

Overview of the IRS Controlled Group Rules and How They May Apply to YOUR Company

Controlled Group Rules:

The Internal Revenue Code (the “Code”) includes a series of rules for controlled groups of corporations. These rules, which can be found in Code Section 414, are used for numerous purposes, but generally are used to determine whether **multiple entities** have a sufficient degree of **common ownership** to require they be **treated** as a **single entity** for federal tax purposes.

Primary Controlled Group Rules:

The primary controlled group rules, set forth under Code Sections 414(b) and 414(c), generally provide "all employees of all corporations which are members of a controlled group of corporations", and "all employees of trade[s] or business[es] (whether or not incorporated) which are under common control" are to be treated as employed by a single employer. Trades or businesses (whether or not corporations, limited liability companies, partnerships or otherwise) which meet the definition of a controlled group are also to be treated as a single "employer" under the Affordable Care Act (“ACA”).



Why is it important to understand if an employer is part of a controlled group in the employee benefits world?



Because if an employer is part of a controlled group, **all employees in the entire controlled group** need to be considered for:

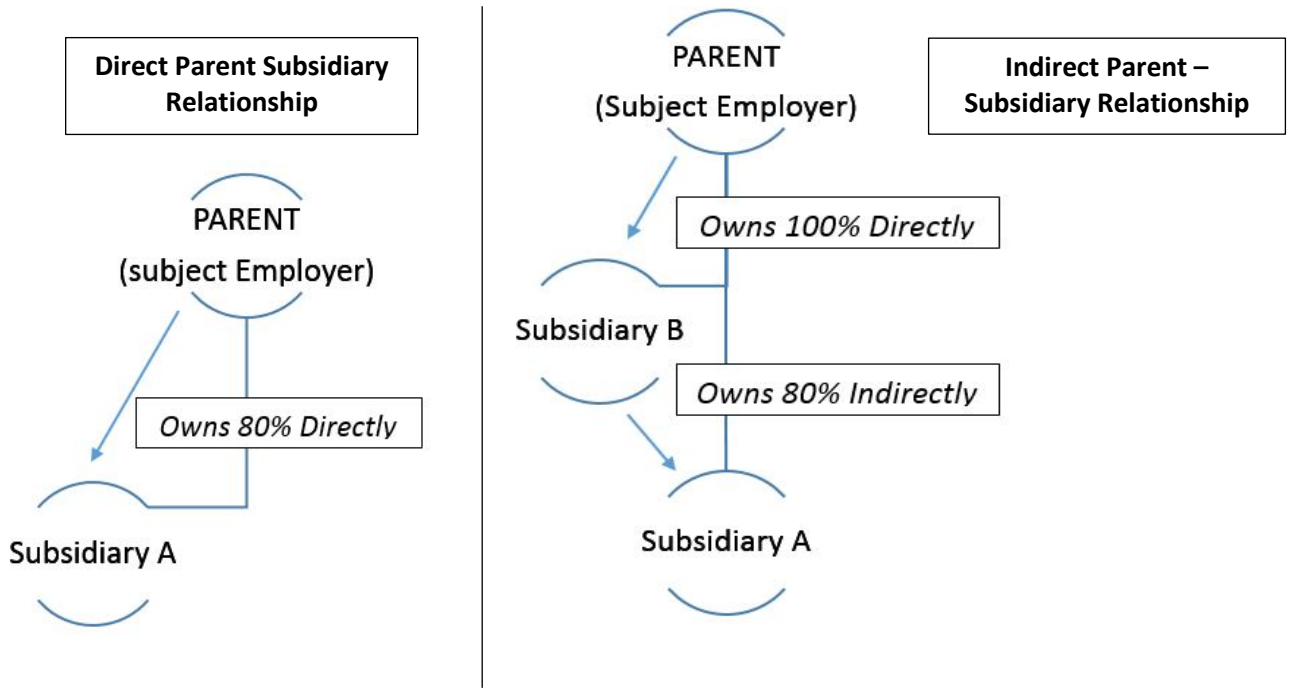
Health and welfare plans. Certain provisions in the Code prohibit discrimination which favors highly compensated employees in health and welfare plans, including; self-funded medical, group term life insurance, flexible spending arrangements and dependent care reimbursement plans. These rules generally require members of a controlled group be treated as a single employer for purposes of satisfying required testing.

COBRA. All employees of a controlled group are counted to determine if an employer is subject to Federal COBRA rules, and COBRA liability can flow to members of a controlled group.

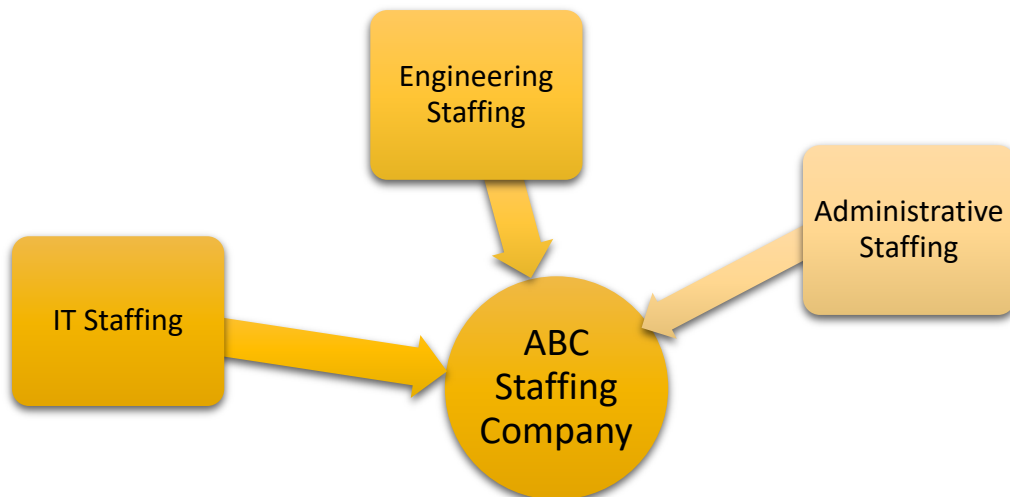
Affordable Care Act. The determination of whether an employer is a large employer subject to the ACA’s “pay-or-play” mandate includes employees of all controlled group members. Whether an employer is subject to the employer mandate depends on its size. The size of the employer is determined on a controlled group basis.

When counting an employer’s full-time equivalent employees (“FTEs”) to determine whether the pay-or-play provisions apply, the Code requires the employer to include not only its own employees, but also the employees of each member of the employer’s controlled group of corporations. An employer that fails to count the FTEs of its controlled group members may erroneously determine that it is exempt from the pay-or-play provisions, creating significant compliance issues.

Parent-Subsidiary Controlled Group – an entity higher up on the chain (i.e. a “parent”) owns a “controlling interest” in an entity below (i.e. a “subsidiary”)



An “affiliated service group” - An organization with the principal business of performing, on a regular basis, management functions for another organization and the management functions are a type historically performed by employees of the same business field. This is most applicable to service entities such as law firms, medical practices or management services companies with respect to investment funds.



Brother-Sister Controlled Group – two or more trades or businesses owned by five or fewer individuals, estates or trusts have a *controlling interest (80% or more)* in the trade or business and have *effective control*. Effective control generally means these entities together control more than 50% of the trades or businesses, but only to the extent the ownership is identical with respect to each organization.

In order for this control group relationship to be confirmed, the organizations must pass both tests (*controlling interest and effective control*) to be considered a Brother-Sister Controlled Group

| TEST 1 | | |
|--|------------|-----------|
| ADAMS AND BELL OWNERSHIP IS SHOW IN FOLLOWING PERCENTAGES | | |
| MEMBER | Adams, LLC | Bell, LLC |
| A | 80% | 20% |
| B | 10% | 50% |
| C | 5% | 15% |
| D | 5% | 15% |
| Total | 100% | 100% |

Based on the results from TEST 1 (the *controlling interest* test), these organizations do meet the controlling interest standard of 80% or more.

| TEST 2 | |
|---|-------------|
| IDENTICAL OWNERSHIP IN BOTH CORPORATIONS | |
| MEMBER | Effective % |
| A | 20% |
| B | 10% |
| C | 5% |
| D | 5% |
| Total | 40% |

Based on the results from TEST 2 (the *effective control* test), these organizations do NOT meet the effective control test of 50% or more.

Therefore, based on the brother-sister controlled group rules, in the example above, the four shareholders together own 80 percent or more of the stock of each corporation. However, under the second component, the shareholders do not own more than 50 percent of the stock of each corporation, taking into account only the identical ownership in each corporation as demonstrated above.

Action items plan sponsors can take to be prepared

Parent - Subsidiary Control Group

Consider whether your company might be part of a parent-subsidiary controlled group. Factors to consider include:

- Whether your company has any direct or indirect ownership interests in another enterprise.
- Whether your company is owned directly or indirectly by one or more enterprises.
- Whether your company may be owned in part by family members who may also have ownership interests in other business enterprises.

Brother - Sister Control Group

Consider whether your company might be part of a brother-sister controlled group. Factors to consider include:

- Whether a small number of persons, trusts or estates (generally less than 5) own a controlling interest in your company (especially where such persons, trusts or estates also have other business enterprises which may have employees).

Affiliated Service Control Group

Consider whether your company may be part of an affiliated service group. Factors to consider include:

- Whether the principal business of the company is performing, on a regular and continuing basis, management functions for other organizations.
- Whether a company is receiving management services from another business of the type historically performed by employees in the same business field.

Identification of members of the employer's "controlled group" for purposes of benefit plans

Many aspects of law governing employee benefit plans require employers to consider all members of the controlled group when determining if and how the law applies. To properly administer their plans, it is vital employers identify members of their controlled group. An employer which is directly or indirectly owned (wholly or partly) by a non-corporate entity or is owned by an investment fund (such as private equity or venture capital) may find its controlled group includes otherwise unrelated companies whose identities are unknown to each other.

The information provided herein is intended as a general overview of the subject matter covered.

Employers should consult with legal counsel to determine and confirm their control group status.

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CONTROL GROUP QUESTIONNAIRE

Does your company have any subsidiaries or affiliated entities?

- If yes, how many (how many total EINs)? _____, if more than 1, please list EIN & full legal name of each subsidiary or affiliated entity.

- Are all entities in Texas?
 - If not, in which states are entities located (list entity name, state for each & EIN if different)

Have you ever had the structure reviewed by an ERISA attorney to determine whether the entities fall under common ownership and control for ERISA health and welfare benefits purposes (this impacts ACA reporting, COBRA, HIPAA, and ERISA, including 5500 and M-1 filings)? (This would be the same analysis done for a 401k plan.)

- If yes, what was the determination? *(If yes, you can stop questionnaire here)*

If you have never had ownership reviewed by counsel, are you familiar with the ownership structure of the entities (who/which entities own them and at what %/rate)?

- If yes, do you have a chart that breaks down the ownership level down to the percentage?
- Are you willing/able to provide us with a copy?

Are there familial relations within the ownership (parent, grandparent, child, sibling, spouse, etc.)?

- Are any of these family members minors?
- Please list all familial relations, the age of the individual and how they are related

Are you willing to have your ownership structure reviewed by ERISA counsel to ensure that all compliance requirements are met? Do you have counsel available to do this in-house?

- If not, do you have an outside firm that does ERISA work for you company?
- Do you need a referral to an attorney?