ERISA and "top hat" requirements

Nonqualified deferred compensation arrangements, sometimes called "top-hat" plans, are contractual obligations of an employer to an employee or an independent contractor. While these arrangements must be 'unfunded' for Employee Retirement Income Security Act of 1974 (ERISA) purposes and to avoid current taxation, they are often informally financed from unrestricted assets of the plan sponsor, which are subject to the plan sponsor's general creditors in the event of bankruptcy, even those assets held in a trust.

A common misconception is that top-hat plans are not subject to the requirements of ERISA. Deferred comp plans covering employees are generally subject to Title I of ERISA, while arrangements covering solely independent contractors are not.

There are five parts contained in Title I of ERISA. For deferred comp plans covering only a top-hat group, there are significant exemptions from ERISA provisions. If a nonqualified plan is maintained by an employer "**primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees**", the plan is not subject to Part 2, Part 3, or Part 4 of Title I[1]. These provisions pertain to plan participation and anti-discrimination rules, and vesting, funding, spousal consent, and fiduciary requirements. In addition, by filing a simple notification with the Department of Labor at plan inception (within 120 days), the employer satisfies Part 1 of Title I (pertaining to plan reporting and disclosure requirements), thereby avoiding the requirement to file an annual Form 5500. This leaves only Part 5 (administration and enforcement provisions), which is typically covered by including ERISA claims procedures in the plan document.

A common concern of employers sponsoring nonqualified plans is whether they have satisfied the top hat requirements and are therefore exempt from ERISA's more onerous rules. Unfortunately, the Department of Labor has not provided a definition of top hat, only limited guidance. Therefore, employers must rely on this guidance, court cases, and industry best practices that have evolved to interpret the top-hat definition.

Department of labor guidance

In 1990, DOL Advisory Opinion 90-14A was issued. In this opinion, the department set out broad requirements for an employee's inclusion in a top-hat group:

- Highly compensated individuals or those with management responsibilities,
- Ability to influence plan design, or
- Ability to appreciate the risks in a nonqualified plan regarding the lack of ERISA protection and employer bankruptcy risk.

Court cases and best practices

Three general themes emerge for employers trying to determine if their plan participation meets the top hat rules:

- "**Select group"** - Court cases have generally addressed the size of the participant group in the nonqualified plan vs. the total number of employees in the organization. Although some court cases have allowed top-hat groups to be as large as 15% of the total workforce, a more common rule of thumb is between 5% and 10% of total workforce.
- "**Management**" - The DOL Advisory Opinion and court cases clearly indicate that it's important to address whether an employee is considered "management." This analysis may be based on job title, job classification, or job responsibilities, and including employees in a nonqualified plan who are clearly not management can cause top-hat issues.
- "**Highly compensated**"- Unfortunately, the definition of highly compensated for qualified plans does not provide a safe harbor for nonqualified plan top-hat determination. Courts have looked at absolute compensation levels, average compensation of the top hat group vs. non top hat employees, and geographic considerations in determining whether an employee is considered to be highly compensated for top hat purposes.

As can be seen above, the determination of a top hat group for participation in a nonqualified plan can be highly subjective. Employers should always consult with legal counsel to determine top hat eligibility.

Groom Law Group in Washington, D.C. has provided a memo discussing top hat issues and cases for our client's use. Please refer to the following memo for more detailed information.

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[1] Employee Retirement Income Security Act of 1974 (ERISA)

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GROOM LAW GROUP

MEMORANDUM

June 30, 2020

Select Group Requirement for ERISA Top Hat Plans

We discuss below how the courts and the Department of Labor ("DOL") have interpreted the requirement that participation in a "top hat plan" be limited to a "select group of management or highly compensated employees" (a "Select Group").

Legal Requirements

Although a nonqualified deferred compensation plan typically is a pension plan subject to ERISA requirements, a "top hat" pension plan is exempt from the participation, funding, vesting and fiduciary responsibility rules of ERISA.[1] In order to qualify as a top hat plan, a plan must be unfunded and "maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees."[2]

The DOL has never issued regulations interpreting the meaning of this Select Group requirement. The DOL did address the issue in several Advisory Opinions, but issued the last of these opinions in 1992. However, the DOL reestablished its position in May 2015 when it filed an amicus brief with the Fourth Circuit for Bond v. Marriott International, Inc., arguing that a plan must consist solely of management or highly compensated employees to satisfy the Select Group requirement for top hat plans.[3] The DOL's reasoning purports to rest on traditional tools of statutory construction.[4] While there is very little guidance in the legislative history of ERISA on this Select Group requirement, exploring the guidance from federal court cases is important in determining the landscape of the Select Group issue and the practical weight of the DOL's amicus brief argument.

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[1] ERISA §§201(2), 301(a)(3) and 401(a)(1). We say "typically" because some courts have ruled that very simple plans, especially those covering only one or two persons, are not ERISA "plans" at all. See, e.g., Sheer v. Israel Disc. Bank of N.Y., No. 06 Civ. 4995(PAC), 2007 WL 700822 (S.D.N.Y. Mar. 7, 2007).

[2] Id.

[3] Br. for the Sec'y of Labor as Amicus Curiae Supp. Pls.-Appellants, Bond v. Marriott Int'l, Inc., 2015 WL 3454598 (4th Cir. 2015) (hereafter "DOL Amicus Brief").

[4] The DOL argues that a straightforward reading of "a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees" suggests that the term "primarily" only applies to the "purpose of providing deferred compensation" and does not modify the "select group" portion of the sentence. DOL Amicus Brief at 17-18.

Most of the useful, and all of the recent, guidance on this issue has come from the federal court cases discussed below. These cases typically arise when participants in a nonqualified plan do not receive the benefits they expected from the plan. The participants sue the employer and/or the plan's administrator claiming that the plan is not a top hat plan because participation was not limited to a Select Group. Thus, the participants claim the plan was required to comply with all the requirements of ERISA for pension plans, including the participant-favorable rules regarding eligibility, vesting, fiduciary responsibility and/or funding. The courts have taken varied and sometimes conflicting approaches to the Select Group issue in these cases. However, most have focused on specific objective measures, such as the percentage of the workforce covered by the plan and the average salary of the covered employees compared to the average for the workforce, in trying to determine whether a plan covers a Select Group.

In its earlier efforts to address the issue in Advisory Opinions, the DOL looked at similar objective factors in performing the Select Group analysis. However, in a 1990 Opinion, the DOL indicated a shift in its thinking on this issue that it reiterated in its 2015 amicus brief. As discussed below, several courts have incorporated the DOL's thoughts into their Select Group analysis.

One thing that is clear from the case law and the DOL Advisory Opinions is that the Select Group determination is based on a consideration of all the relevant facts and circumstances, and no single factor is determinative or consistently applied from one jurisdiction to another. We address below the key factors the courts and the DOL have considered in their analyses.

A. Percentage of Workforce Covered

One factor that the courts and DOL frequently address in performing the Select Group analysis is the percentage of a company's workforce covered by the plan. Generally, the smaller the percentage, the more likely it is that the participants are members of a Select Group. However, the relevant authorities do not establish a bright-line rule as to what percentage is sufficiently small.

The courts and the DOL have generally upheld the top hat status of plans with coverage percentages in the 4-5% range,[5] and the First Circuit seemed to have little trouble concluding that a plan available to 8.7% of an employer's workforce covered a Select Group.[6] The Second Circuit held that a plan available to 15.34% of an employer's workforce covered a Select Group, however, the court noted that this level of coverage was probably "at or near the upper limit of the acceptable size for a 'select group.'"[7] Similarly, a district court within the Ninth Circuit recently found a top hat plan existed where "less than 15%" of the employer's total workforce

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[5] See, e.g., Duggan v. Hobbs, 99 F.3d 307 (9th Cir. 1996) (5% coverage); Belka v. Rowe Furniture Corp., 571 F. Supp. 1249 (D. Md. 1983) (4.6% coverage); DOL Adv. Op. 75-64 (Aug. 1, 1975) (4% coverage).

[6] See Alexander v. Brigham and Women's Physicians Org., Inc., 513 F.3d 37, 46 (1st Cir. 2008) (summarily stating that at this coverage level the group was quantitatively select before moving on to the "even more open-and-shut" question of whether the employees were highly compensated).

[7] Demery v. Extebank Deferred Compensation Plan (B), 216 F.3d 283 (2d Cir. 2000).

was eligible to participate.[8] However, other courts have held that plans covering 12.8% and 18.7% of a company's work-force did not cover a Select Group.[9] The courts and the DOL have also ruled that plans with typically acceptable coverage percentages in the 5% to 7% range were not top hat plans when other unfavorable factors were present.[10]

One significant case involves the question of who to count when determining the percentage of a workforce covered. Generally, courts have focused on the number of employees eligible or invited to contribute to a plan when determining whether they were a Select Group.[11] However, the First Circuit made a distinction in Alexander v. Brigham and Women's Physicians Org., Inc.[12] between technical eligibility and realistic eligibility. In this case, the employer maintained two deferred compensation plans for its surgeons.[13] The surgeons who earned more than the organization's salary cap were required to defer the excess salary into these two plans.[14]

The court in Alexander reasoned that if participation is optional, the percentage of employees covered includes all employees invited to participate.[15] However, if participation is realistically available only to the highest earning employees, the court deemed it appropriate to consider only the actual participants in the plan in determining such percentage.[16] Thus, even though almost all of the organization's surgeons (30% of total employees) were technically "eligible" to participate in the plans, only the most profitable surgeons could realistically exceed the salary cap and participate in the plans, which resulted in actual participation percentages of 8.7% or less.[17]

Two issues the courts and the DOL have not yet explicitly addressed are: (1) whether the percentage of employees covered is based on the employee population of a plan sponsor or,

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[8] Callan v. Merrill Lynch & Co., Inc., 2010 WL 3452371, *10-11 (S.D. Cal. 2010).

[9] Daft v. Advest, Inc., No. 5:06-cv-1876, 2008 WL 190436, *7 (N.D. Ohio Jan. 18, 2008), rev'd on other grounds, 658 F.3d 583 (6th Cir. 2011) (stating that "[12.87%] is not so small that it would automatically qualify as a 'select group'"); Darden v. Nationwide Mut. Ins. Co., 717 F. Supp. 388, 397 (E.D.N.C. 1989), aff'd on other grounds, 922 F.2d 203 (4th Cir. 1991), rev'd on other grounds, 503 U.S. 318 (1992) (finding 18.7% coverage too large to qualify as a Select Group).

[10] See Carrabba v. Randalls Food Markets, Inc., 38 F. Supp. 2d 468 (N.D. Tex. 1999) (coverage less than 5%); DOL Adv. Op. 85-37A (Oct. 25, 1985) (coverage less than 7%).

[11] See, e.g., Demery, 216 F.3d at 285; Carrabba, 38 F. Supp. 2d at 473-74; Guiragoss v. Khoury, 444 F. Supp. 2d 649, 653-54 (E.D. Va. 2006).

[12] 513 F.3d 37 (2008).

[13] See id. at 40.

[14] Id.

[15] See id. at 44.

[16] Id.

[17] Id.

where applicable, the plan sponsor's entire controlled group;[18] and (2) whether the percentage of employees covered should include former employees. First, although not explicitly addressed, the facts in Demery imply that a court may look to the employees of the plan sponsor (*i.e.*, determine percentage at the subsidiary level) rather than all employees of the entire controlled group.[19] However, at least one district court has looked to the employees of the entire controlled group where such group is indicated by the plan document. A district court in the Fifth Circuit recently defined the relevant employee pool as the employees of the company and its participating subsidiaries because the plan's terms identified the employees of the company and its participating subsidiaries as eligible.[20] Second, most courts only mention current employees when determining the percentage of coverage. However, in at least two cases, courts took into account former employees who still had an account in the plan.[21] Generally, the statutory language requires coverage of a "select group of management or highly compensated employees."[22] By definition, a former employee is not management or a highly compensated employee. Thus, even though a former employee may still be a participant in the plan,[23] it seems unlikely that a court considering the issue would take into account former employees.

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[18] We note that certain ERISA participation requirements expressly apply on a controlled group basis. See ERISA § 210(c).

[19] In Demery, the court referred to a corporate parent, while the percentage analysis focused only on the workforce of Extebank, the subsidiary and plan sponsor. Participants in the plan in this case were all employees of one subsidiary, the plan sponsor. Demery, 216 F.3d at 285. See also Browe v. CTC Corp., 2018 WL 3085201, at *28 (D. Vt. June 22, 2018) ("no court has relied on [an employer's controlled group] to determine the size of an employer's workforce eligibility for participation in a top hat plan").

[20] Tolbert v. RBC Capital Markets Corp., No. CIV.A. H-11-0107, 2015 WL 2138200, at *9 (S.D. Tex. Apr. 28, 2015).

[21] The Belka court included both present and former employees in calculating the percentage of employees covered. Belka, 571 F. Supp. at 1252. See also Colburn v. Hickory Springs Mfg. Co., __F.Supp.3d__, 2020 WL 1490703 at *9 (W.D. N.C.) (the court found that two former employees' inclusion in a SERP program did not abrogate the SERP's status as a top-hat plan. The district court reasoned that, although not dispositive, the Supreme Court's decision in Robinson v. Shell Oil Co., 519 U.S. 337, 346, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997), where the Court held the term 'employee' may encompass former employees, suggested that the term 'employee' under ERISA encompasses former employees. Additionally, the court noted that the Internal Revenue Code's definition of "highly compensated employees" under section 414(q) was further suggestive that former employees may be considered highly compensated employees in the SERP context. Further, in light of the two employees' institutional knowledge regarding their rights and obligations, the court reasoned they did not need the extra protections afforded by ERISA.)

[22] ERISA §§ 201(2), 301(a)(3) and 401(a)(1).

[23] The definition of "participant" under ERISA is "any employee or former employee… who is or may become eligible to receive a benefit of any kind from an employee benefit plan." ERISA § 3(7). However, the court in Alexander rejected the use of the statutory definition of "participants" under ERISA for determining the relevant group. Alexander, 513 F.3d at 45.

B. Average Salary Comparison

Many courts and the DOL have also taken into account how the average salary of plan participants compares to the average salary of all employees. The larger the difference is between plan participants' average salary and the average salary of employees generally, the greater the likelihood of a finding of a Select Group. One district court upheld a plan's status as a top hat plan where the average salary of plan participants was approximately 3½ times that of the average of all employees.[24] Similarly, the Second Circuit in Demery upheld a plan's status as a top hat plan where the average salary of participants was "more than double" the average salary of employees generally.[25] While courts have typically based this comparison on salary only, at least two district courts have considered all other forms of compensation.[26]

Some district courts have used the range of salaries rather than average salary alone to evaluate compensation disparity. Courts that use the range of salaries to evaluate the compensation disparity compare the salary of the lowest-paid plan participant with the average salary of other employees. The larger the range of salaries generally, the greater the likelihood of a finding of a Select Group. A district court in the Fifth Circuit recently identified range of salaries as the appropriate tool for compensation disparity, but did not reach the merits of conflicting statistical information presented by the parties.[27] Another district court within the Sixth Circuit found that satisfaction of a 2 to 1 ratio is also sufficient when using range of salaries to evaluate compensation disparity.[28] Additionally, some district courts have opted to analyze each plan participant's compensation rather than the average participant salary figure.[29] The general concern for these courts was that the average participant salary figure could be skewed by the inclusion of a few highly-paid participants. Nevertheless, the majority of courts which have analyzed this issue have compared averages.

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[24] See Belka, 571 F. Supp. at 1252-53.

[25] Demery, 216 F.3d at 289. See also Callan, 2010 WL 3452371 at *11 (finding a 2 to 1 ratio between participants and all employees to be sufficient). See also Jones v. Merch. & Farmers Bank of Holly Springs, Miss., 2019 WL 2425677 (N.D. Miss. 2019) (more than twice the average annual salary was sufficient to show a significant compensation disparity between plan members and nonmembers).

[26] See Fishman v. Zurich American Ins. Co., 539 F.Supp.2d 1036, 1046 n.12 (N.D. Ill. 2008) (taking into account all compensation reportable on Form W-2); see also Berry v. Wells Fargo & Co., 2018 WL 9989652 at *4 (D. S.C.) (the court agreed that all forms of compensation, rather than salary alone, be considered in determining the top hat status of the Deferral Plan); see also In re New Century Holdings, Inc., 387 B.R. 95, 113 (Bkrtcy. D. Del. 2008) (considering all compensation, including commissions, earned by the employee in determining whether an employee is "highly compensated").

[27] Tolbert, 2015 WL 2138200 at *10.

[28] Cramer v. Appalachian Reg'l Healthcare, Inc., No. CIV.A. 5:11-49-KKC, 2012 WL 5332471, at *5 (E.D. Ky. Oct. 29, 2012) (The court did, however, primarily rely upon the fact that the average annual compensation of the top hat plan participants was 5 times that of the average salary of all other employees in upholding the plan's top hat status.).

[29] See Daft, 2008 WL 190436 at *6; Fishman, 539 F.Supp.2d at 1045.

C. "Management or Highly Compensated"

As discussed above, a Select Group must be made up of management or highly compensated employees. ERISA does not provide any guidance on how to construe these terms. Indeed, one district court even required evidence that the participants in a plan were "a select group" of a larger group of management or highly compensated employees.[30] The courts and the DOL have looked carefully at the job titles of individuals eligible to participate in a plan to determine if they are "management."[31] The courts and the DOL have also looked at the individual salaries of covered employees (apart from comparing average salaries) to determine whether they are "highly compensated."[32]

Both the DOL and IRS have stated that the definition of "highly compensated employee" found in Code § 414(q) (generally employees with taxable income of $120,000 or more for 2018) ("HCE") is not a "safe harbor" definition for this purpose.[33] Thus, in most cases, use of the Code § 414(q) definition to determine plan eligibility may be considered aggressive. Nevertheless, a Delaware bankruptcy court ruled in 2004 (when the §414(q) amount was $90,000) that a plan covering participants having pay levels at $100,000 met the Select Group requirement.[34] The court reviewed both titles and pay levels of participants with respect to the qualitative requirement that plan participants must be "high level" employees, either "management" or "highly compensated."[35] The court concluded that the $100,000 floor on participants' salaries was itself sufficient to satisfy the "highly compensated" criteria to qualify as a top hat plan.[36] Whether all courts would rule the same way is unclear. However, this case provides a recent example of flexible criteria a court may use in the Select Group analysis.

Thus, although no bright-line guidance has emerged from the analyses of the DOL and the courts on these issues, reasonable efforts should be made to determine whether the covered employees may fairly be considered to be management and/or highly compensated.

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[30] See Carrabba, 38 F. Supp. 2d at 478.

[31] See, e.g., Carrabba, 38 F. Supp. 2d at 474-75; Demery, 216 F.3d at 289; DOL Adv. Op. 85-37A (Oct. 25, 1985).

[32] See, e.g., Carrabba, 38 F. Supp. 2d at 473-75; DOL Adv. Op. 85-37A (Oct. 25, 1985).

[33] See preamble to Code § 414(q) regulations, 53 Fed. Reg. 4965, 4967 (Feb. 18, 1988) ("The Departments of Treasury and Labor concur in the view that a broad extension of 414(q) to determinations under [the top hat exemption] would be inconsistent with the tax and retirement policy objectives of encouraging employers to maintain tax-qualified plans that provide meaningful benefits to rank and file employees.").

[34] See In re IT Group, Inc., 305 B.R. 402 (Bankr. D. Del. 2004).

[35] Id. at 410.

[36] See id.

D. "Bargaining Power" of Participants

As noted above, the DOL shifted its focus regarding the Select Group analysis in 1990. According to the DOL, Congress adopted the top hat plan exemption because it recognized that:

> certain individuals, by reason of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and, therefore, would not need the substantive rights and protections of Title I [of ERISA].[37]

While the DOL touched upon this bargaining power issue in its recent amicus brief by stating that ERISA was not intended to protect employees with considerable economic bargaining power, the DOL only did so in support of its primary argument that all participants in a top hat plan must be management or highly compensated employees to meet the Select Group requirement.[38] The DOL, however, cited nothing in the legislative history to support its view. The DOL also did not expressly state that the ability to negotiate the terms of a plan would need to be considered as the factor (or even as one of many factors) in actually performing the Select Group analysis. Finally, the DOL did not disavow its previous Advisory Opinions on the issue which had focused on the more objective factors described above.

Several courts have agreed with the DOL's view of Congressional intent.[39] Some courts (though not all) have also indicated that the ability to negotiate the terms of a plan should be one of the factors considered in the Select Group analysis, although they did not seem to place much emphasis on this factor.[40] The Ninth Circuit, however, placed significant emphasis on this factor in its lone "Select Group" decision, Duggan v. Hobbs.[41] A district court in the Fifth Circuit also recently placed significant emphasis on the factor, but found that bargaining power is not a determinant factor in isolation and is not a separate factor or requirement.[42]

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[37] DOL Adv. Op. 90-14A (May 8, 1990); see also DOL Adv. Op. 92-13A, n.1 (May 19, 1992) (repeating same position).

[38] See DOL Amicus Brief 23.

[39] See, e.g., Demery, 216 F.3d at 289; Spacek v. Maritime Assoc.-I.L.A. Pension Plan, 134 F.3d 283, 296 n.12 (5th Cir. 1998) (abrogated on other grounds); Browe v. CTC Corp., 331 F. Supp.3d 263 (D. Vt. 2018) (the court reiterated that an ability to negotiate is an important component of top hat plans and disagreed with recent case law to the contrary).

[40] See, e.g., Van Gent v. Saint Louis Country Club, No. 4:08CV959 FRB, 2013 WL 6198122, at *10 (E.D. Mo. Nov. 27, 2013) (noting that plaintiff, as sole participant in Employment Agreement Plan, possessed bargaining power over the terms of top hat plan); Demery, 216 F.3d at 289 (insufficient evidence to analyze); Carrabba, 38 F. Supp. 2d at 478 (stating that the DOL's view on this issue is "perhaps" correct).

[41] 99 F.3d 307 (9th Cir. 1996); see also In re Battram, 214 B.R. 621 (Bankr. C.D. Cal. 1997) (stating that under Duggan, the two relevant factors are percentage of workforce covered and ability to negotiate).

[42] Tolbert, 2015 WL 2138200 at *7-8.

In Bakri v. Venture Mfg. Co., the Sixth Circuit referred to the DOL's position that top hat plans should be for high-ranking management personnel who have the ability to protect their benefit interests, through negotiations or otherwise.[43] The Sixth Circuit outlined a four-factor Select Group test incorporating the usual objective criteria, yet then seemed to focus exclusively on the fact that eligible managers and individuals holding secretarial and administrative positions did not have any "supervisory, policy making, or executive responsibility, and had little ability to negotiate pension, pay or bonus compensation."[44] Finding that these employees had little to no bargaining power, the court concluded that the deferred compensation plan was not a top hat plan.[45]

As stated above, the DOL did not (and could not) cite any legislative history supporting its view on Congressional intent on this point. The statute itself simply requires that the plan cover a select group of management or highly compensated employees. Thus, covered employees need only be management or highly paid, not both.[46] At the enactment of ERISA (and continuing today), there are highly paid employees (e.g., salespersons or employees in other "fungible" positions) who do not have the ability to bargain over the terms of their nonqualified benefit plans.

Presumably, if Congress intended to do so, it could have made clear that a top hat plan could not cover one of these types of employees. The First Circuit and other courts have embraced this logic, criticizing other courts for adopting a rationale set out in an agency opinion as an independent statutory test.[47]

In many circumstances, it would also be difficult to apply this "ability to negotiate" test to particular facts. For example, as the Ninth Circuit found in Duggan, it would be easy to apply this test if a deferred compensation plan was negotiated by an attorney on behalf of an executive as part of his severance package.[48] The task, however, would be much more difficult with a typical deferred compensation plan covering a number of employees.[49] There, evidence that the covered employees had negotiated employment or change in control agreements, or otherwise had individualized pay and/or benefits packages (e.g., option grants, incentive arrangements, loans), should help to demonstrate the requisite ability to negotiate over the terms of the plan.

However, the fact that covered employees did not negotiate their individual pay and/or benefits packages or the terms of the plan should not foreclose a determination that the plan satisfies the Select Group requirement. Notably, a district court within the Fifth Circuit recently

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[43] 473 F.3d 677 (6th Cir. 2007).

[44] See Bakri, 473 F.3d at 680.

[45] See id.

[46] See Sikora v. UPMC, 153 F. Supp.3d 820, 825, fn. 6 (2015).

[47] Alexander, 513 F.3d at 48; see also Fishman at 1041 n.3.

[48] See Duggan, 99 F.3d at 310; see also In re Battram, 214 B.R. at 625-26 (the agreement's individualized disability benefits reflect the employee's ability to negotiate).

[49] See Carrabba, 38 F. Supp. 2d at 478 (noting the difficulty applying this test).

found that a plaintiff need only show that "a significant number of participants individually had the required bargaining power" to qualify as a select group in a top hat plan.[50] A district court within the Sixth Circuit similarly found that each individual need not have bargaining power and that such a requirement would result in "bizarre consequences."[51] Further, a district court within the Ninth Circuit has found that a plan was still a top hat plan despite including some non-management personnel with little, if any, bargaining power.[52] And the First Circuit Court expressed "grave doubts" that even "collective" bargaining power of all plan participants is a necessary prerequisite to finding a select group.[53] More recently, in Sikora v. UPMC, the Third Circuit adopted the First Circuit's approach.[54]

E. The "Primarily" Requirement

The statutory exemptions state that a top hat plan must be maintained "primarily for the purpose of providing deferred compensation for a select group…." Thus, a plan sponsor can argue that as long as a plan covers primarily members of a Select Group, it should be able to cover a few other employees without jeopardizing its top hat status. The DOL, however, has stated in its recent amicus brief that it believes "primarily" refers to the purpose of the plan (e.g., the provision of deferred compensation) and not the composition of the group of plan participants.[55]

By applying the term "primarily" to the purpose of the plan rather than the employees covered, the DOL position seems to be that all covered employees must be members of a Select Group in order for a plan to qualify as a top hat plan. In support of this statutory interpretation, the DOL's amicus brief cites admittedly sparse legislative history that describes the top hat provision as being intended for top executives and gives an example of stock plans established solely for the officers of a corporation.[56] Prior to this amicus brief, the Second Circuit rejected this reasoning in Demery, stating that a plan would not be disqualified from top hat status simply

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[50] Tolbert, 2015 WL 2138200 at *7.

[51] Cramer, 2012 WL 5332471 at *4.

[52] See Callan, 2010 WL 3452371 at *11-12.

[53] Alexander, 513 F.3d at 48; see also Tolbert, 2015 WL 2138200 at *7 (also stating that collective bargaining power is not required).

[54] 876 F.3d 110, 115 (3rd Cir. 2017).

[55] DOL Amicus Brief 17-18; see also DOL Adv. Op. 90-14A, n.1.

[56] DOL Amicus Brief 19-20; see, e.g., H.R. Rep. No. 93-1280, at 296 (1974) (Conf. Rep.) ("the labor fiduciary rules do not apply to an unfunded plan primarily devoted to providing deferred compensation for a select group of management or highly compensated employees. For example, if a 'phantom stock' or 'shadow stock' plan were to be established solely for the officers of a corporation, it would not be covered by the labor fiduciary rules"); H.R. Rep. No. 93-533, at 4656 (1974) (Conf. Rep.) ("Title I would cover all private employee benefit plans under Commerce Clause jurisdiction except . . . Unfunded deferred compensation schemes of top executives.").

because a "very small number" of plan participants were not members of the Select Group.[57] Several district courts have followed this reasoning prior to the DOL's amicus brief as well.[58]

F. Plan Language

Another factor in the Select Group analysis is a plan's language regarding purpose and eligibility. Plan documents often contain a specific provision stating an intent that the plan qualify as a "top hat" plan. Courts engaged in the Select Group analysis have stopped to note such provisions, yet the overall impact of these provisions on the analysis seems negligible. Most courts have looked beyond such language of intent and focused primarily on the actual mechanics of the plan.[59]

G. Burden of Proof

If a participant challenges a plan's top hat status, several courts have held that the employer has the burden of proving that the plan qualifies as a top hat plan.[60] At least one court has stated that ERISA is a remedial statute to be liberally construed in favor of participants, so that exemptions should be confined to their narrow purpose.[61]

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[57] Demery, 216 F.3d at 289.

[58] See Tolbert, 2015 WL 2138200 at *10 (stating "that a small number of participants are not 'high ranking' is not dispositive of the top hat issue"); Cramer, 2012 WL 5332471 at *3; Fishman, 539 F.Supp.2d at 1043 n.7; Belka, 571 F. Supp. at 1253; Carrabba, 38 F. Supp. 2d at 478; Callan, 2010 WL 3452371 at *11.

[59] See Bakri v. Venture Mfg. Co., No. 3-:03-CV-405, 2005 WL 2850142 (S.D. Ohio Oct. 31, 2005), rev'd on other grounds, 473 F.3d 677 (6th Cir. 2007) (stating that "the mere fact that [the company] intended the plan to be a 'top hat' plan does not necessarily satisfy the requirement that it is a 'top hat' plan"); Callan, 2010 WL 3452371 at *12 (finding that a plan's stated purpose is a relevant but not determinative factor).

[60] See, e.g., Daft v. Advest, Inc., 658 F.3d 583, 597 (6th Cir. 2011); Carrabba, 38 F. Supp. 2d at 470; In re The IT Grp., Inc., 305 B.R. at 407; Alexander, 467 F. Supp. 2d at 142.

[61] See Carrabba, 38 F. Supp. 2d at 470.