
Key Employees (IRC §416(i)(1)(A))

To determine if plans are top-heavy (typically at the end of each plan year), plans must identify their Key Employees. In many cases, they will be the same individuals as the HCEs. A 412(i) plan is top heavy if the present value of Key Employees' accrued benefits exceeds 60% of the present value of all accrued benefits.

A Key Employee is an employee who at any time during the plan year fell into one or more of the following three categories:

1. *An officer whose compensation from the employer exceeds \$130,000 (indexed for inflation).*

For an officer to be considered a Key Employee, the officer must be an officer-in-fact and not merely an officer-in-title, as explained by the TERFA committee reports:

"... in determination as to whether an employee is an officer is to be determined upon the basis of all the facts and circumstances, including, for example, the source of the employee's authority, the term for which elected or appointed, and the nature and extent of the employee's duties. As generally accepted in connection with corporations, the term "officer" means an administrative executive who is in regular or continued service. It implies continuity of service and excludes those employed for a special and single transaction, or those with only nominal administrative duties. Thus, for example, all the employees of a bank who have the title of vice president or assistant vice president would not automatically be considered to be officers."

The number of officers to be considered Key Employees is limited to the greater of three or 10% of the employees. No more than the highest paid 50 officers are considered Key Employees, regardless of the number of employees.

2. *An employee owning more than 5% of the business.*

A 5% owner is an employee who owns more than a 5% interest in a corporate employer, or more than 5% of the employer's outstanding stock or combined voting power. Family Attribution rules also apply here. Only ownership in the particular

employer is used, and Controlled Group and Affiliated Service Group rules are ignored for this purpose.

3. *An employee owning more than 1% of the business and whose compensation exceeds \$150,000 for the plan year.*

Ownership is determined by the same rules as outline, above.