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DISQUALIFICATION OF EMPLOYEE RETIREMENT PLANS: THE WRONG REMEDY

WILLIAM J. RANDS

When the framers of reform legislation prescribe their palliatives for the ills of society, they ought to excise from their prescriptions the nostrums that aggravated the ills sought to be eased. Through enactment of the Employee Retirement Income Security Act of 1974 (ERISA), Congress strove purposefully to ease the lot of American workers by strengthening the private pension system. In so doing, Congress intended to increase the number of participants in private pension plans and to prevent loss of pension benefits from "underlying restrictive forfeiture provisions or the failure of the pension plan to accumulate and retain sufficient funds to meet its obligations."
Yet Congress failed to extirpate from the tax laws the sanction of disqualifying an employee retirement plan. Not only has disqualification been described as being "draconian" and "harsh," but it has also been noted that it results in "tragedy," "penalizes the covered employees who have no part in the wrongdoing," and frustrates the legislative purpose of encouraging the establishment and maintenance of employee retirement plans. The imposition of this sanction is nonsensical: the tax consequences devastate the financial security of employees whose future depends on the retirement income they will receive from their employers' plans. This article will discuss this tax consequence with the hope that the harsh sanction of disqualification will not merely be softened but rather will be excised from federal tax law.

BACKGROUND
The regulation of pension plans has been an evolutionary process. Since its inception, the federal income tax has impacted upon the economic transfers related to employee benefit plans. Prior to the 1921 Revenue Act, there were no tax law provisions specifically concerning employee pension...
funds. The general rule of taxation, however, was that contributions by
an employer were deductible when the fund was a separate and distinct
entity, the income generated by the trust was taxable to the trust and the
employee beneficiaries were treated as having received income unless their ex-
pected receipt was too remote. Beginning with the 1921 Revenue Act, how-
ever, provisions were enacted which specifically dealt with the tax treatment
of such plans. Generally, these provisions were enacted to alleviate undue
tax burdens and to promote the establishment of private pension plans by
creating tax incentives.

Legislation in ancillary areas increased federal involvement in the private
pension area. However, while Congress mandated some regulation of private
plans as part of major labor legislation with the National Labor Relations
Act in 1935, it was not until 1958 with the enactment of the Welfare
and Pension Plans Disclosure Act that it specifically strove to institute
regulatory controls over pension and welfare funds.

Legislative enactment culminated on September 2, 1974, when Con-
gress enacted ERISA. This legislation is by far the most comprehensive
federal law relating to what has become the "private employee benefit
complex." ERISA was intended by Congress to increase federal supervision
for the purpose of protecting individual pension rights. Four titles govern
particular aspects of the supervision which involves the interaction of three
governmental agencies. The scope of this article, however, is limited
to a discussion of supervision by the Internal Revenue Service and specifically
that policing of the Internal Revenue Service which is inconsistent with
the overall purpose of ERISA.

contrast, it is interesting to note that the first known industrial pension plan was established
by the American Express Company in 1875, E. ALLEN, J. MELONE, & J. ROSENBLoom, PEN-
SION PLANNING 1 (3d 1976) citing M. LATимер, INDUSTRIAL PENSION SYSTEMS 21 (1932),
and that the growth of private plans was slow until the years before World War II. H.R.
4639, 4640.
10 O.D. 110, 1 C.B. 224 (1919).
12 4A. J. MERTENS, supra note 9.
13 Id.
14 72 Stat. 997 (current version at 29 U.S.C. §§ 301-09 (1976)). Under this Act disclosures
as to the operations and activities of certain plans were to be made to the Secretary of
Labor. Amendments in 1962 imposed the sanctions of federal criminality on certain acts
and also conferred investigatory and regulatory powers upon the Secretary of Labor.
§ 301 et seq. (1976)).
16 W. CHADWICK, REGULATION OF EMPLOYEE BENEFITS: ERISA AND THE OTHER FEDERAL
LAWS 1 (1978).
18 These agencies are: the Department of Labor, the Internal Revenue Service, and the
Pension Benefit Guarantee Corporation.
I. TAXATION OF QUALIFIED AND NON-QUALIFIED PENSION PLANS

The keystone of the federal pension scheme is the tax law. It grants tax incentives to encourage private employers to establish and maintain qualified plans for their employees. In enacting ERISA, Congress relied primarily upon tax law to secure improvements in the private pension area. 10

In discussing tax incentives and the devastating effect of disqualification, it is first necessary to define the terms qualified pension plan and non-qualified pension plans. A qualified pension plan is one which meets the requirements for qualification as set forth in sections 401 (a), 403, 405, 408, 409, 410, 411 and 415 of the Internal Revenue Code of 1954. 10

On the other hand, a non-qualified plan is simply a term qualified by its opposite: i.e. a plan not meeting one of the many requirements set-forth in the aforesaid sections. 21 Succinctly, when a qualified plan is disqualified, it is relegated to a nonqualified status and must absorb the taxation attendant to this status from the point in time when the plan is deemed to be disqualified.


20 The requirements set-forth in these sections have been summarized as follows:

1. The plan must be established and maintained by the employer for the exclusive benefit of his employees or their beneficiaries.
2. The plan must be permanent.
3. The plan must be in writing.
4. The plan must be communicated to the employees.
5. The plan must satisfy the minimum participation standards.
6. Contributions to or benefits under the plan must not discriminate in favor of officers, shareholders or highly compensated employees.
7. The plan must satisfy the minimum vesting standards.
8. A pension plan must provide that forfeitures shall not be allocated to plan participants.
9. A plan which provides for the payment of benefits in the form of an annuity must also provide for the payment of benefits in the form of a qualified joint and survivor annuity.
10. The plan must provide that on merger or consolidation of the plan, each participant shall be entitled to a benefit after the merger no less than his benefit before the merger.
11. The plan must provide that the payment of benefits shall commence, unless the participant otherwise elects, at the latest of normal retirement age, ten years of plan participation, or termination of service.
12. The plan must provide that benefits shall not be reduced by reason of changes in Social Security benefits or the Social Security wage base after a participant starts receiving benefits or is separated from the service.
13. The plan must not provide benefits or contributions which exceed the limitations on benefits and contributions.
14. The plan must not provide for forfeitures on withdrawals by a plan participant of his own contributions except in certain limited situations.
15. The plan must provide that on termination and in certain cases, on a discontinuance of contributions, the rights of plan participants shall vest.

[1977 Index] Pens. & Profit Sharing (P-H) ¶ 8521. All subsequent references to Code Sections are to the Internal Revenue Code of 1954 unless otherwise indicated.

21 In connection with the term non-qualified, the terms 'funded' and 'unfunded' are also used. Under a funded plan, the employer's contributions are placed beyond the employer's control. Where there is nothing more than a mere agreement to make contributions, an unfunded plan exists. E. Allen J. Melone & J. Rosenblom, supra note 9, at 352.
A. Non-Qualified Plans

Non-qualified plans receive no favorable tax treatment. Basically the taxation of non-qualified plans is a codification of the law existing prior to the 1921 Revenue Act as discussed above. When the employer makes contributions to a non-qualified trust, such contributions will be taxed in accordance with section 402 (b). Generally, such contributions are included in the employee's gross income when they are available to him. However, the terms 'available' and 'receivable' are not synonymous. As a result, contributions may be includable in the employee's gross income even though he has not received them. Thus, under a non-qualified plan, the amount taxable in any one year to an employee when the interests are

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22 Tax treatment is often not the sole criterion. Often it is necessary to balance the administrative cost of a qualified plan against its tax advantages. Many believe that the nontax aspects of ERISA are responsible for discouraging employer-participation in employee retirement plans. One of ERISA's proponents has conceded that ERISA requirements, including the paper work and compliance costs, have contributed to the increased incidence of plan terminations and the decreased incidence of new plan starts. 124 CONG. REC., supra note 3, at § 6582-83. Further, qualification may be offset by the fact that an employer may desire to reward particular employees: an action which cannot be taken under a qualified plan. M. CANAN, QUALIFIED RETIREMENT PLANS 17 (1977).

23 Section 402(b) states:

Contributions to an employees trust made by an employer during a taxable year of the employer which ends within or with a taxable year of the trust for which the trust is not exempt from tax under section 501(a) shall be included in the gross income of the employee in accordance with section 83 (relating to property transferred in connection with performance of services), except that the value of the employee's interest in the trust shall be substituted for the fair market value of the property for purposes of applying such section. The amount actually distributed or made available to any distributee by any such trust shall be taxable to him in the year in which so distributed or made available, under section 72 (relating to annuities), except that distributions of income of such trust before the annuity starting date (as defined in section 72(c)(4)) shall be included in the gross income of the employee without regard to section 72(e)(1) (relating to amount not received as annuities). A beneficiary of any such trust shall not be considered the owner of any portion of such trust under subpart E or part I of subchapter J (relating to grantors and others treated as substantial owners).

See also I.R.C. §§ 83(a), 72; Treas. Reg. § 1.402(a)-1(a)(1)(i)-(ii); Treas. Reg. § 1.402(b)-1(a)(1).


25 I.R.C. § 83(a). This section states:

If, in connection with the performance of services, property is transferred to any person other than the person for whom such services are performed, the excess of -

1) the fair market value of such property (determined without regard to any restriction other than a restriction which by its terms will never lapse) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over

2) the amount (if any) paid for such property, shall be included in the gross income of the person who performed such services in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable. The preceding sentence shall not apply if such person sells or otherwise disposes of such property in an arm's length transaction before his rights in such property become transferable or are not subject to a substantial risk of forfeiture.
fully vested\textsuperscript{26} will be the full amount of the employer's contribution made for the employee's contribution made for the employee's account.\textsuperscript{27} For partially vested interest, the amount taxed will be based on the percentage of the vested interest multiplied by the amount of the employer's contributions made for the employee's account.\textsuperscript{28} When the employee's interest vests incrementally,\textsuperscript{29} the employee will be taxed at the time of each incremental change and the value of his interest in the plan assets to the extent that his interest was not previously taxed. It must be noted, however, that this tax will be assessed against only that part of the employee's interest in the plan assets which is attributable to contributions made by the employer after August 1, 1969.\textsuperscript{30}

\textsuperscript{26} 'Vested' refers to the employee's interest in the employer's contributions. An employee has such an interest to the extent it is "transferable" or "not subject to a substantial risk of forfeiture." Treas. Reg. § 1.83-3(b).

\textsuperscript{27} I.R.C. §§ 83(a), 402(b). Treas. Reg. § 1.402(b)-(1)(a)(1) states:

In general, any such contributions [to a non-exempt trust] made after August 1, 1969, during a taxable year of the employer which ends within or with a taxable year of the trust for which it is not so exempt shall be included as compensation in the gross income of the employee for his taxable year during which the contribution is made, but only to the extent that the employee's interest in such contribution is substantially vested at the time the contribution is made.

\textsuperscript{28} I.R.C. §§ 83(a), 402(b). Treas. Reg. § 1.402(b)-1(b)(3) states:

For purposes of paragraph (b)(1) of this section, there shall be included in the gross income of the employee for his taxable year in which his rights under the trust become substantially vested only that portion of the value of his interest in the trust that is attributable to contributions made by the employer after August 1, 1969. However, the preceding sentence shall not apply —

(i) To the extent such value is attributable to a contribution made on the date of such change, and

(ii) To the extent such value is attributable to contributions described in paragraph (d)(1)(ii) or (iii) of this section (relating to contributions made pursuant to a binding contract entered into before April 22, 1969).

For purposes of this (3), if the value of an employee's interest in a trust which is attributable to contributions made by the employer after August 1, 1969, is not known, it shall be deemed to be an amount which bears the same ratio to the value of the employee's interest as the contributions made by the employer after such date bear to the total contributions made by the employer.

See also, Feroleto Steel Co. v. Commissioner, 69 T.C. 97 (1977).

\textsuperscript{29} That is, by percentage amount each year.

\textsuperscript{30} Treas. Reg. § 1.402(b)-1(a). These rules may be illustrated by the following example:

Facts:
1. M Corporation establishes an employee benefit plan for one of its employees, A, on January 1, 1968.
2. M contributes $5,000 to plan on February 1, 1968.
3. On January 1, 1971, M makes a contribution of $5,000 to the plan.
4. At the time of this contribution, A's rights were 50% vested.
5. On January 1, 1974, M makes a 2d contribution of $5,000 to the plan.
6. A's interest in the plan increases from a 50% vested interest on December 31, 1974, to a 100% vested interest.
7. The value of A's interest in the plan on December 31, 1974, which is attributable to M's contributions made after August 1, 1969, is $11,000.

1. Years during which the employee's vested interest remains constant: (Percentage of vested interest) X (amount of employer's contribution during the taxable year)
When amounts are actually distributed or made available to a beneficiary in the form of periodic payments, such amounts are, of course, taxable to him in the year received under section 72. Any amount contributed by the employee, however, will be excluded from his income in the year of distribution. Further, contributions earlier included in his income will also be excluded. Although this latter exclusion is designed to avoid the imposition of double taxation on the employer's contributions, such relief is scarcely restorative. The recipient of the exclusion is probably in a lower tax bracket than when he paid the tax and the earlier tax caused a reduction in the earning power of the plan. When distribution is made in a lump sum fashion, such distribution under a non-qualified plan does not receive the tax advantages available under a qualified plan. Although qualified and non-qualified plans are treated in identical fashion in that employee will be taxed on the total sum of the distribution less the amount he contributed and standard five year income averaging is available, a qualified plan entitles the beneficiary to preferential capital gain treatment and ten year averaging.

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31 I.R.C. §§ 402(a)(1)-402(b). Section 402(b) refers to § 72. The latter sets forth rules for computing the employee's contribution to the plan.

32 I.R.C. §§ 72, 402(a)(2)-(b)-(e)(4)(D). The recipient is taxed only on the to the "total taxable amount," which is defined in § 402(e)(4)(D) as:

(i) the amounts considered contributed by the employee shall be (determined by applying Section 72(f)), which employee contributions shall be reduced by any amounts therefore distributed to him which are not includable in gross income, and

(ii) the net unrealized depreciation attributable to that part of the distribution which consists of the securities of the employer corporation so distributed.

33 I.R.C. § 1301.

34 Both preferential capital gain treatment and ten year averaging will be treated in the discussion of qualified plans. An example at this point, however, may be helpful.

Facts:

1. A participates in M Corporation's employee benefit plan for four years (1972-1975).

2. M contributed $180,000 to the plan in 1972.

3. On December 31, 1975, A's interest by reason of M's contributions to plan is $200,000 of which $20,000 represents income earned by plan in 1974.

Note that under the qualified plan nothing would be includable in A's gross income in either 1971 or 1974.
As to the employer, he is allowed a deduction equal to the amount includable in the employee's gross income in the year when such amount is so included. In a multi-employee plan, however, separate accounts for each employee must be maintained in order for the contribution to be deductible. Further, the contribution must meet the strictures of an allowable deduction.

4. Upon retirement, A may elect to receive either a lump sum payment of $120,000 or 20 annual payments of $10,000 each payments to continue to his son in the event that A dies within the ten-year period.

5. A's interest changed from nonvested to 25% vested on January 1, 1974.


Taxation Prior To Distribution

1. Qualified plan: no tax prior to distribution.

2. Nonqualified plan:
   (a) Trust taxed on income earned in 1974: $20,000.
   (b) In accordance with rules set forth above, A will be taxed in 1974 as follows:
      \[ 180,000 \times 25\% \text{ vested interest} = \text{amount includable in A's income in 1974.} \]
      \[ 45,000 = \text{amount includable in A's income in 1974.} \]

Taxation If Periodic Payments:

1. Taxation prior to A's death:
   (a) Qualified Plan:
      \[
      \begin{array}{ccc}
      \text{Year} & \text{Amount Includable in A's Income} \\
      1976 & \$10,000 \\
      1977 & \$10,000 \\
      \end{array}
      \]
   (b) Nonqualified Plan:
      \[
      \begin{array}{ccc}
      \text{Year} & \text{Amount Includable in A's Income} \\
      1976 & \$7,750 \text{ (approximate)} \\
      1977 & \$7,750 \text{ (approximate)} \\
      \end{array}
      \]

2. Taxation upon A's death:
   (a) Qualified Plan - benefits excluded from federal estate tax.
   (b) Nonqualified Plan - $180,000 paid to A's son subject to federal estate tax.

Taxation If Lump Sum Distribution

(a) Qualified Plan:
   \[
   \begin{array}{ccc}
   \text{Years of pre-1974 plan participation} & \text{Percentage of capital gain} \\
   \text{Years of total participation} & \text{Amount of distribution minus amount taxed as capital gain} & \text{amount taxed as ordinary gain} \\
   \end{array}
   \]
   \[
   \begin{array}{ccc}
   4 \text{ years} & 50\% \times \$120,000 = \$60,000 \\
   \$60,000 = \text{amount taxed as capital gain} \\
   \$120,000 - \$60,000 = \text{amount taxed as ordinary gain} \\
   \$60,000 = \text{amount eligible for ten-year averaging device} \\
   \end{array}
   \]

(b) Nonqualified Plan:
   \[
   \begin{array}{ccc}
   \text{Amount of distribution minus amount previously included in employee's income} & \text{taxable portion} \\
   \text{Taxable portion} = \text{amount taxed as ordinary gain} \\
   \$120,000 - \$45,000 = \$75,000 \\
   \$75,000 = \text{amount taxed as ordinary gain} \\
   \end{array}
   \]

\[35\] I.R.C. § 404(a)(5).
\[36\] Id.
The trust of the non-qualified plan is also not entitled to favorable tax treatment. It, like other trusts, must pay tax on its income in the year in which it is earned. Moreover, although most trusts receive a deduction for amounts distributed to trust beneficiaries or "credited or required to be distributed" to the trust beneficiaries under section 661, this section likely will be of no assistance to the beneficiary, whose tax liability on distribution will be governed by the terms of section 402(b) and section 72. Neither of these sections provide for such credit.

B. Qualified Plans

Under a qualified plan, an employee is taxed only on the amount of the employer's contribution actually distributed or made available to him in the year in which such amounts are so distributed or made available. The employee is not otherwise required to include, contributions to the trust made by the employer for his account in his income. This exemption is fundamental to federal pension law. Employer's contributions to employees' plans would be little more than potentially refundable income surtax payments without it.

When the amounts actually distributed or made available to the beneficiary are in the form of a periodic payment they are taxable to the beneficiary in the year received under section 72. When a lump sum distribution is made the amount taxable is the same as that distributed from a non-qualified plan: the total sum of the distribution less the amount that he

88 I.R.C. § 641.
89 I.R.C. § 661(a). The effect of this deduction is to transfer the liability from the trust to the beneficiaries, and, thereby, avoiding the imposition of double taxation on the same items of income.
40 SIMMONS, supra note 5, at 536. Rev. Rul. 74-229, 1974-1 C.B. 154, concluded that, due to its specificity, § 402(b) preempted the more general provisions of § 661 for purposes of determining the amount and character of the income to be included in the beneficiary's gross income under § 661 and, thereby, made § 772 the applicable provision for determining the beneficiary's tax liability upon distribution. Section 402(b) may likewise preempt § 668(b) and, thereby, make § 72 the applicable code section in determining whether the beneficiary will receive a credit. Since § 72 provides no credit, the beneficiary may not receive a credit for income taxes paid by the trust.
41 I.R.C. § 402(a)(1). This section states as follows: Except as provided in paragraphs (2) and (4), the amount actually distributed or made available to any distributee by any employees' trust described in section 401(a) which is exempt from tax under section 501(a) shall be taxable to him in the year in which so distributed or made available, under section 72 (relating to annuities). The amount actually distributed or made available to any distributee shall not include net unrealized appreciation in securities of the employer corporation attributable to the amount contributed by the employee. Such net unrealized appreciation and the resulting adjustments to basis of such securities shall be determined in accordance with regulations prescribed by the Secretary or his delegate.
43 See note 30 supra. As indicated therein, none of the amount included in the employee's gross income through the non-qualified in the example would be includable if the plan was qualified.
contributed to the plan." Under the qualified plan, however, the taxable part of the distribution is divided into ordinary and capital gain. The capital gain portion is determined by multiplying the total taxable part of the total distribution by the sum reached by dividing the number of years of active participation in the plan prior to 1974 by the total number of years of active participation in the plan. The capital gain rates are eligible for the usual five year averaging device. Further the tax on the ordinary gain portion may be reduced by the special ten year averaging rule.

Section 404 of the Code allows employers to deduct their contributions in the taxable year when paid to a qualified plan. This includes pension trust, employees' annuities, and stock bonus and profit sharing trusts. The contribution must also qualify as either a deduction under section 162 which concerns trade or business expenses, or section 212 which concerns expenses for the production of income.

The income of a qualified trust also receives favorable tax treatment. Section 501(a) of the Code provides for an exemption from income taxation for a trust which is part of a plan qualified under section 401(a). Thus, funds which would otherwise be paid as taxes with a non-qualified plan are immediately available for investment by the trust and subsequently available for distribution to the employees.

Additional advantages accrue to the participant of a qualified plan in the areas of estate and gift taxation. Section 2039(c) provides that an employer's contribution to a qualified plan will not be considered as a contribution made by the decedent. As a result, that percentage of the

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44 I.R.C. § 72, 402(a)(2),-(b),-(e)(4)(D).
45 I.R.C. § 402(a)(2), which, in full, is as follows:
   In the case of employee trust described in section 401(a), which is exempt from tax under section 501(a), so much of the total taxable amount (as defined in subparagraph (D) of subsection(e)(4) of lump sum distribution as is equal to the product of such total taxable amount multiplied by a fraction -
   (A) the numerator of which is the number of calendar years of active participation by the employee in such plan before January 1, 1974, and
   (B) the denominator of which is the number of calendar years of active participation by the employee in such plan.
   Note that a lump-sum distribution need not be treated as capital gain. The recipient may elect to treat the entire amount as ordinary income. I.R.C. § 402(e)(4)(L). Thus the recipient may choose to treat "pre-1974 participation as post-1973 participation."
46 I.R.C. § 402(e)(1). When the entire distribution is treated as ordinary income, it is subject to the ten-year averaging rule. The beneficiary may thereby avoid the tax preference and the consequent minimum tax.
47 I.R.C. § 404(a)(1).
48 I.R.C. § 404(a)(2).
49 I.R.C. § 404(a)(3).
50 I.R.C. § 404(a).
51 In full § 2039(c) states:
   Notwithstanding the provisions of this section or of any provision of law, there shall be excluded from the gross estate the value of an annuity or other payment (other than a lump-sum distribution described in section 402(e)(4), determined without regard
survivor’s benefits attributable to the employer’s contributions are not included in the employee’s estate. Lump sum distributions, however, qualify for this exclusion only if the survivor elects not to use the ten year averaging allowed under the income tax.\(^2\) Additionally, even if the decedent possessed incidents of ownership of life insurance which is a part of a qualified plan, the amount of the life insurance is not included in the decedent’s estate.\(^3\) If the plan is not qualified the insurance is included in the estate.

to the next to the last sentence of section 402(e)(4)(A)) receivable by any beneficiary (other than the executor) under —

(1) an employees’ trust (or under a contract purchased by an employees’ trust) forming part of a pension, stock bonus, or profit-sharing plan which, at the time of the decedent’s separation from employment (whether by death or otherwise), or at the time of termination of the plan (if earlier, met the requirements of section 401(a));

(2) a retirement annuity contract purchased by an employer (and not by an employees’ trust) pursuant to a plan which, at the time of decedent’s separation from employment (by death or otherwise), or at the time of termination of the plan if earlier, was a plan described in section 403(a);

(3) a retirement annuity contract purchased for an employee by an employer which is an organization referred to in section 170(b)(1)(A)(ii) or (vi), or which is a religious organization (other than a trust), and which is exempt from tax under section 501(a); or

(4) chapter 73 of title 10 of the United States Code. If such amounts payable after the death of the decedent under a plan described in paragraph (1) or (2) under a contract described in paragraph (3), or under chapter 73 of title 10 of the United States Code are attributable to any extent to payments or contributions made by the decedent, no exclusion shall be allowed for that part of the value of such amounts in the proportion that the total payments or contributions made by the decedent bears to the total payments or contributions made. For purposes of this subsection, contributions or payments made by the decedent’s employer under a trust or plan described in paragraph (1) or (2) shall not be considered to be contributed by the decedent, and contributions or payments made by the decedent’s employer under a trust or plan described in paragraph (3) shall, to the extent excludable from the gross income under section 403(b), not be considered to be contributed by the decedent. This subsection shall apply to all decedents dying after December 31, 1953. For purposes of this subsection, contributions or payments on behalf of the decedent while he was an employee within the meaning of section 401(c)(1) made under a trust or plan described in paragraph (1) or (2) shall, to the extent allowable as a deduction under section 404, be considered to be made by a person other than the decedent and, to the extent not so allowable, shall be considered to be made by the decedent. For purposes of this subsection, amounts payable under chapter 73 of title 10 of the United States Code are attributable to payments or contributions made by the decedent only to the extent of amounts deposited by him pursuant to section 1438 or 1452(d) of such title 10.

The estate tax exclusion is not available for either lump sum distributions or amounts “attributable to any extent to payments or contributions made by the decedent.” The exclusion does apply to the distribution of an annuity contract which is not considered a lump sum distribution. Contributions made by the employer to a nonqualified plan are deemed to have been made by the decedent and hence are includable in the employee’s gross estate so long as the distribution is made pursuant to an obligation enforceable against the employer.

\(^2\) I.R.C. § 2039(f)(2).

\(^3\) I.R.C. § 2039(c). Normally, where the decedent possesses the incidents of ownership in a life insurance policy at death, the amount of the policy is included in the estate. I.R.C. § 2042.
Section 2517 of the Internal Revenue Code provides an exemption from the gift tax which parallels I.R.C. § 2039(c) of the estate tax.\textsuperscript{54}

II. AN EXAMPLE OF GROUNDS FOR DISQUALIFICATION

As can be seen the tax advantages of a qualified plan are myriad. Unfortunately, the requirements for qualification of an employee retirement plan, and correlatively grounds for its disqualification, are also myriad. The following example will point out some disqualifying features.

Assume that M corporation maintains a retirement plan for its employees. The plan provides three alternative methods for payment of benefits. First, upon retirement the employees may receive periodic payments at regular intervals. This type of settlement is the classic form of a pension. Second, the employee may receive his benefits in the form of a lump sum distribution upon retirement. Third, the employee may receive a partial distribution at normal retirement age and defer payment of the balance to a later date. Though the plan requires the plan participant to elect this alternative, the plan is silent as to when the deferred payments must begin.

The third option has not proved attractive to most workers whose employment is terminated at normal retirement age and need the retirement income provided them by the plan. In our example, however, assume that some of the executives of M corporation continue to work for the corporation beyond the retirement age. Further assume that not only do they continue to earn their salaries from M, but many of them have achieved a degree of financial independence from outside investments. Thus, they are in less necessitous circumstances than the workers and need not rely on the retirement benefits to which they are entitled under M corporation's plan. Several have opted for the third alternative and intend to defer payment until their deaths on the theory that postponement of the distribution of planned benefits would shelter these benefits from the federal estate tax.

Unfortunately, the provision in M corporation's plan which permit the third option likely will cause disqualification of the plan. The operation of M's plan action might be deemed discriminatory because arrangements for continuation of employment beyond normal retirement age for payment of additional benefits on the account of such subsequent service must be uniformly applied to all plan participants.\textsuperscript{55} In the example, the regular employees do not have the option to continue working beyond normal retire-

\textsuperscript{54} Under § 2517, the employee may irrevocably name a beneficiary to receive death benefits under a qualified plan without incurring gift tax liability. The designation will constitute a taxable gift to the extent its value is attributable to the employee's own contributions. As indicated, the gift tax exclusion applies solely to a plan qualified under § 401(a).

\textsuperscript{55} Rev. Rul. 69-414, 1969-2 C.B. 59. With a few modifications not relevant to the example, ERISA perpetuated the law with respect to discrimination in favor of key executives and with respect to commencement of benefits at normal retirement age. See I.R.C. §§ 401(5)(4), (5), (9), (14).
ment age and increase accrual of their benefits. Further they do not have the financial resources to elect the third alternative.

Even if all employees elected to postpone payment of benefits until their death, the third option might cause disqualification of the plan on another basis. Section 401 (a)(14), a section added by ERISA, codifies earlier rules that the payment of benefits under a qualified plan must commence within certain specified time limitations. Regulations permit a plan which allows a participant to elect benefit commencement at a date later than normal retirement age. Further, the employer and employee are allowed to make mutual arrangements for continued employment beyond the normal retirement age. Yet a plan participant may not elect to defer retirement benefits, "if the exercise of such election will cause benefits payable under the plan with respect to the participant in the event of his death to be more than incidental within the meaning of section 401-1 (b)(1)(i)." The reason for this is that the cited section defines pension plan as a "plan established ... primarily to provide systematically for payment of definitely determinable benefits to his employees over a period of years, usually for life, after retirement."

In construing the regulations, the IRS has formulated a rule that for qualification purposes, a plan may not provide a mode of settlement which does not assure that the cost of the present value of benefits that each participant is likely to receive while living, would be more than 50% of the present value of the benefits payable to the participant and to his beneficiary after his death. In the above example, an employee may choose to defer payment of 100% of the benefits to which he is entitled until his death. Thus, the plan will be subject to disqualification because it does not assure that the employee likely will receive more than 50% of the total value of the plan benefits.

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57 Treas. Reg. § 1.401(a)-14(b).
58 Treas. Reg. § 1.401-1(b)(1)(i).
59 T.I.R. 1334 found in [1975] 4 PENS. PLAN. GUIDE (CCH) ¶ 17, 428. The Internal Revenue Service has affirmatively stated that enactment of ERISA and § 401(a)(14) has not modified the 50% test developed in earlier Revenue Rulings. See Revenue Rulings cited at note 56, supra.
60 Even without the possibility of disqualification, it might be unwise for any employee to defer payment of his benefits. The more years an employee participates in a plan after the year 1973, the smaller the percentage of the taxable portion of a lump sum distribution that will be given capital gain treatment. This occurs because the percentage of capital gain depends upon the number of years of participation in the plan. See I.R.C. § 402(a)(2). Assume, that M corporation establishes a plan in 1963 and contributes $10,000 per year through 1973 and then $2,000 per year through 1978 for Mr. A's account. Thus, $100,000 is accumulated in A's account by 1973. If A had retired at the end of 1973 and had received a lump sum distribution, all of the $100,000 would have been taxed at capital gains rates. However, if A retires in 1978 and receives a lump sum distribution, he will receive an extra $10,000 but may lose money because only $55,000 will be taxed as capital gains. The other $55,000 will be taxed as ordinary income.
The example above may be extreme. Yet section 401(a)(14) and the regulations interpreting the section present an invitation to defer payment of the benefits as presented in the example. Though perhaps we can avoid the snare described in the example, there are many other traps that could catch any of us.

III. DISQUALIFICATION AND ITS CONSEQUENCES

Although this article will not discuss all possible grounds for disqualification, it can be noted that generally a plan must comply with various provisions contained in Subchapter D of the Internal Revenue Code to remain qualified. The disqualifying feature may be a term within the text of the plan, or it may be in the manner the plan is administered. The effects of disqualification accrue at the moment the disqualifying event occurs. The fact that the Service does not discover the infraction at this moment is of no consequence: The exemption is lost in the year of the violation.

No matter how disqualification is invoked, however, it is important to understand its consequences. As noted, what occurs upon disqualification is that an assumed qualified plan will be taxed as a non-qualified plan. Accordingly, disqualification adversely affects the employee, the employer and the trust.

As a direct consequence of disqualification, the employee is required to include an additional amount in his gross income for each year the plan was not qualified. As noted, this amount includes the employee’s vested interest of employer contributions made after August 1, 1969, and during

61 Requirements for qualification are set forth in I.R.C. §§ 401(a), 403, 405, 408, 409, 410, 411 and 415.

62 See Treas. Reg. § 1.401-1(b) which states: “the law is concerned not only with the form of the plan but also with its effects and operation.” Thus while the plan in Jack R. Mendenhall Corp. v. Comm’r, 68 T.C. 676 (1977) failed to qualify because of its own terms, the Teamster’s Central States, Southeast and Southwest Areas Pension Fund was disqualified for not operating for the exclusive benefit of the beneficiaries. More particularly, in the latter plan:

- Payment of benefits were not made in accordance with the terms of the plan.
- Accrued benefits of participants were forfeited after retirement.
- Records of participants’ service were not sufficient to determine participants’ benefits under the plan.
- Contributions owing to the Fund by participating employers were forgiven to the detriment of plan participants.
- The trust failed to establish policies and procedures in Fund operations that would provide for timely and proper payment of benefits to qualifying participants.
- The trust computed participant benefits inconsistent with plan provisions.
- Investment policies and practices of the trust were imprudent.

Letter from District Director, Internal Revenue Service, Chicago, Ill., to Frank Fitzsimmons and other trustees (June 25, 1976).

63 SIMMONS, supra note 5, at 524.

64 For these purposes, the value of the employee’s interest in the plan at any one point in time means his share of the net asset value of the plan. I.R.C. § 402(b); Treas. Reg. § 1.402(b)-1.

65 See text accompanying notes, supra. See also SIMMONS, supra note 5, at 534, and
the plan's disqualified tax years. Further, the employee also will owe interest on the additional income taxes since the formal disqualification will probably occur subsequent to the making of the contribution which is included in the employee's gross income. The most painful wound that may be suffered by the employee, however, is not that he sustains unexpected tax liability, but rather that he may not have available cash to pay the tax. This is caused by the fact that distribution from the plan is not necessary to invoke income taxation. Accordingly, if he has not received a distribution, the money to pay the taxes is either not present or must be taken from past savings.

If distribution is made after disqualification, the recipient loses preferential capital gain treatment and ten year averaging. Also be aware that when distribution is made after the trust has lost its exempt status, the Commissioner has argued that the entire amount of the distribution is taxable as if there had never been a qualified plan. This argument, however, has not been availing. Courts have held that only the amounts attributable to distributions made after the disqualifying fact occurred were not entitled to the benefits available to a distribution from a qualified plan.

The employer may be either beneficially or adversely affected by the disqualification. Under a non-qualified plan, the employer is entitled to deduct that amount which is taxable to the beneficiaries. The amount taxed to the beneficiaries includes not only the employer's contributions but also amounts of the trust which are attributable to earnings and appreciation. Accordingly, the employer will be entitled to a deduction exceeding his original contributions. However, no deduction is available for those contributions not includable in the employee's gross income. Further, if there is more than one employee, and separate accounts are not maintained for each employee, no deductions will be allowed.

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67 Id. at 589 n. 119.
68 STOGEL & ERVIN, supra note 65, at 588-89.
69 See text accompanying notes 31-34 and 44-46 supra.
70 Greenwald v. Commissioner, 366 F.2d 538 (2d Cir. 1966); Pitt v. United States, 75-1 U.S. Tax Cas. ¶ 87,244 (M.D. Fla. 1975).
71 See text accompanying notes 35-37 supra.
72 SIMMONS, supra note 5, at 537.
73 I.R.C. § 404(a)(5). There is also the possibility of withholding tax complications, i.e. FICA and FUTA. Since the term "wages" for FICA and FUTA does not include contributions to an employee's plan, retroactive disqualification may turn past contributions into wages. A. J. MERTENS, supra note 9, at 118 N.92.
Even though the employee is not directly chargeable with the income earned by the disqualified plan,\(^4\) the non-qualified trust itself is taxed\(^5\) and it follows that the employee's proportionate interest in the trust is reduced by the amount of taxes and interest penalties attributable to such interest. Thus disqualification results in reducing the funds available for distribution and investment. Further, a disqualified trust has peculiar characteristics which makes it susceptible to more taxation than an ordinary trust. Most trusts receive a deduction for amounts distributed to trust beneficiaries or "credited or required to be distributed" to the trust beneficiaries.\(^6\) Under Revenue Ruling 74-299\(^7\) however, the deduction is limited to distributions made to separate accounts of employee-beneficiaries.\(^8\) If plans do not maintain such accounts there will be no sufficient deduction to offset the income of the trust.\(^9\) Further, as noted, a beneficiary may be taxable for his interest in the trust even though there is no distribution.\(^10\) Yet the fact that the distribution is taxable to the employee does not mean it has been "credited or [is] required to be distributed."\(^11\) The result is that the employee is taxed twice; once indirectly and once directly. The same income is taxed to the trust since there has been no distribution and it is also included in the recipient's gross income under section 402(b).

IV. REQUALIFICATION OF DISQUALIFIED PLANS

Though Spartan in coverage, several revenue rulings, the Code and a few cases permit corrective measures in some instances. The Internal Revenue Service has conceded that the failure of a pension, profit-sharing or stock bonus trust to meet the requirements of section 401(a) in the year it was established does not prevent the trust from being qualified in some future year,\(^12\) and a disqualified trust, previously qualified, may regain

\(^{14}\) The trust is a taxable entity, separate and distinct from the employee. I.R.C. § 402(b).

\(^{15}\) I.R.C. § 641.

\(^{16}\) I.R.C. § 661(a)(2).

\(^{17}\) 1974-1 C.B. 154. The revenue ruling concluded that due to its specificity, § 402(b) preempted the more general provisions of § 661 for purposes of determining the amount and character of the income to be included in the beneficiary's gross income under section 661. This made § 72 the applicable provision for determining the beneficiary's tax liability upon distribution. Section 402(b) may likewise preempt § 668(b) and, thus § 72 would also be made the applicable code section in determining whether the beneficiary will receive a credit. Since § 72 provides no credit, the beneficiary may not receive credit for income taxes paid by the trust. SIMMONS, supra note 5, at 536.

\(^{18}\) See Treasury Regulations interpreting I.R.C. § 641.

\(^{19}\) Although deductions for ordinary and necessary business expenses, Treas. Reg. § 1.641(b) an exemption of $100 per year, id., and dividend exclusion, Treas. Reg. § 1.116-1, T.D. 7332, 1975-1 C.B. 204, are available, it is very doubtful that such reductions will offset the income of the trust.

\(^{20}\) I.R.C. § 402(b).

\(^{21}\) I.R.C. § 661(a). The distribution must be "beyond the trustee's control and within the immediate availability of the beneficiary." SIMMONS, supra note 5, at 534 citing, Lynchburg Trust and Savings Bank v. Comm'r., 68 F.2d 356 (4th Cir. 1934).

its exempt status for future years by an amendment correcting the disqualifying features of the plan. Yet, to the employee, this like telling a farmer that the culprit who shot his only cow has been rehabilitated and is now an upright citizen who won’t shoot any more cows. Nevertheless, corrective measures are mandated, not only to prevent further harm but to regain the preferential tax treatment afforded for qualified plans.

Section 401(b) permits the enactment of retroactive plan amendments to cure disqualifying provisions contained in the text of the plan. The corrective amendments must be made within the “remedial amendment period.” No release from the Tartarean consequences of earlier disqualifications is tendered. Further these provisions do not apply to a disqualification caused by the improper administration of the plan: Section 401(b) refers only to textual errors.

There is jurisprudence that section 401(b) is not an exclusive remedy, but merely operates as a safe harbor provision for purposes of obtaining retroactive treatment. Courts have been reluctant, however, to permit retroactive correction of errors in the administration of employee plans in the absence of statutory criteria.

V. EMPLOYEE INJURY AS A CONSIDERATION IN A COURT’S DECIDING AGAINST DISQUALIFICATION

Where there is a potential injury to an employee upon disqualification courts have indicated a willingness to entertain a balancing process. In *Time Oil Co. v. Commissioner* the Ninth Circuit Court of Appeals stated that “while hard justice might befit [the employer’s] officers, ... prospective consequences of injury to the employees ... are quite possible....” Accordingly the courts have found that “in determining whether revocation is warranted, the interests of employees who were not responsible for the

84 I.R.C. § 401(b) provides as follows:
A stock bonus, pension, profit-sharing, or annuity plan shall be considered as satisfying the requirements of subsection (a) for the period beginning with the date on which it was put into effect, or for the period beginning with the earlier of the date on which there was adopted or put into effect any amendment which caused the plan to fail to satisfy such requirements, and ending with the time prescribed by law for filing the return of the employer for his taxable year in which such plan or amendment was adopted (including extensions thereof) or such later time as the Secretary or his delegate may designate, if all provisions of the plan which are necessary to satisfy such requirements are in effect by the end of such period and have been made effective for all purposes for the whole of such period.
85 Treas. Reg. § 401(b)-1.
87 Id. See also Myron v. United States, 550 F.2d at 1145; Jack R. Mendenhall Corp. v. Comm’r, 68 T.C. 676 (1977); Aero Rental v. Comm’r, 64 T.C. 331 (1975).
88 258 F.2d 237 (9th Cir. 1958).
89 Id. at 239.
taxpayer's error but who will nonetheless suffer from disqualification ought to be considered.\footnote{90}

Although the above represents a step in the right direction, it is far from being the correct answer to the problem. First, although the courts indicate that employee injury is a factor, they do not indicate that it is a determining factor. Secondly, the courts appear to entertain the employee interest when there are pure employees and not when the employee is also a shareholder.\footnote{91} Although such plans should not be used for the inordinate benefit of shareholders,\footnote{92} it is submitted that there are situations in which the latter's interest should be weighed in the balancing process.

**VI. RECENT LEGISLATION**

Prior to ERISA, a prohibited transaction may have caused the plan to be disqualified. ERISA replaced the sanction of disqualification with an excise tax to be imposed on the party in interest involved in the prohibited transaction.\footnote{93} Congress recognized that the sanction of disqualification fell most heavily upon innocent employees.\footnote{94} In 1978, legislation was introduced which would have eliminated retroactive disqualification unless it was "determined that the failure to meet . . . requirements in [a] preceding year was a result of intentional failure or willful neglect on the part of the person or persons maintaining the plan."\footnote{95} Though this proposal would eliminate hardship in many instances, it misses a crucial point: retention of the tax penalties associated with disqualification, whether applied retroactively or prospectively, for inadvertent or willful violations, hurt the people ERISA was designed to help i.e., the employees. Unfortunately, even the above proposal was not enacted into law and although legislation concerning pension reform was introduced in 1979, none appears to contain a provision similar to the one above.\footnote{96}

\footnote{91} Myron v. United States, 382 F. Supp. 590 (C.D. Cal. 1974).
\footnote{92} Tavannes Watch Co. Inc. v. Comm'r, 176 F.2d 211 (2d Cir. 1949).
\footnote{93} I.R.C. § 4975.
\footnote{94} S. REP. No. 93-383, supra note 2, at 18, [1974] U.S. CODE CONG. & AD. NEWS at 4903.
\footnote{96} In full, § 307 states as follows:

In the administration of part I of subchapter D of chapter 1 of the Internal Revenue Code of 1954, the Secretary of the Treasury shall not treat the employee benefit plan described in section 122(d)(3) of the ERISA Improvements Act of 1978 as not meeting the requirements of such part for any taxable year or plan year preceding the year in which the Employee Benefits Commission determines that the plan does not meet such requirements unless the Commission has also determined that the failure to meet such requirements in such preceding year was a result of international failure or willful neglect on the part of the person or persons maintaining the plan.

Id. S6596.

\footnote{96} S. 209, 96 Cong. 1st Sess., 125 CONG. REC. S557 (daily ed. January 24, 1979). Although H.R. 5337 and S. 1089 have also been introduced as bills concerning pension reform, it is not known if these bills have provisions concerning disqualification. For the intro-
DISQUALIFICATION OF EMPLOYEE RETIREMENT PLANS

CONCLUSION

Federal pension law proclaims to assist the American worker by encouraging private employers to establish and maintain retirement plans and to make certain that these plans provide the worker with the retirement income he justifiably anticipates. The tax provisions concerning qualified plans are consonant with this objective. Disqualification, however, is an anomaly. It is a bludgeon to compel compliance with a plethora of rules set forth in statutes, codes, administrative rules, regulations, opinions, guidelines, technical information releases, letters, forms, determinations and plan instruments. Upon disqualification, the impetus for creation and the expectations fostering participation are extinguished. Disqualification is not a salutary coercion of the law but rather a penalty without purpose. Ironically it is a policing device which destroys that to be policed. Accordingly, disqualification is inconsistent with stated Congressional objectives and should be eliminated from the tax law.