

# Coverage Testing & Excluding Employees by Class

Presented by Mark Nicholas

August 2013



# Disclaimer

Any views and opinions expressed in this presentation are my own and do not necessarily reflect those of my employer.

# Agenda

- The Need for Expanded Coverage
- Excluded vs. Excludable
- Leased Employees
- Part Time or Seasonal Employees
- VCP Case Study
- Questions

# Need for Expanding Coverage

- Retirement coverage needs to be expanded, not limited
  - If our industry fails here, others will pick up the cause
    - See also CA, CT, MD, OR, etc...



# Excluded v. Excludable



## Excluded from Plan

- Business classifications
- Separate lines of business
- Irrevocable waivers
- Leased employees
- Nonresident aliens



## Excludable from Coverage

- Individual hasn't met age/service
- Terminees with < 500 hours and not benefiting
- Collectively bargained

# Leased Employees

- Temp Agencies are flourishing in the wake of Obamacare
- Kelly Services – 2<sup>nd</sup> largest employer in the U.S.
  - Employs more people than everyone except Wal-Mart
- Critical to know the difference between employees and leased employees, even if you don't exclude leased employees as a class



# Leased Employees



- Leased employee must not be a common law employee of the recipient organization
  - Must be common law employee of leasing organization
- Recipient must pay a fee for the individual's services
- Services must be provided on a substantially full time basis for at least a year
- The recipient has primary work direction over services

# Common Law Employee

- Individual subject to will and control of employer not just with regards to what is done, but also how it is done
  - In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor
- Facts & Circumstances determination

# Part Time & Seasonal Employees

- Inclusion may cause administrative complexities
  - Added cost of more participants
  - Low ADP/ACP
  - Top Heavy
- But so can exclusion
  - Loss of qualified plan status
- Fail Safe language prevents “accidental” violations of maximum eligibility rules

# What do you do with that Burger King?

- Exclude HCEs?
  - Will the franchise owner care?
- Exclude hourly employees as a class?
  - Catch a lucky break and catch the proprietors spouse or children?
  - Who will you inadvertently exclude?
- Who's monitoring the eligibility requirements?



# VCP Case Study

- Real life VCP case (2011/12)
  - Plan excluded hourly employees and “owners”
  - About 600 total employees, with 15 eligible – lots of part time
  - An employee became a HCE by salary and continued contributing
    - TPA did not immediately notice
- Requested retro plan amendment
  - IRS rejected
    - Only viable solution in their view was to expand coverage

# Questions

Mark S. Nicholas

[msnicholas@pai.com](mailto:msnicholas@pai.com)

(800) 236-7400

Ext. 3423



Retirement & Benefits Compliance  
**Customer Conference**

# Continuing Education

*Please* – before you leave:

## 1. Sign in

- Verify your attendance
- Check the box if you want your attendance reported to IRS (for ERPA reporting and those with a PTIN only)

## 2. Pick up your certificate of attendance

- Certificates will not be emailed after the conference