

Internal Revenue Code Section 416(i)(1)(B)(i)

Special rules for top-heavy plans.

(i) Definitions.--For purposes of this section--

(1) Key employee.--

(A) In general.--The term "key employee" means an employee who, at any time during the plan year, is--

- (i) an officer of the employer having an annual compensation greater than \$130,000,
- (ii) a 5-percent owner of the employer, or
- (iii) a 1-percent owner of the employer having an annual compensation from the employer of more than \$150,000.

For purposes of clause (i), no more than 50 employees (or, if lesser, the greater of 3 or 10 percent of the employees) shall be treated as officers. In the case of plan years beginning after December 31, 2002, the \$130,000 amount in clause (i) shall be adjusted at the same time and in the same manner as under section 415(d), except that the base period shall be the calendar quarter beginning July 1, 2001, and any increase under this sentence which is not a multiple of \$5,000 shall be rounded to the next lower multiple of \$5,000. Such term shall not include any officer or employee of an entity referred to in section 414(d) (relating to governmental plans). For purposes of determining the number of officers taken into account under clause (i), employees described in section 414(q)(5) shall be excluded.

(B) Percentage owners.--



(i) 5-percent owner.--For purposes of this paragraph, the term "5-percent owner" means--

- (I) if the employer is a corporation, any person who owns (or is considered as owning within the meaning of section 318) more than 5 percent of the outstanding stock of the corporation or stock possessing more than 5 percent of the total combined voting power of all stock of the corporation, or
- (II) if the employer is not a corporation, any person who owns more than 5 percent of the capital or profits interest in the employer.

- (ii) 1-percent owner.--For purposes of this paragraph, the term “1-percent owner” means any person who would be described in clause (i) if “1 percent” were substituted for “5 percent” each place it appears in clause (i).
- (iii) Constructive ownership rules.--For purposes of this subparagraph--
 - (I) subparagraph (C) of section 318(a)(2) shall be applied by substituting “5 percent” for “50 percent”, and
 - (II) in the case of any employer which is not a corporation, ownership in such employer shall be determined in accordance with regulations prescribed by the Secretary which shall be based on principles similar to the principles of section 318 (as modified by subclause (I)).
- (C) Aggregation rules do not apply for purposes of determining ownership in the employer.--The rules of subsections (b), (c), and (m) of section 414 shall not apply for purposes of determining ownership in the employer.
- (D) Compensation.--For purposes of this paragraph, the term “compensation” has the meaning given such term by section 414(q)(4).
- (2) Non-key employee.--The term “non-key employee” means any employee who is not a key employee.
- (3) Self-employed individuals.--In the case of a self-employed individual described in section 401(c)(1)--
 - (A) such individual shall be treated as an employee, and
 - (B) such individual's earned income (within the meaning of section 401(c)(2)) shall be treated as compensation.
- (4) Treatment of employees covered by collective bargaining agreements.--The requirements of subsections (b), (c), and (d) shall not apply with respect to any employee 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 1 or more employers if there is evidence that retirement benefits were the subject of good faith bargaining between such employee representatives and such employer or employers.
- (5) Treatment of beneficiaries.--The terms “employee” and “key employee” include their beneficiaries.
- (6) Treatment of simplified employee pensions.--
 - (A) Treatment as defined contribution plans.--A simplified employee pension shall be treated as a defined contribution plan.
 - (B) Election to have determinations based on employer contributions.--In the case of a simplified employee pension, at the election of the employer, paragraphs (1)(A)(ii)

and (2)(B) of subsection (g) shall be applied by taking into account aggregate employer contributions in lieu of the aggregate of the accounts of employees.