif-
ferent age and service requirements for
present and future employees either
upon establishment or subsequent
amendment is not, of itself, discrimi-
natory under section 410(b)(1)(B) even
though present employees who are offi-
cers, shareholders, or highly com-
penated cannot meet the age and service
requirements for future employees at
the time the plan is established or
amended and even though present par-
ticipants who are officers, share-
holders, or highly compensated would
not have satisfied the age and service
requirements for future employees at
the time they became participants in
the plan. Furthermore, prohibited dis-
crimination will be deemed not to arise
in operation, solely because of such dif-
f erent requirements, when future em-
ployees are added to the employer's
work force.

(8) Certain controlled groups. In apply-
ning the percentage test and classifica-
tion test described in paragraph (b) (1)
and (2) of this section for a year, all the
employees of corporations or trades
and businesses whose employees are
 treated as employed by a single em-
ployer by reason of section 414 (b) or (c)
and the regulations thereunder for rules relating to
integration of plans with the Social Se-
curity Act.

(9) Transitional rule. In the case of a
cash and deferred profit-sharing plan,
in existence on June 27, 1974, the re-
quirements of paragraph (b)(2) of this
section are satisfied if over one-half of
the participants in the plan are among
the lowest paid two-thirds of all eligi-
bale employees. This subparagraph shall
not apply after December 31, 1977.

(e) Example. The rules provided by
this section are illustrated by the fol-
lowing example:

Example. An employer established a non-
contributory defined benefit plan covering
all employees of its ABC Division who are
hired prior to age 60 and who are at least 25
years old. The normal retirement age under
the plan is age 65. The employer has 100 em-
ployees including 20 employees who are
under age 25 and 10 employees who were
hired before age 60 because they are not in
the ABC Division. Of these 15 excluded em-
ployees, 3 have less than 1 year of service. In
addition, 12 of the 55 employees covered have
less than one year of service. The plan can be
§ 1.410(b)-2 Minimum coverage requirements (after 1993).

(a) In general. A plan is a qualified plan for a plan year only if the plan satisfies section 410(b)(1)(A) for the plan year. A plan satisfies section 410(b) for a plan year if and only if it satisfies paragraph (b) of this section with respect to employees for the plan year and paragraph (c) of this section with respect to former employees for the plan year. The rules in paragraphs (a), (b) and (c) of this section apply to all plans as a condition of qualification, including plans under which no employee is able to accrue any additional benefits (for example, frozen plans). Paragraph (d), (e), and (f) of this section provide special rules for nonelective section 403(b) plans subject to section 403(b)(12)(A)(i), for governmental and church plans subject to section 410(c), and for certain acquisitions or dispositions, respectively. See §1.410(b)-7 for rules for determining the “plan” subject to section 410(b).

(b) Requirements with respect to employees—(1) In general. A plan satisfies this paragraph (b) for a plan year if and only if it satisfies at least one of the tests in paragraphs (b)(2) through (b)(7) of this section for the plan year.

(2) Ratio percentage test—(i) In general. A plan satisfies this paragraph (b)(2) for a plan year if and only if the plan’s ratio percentage for the plan year is at least 70 percent. This test incorporates both the percentage test of section 410(b)(1)(A) and the ratio test of section 410(b)(1)(B). See §1.410(b)-9 for the definition of ratio percentage.

(ii) Examples. The following examples illustrate the ratio percentage test of this paragraph (b)(2).

Example 1. For a plan year, Plan A benefits 70 percent of an employer’s nonhighly compensated employees and 100 percent of the employer’s highly compensated employees. The plan’s ratio percentage for the year is 70 percent (70 percent/100 percent), and thus the plan satisfies the ratio percentage test.

Example 2. For a plan year, Plan B benefits 40 percent of the employer’s nonhighly compensated employees and 60 percent of the employer’s highly compensated employees. Plan B fails to satisfy the ratio percentage test because the plan’s ratio percentage is only 66.67 percent (40 percent/60 percent).

(3) Average benefit test. A plan satisfies this paragraph (b)(3) for a plan year if and only if the plan satisfies both the nondiscriminatory classification test of §1.410(b)-4 and the average benefit percentage test of §1.410(b)-5 for the plan year.

(4) Certain tax credit employee stock ownership plans. A plan satisfies this paragraph (b)(4) for a plan year if and only if the plan—

(i) Is a tax credit employee stock ownership plan (as defined in section 409(a)).

(ii) Is the only plan of the employer that is intended to qualify under section 401(a), and

(iii) Is a plan that satisfies the rule set forth in section 410(b)(6)(D).

This paragraph (b)(4) is available only for plan years for which the tax credit employee stock ownership plan receives contributions for which the employer is allowed a tax credit under section 41 (as in effect prior to its repeal by the Tax Reform Act of 1986) or section 48(n) (as in effect prior to its amendment by the Tax Reform Act of 1984). The requirement of this paragraph (b)(4) that the plan be the only plan of the employer that is intended to qualify under section 401(a) is not satisfied if the employer has only one plan, but that plan is treated as two or more separate plans under the mandatory disaggregation rules of §1.410(b)-7(c).

(5) Employers with no nonhighly compensated employees. A plan satisfies this paragraph (b)(5) for a plan year if and only if the plan is maintained by an