

§ 1.401(m)-4

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§ 1.401(m)-4 Special rules for mergers, acquisitions and similar events. [Reserved]

§ 1.401(m)-5 Definitions.

Unless otherwise provided, the definitions of this section govern for purposes of section 401(m) and the regulations thereunder.

Actual contribution percentage (ACP). *Actual contribution percentage* or *ACP* means the ACP of the group of eligible employees as defined in § 1.401(m)-2(a)(2)(i).

Actual contribution percentage (ACP) test. *Actual contribution percentage test* or *ACP test* means the test described in § 1.401(m)-2(a)(1).

Actual contribution ratio (ACR). *Actual contribution ratio* or *ACR* means the ACR of an eligible employee as defined in § 1.401(m)-2(a)(3).

Actual deferral percentage (ADP) test. *Actual deferral percentage test* or *ADP test* means the test described in § 1.401(k)-2(a)(1).

Compensation. *Compensation* means compensation as defined in section 414(s) and § 1.414(s)-1. The period used to determine an employee's compensation for a plan year must be either the plan year or the calendar year ending within the plan year. Whichever period is selected must be applied uniformly to determine the compensation of every eligible employee under the plan for that plan year. A plan may, however, limit the period taken into account under either method to that portion of the plan year or calendar year in which the employee was an eligible employee, provided that this limit is applied uniformly to all eligible employees under the plan for the plan year. See also section 401(a)(17) and § 1.401(a)(17)-1(c)(1). For this purpose, in case of an HCE whose ACR is determined under § 1.401(m)-2(a)(3)(ii), period of participation includes periods under another plan for which matching contributions or employee contributions are aggregated under § 1.401(m)-2(a)(3)(ii).

Current year testing method. *Current year testing method* means the testing method under which the applicable year is the current plan year, as described in § 1.401(k)-2(a)(2)(ii) or 1.401(m)-2(a)(2)(ii)

Designated Roth contributions. *Designated Roth contributions* means designated Roth contributions as defined in § 1.401(k)-1(f)(1).

Elective contributions. *Elective contributions* means elective contributions as defined in § 1.401(k)-6.

Elective deferrals. *Elective deferrals* means elective deferrals described in section 402(g)(3).

Eligible employee—(1) *General rule.* *Eligible employee* means an employee who is directly or indirectly eligible to make an employee contribution or to receive an allocation of matching contributions (including matching contributions derived from forfeitures) under the plan for all or a portion of the plan year. For example, if an employee must perform purely ministerial or mechanical acts (*e.g.*, formal application for participation or consent to payroll withholding) in order to be eligible to make an employee contribution for a plan year, the employee is an eligible employee for the plan year without regard to whether the employee performs these acts.

(2) *Conditions on eligibility.* An employee who is unable to make employee contributions or to receive an allocation of matching contributions because the employee has not contributed to another plan is also an eligible employee. By contrast, if an employee must perform additional service (*e.g.*, satisfy a minimum period of service requirement) in order to be eligible to make an employee contribution or to receive an allocation of matching contributions for a plan year, the employee is not an eligible employee for the plan year unless the service is actually performed. An employee who would be eligible to make employee contributions but for a suspension due to a distribution, a loan, or an election not to participate in the plan, is treated as an eligible employee for purposes of section 401(m) for a plan year even though the employee may not make employee contributions or receive an allocation of matching contributions by reason of the suspension. Finally, an employee does not fail to be treated as an eligible employee merely because the employee may receive no additional annual additions because of section 415(c)(1).

(3) *Certain one-time elections.* An employee is not an eligible employee merely because the employee, no later than the employee's first becoming eligible under any plan or arrangement described in section 219(g)(5)(A) and providing for employee or matching contributions, is given a one-time opportunity to elect, and the employee in fact does elect, not to be eligible to make employee contributions or to receive allocations of matching contributions under the plan or any other plan or arrangement maintained by the employer (including plans not yet established) for the duration of the employee's employment with the employer. In no event is an election made after December 23, 1994, treated as a one-time irrevocable election under this paragraph if the election is made by an employee who previously became eligible under another plan or arrangement (whether or not terminated) of the employer.

Eligible HCE. *Eligible HCE* means an eligible employee who is an HCE.

Eligible NHCE. *Eligible NHCE* means an eligible employee who is not an HCE.

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

Employee contributions. *Employee contributions* means employee contributions as defined in § 1.401(m)-1(a)(3).

Employee stock ownership plan (ESOP). *Employee stock ownership plan* or *ESOP* the portion of a plan that is an ESOP within the meaning of § 1.410(b)-7(c)(2).

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

Excess aggregate contributions. *Excess aggregate contributions* means, with respect to a plan year, the amount of excess aggregate contributions apportioned to an HCE under § 1.401(m)-2(b)(2)(iii).

Excess contributions. *Excess contributions* means with respect to a plan year, the amount of excess contributions apportioned to an HCE under § 1.401(k)-2(b)(2)(iii).

Excess deferrals. *Excess deferrals* means excess deferrals as defined in § 1.402(g)-1(e)(3).

Highly compensated employee (HCE). *Highly compensated employee* or *HCE* has the meaning provided in section 414(q).

Matching contributions. *Matching contribution* is defined in § 1.401(m)-1(a)(2).

Nonelective contributions. *Nonelective contributions* means employer contributions (other than matching contributions) with respect to which the employee may not elect to have the contributions paid to the employee in cash or other benefits instead of being contributed to the plan.

Non-employee stock ownership plan (non-ESOP). *Non-employee stock ownership plan* or *non-ESOP* means the portion of a plan that is not an ESOP within the meaning of § 1.410(b)-7(c)(2).

Non-highly compensated employee (NHCE). *Non-highly compensated employee* or *NHCE* means an employee who is not an HCE.

Plan. *Plan* means plan as defined in § 1.401(m)-1(b)(4).

Prior year testing method. *Prior year testing method* means the testing method under which the applicable year is the prior plan year, as described in § 1.401(k)-2(a)(2)(ii) or 1.401(m)-2(a)(2)(ii).

Qualified matching contributions (QMAC). *Qualified matching contributions* or *QMAC* means matching contributions that satisfy the requirements of § 1.401(k)-1(c) and (d) at the time the contribution is made, without regard to whether the contributions are actually taken into account as elective contributions under § 1.401(k)-2(a)(6). See also § 1.401(k)-2(b)(4)(iii) for a rule providing that a matching contribution does not fail to qualify as a QMAC solely because it is forfeitable under section 411(a)(3)(G) because it is a matching contribution with respect to an excess deferral, excess contribution, or excess aggregate contribution.

Qualified nonelective contributions (QNEC). *Qualified nonelective contributions* or *QNEC* means employer contributions, other than elective contributions or matching contributions, that satisfy the requirements of § 1.401(k)-1(c) and (d) at the time the contribution is made, without regard to whether the contributions are actually taken into account under the ADP

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test under § 1.401(k)-2(a)(6) or the ADP test under § 1.401(m)-2(a)(6).

[T.D. 9169, 69 FR 78184, Dec. 29, 2004, as amended by T.D. 9237, 71 FR 10, Jan. 3, 2006]

§ 1.402(a)-1 Taxability of beneficiary under a trust which meets the requirements of section 401(a).

(a) *In general.* (1)(i) Section 402 relates to the taxation of the beneficiary of an employees' trust. If an employer makes a contribution for the benefit of an employee to a trust described in section 401(a) for the taxable year of the employer which ends within or with a taxable year of the trust for which the trust is exempt under section 501(a), the employee is not required to include such contribution in his income except for the year or years in which such contribution is distributed or made available to him. It is immaterial in the case of contributions to an exempt trust whether the employee's rights in the contributions to the trust are forfeitable or nonforfeitable either at the time the contribution is made to the trust or thereafter.

(ii) The provisions of section 402(a) relate only to a distribution by a trust described in section 401(a) which is exempt under section 501(a) for the taxable year of the trust in which the distribution is made. With two exceptions, the distribution from such an exempt trust when received or made available is taxable to the distributee to the extent provided in section 72 (relating to annuities). First, for taxable years beginning before January 1, 1964, section 72(e)(3) (relating to the treatment of certain lump sums), as in effect before such date, shall not apply to such distributions. For taxable years beginning after December 31, 1963, such distributions may be taken into account in computations under sections 1301 through 1305 (relating to income averaging). Secondly, certain total distributions described in section 402(a)(2) are taxable as long-term capital gains. For the treatment of such total distributions, see subparagraph (6) of this paragraph. Under certain circumstances, an amount representing the unrealized appreciation in the value of the securities of the employer is excludable from gross income for the year of distribution. For the rules re-

lating to such exclusion, see paragraph (b) of this section. Furthermore, the exclusion provided by section 105(d) is applicable to a distribution from a trust described in section 401(a) and exempt under section 501(a) if such distribution constitutes wages or payments in lieu of wages for a period during which an employee is absent from work on account of a personal injury or sickness. See § 1.72-15 for the rules relating to the tax treatment of accident or health benefits received under a plan to which section 72 applies.

(iii) Except as provided in paragraph (b) of this section, a distribution of property by a trust described in section 401(a) and exempt under section 501(a) shall be taken into account by the distributee at its fair market value. In the case of a distribution of a life insurance contract, retirement income contract, endowment contract, or other contract providing life insurance protection, or any interest therein, the policy cash value and all other rights under such contract (including any supplemental agreements thereto and whether or not guaranteed) are included in determining the fair market value of the contract. In addition, in the case of a transfer of property that occurs on or after August 29, 2005 where a trust described in section 401(a) and exempt under section 501(a) transfers property to a plan participant or beneficiary in exchange for consideration and where the fair market value of the property transferred exceeds the value of the consideration, then the excess of the fair market value of the property transferred by the trust over the value of the consideration received by the trust is treated as a distribution to the distributee under the plan for all purposes under the Internal Revenue Code. Where such a transfer occurs before that date, the excess of the fair market value of the property transferred by the trust over the value of the consideration received by the trust is includable in the gross income of the participant or beneficiary under section 61. However, such a transfer of a life insurance contract, retirement income contract, endowment contract, or other contract providing life insurance protection occurring before that date is