



## Does Your Executive Plan Cover Only Top-Hat Employees?

Employment, Labor & Benefits Practice Group

*Foster Swift Employment, Labor & Benefits Quarterly*

September 2008

---

**PRACTICE AREAS**

Employee Benefits

Many employers maintain a non-qualified, unfunded, deferred compensation plan (the "Plan") for certain select management and highly-compensated employees. When such a plan is maintained by a nonprofit employer, it is often referred to as a "457(b) Plan." A taxable employer will often refer to such a plan as a "451 Plan." Federal rules limit eligibility for such Plans to a group of "select management or highly-compensated" employees. An important decision has been handed down by the U.S. Circuit Court of Appeals for the Sixth Circuit (the Court whose decisions are binding on employers in the State of Michigan). When reviewing the Plan, the Court looked at the following four factors: (1) The percentage of the company's work force that was eligible for Plan participation; (2) the nature of each eligible employee's work; (3) the disparity in pay between individuals who are eligible for the Plan and those who are not; and (4) the Plan language. As part of its discussion regarding these standards, the Court noted that such Plans can be made available only to persons who, because of their high salaries or executive positions within a company, exercise substantial influence over the design and operation of their Plans.

In this case, the plaintiff had no executive responsibility and little opportunity to negotiate her salary or benefits. The Court also pointed out that some of the most senior employees of the company did not participate in the Plan. The Court concluded that the Plan had failed to use sufficiently selective eligibility standards. As a result, the Plan was subject to important provisions of ERISA regarding contributions, vesting, and funding that the company had assumed did not apply.

This case could affect eligibility standards that are being used in Section 451 plans and in nongovernmental Section 457(b) plans. Please contact us if you would like more details regarding the Court's decision.