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Employee Benefits

The Contingent Workforce: A Challenge for Benefits Managers

Anne E. Moran

The benefits news that graced the front page of The *New York Times* on August 19, 2004—"Costs of Benefits Cited As Factor in Slump of Jobs"—was of no surprise to benefits professionals. And the "solution" proposed from corporate boardrooms to small businesses—the hiring of temporary workers or independent contractors—was of no surprise either. Indeed, the *Times* set forth the data illustrating what most workers and businesses knew instinctively:

> In July, 2.4 million people were working for temporary agencies, according to the Bureau of Labor Statistics. That was a 9 percent increase from a year earlier, compared with an overall increase in the labor force of 1 percent. . . .

Business owners quoted in the article went on to indicate that their only solution for dealing with rising health care costs was to keep "headcount"—costly employees—down to the minimum number of workers to perform the necessary task at hand. Other factors contribute to this trend. A growing segment of workers are reluctant to remain in permanent employment positions. This combination of factors has created a so-called "contingent workforce." This workforce consists of individuals who do not identify themselves as employees, but who perform services on a free lance or independent basis, either on their own or through a temporary agency or other third party. It is fairly typical that such contingent workers do not receive the same employee benefit packages as "permanent employees" of the employer although they may receive higher cash compensation.

The emergence of the contingent workforce creates special challenges for the human resources professionals and for those who counsel them.

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Cautious service recipients define these new arrangements by contracting with any such contingent workers to ensure that they understand the consequences of this arrangement. Controversies often arise, however, when a worker, the IRS, or a court decides to challenge these arrangements by reclassifying the previously agreed-upon status of the worker. This can occur in a variety of circumstances:

1 Where the contingent worker (or a class action lawyer on his or her behalf) believes his or her duties are similar to that of company employees and that he or she should be entitled to the same benefits that those employees receive;

2. Where the IRS determines that the worker has acted as an employee under the common law tests of employment and thus should be treated as one for payroll tax purposes and for purposes of the nondiscrimination rules that govern which employees must receive tax-qualified employee benefits;

3. When a dispute arises as to who is the "employer" of a particular worker for liability or other purposes (*e.g.*, in the case of a worker providing services at home and/or through a temporary services agency);

4. Where the worker seeks redress as an employee under state employment protections, such as unemployment benefits;

5. When the entity hiring the worker is being sued as liable for the worker's work; or

6 When a worker or a court decides to invoke the protections of certain statutes, such as the Employee Retirement Income Security Act (ERISA), the Age Discrimination in Employment Act (ADEA), or the National Labor Relations Act (NLRA), all of which protect "employees."[1]

This column does not discuss all of these issues but focuses primarily on how a worker's classification affects his or her rights to employee benefits, and how such status can be defined to reflect the intent of the parties. It describes the commonly applied tests for "employee" status, the significance of a worker's status under the Internal Revenue Code (Code), and the court cases that have applied these principles. It also discusses the effect of reclassifying employees or independent contractors on employee benefit plans under the Code, and describes some basic steps businesses and human resource departments can take to help keep workers in their proper classification.

Status of Worker as Employee/Status of Service Recipient as Employer

In many instances, it is not easy to distinguish between an employee and an independent contractor. Moreover, the tests that are applied vary depending on the circumstances and the government agency (if any) applying them. Where a particular statute or regulation affecting an employee or employment relationship contains a definition of the term "employee," that definition will be determinative for purposes of that application. For example, for purposes of the Fair Labor Standards Act,[2] the term "employee" is defined more broadly than at common law. Similarly, as discussed below, the Internal Revenue Service prescribes specific rules for determining a worker's status for certain purposes. If, however, the term is used in a rule absent a specific definition for purposes of that rule, then it is presumed that the term is intended to denote the traditional "master-servant" relationship as understood by the common-law agency doctrine.[3]

Under the common law agency doctrine, an employer-employee relationship is not capable of exact definition in Restatement 2d Agency Section 200.[4] Generally, an employment relationship is determined by the amount of control to which the employee is subject; this is true whether or not the control is actually exercised by the employer, provided the employer retains the right to exercise such control. A variety of factors are cited by the Restatement 2d Agency as relevant in determining whether requisite control is reserved to establish a common law employment relationship. These include:

1. Custom;

2. Skill required;

3. Who furnishes tools;

4. Whether work is to be performed at service recipient's premises;

5. The length of time employed;

6. The method of payment (hourly, salary);

7. Whether the work is part of the regular business of the service recipient; and

8. The parties' intent.

Since this column discusses how a worker should be classified for payroll tax and employee benefit purposes, it focuses on how the IRS defines

"employee." Benefits professionals are aware that the IRS has developed a well-known "20-factor" test, under which 20 listed factors are to be examined to determine whether a worker is, in fact, an employee. The weight to give each factor is dependent on facts and circumstances. As discussed in more detail below, subsequent IRS guidance makes it clear that these factors should be used to evaluate the extent of the service recipient's *control over the worker*; the extent of the service provider's *financial control* over the work; and the *relationships between the parties*. These factors are (1) the degree of the instructions to the worker; (2) the training provided; (3) the integration of the project into the business operations; (4) whether the service recipient can fire the worker, (5) whether the worker's services must be personally performed; (6) whether there is a continuous relationship; (7) whether there are set hours of work; (8) whether the worker is full or part-time; (9) whether the worker has a specific job location; (10) whether the work must be performed in a certain order; (11) whether reports are required; (12) whether pay is hourly or salaried; (13) whether business or travel expenses are paid; (14) whether tools are furnished for the worker; (15) whether the worker has made a significant investment in facilities; (16) whether the worker has a risk of loss; (17) whether the worker works for more than one entity; (18) whether the worker makes services available to the public; (19) whether the individual worker can be discharged and another substituted; and (20) whether the worker can quit without liability.[5] However, although the 20-factor test does not appear to have been formally abandoned, the IRS Manual requires its examiners to apply these factors in a manner that reflects the more modern workforce.[6]

The Manual's guidance to examiners departs from some of the standards of the past. It clearly states that certain of the 20 factors may not be relevant, depending on the circumstances. For example, it recognizes that the need to require uniforms and certain standard procedures might not always reflect employer control, but rather indicate safety or customer service needs.

The Manual focuses on whether the service recipient has the right to "control" the worker. Exhibit 4.23.5-1 of the Manual cites three general sets of control factors to examine. The first set of facts involve "behavioral control"—whether there is a right to direct or control how the worker performs the specific task for which he or she is hired; *i.e.*, the degree of instructions or training provided. Note again, that this is only a factor. For example, businesses in certain industries (*i.e.*, chemical, transportation) often are legally required to train any worker who provides services to that entity, regardless of whether the individual is an "employee."

The second set of facts looks at "financial control," *i.e.*, whether there is a right to direct the business aspects of the worker's activities. Factors cited are whether the worker has a significant investment, how expenses are handled, whether the worker can provide his or her services to the public, and the opportunity for profit or loss. Again, specific facets of

these indicators may be difficult to apply correctly; for example, in a service industry where the worker may have little or no demonstrative capital investment.

The third general category, the "relationship of the parties," examines how the parties perceive their relationship. It looks at benefits provided employees, the control over the ability to discharge or to terminate employment, and the regularity of business activities. A contract between the parties is not determinative, but may be helpful in close cases.

Employer Status

Even if one can define the status of the worker as an "employee," another significant question may arise as to who is the "employer." Many organizations "lease" workers from temporary or special services agencies, and some of these agencies actually assume employer-like responsibilities, including screening applicants, evaluating work, setting pay scales, and providing vacations and certain employee benefits. In fact, many businesses have been advised to use a third-party entity to hire their workers, particularly in cases where they are re-hiring former employees or hiring workers to perform services their employees have traditionally performed. But a company that uses such an agency to provide it with workers is not entirely secure from the threat that it can be deemed an employer. It still must examine carefully the contractual terms of its relationship with the agency and the worker(s), and monitor in operation how the workers are treated while they are performing services. For example, it is not uncommon for service recipients to allow workers to use employee badges and enjoy certain privileges (*e.g.*, cafeteria, gym, parking) available to employees. Depending on the particular circumstances, this can raise questions as to whether the worker is an independent contractor or an employee.

In addition, certain of these workers, even if they are not company employees, may be subject to special rules that define their status, at least under the Code. For example, for purposes of applying the nondiscrimination rules discussed below, qualified retirement plans must count as their own employees certain "leased workers" who are not common law employees of that employer, but who work for temporary or other agencies, if (1) such workers provide services under an agreement between the company and a leasing company; (2) the worker has worked for the recipient company on substantially full-time basis for at least a year, and (3) the work is under the recipient's primary direction and control.[7] As discussed more fully below, these workers do not have to be included in the company's plan, but they must be counted for purposes of applying the nondiscrimination tests.[8]

The Significance of a Worker's Status

A worker's status as employee or independent contractor can affect the worker's and the company's individual and payroll tax liability as well as rights under employee benefit plans. In fact, sometimes it is advantageous for a worker to be classified as an independent contractor. For example, an independent contractor can establish a simplified employee pension or a Keogh retirement plan and generally shelter up to 15 percent of his or her income, up to $30,000. By contrast, an employee is limited to the participation in the employer's retirement plan and whatever tax advantages are available to him or her in an IRA. Similarly, an independent contractor can deduct all of his or her business expenses without regard to the disallowance of deductions by employees for such expenses to the extent of the first 2 percent of his or her income (the so-called 2 percent floor). On the other hand, independent contractors are not permitted to participate in qualified employee benefit plans because, under ERISA, such plans must be established for the "exclusive benefit of employees." Usually such plans define eligible participants in terms of "employees of the Company."[9]

Mistaken Classification as Employee

Although usually workers want to be classified as employees, as shown above, in certain circumstances, classifying an independent contractor as an employee can hurt the worker. This was illustrated in a series of cases involving insurance agents. In *Butts v. Commissioner*,[10] an insurance company consistently treated workers as employees for benefits and other purposes. They were trained by the employer, on the payroll of the employer, and included in the employer's benefit plans. For tax purposes, however, certain insurance agents took deductions for business expenses in excess of the 2 percent floor on their individual returns, claiming that they were self-employed, rather than employees.

The Eleventh Circuit Court of Appeals held for the workers on the individual tax issues, but did not deal with the effect of its decision on the company's retirement plan. That left the employer in the position of having workers in its qualified plan who were not deemed to be "employees." Although the government had taken the position in the litigation that the workers were employees (and lost), the IRS then argued that the retirement plan was not qualified because the inclusion of these independent contractors meant that the plan was not established for the exclusive benefit of employees. The employers had to spend many years negotiating with the IRS to resolve this issue.

Mistaken Classification as an Independent Contractor

A different set of issues arises in the more typical case when a worker has been classified as an independent contractor, and the court or employee maintains otherwise. First, the service-receiving company can be liable for a wide variety of payroll taxes that only apply to "employees," such as payroll withholding, FICA, and FUTA taxes. Second, if a benefit plan purports to offer benefits to "employees," and the worker is now classified as such, as a contractual matter that worker may be entitled to benefits under the plan, depending on how the plan is drafted. Finally, as discussed below, the tax qualified status of the company's retirement and other plans may be in jeopardy due to the special rules governing the proportion of nonhighly compensated employees that qualified plans must cover.

So-called "qualified" retirement plans are entitled to special tax advantages if they meet certain criteria. These tax advantages include tax-free buildup of investment income in retirement plans and accelerated deductions for employer contributions to such plans. Special rules under IRC Section 423 apply to employee stock purchase plans and allow capital gains rather than ordinary income treatment of the bargain element of any stock purchase price set by the employer.

The price of these tax advantages often includes a requirement that the benefits be offered to a nondiscriminatory group of employees. Employee stock purchase plans under IRC Section 423 must be made available to all employees of an employer, other than those who do not meet minimum age and service requirements. Nondiscrimination rules for other types of retirement plans are more flexible and complex, but, very generally, a qualified retirement plan must (1) allow 70 percent of its nonhighly compensated employees to participate, if all of its highly compensated employees can participate, or (2) cover a classification of employees that does not discriminate in favor of highly compensated employees and provide that the average benefit paid under the plan to nonhighly compensated employees be at least 70 percent of the average benefit paid to the highly compensated.[11] The Code contains objective definitions of the term "highly compensated employee,"[12] and IRS regulations set forth extremely complex objective testing rules to ensure that the benefits paid under the plan do not discriminate in favor of the highly compensated.[13]

The Code does not require that all employees be covered in a qualified retirement plan as long as the exclusion of certain employees is based on a reasonable classification (which is a relatively broad test) and does not discriminate in favor of the highly compensated. Plans can therefore be drafted to ensure that they specifically exclude individuals hired as independent contractors. (As discussed below, if they are not so carefully drafted, the reclassified workers may be entitled to participate in the plan as a matter of contract right.) Note, however, that under the Code, a plan

cannot exclude a worker based on "age or service." Thus, the IRS will generally not permit employees to exclude part-time workers *per se*, unless such workers are permitted to participate if they have 1,000 hours of service in a year.[14]

Because these nondiscrimination tests focus on the percentage of the employer's "employees" who are participating, if a large number of independent contractors are reclassified as employees, even if they are excluded under the plan, the employer may inadvertently have excluded too many nonhighly compensated employees and thus failed the nondiscrimination in coverage test. Employers who have a large number of "leased employees" as defined in IRC Section 414(n) can also find themselves in this predicament.

Health plans that are insured are not required to pass any nondiscrimination tests, so employers have a great deal more flexibility in establishing classes of excluded or included employees.[15] However, if a health plan is not insured (as is often the case with large employers who self-insure) some *basic* nondiscrimination requirements apply, although these are more flexible with respect to the categories of employees who may be excluded.[16] Thus, many health insurance plans can be drafted to exclude contingent workers, so it is generally in the retirement plan arena where the classification of a worker as an employee or independent contractor is significant.

Application of These Principles in the Courts

The most highly publicized case involving contingent workers is *Vizcaino v. Microsoft Corp.*[17] Here, a significant number of workers, called "freelancers," had been hired by the software company as independent contractors, although they did perform work similar to that which was done by the company's designated "employees." The freelancers had agreed in writing to this arrangement, and received payments that in general were higher than the base salaries paid to the company's designated employees. The freelancers were not carried on the company's payroll, but were paid through the accounts receivable department. They did not participate in the company's 401(k) plan and Section 423 stock purchase plan.

The IRS audited the company, and determined that these workers were employees for payroll tax purposes. Microsoft acquiesced in that finding, and reached a settlement with the IRS. Then the freelancers initiated class actions to obtain employee benefits retroactively under the 401(k) plan and the stock purchase plan.

Based on a review of the freelancers' activities and a comparison of their work with those of the company's employees, the three-judge panel in the Ninth Circuit initially ruled that the workers were employees and that the contracts between the workers and the company were not bind-

ing because they were based on a misunderstanding of facts—*i.e.*, that the workers were "independent contractors." On rehearing *en banc,* the entire Ninth Circuit Court of Appeals agreed with the panel that the workers were employees, and thus had to be included in the stock purchase plan, but remanded to the district court the question of whether a provision in the 401(k) plan limiting participation to individuals "on the U.S. payroll," could be read to allow the plan to exclude the freelancers from participation. This case was eventually settled.

While the *Microsoft* case has been the most highly publicized, workers at other companies have made similar complaints. The success of the companies in defending the status of their workers depends in large part on the terms of the benefit plans. For example, in *Abraham v. Exxon Corporation*,[18] the Fifth Circuit held that although certain "special agreement" workers appeared to be common law employees indistinguishable from Exxon's other employees, the plan specifically excluded this category of employees and was permitted to do so. In fact, in that case the court went on to say that if such workers were specifically excluded under the terms of the plan, the court could not rewrite the plan to require inclusion of such employees, even if the exclusion of such workers would result in a loss of the tax status of the plan. In *Clark v. E.I. DuPont de Nemours & Co.*,[19] leased workers who were excluded under the terms of the company's pension and welfare plans were held not entitled to benefits. Similarly, in *Capital Cities/ABC Inc. v. Ratcliff*,[20] the court held that a class of newspaper carriers was not entitled to coverage under the paper's benefit plans because they were specifically excluded from the plans. The court further held that the employees had knowingly agreed to the exclusion when they were hired, even though as a practical matter they had no bargaining power to disagree.

Workers have attempted to argue that they have a right to plan benefits under other theories. Initially, certain workers successfully argued that the law did not permit retirement plans to exclude from participation employees who had met the minimum age and service criteria set forth in the Code. (Under IRC Section 410(a), employers must generally count for purposes of nondiscrimination *testing* those employees who have a year of service and are age 21.)[21] However, this decision was reversed by the Tenth Circuit.[22]

Attempts to parse the law in favor of workers seeking benefits still continue, and point to planning precautions that employers should take. In *Burney v. Pacific Gas & Electric Co.*,[23] a group of leased workers argued that they were entitled to benefits under PG&E's retirement plan. The district court had granted summary judgment to the employer because the plan specifically excluded "leased workers under section 414(n)(2) of the Code." The Ninth Circuit reversed the decision, stating that Section 414(n) defined a leased employee as one that is not a common law employee. As a result, the literal reading of the exclusion in the plan document could not exclude workers who were common law employees.

Therefore, the case was remanded to the lower court for a determination of the employee status of the workers.

The status of an individual as an employee or an independent contractor will be important to an employer in terms of designing qualified employee pension plans to ensure compliance with strict regulatory requirements. For example, the IRS requires that qualified pension plans be established and maintained for the exclusive benefit of employees.[24] Thus, an independent contractor may not participate in the qualified plan of the entity for whom services are performed, and deductions for contributions to qualified plans may not be taken with respect to independent contractors.[25]

Section 403(b) tax deferred annuities may be purchased only by certain categories of religious, charitable, scientific, educational, or like employers for its *employees*; thus independent contractors are ineligible for these benefits.[26] But as noted above, one condition for the 403(b) plus is that *all* employees be given the opportunity to defer. An employer who misclassifies employees as independent contractors could be forced, upon audit, to correct the problem by making a contribution equal to the average amount of salary deferral for other employees.[27]

An employer is required to analyze the benefits provided to various classes of employees under its pension plans to ensure "minimum coverage," or equitable distribution of pension benefits to employees.[28] In order to ensure proper application of rigid numerical tests to satisfy these requirements, an employer will need to be sure of the status of individuals who perform services for it. Improperly including individuals who are not truly employees may jeopardize qualified plan status, while improperly excluding individuals who are in fact employees may cause a plan to fail to satisfy minimum coverage tests.[29]

It has been argued successfully that a non-employee does not have standing under ERISA Section 510 (which prohibits actions interfering with protected rights under an employee benefit plan) based on allegations that the worker's classification prevented participation in an ERISA plan.[30] Nonetheless, employees and non-employee participants are clearly covered by ERISA Section 510, and any attempts to manipulate their status (or to change their status) could be challenged.[31]

Options for Business

Unfortunately, there is no foolproof, "magic formula" that can turn an employee into an independent contractor or visa versa. However, there are a few procedural steps that should be taken to ensure that the employer does its best with the individuals that are being hired.

1. "Get It in Writing."

This is *not* foolproof. However, a written agreement that spells out the intent of the parties to treat the hired worker as an independent contractor helps to dissuade individuals from lawsuits, and forces both the worker and his or her service recipient to focus on the rights and obligations of both parties. A contract for an independent contractor should state that the worker is to be classified as an independent contractor, and to the extent possible, use language describing the worker's job duties in a manner that illustrates independent contractor status. For example, if a worker's own equipment will be used, indicate that fact and how the worker will be reimbursed. If the contract must specify whether the worker is expected to show up at particular times, it should also recite any flexibility that the worker enjoys in contrast to a typical employee, such as the ability to set hours, the time and place or method of work, and the ability to hire others.

2. Consider Use of Third-Party Service Providers

If a business hires temporary workers from an entity that provides its own payroll services and may even provide health and other benefits, it is less likely that the worker will want to sue the business recipient. In addition, it is more likely that the service recipient will be able to demonstrate that the temporary agency, and not the service recipient, had primary direction and control over the employee. However, this is not foolproof, since the IRS does take the position that a worker can have two employers in certain circumstances.

3. Screen Potential New Hires and Third-Party Providers

If one is hiring through a third party, and particularly if one is not, the service recipient of "contingent workers" should know (a) whether the worker has a separate legal entity for his or her business; (b) whether the worker has business licenses or outside training; and (c) whether the worker has an office or place to report) separate from his or her home. If hiring through third parties (an agency), the third party should be required to supply this and other information regarding the benefits (if any) provided by that entity to its workers.

4. Review Employee Benefit Plans

As noted above, the determination of who can participate in most employee benefit plans is discretionary as long as it meets the applicable nondiscrimination rules. Although many plans are required to cover a certain percentage of the employer's lower paid workforce under nondis-

crimination rules, employers who hire only a few contingent employees do not need to worry about that, assuming, as discussed above, that the plan is drafted properly to exclude these employees. As shown in the *Microsoft*, case, such permitted exclusions, carefully drafted, could have save the employer a significant legal battle and benefit obligation.

Language that has been dubbed "Microsoft" language should be considered for all employee benefit plans. This "Microsoft" language essentially states that even if a worker is reclassified later as an employee, a worker who is classified by the employer at hire as an independent contractor will be treated as such for purposes of the benefit plan's eligibility rules.

There are some types of plans—Section 423 employee stock option plans and 403(b) salary deferral plans—that require that *all* "employees" be given an opportunity to buy stock (in a Section 423 plan) or to make salary deferrals (in a 403(b) plan). Companies with such plans should be very sure of their employees' and workers' status.

A company that uses the common "leased" employees from a staffing agency should make sure that the plan properly excludes leased employees. As illustrated in the *Pacific Gas & Electric Company* discussed above, that exclusion should not merely cross-reference the leased employee definition of IRC Section 414(n), but should specifically state that the plan excludes workers leased from other parties whether or not they are later deemed to be common law employees of the company.

5. Review Communications to Workers

All communications to workers should be reviewed, keeping the status of contingent workers in mind. Although it may be necessary or desirable to include temporary or contingent workers in certain general announcements or business activities (*e.g.*, parking), the communication to such workers should not call them employees or say they are being treated "like employees."

Conclusion

With careful planning and subject to the demographics of the employer's workforce, an employer can exclude a group of contingent workers from most of its benefit plans,[32] even if the workers are currently or in the future classified as common law employees. But if such an approach is desired, all plan documents in particular, as well as employee communications and hiring agreements, must be scrutinized with this issue in mind. Moreover, it should be recognized that a contractual understanding between the worker and the company at hiring is significant but not determinative. Finally, if a large group of these individuals constitutes a

significant part of the company's workforce, their status must be carefully analyzed under the 20-factor and other common law tests of employee status, because if they are later reclassified as employees, and must be counted for purposes of the nondiscrimination tests, the qualified retirement plans could fail those tests.

Notes

1. Slightly different tests apply for purposes of determining who is an "employee" under the Internal Revenue Code, ADEA, ERISA and under NLRA.

2. 29 U.S.C. § 201 *et seq.*

3. *See, e.g.*, Creative Non-Violence v. Reid, 490 U.S. 730 at 751–752; (1989); Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 323 (1992); *compare* Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947) (using a broader standard than common law employee to determine if an individual was entitled to protection under the Fair Labor Standards Act).

4. Restatement 2d Agency § 220, comment (c).

5. *See* Rev. Rul. 87-41, 1987-1 C.B. 296.

6. *See* IRM § 4.23.5 and Exhibit 4.23.5.1.

7. *See* Code § 414(n).

8. *See* IRS Notice 84-11, Q&A-14 and 15, 1984-2 C.B. 469, and Burnetta v. Commissioner, 68 T.C. 387 (1977).

9. Moreover, although not discussed in this memorandum, a worker's status as an employee provides protections under statutes such as ERISA, ADEA, and NLRA.

10. 49 F.3d 713 (11th Cir. 1995).

11. *See* IRC § 410(b).

12. *See* IRC § 414(q) (very generally, $90,000 for 2004).

13. *See* Treas. Reg. § 1.401(a)(4)-1.

14. *See* IRC § 410(a)(1)(A).

15. *See* IRC §§ 105, 106.

16. *See* IRC § 105(h).

17. 120 F.3d 1006 (9th Cir. 1997) *(en banc), cert denied,* 118 S. Ct. 1998.

18. 85 F.3d 1126 (5th Cir. 1996).

19. 105 F.3d 646 (4th Cir.) *(per curiam)* [designated by the court as not for publication], printed in 20 E.B.C. 2039, *cert. denied*, 138 L. Ed. 188 (1997).

20. 141 F.3d 1405 (10th Cir.) *cert. denied,* 1998 U.S. LEXIS 5658 (1998).

21. *See* Bronk v. Mountain States Tel. & Tel., Inc., 943 F. Supp. 1317 (D. Colo. 1996).

22. 140 F. 3d 1335 (10th Cir. 1998).

23. 159 F.3d 388 (9th Cir. 1998).

24. IRC § 401(a).

25. *See* Professional and Executive Leasing v. Commr, 89 T.C. 225 (1987) *aff'd* 862, 852 F.2d 751 (9th Cir. 1988) and PLR 9546018 (Aug. 18, 1995), where the IRS has set forth possible measures to undo an exclusive benefit violation. (Note—it is not clear that the IRS would agree to these measures today.)

26. *See, e.g.*, Rev. Rul. 66-274, 1966-2 C.B. 446; Azad v. United States, 388 F.2d 74 (8th Cir. 1968).

27. *See* Rev. Proc. 2004-33, 2004-1 C.B. 1051 (IRS qualified plan correction procedures).

28. IRC §§ 401(a)(4), 410(b).

29. *See, e.g.*, Kenny v. Commr, 70 TCM (CCH) 614 (1995), where a retirement plan was disqualified for failure to meet the coverage test as a result of misclassification.

30. *See* Edes v. Verizon Communications, Inc. 288 F. Supp. 2d 55 (D. Mass 2003).

31. *See, e.g.*, Gitlitz v. Compagnie Air France, 1129 F.3d 554 (11th Cir. 1997) (existence of Section 510 claim is issue of fact).

32. The exceptions for Section 423 stock purchase plans and 403(b) plans have been noted above.