

Rev. Proc. 2002-21

SECTION 1. INTRODUCTION

.01 *Introduction.* This revenue procedure describes steps that may be taken to ensure the qualified status of defined contribution retirement plans maintained by professional employer organizations (PEOs) for the benefit of Worksite Employees. PEOs are also commonly known as employee leasing organizations.

.02 *Potential for plan disqualification.* The employment relationship between workers and the employer maintaining a plan is fundamental to whether a plan is qualified under § 401(a) of the Internal Revenue Code. The determination of whether an employment relationship exists depends on the facts and circumstances of each particular case. If a retirement plan provides benefits for individuals who are not employees of the employer maintaining the plan, the plan does not satisfy the exclusive benefit rule contained in § 401(a)(2), and therefore could be disqualified.

.03. *Relief from disqualification of plan.* The Service recognizes the complexity involved in the determination of whether a Worksite Employee is the common law employee of the PEO or the client organization (CO), as well as the need of the PEO, the CO, Worksite Employees, and plan administrators for certainty in this area. Accordingly, this revenue procedure provides a framework under which

plans sponsored by PEOs will not be treated as violating the exclusive benefit rule solely because they provide benefits to Worksite Employees. Under the approach provided in this revenue procedure, a PEO that maintains a defined contribution retirement plan may establish a multiple employer plan that benefits Worksite Employees providing services to COs. For PEOs that do not wish to establish a multiple employer plan, the revenue procedure provides transition rules under which the existing PEO plan will be treated as a qualified plan if it is terminated by a specified date.

SECTION 2. PURPOSE

.01 *In general.* The purpose of this revenue procedure is to provide relief with respect to certain defined contribution retirement plans maintained by a PEO (“PEO Retirement Plans”) that benefit Worksite Employees.

.02 *Scope of relief.* With regard to PEO Retirement Plans established prior to May 13, 2002, if the requirements of section 5 are met, the Service will not disqualify the PEO Retirement Plan solely on account of an exclusive benefit rule violation under § 401(a)(2) for a plan year beginning before the Compliance Date if that violation results from the PEO Retirement Plan benefitting Worksite Employees who are not the PEO’s employees. Relief provided under this revenue procedure applies only with respect to the PEO Retirement Plan for which relief is granted and not to other plans maintained by a CO or the PEO.

.03 *No effect on other law.* The relief provided under this revenue procedure with respect to the provisions of § 401(a) has no effect on the rights of any party under any other law, including Title I of the Employee Retirement Income Security Act of 1974 and other provisions of the Internal Revenue Code.

SECTION 3. BACKGROUND

.01 *In general.* An employee leasing arrangement typically involves the interaction among three parties: the PEO, the CO, and the Worksite Employees. In a typical situation, a PEO enters into an agreement with a CO whereby employees become Worksite Employees and continue to provide services to the CO.

.02 *Employment relationship.* The issue of whether a worker is an employee of a particular entity for employment tax purposes is determined by reference to § 3121(d), which incorporates the common law definition of employee. The Supreme Court has also applied this common law definition of employee for purposes of determining whether a worker is an employee entitled to receive benefits under a retirement plan. See *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). Courts have also found that common law factors are applicable to determine which of two entities is the employer for purposes of retirement plans. The critical issue in determining who is the employer of an individual is which entity has the right to direct and control the individual performing the services. If it is found that the CO, not the PEO, is the employer, the plan maintained by a PEO that benefits Worksite Employees of the CO would fail to satisfy the exclusive benefit rule. See *Professional and Executive Leasing, Inc. v. Commissioner*, 89 T.C. 225 (1987), *aff’d*, 862 F.2d 751 (9th Cir. 1988).

.03 *Exclusive benefit rule.* Section 401(a)(2) provides that a trust forming a part of a qualified pension, profit-sharing, or stock bonus plan must be a trust established and maintained by an employer for the exclusive benefit of that employer’s employees and their beneficiaries (“exclusive benefit rule”). Therefore, a retirement plan that provides benefits for individuals who are not employees of the employer maintaining the plan (and who are not otherwise treated as employees under rules such as those under § 414) violates the exclusive benefit rule and does not satisfy the requirements of § 401(a).

.04 *Leased employees.* Section 414(n) does not permit PEOs to maintain plans for Worksite Employees who are not the common law employees of the PEO. Section 414(n) deals with individuals who are not common law employees of the entity for which they perform services (“recipient”) but who might have to be taken into account in determining whether a retirement plan maintained by the recipient satisfies the requirements of § 401(a). Notice 84-11 (1984-2 C.B. 469) provides questions and answers relating to § 414(n). Section 414(n)

addresses the relationship between the recipient and the leased workers, but it does not apply to situations in which a worker is the common law employee of the recipient.

.05 *Multiple employer plan.* Section 413(c) provides rules for the qualification of a plan maintained by more than one employer (*i.e.*, a “multiple employer plan”). Under § 413(c)(2), in determining whether a multiple employer plan complies with the exclusive benefit rule, all employees benefitting under the multiple employer plan are treated as the employees of all employers who maintain the plan. Additionally, an employee’s service with all of the employers participating in the plan is taken into account for purposes of vesting under § 411 and plan participation under § 410(a). See § 413(c)(1) and (3). Similarly, for purposes of the contribution and benefit limitations of § 415, an employee’s compensation from all employers participating in the plan is taken into account. See § 1.415-1(e)(1) of the Income Tax Regulations. Other rules apply separately to each participating employer and its employees. For example, nondiscrimination testing under § 401(a)(4) and § 401(k), and coverage testing under § 410(b), are performed separately for each employer maintaining the multiple employer plan. See § 1.401(a)(4)-1(c)(4), § 1.413-2(a)(3)(ii) and § 1.401(k)-1(g)(11). Top-heavy requirements under § 416 also apply separately to each employer. See § 1.416-1, Q&A G-2.

SECTION 4. RELIEF AVAILABLE

.01 *No disqualification of PEO Retirement Plan.* If a PEO has a PEO Retirement Plan in existence on May 13, 2002, that benefits Worksite Employees, section 5 provides the PEO with the option of either converting the PEO Retirement Plan to a multiple employer plan or terminating the plan. If a PEO timely satisfies the requirements of section 5, the Service will not disqualify its PEO Retirement Plan solely on the grounds that the plan violates or has violated the exclusive benefit rule for plan years beginning before the Compliance Date by benefitting Worksite Employees who are not the PEO’s employees.

.02 *Effective Dates.* (1) *Compliance Date.* Except as specifically provided, all

remedial actions and other requirements in section 5 must be completed by the Compliance Date. The Compliance Date is the last day of the first plan year of the PEO Retirement Plan beginning on or after January 1, 2003. For a calendar year plan, the Compliance Date is December 31, 2003.

(2) *PEO Decision Date.* The PEO Decision Date is the date by which the PEO must take specified actions affirming its decision whether to terminate the PEO Retirement Plan or maintain a multiple employer retirement plan that benefits Worksite Employees. The PEO Decision Date is the date that is 120 days after the first day of the plan year beginning on or after January 1, 2003. For a calendar year plan, the PEO Decision Date is May 2, 2003.

.03 *Plan terminations.* For the purpose of determining whether a PEO Retirement Plan or Spinoff Retirement Plan satisfies the qualification requirements in § 401(a) upon plan termination (as described in section 5.06), Worksite Employees may be treated as if they were employees of the PEO.

SECTION 5. REMEDIAL ACTION REQUIRED

.01 *In general.* In order to obtain the relief provided in section 4, the plan sponsor of a PEO Retirement Plan must either terminate the PEO Retirement Plan in accordance with section 5.02, or convert the PEO Retirement Plan into a multiple employer plan (“Multiple Employer Retirement Plan”) in accordance with section 5.03.

.02 *Termination Option.* (1) *Termination of PEO Retirement Plan.* If a PEO chooses to terminate a PEO Retirement Plan in accordance with this section, the PEO must adopt a resolution of its board of directors (or, if the PEO is not a corporation, it must take comparable binding action, such as a partnership vote) on or before the PEO Decision Date, providing that the plan will be terminated on or before the Compliance Date. After the date of termination, all assets in the plan’s related trust must be distributed as soon as administratively feasible. See Rev. Rul. 89-87 (1989-2 C.B. 81). Consequently, the mere discontinuance of contributions under the PEO Retirement

Plan is not a termination of the plan and will not satisfy the requirements of this section.

(2) *Notification of COs.* The PEO must provide notice of the options set forth in section 5.02(3) to each CO that has Worksite Employees with accrued benefits in the PEO Retirement Plan. The PEO must specify in the notice the date by which each CO must notify the PEO of the option it selects. This notice must be sent on or before the PEO Decision Date.

(3) *CO Options.* The PEO must provide each CO with all of the following options:

(a) *Transfer of assets and liabilities to CO plans.* The CO may choose to have the assets and liabilities of the PEO Plan that are attributable to Worksite Employees performing services for the CO transferred to a retirement plan of the CO as provided in section 5.04(1). The transfer of assets and liabilities attributable to Worksite Employees performing services for the CO to the CO’s plan must be completed on or before the Compliance Date.

(b) *Spinoff of assets and liabilities to a separate plan and termination of that plan.* The CO may choose to have the assets and liabilities of the PEO Retirement Plan that are attributable to its Worksite Employees spun off to a Spinoff Retirement Plan, which is then terminated, as provided in section 5.04(2). The spinoff and termination must be completed on or before the Compliance Date. Plan assets must be distributed as soon as administratively feasible after the plan termination date.

(4) *CO Decision and Implementation.* The CO must provide notice of the selected option to the PEO by a date specified by the PEO. If a CO fails to timely inform the PEO of the option it selected, the PEO must treat the CO as having selected option 5.02(3)(b) (Spinoff and Termination). The PEO must implement the choice made or deemed made by each CO on or before the Compliance Date.

(5) *Determination Letter request.* The PEO must request determination letters on the termination of the PEO Retirement Plan and the Spinoff Retirement Plan. See section 5.06 of this revenue procedure for further information on determination letters on plan terminations.

.03 *Conversion Option.* (1) *Conversion to Multiple Employer Retirement Plan.* A PEO may choose to convert the PEO Retirement Plan to a Multiple Employer Retirement Plan, effective the first day of the first plan year beginning after the Compliance Date. If the PEO chooses this option, the PEO must satisfy the requirements of section 5.03(2) through (6). In addition, the Multiple Employer Retirement Plan must be adopted by those COs that wish to have Worksite Employees participate in the plan. To the extent that a PEO Retirement Plan is converted into a Multiple Employer Retirement Plan, assets and liabilities will remain in the plan and not be distributed to participants.

(2) *Adoption of Plan Amendments.* The PEO must adopt plan amendments necessary to convert the PEO Retirement Plan to a Multiple Employer Retirement Plan on or before the PEO Decision Date. The effective date of the plan amendments adopted by the PEO must be no later than the first day of the first plan year beginning after the Compliance Date.

(3) *Notification of COs.* The PEO must provide notice of the options set forth in section 5.03(4) to each CO that has Worksite Employees with accrued benefits in the PEO Retirement Plan. The PEO must specify in the notice the date by which each CO must notify the PEO of the option it selects. This notice must be sent on or before the PEO Decision Date.

(4) *CO Options.* The PEO must provide each CO with all of the following options:

(a) *Adoption of Multiple Employer Retirement Plan.* The CO may adopt the Multiple Employer Retirement Plan. The CO must adopt the Multiple Employer Retirement Plan by the first day of the first plan year beginning after the Compliance Date (or any earlier date as may be specified by the PEO). If a CO chooses this option, the Worksite Employees performing services for the CO may participate in the Multiple Employer Retirement Plan after its adoption by the CO without causing the plan to fail to satisfy the exclusive benefit rule. If a CO has not adopted the Multiple Employer Retirement Plan by the first day of the first plan year beginning after the Compliance Date (or any earlier date as may be specified by the PEO), the Multiple Employer Retirement Plan may

not accept contributions after the Compliance Date on behalf of the Worksite Employees performing services for the CO. In that event, the assets and liabilities attributable to the COs must be spun off as soon as administratively feasible to a Spinoff Retirement Plan.

(b) *Transfer of assets and liabilities to CO plans.* The CO may choose to have the assets and liabilities of the PEO Retirement Plan that are attributable to its Worksite Employees transferred to a retirement plan of the CO as provided in section 5.04(1). The transfer must be completed on or before the Compliance Date.

(c) *Spinoff of assets and liabilities to a separate plan and termination of that plan.* The CO may choose to have the assets and liabilities of the PEO Retirement Plan that are attributable to its Worksite Employees spun off to a Spinoff Retirement Plan that is then terminated, as provided for in section 5.04(2). The spinoff and termination must occur on or before the Compliance Date. Plan assets must be distributed as soon as administratively feasible after the plan termination date

(5) *CO Decision and Implementation.* The CO must provide notice of the selected option to the PEO by a date specified by the PEO. If a CO fails to timely inform the PEO of the option it selected, the PEO must treat the CO as having selected option 5.03(4)(c) (Spinoff of assets and liabilities). The PEO must implement the choice made or deemed made by each CO on or before the Compliance Date.

(6) *Determination Letter request.* The PEO must request determination letters on the Multiple Employer Retirement Plan and the Spinoff Retirement Plan. See section 7.02 of this revenue procedure for further information on an application for a determination letter on the qualified status of a Multiple Employer Retirement Plan. See section 5.06 of this revenue procedure for further information on determination letters on plan terminations.

.04 *Transfers to CO's plan or Spinoff of CO's assets and liabilities.* This section 5.04 applies if the PEO decides to terminate the PEO Retirement Plan; if a CO chooses to terminate its participation in the PEO Retirement Plan and transfer its

attributable assets and liabilities to the CO's plan; or if a CO's attributable assets and liabilities are spun off to a Spinoff Retirement Plan and distributed in connection with the termination of the Spinoff Retirement Plan.

(1) *Transfers to CO's plan.* (a) *Documentation of qualified status of plan maintained by the CO.* If a CO chooses to transfer its attributable assets and liabilities in a PEO's Retirement Plan to the CO's plan, the CO must provide the PEO, on or before a date specified by the PEO, with documentation that the plan to which assets are transferred is a qualified plan established and maintained by the CO. If such documentation is provided, the PEO must transfer the assets and liabilities attributable to the Worksite Employees from the PEO Retirement Plan to the CO's plan before the Compliance Date. If the CO fails to provide the PEO with this documentation, or any other information required by the PEO to effect transfer, on or before the date specified by the PEO, the PEO must utilize the procedures in section 5.04(2).

(b) *Qualified Plan Determination.* For purposes of determining whether a CO maintains a qualified plan, a "qualified plan" is a retirement plan that on or before the Compliance Date either (i) had received a favorable determination, notification, or opinion letter that considered GUST (GUST is an acronym for the Uruguay Round Agreements Act (GATT), the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), the Small Business Job Protection Act of 1996 (SBJPA), the Taxpayer Relief Act of 1997 (TRA'97), the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA'98) and the Community Renewal Tax Relief Act of 2000) or (ii) had submitted a request to the Service for a determination letter that considers GUST.

(2) *Spinoff and termination.* If a CO chooses a spinoff, or fails to timely notify the PEO of its selection, the PEO must implement a spinoff of the assets and liabilities of the PEO's Retirement Plan that are attributable to the CO's Worksite Employees to a Spinoff Retirement Plan. The Spinoff Retirement Plan may receive and hold assets and liabilities attributable to Worksite Employees of all of the COs that selected the spinoff option or failed

to timely notify the PEO of a selection. The PEO must then terminate the Spinoff Retirement Plan on or before the Compliance Date and distribute benefits to the Worksite Employees performing services for the COs as soon as administratively feasible after the termination date. For purposes of this revenue procedure, a *spinoff* means a spinoff of plan assets and liabilities attributable to the Worksite Employees performing services for the COs selecting the spinoff option (or failing to timely select an option) from the PEO Retirement Plan to a Spinoff Retirement Plan that satisfies the transfer requirements of § 414(1).

.05 *Methods of providing notice.* Any notice required to be provided under this revenue procedure may be sent by any method, including an electronic medium, that reasonably ensures that the intended recipient will receive timely and adequate notice. For purposes of this revenue procedure, notice sent by United States mail is considered sent as of the date of the United States postmark stamped on the cover in which the notice is mailed.

.06 *Plan terminations.* (1) *Request for determination letter on plan termination.* In choosing any of the options relating to plan terminations, a PEO must request a determination letter on the plan termination. Section 12 of Rev. Proc. 2002-6 (2002-1 I.R.B. 203) explains the procedures for requesting determination letters involving qualification of a plan upon plan termination. The permanency requirement described in § 1.401-1(b)(2) will not be raised as a disqualifying defect for plans being terminated pursuant to this revenue procedure. The request for a determination letter must be made within one year of the date of termination using the applicable provisions of Rev. Proc. 2002-6.

(2) *Distribution treated as being from a qualified plan.* Distributions made to Worksite Employees upon the termination of the PEO Retirement Plan or Spinoff Retirement Plan in accordance with this section will not fail to be eligible for favorable tax treatment accorded distributions from qualified plans (including eligibility for tax-free rollovers) solely because the plan violated the exclusive benefit rule of § 401(a)(2).

.07 *Example.* (i) A PEO maintains a PEO Retirement Plan established in 1994,

and the PEO uses the calendar year for its plan year. The PEO Retirement Plan treats all Worksite Employees performing services for COs as employees of the PEO. There are 75 COs with Worksite Employees benefiting under the PEO Retirement Plan.

(ii) After reviewing the options set forth in section 5, the PEO decides to convert the PEO Retirement Plan to a Multiple Employer Retirement Plan. In accordance with the requirements of section 5.03, on January 31, 2003, the PEO adopts amendments to the PEO Retirement Plan converting the plan to a Multiple Employer Retirement Plan, effective January 1, 2004. On February 14, 2003, the PEO mails notification to each CO that it has decided to convert the PEO Retirement Plan to a Multiple Employer Retirement Plan and explains the options available to the CO as described in section 5.03(4). In its letter to the COs, the PEO explains that each CO has until August 15, 2003, to notify the PEO, in writing, of its choice. The letter explains that if the CO does not notify the PEO of its selected option on or before August 15, 2003, the PEO will treat the CO as having selected the spinoff and termination option. The letter further explains that if a CO elects to adopt the Multiple Employer Retirement Plan, the Plan must be adopted on or before December 1, 2003.

(iii) By August 15, 2003, fifty of the COs with Worksite Employees benefiting under the PEO Retirement Plan notify the PEO of their decision to adopt and maintain the Multiple Employer Retirement Plan for the Worksite Employees. By December 1, 2003, forty-nine of the fifty COs adopted the Multiple Employer Retirement Plan, effective January 1, 2004. In accordance with section 5.03(4)(a) of this revenue procedure, on December 10, 2003, the PEO spins off the assets and liabilities attributable to the one CO that did not timely adopt the Multiple Employer Retirement Plan to a Spinoff Retirement Plan.

(iv) Ten COs timely elect a transfer, in which the assets and liabilities attributable to each CO's Worksite Employees are transferred to a qualified retirement plan established and maintained by each CO, and that satisfy the requirements

described in section 5.04(1). The ten COs timely provide all information required to effect the transfer, including documentation of the plans' qualified status. The transfers to each of the CO plans are completed by December 31, 2003.

(v) Ten COs affirmatively elect the spinoff and termination option. The PEO spins off plan assets and liabilities attributable to the Worksite Employees performing services for those COs to the Spinoff Retirement Plan on December 10, 2003.

(vi) The remaining five COs failed to notify the PEO of their choice by August 15, 2003. Therefore, in accordance with requirements in section 5.03(5), each of those COs is treated as having selected the spinoff and termination option as its choice. The PEO spins off the assets and liabilities of these COs to the Spinoff Retirement Plan on December 10, 2003.

(vii) On December 11, 2003, the PEO terminates the Spinoff Retirement Plan. On February 5, 2004, the PEO submits an application for a determination letter on the termination of the Spinoff Retirement Plan. The PEO receives a favorable determination letter on the termination of the plan. As soon as administratively feasible following the termination, distributions are made to the Worksite Employees performing services for the sixteen COs (the one CO that failed to timely adopt the Multiple Employer Retirement Plan, the ten COs that selected the spinoff and termination option, and the five COs that failed to timely notify the PEO of their choice) with assets in the Spinoff Retirement Plan.

(viii) On February 5, 2004, the PEO submits an application for a determination letter on the qualified status of the Multiple Employer Retirement Plan, and subsequently receives such a determination letter from the Service. Because the PEO took all of the steps required in section 5 of the revenue procedure, the PEO Retirement Plan is entitled to the relief set forth in section 4 of the revenue procedure.

.08 *PEOs not electing to take advantage of relief under this revenue procedure.* If a PEO does not, as of the Compliance Date, either terminate the PEO Retirement Plan it maintains for Worksite Employees performing services for COs

(as provided for in section 5.02) or convert the PEO Retirement Plan to a Multiple Employer Retirement Plan (as provided for in section 5.03), the relief in this revenue procedure is not available for any violations of the qualification requirements, including violations of the exclusive benefit rule, by PEO Retirement Plan.

.09 *No Reliance on Determination Letters for PEO Retirement Plans.* After the Compliance Date, a PEO may not rely on a determination letter for a PEO Retirement Plan that benefits Worksite Employees performing services for COs, regardless of when the determination letter was issued.

SECTION 6. DEFINITIONS

.01 *PEO Retirement Plan.* The term "PEO Retirement Plan" means a defined contribution plan (including a plan that includes a cash or deferred arrangement described in § 401(k)) intended to satisfy the requirements of § 401(a) or § 403(a). The definition of a PEO Retirement Plan does not include a plan maintained as a multiple employer plan that has been adopted by a PEO and one or more COs.

.02 *Multiple Employer Retirement Plan.* The term "Multiple Employer Retirement Plan" means a defined contribution plan (including a plan that includes a cash or deferred arrangement described in § 401(k)) intended to satisfy the requirements of § 401(a) or § 403(a), and § 413(c), under which each CO is treated as an employer.

.03 *Spinoff Retirement Plan.* The term "Spinoff Retirement Plan" means a separate plan established by a PEO for the specific purpose of a spinoff and termination as provided for in section 5.04(2).

.04 *Worksite Employees.* The term "Worksite Employees" means employees who receive amounts from a PEO for providing services to a CO pursuant to a service agreement between the PEO and the CO.

.05 *Client Organization.* The term "Client Organization" (CO) means an organization that enters into a service agreement with a PEO under which Worksite Employees provide services to the organization.

SECTION 7. PROCEDURES AND TRANSITIONAL RULE

.01 *Other qualification issues.* (1) *Use of EPCRS.* Plan qualification issues, other than the exclusive benefit issue for which relief is provided under this revenue procedure, may be resolved under the Employee Plans Compliance Resolution System (EPCRS). See Rev. Proc. 2001-17 (2001-1 C.B. 589).

(2) *Transitional relief for PEOs.* For purposes of determining whether a retirement plan maintained by a PEO for the benefit of Worksite Employees of COs satisfies the requirements of § 401(a)(2) prior to the Compliance Date, a PEO may treat Worksite Employees as its employees.

(3) *Transitional Rule for Code section 416.* For purposes of determining whether the Multiple Employer Retirement Plan is top heavy (as defined in § 416(g)(1)(A)(ii)) in its first plan year, the determination date with respect to the first plan year of such plan shall be the last day of such plan year. See § 416(g)(4)(C)(ii).

.02 *Determination letters.* (1) *Determination letter application.* Any application for a determination letter on the qualified status of any Multiple Employer Retirement Plan adopted and maintained by PEOs and COs that are seeking relief under this revenue procedure shall be made under the relevant provisions of Rev. Proc. 2002-6.

(2) *Time of disqualification provision.* For purposes of § 1.401(b)-1(b) the Service will treat the requirement that the PEO adopt a Multiple Employer Retirement Plan by the Compliance Date as a disqualifying provision.

.03 *Pending examinations no bar to relief.* A PEO Retirement Plan under examination by the Service is eligible for the relief provided by this revenue procedure.

SECTION 8. EFFECT ON OTHER DOCUMENTS

SECTION 9. EFFECTIVE DATE

This revenue procedure is effective on May 13, 2002.

DRAFTING INFORMATION

The principal author of this revenue procedure is Jeanne Royal Singley of the Employee Plans, Tax Exempt and Government Entities Division. For further information regarding this revenue procedure, please contact the Employee Plans taxpayer assistance telephone service at 1-877-829-5500 (a toll-free number), between the hours of 8:00 a.m. and 6:30 p.m. Eastern time, Monday through Friday. Ms. Singley may be reached at 1-202-283-9888 (not a toll-free number).