

Section 125 Nondiscrimination Testing

What is Section 125 Nondiscrimination Testing?

Your plan allows employees to pay for their health care and dependent care expenses on a pre-tax basis. This saves both the employer and the employee money on income taxes and Social Security taxes. In order for Highly Compensated and Key employees to receive these benefits, the plan must not discriminate in their favor. That is, Key Employees and Highly Compensated Employees cannot receive a better benefit than other employees. All Section 125 Benefits should be included in order to carry out the testing. Please see 'About the Tests' below for more information on each test.

About the Tests

If you sponsor a Cafeteria/Section 125 Plan, there are three tests to complete. If you also offer Health Flexible Spending Account (FSA) or Dependent Care FSA benefits, there are additional tests to complete. All of the possible tests are listed below.

Cafeteria Plan Tests

1. **Cafeteria Plan Eligibility Test:** To automatically pass the test, your plan must be offered to all of your employees except union employees and non-resident aliens. In addition, the requirements to join the plan must be the same for all employees, the premium paid through the plan must be the same for all employees and the waiting period must be less than 3 years. Please consult your plan document for the eligibility requirements of your plan.
2. **Cafeteria Contributions & Benefits Test:** A plan cannot discriminate in favor of highly compensated participants as to contributions and benefits. If the plan consists solely of health insurance benefits and the employer pays for 100% of the cost of health benefits; or, pays 75% of the cost of the most expensive plan offered, the plan is deemed to be not discriminatory. If additional benefits are included (i.e. FSA benefits), the rule is that the percentage of benefit dollars compared to compensation for the Highly Compensated Employee group should be equal to or less than the same percentage for non-Highly Compensated Employees.
3. **Cafeteria Plan Key Employee Concentration Test:** This test measures the amount of pre-tax benefits provided to key employees versus all other employees. This is the test that small employers most often fail. Key employees cannot receive more than 25% of the pre-tax benefits from the plan.

Health FSA Tests

1. **Health FSA Eligibility Test:** Under the Health FSA Eligibility Test, a plan may not discriminate in favor of HCLs as to eligibility to participate. A plan may satisfy any of these three sub-tests in order to pass:
 - Subtest #1: The plan benefits 70% of all non-excludable employees.
 - Subtest #2: The plan benefits 80% or more of all non-excludable employees who are eligible to benefit, if 70% or more of all non-excludable employees are eligible to benefit under the plan.
 - Subtest #3: Nondiscriminatory Classification Test. Safe Harbor and Unsafe Harbor Percentage Tests.
2. **Health FSA Benefits Test:** Under the Health FSA Benefits Test, a plan may not discriminate in favor of HCLs and all participants should be benefiting from the plan in the same way as HCLs.

The Benefits Test consists of two requirements that must be met in order for the Health FSA to pass.

- First Requirement: No Discrimination on the Face of the Plan.
- Second Requirement: No Discrimination in Operation

In order for a Health FSA to be nondiscriminatory on its face, it must satisfy the following conditions as a matter of plan design and in operation. Examples of this include:

- The required employee contributions must be identical for each benefit level;
- The maximum benefit level that can be elected cannot vary based on percentage of compensation, age, or years of service;
- The same type of benefits (e.g., medical expenses) provided to HCLs must be provided to all other participants; and
- Disparate waiting periods cannot be imposed.

Dependent Care Tests

1. **Dependent Care Eligibility Test:** The Eligibility Test is designed to ensure that a minimum percentage of non-HCE's are eligible to participate in the plan and that benefits are available to them on a nondiscriminatory basis.
2. **Dependent Care Contributions & Benefits Test:** This test is used to determine if non-HCEs are benefiting from the plan in the same way as HCEs. This is a subjective test. As long as the benefit maximum is the same for all employees the plan will pass this test.
3. **Dependent Care More-Than-5% Owners Test:** This test is used to determine if owners are receiving too much benefit from the Dependent Care benefit. As long as more-than-5% owners are receiving less than 25% of the total DCAP benefits then the plan will pass this test.
4. **Dependent Care 55% Average Benefits Test:** This test is used to determine if HCEs are receiving too much benefit from the Dependent Care (DCAP) benefit. If the average DCAP benefit for the non-HCE group is at least 55% of the average DCAP benefit for the HCE group then the plan will pass this test. The 55% average is the average for all employees, not just the employees who are participating in the dependent care benefit.

Important Definitions

Though Key Employee and Highly Compensated Employees may vary based on each employer and plan design, the definitions generally follow these guidelines (subject to change annually):

Key Employee (Key EE):

- An officer with annual compensation more than \$200,000 for 2022, (\$185,000 for 2021), as indexed;*
- A more than 5% owner; or
- A more than 1% owner with compensation over \$150,000

*The determination of whether an individual is an officer is made on the basis of all the facts and circumstances, including the source of the person's authority, the term for which he or she is elected or appointed, and the nature and extent of the officer's duties. Generally, an "officer" means an administrative executive who is in regular and continued service, and it implies a continuity of service, exclusive of those employed for a special or single transaction. Also, an employee who may have the title of officer, but not the authority of an officer, is not considered to be an officer. **For the Key Employee definition specifically**, if an employer has 30 or fewer employees, the maximum number of officers counted for testing purposes is 3, even if the organization has more than 3 officers. If the employer has between 30 and 500 employees, the maximum number of officers that need to be considered will be no more than 10% of all employees.

Highly Compensated Employee (HCE):

- A more than 5% owner; or
- For 2022, an employee with compensation over \$130,000 in 2021
- If elected by the employer, an employee in the "Top-Paid group"

Highly Compensated Individual (HCI):

- A more than 5% owner; or
- For 2022, an employee with compensation over \$130,000 in 2021
- An Officer*
- A Spouse or Dependent of one of the above

*The determination of whether an individual is an officer is made on the basis of all the facts and circumstances, including the source of the person's authority, the term for which he or she is elected or appointed, and the nature and extent of the officer's duties. Generally, an "officer" means an administrative executive who is in regular and continued service, and it implies a continuity of service, exclusive of those employed for a special or single transaction. Also, an employee who may have the title of officer, but not the authority of an officer, is not considered to be an officer. Unlike the definition of Officer used in the "Key Employee" definition above, the definition for an HCI does not appear to limit the number of Officers that an organization can count for the purposes of non-discrimination testing.

What is Required?

The IRS requires that these tests are performed on an annual basis, once the plan year is complete. This requirement include short plan years as well. Unlike other benefits testing, the Section 125 and FSA tests are not filed with any government agency. They are to be performed and kept on file to produce in the event of a Plan audit. If testing is performed and the Plan fails, the usual course of action is to include the effected benefits as taxable income for Key EEs, HCEs, and/or HCIs (depending on which test or tests were failed). In order to prevent this from occurring, an employer may test before or even early into the plan year and make corrections prior to the end of the plan year.

How Sentinel Group Can Help

Sentinel offers a self-testing portal for you to test your Plan at any point in the year. The portal can be found here: <https://www.sentinelgroup.com/section-125-nondiscrimination-testing-suite>

Please be sure to complete all three tabs which include Employer Information, Plan Design and Census. For the Census data, please be sure to include information on all employees, regardless of whether or not they are eligible for benefits. The standard fee for Sentinel to conduct the testing is \$350 (unless otherwise specified in your Service Agreement).

Where to Send the Information

If Sentinel Group is to help in conducting the tests, completed spreadsheets may be sent to your assigned Health & Welfare Account Manager. If you cannot send the data in a secure fashion, please contact your Health & Welfare Account Manager and we will find a means for you to transmit the data in a secure fashion.