

Webinar Title Q&A – the following questions were asked during the two webinar sessions in (July, 2017)

Q: All our plans run on a calendar year basis. I brought up nondiscrimination testing to Employee Benefits Corporation with our account representation in January and was told we shouldn't do it until July. Why?

A: The Section 125 nondiscrimination testing rules state that the test must be performed at the end of the plan year.

For this reason, every TPA makes its own determination on how early is too early. Please speak with your account representative on how early Employee Benefits Corporation will test your plan and consider it an end-of-year test.

Q: As the Employer (ER), we pay the entire premium for our single benefit employees (EEs) (EE only vs family). If the employee chooses coverage for family members, we apply the ER paid amount towards to that family premium and the EE then pays the difference. If we charge the Employees that are being insured as Single only \$1 each pay, should we also charge the other EEs that elect family etc. the same \$1 per pay on top of what they pay for the family?

A: Making individuals who elect single coverage pay \$1 each pay period (as suggested as a remedy to failing the Section 125 Contributions and Benefits Test or Key Employee Test) would not necessarily require increasing the cost of family coverage.

Q: Is there any certain pay date or month that needs to be used for the testing?

A: Employers can just choose a month that is “average” for the organization with respect to reflecting monthly premiums.

Compensation, however, should reflect the appropriate time period as discussed in a subsequent question below.

Q: Can you explain the gross wages in more detail? I didn't understand which box of income should be reported.

A: Gross wages reflects the total amount of wages paid to the employee in the form of pay or taxable benefits. This would include taxable income, income deferred to pay for tax-free benefits (such as

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pre-tax FSAs, 401(k), etc.) and any taxable benefits that are provided. This figure does not appear on the W-2. It may be found, typically, in a payroll system or on a paystub.

Q: Our company plan year runs July 1 thru June 30 but our benefits run January 1 through December 31 so what compensation is used to test calendar or plan year?

A: If the cafeteria plan runs from January 1, 2017 to December 31, 2017, then all employees employed in 2017 should be included. Compensation would reflect January 1, 2016 to December 31, 2016 gross compensation for any individuals who were hired prior to January 1, 2017. For any individuals who were hired after January 1, 2017 or who received no earnings in 2016, compensation should reflect January 1, 2017 to December 31, 2017 gross compensation. For any employees hired and terminated in 2017, you should report the true year to date wages from 2017.

Q: Can you provide more examples of who an officer might be? Also, in state government who would be classified as an officer? If officer does not apply to government agencies, can you provide IRS or statute language?

A: An officer is an “administrative executive who is in regular and continued service.” An employee who is given the title of an officer but no authority should not be included. Similarly an employee who is not given the title of an officer but has authority to make day-to-day administrative decisions for the organization should be included.

Governmental entities are not exempt from the requirement to provide an officer for purposes of nondiscrimination testing. For governmental entities, the officer is typically an individual who has a title of “administrator,” such as city administrator, town administrator or village administrator. Occasionally this person is an elected official, but it all depends on how the governmental entity operates.

Q: Would you include a CFO or COO - Chief Operating Officer as an Officer or the company or JUST the President / CEO?

A: This would depend on what the duties associated with your CFO or COO include. An officer is an “administrative executive who is in regular and continued service.” An employee who is given the title of an officer but no authority should not be included. Similarly an employee who is not given the title of an officer but has authority to make day-to-day administrative decisions for the organization should be included.

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Q: Can you repeat the number of hours that determine the employee ineligible?

A: Under the Section 105 testing, individuals who are ineligible to participate and are part-time employees are able to be excluded from the test. A “part-time” employee is classified as someone who regularly works less than 35 hours per week unless all employees performing similar work would generally work less than 35 hours per week. If all employees performing similar work would generally work less than 35 hours per week, a “part-time” employee would be someone who regularly works less than 25 hours per week.

Please note that the Affordable Care Act definition of part-time differs from the definition used for Section 105 testing.

Q: I have groups that have professional vs. non-skilled workers. They offer different probationary periods - is that prohibited?

A: Different probationary periods (or waiting periods) are not allowable under Section 105 testing. Under Section 129 and Section 125 testing, it is allowable. So long as the probationary period to enroll in the Health Care FSA (or other self-funded medical plans) is the same for all employees, there should be no issue.

Q: So if an employee is not eligible for the plan, it is noted on the employee list with a yes or no if they are eligible. Do they still need to be listed on there if they are not eligible?

A: Yes, individuals who are ineligible should still be listed, because they are required to be included to accurately test the plan.

Q: Will there be an additional training showing individuals how to enter the information on the spreadsheet?

A: Yes, this webinar is scheduled for August 29, 2017 at 10:00 AM Central Daylight Time.

Q: Is 5% owner only relevant in a C-Corp?

A: The definition of highly compensated employee does not typically differ depending on tax filing status of the employer. The exception is the attribution rules for S Corporations.

For S Corporations, the attribution rules state that spouses, ascendants and descendants of more-than-2% owners are considered to own the same percentage of the company as the owners

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themselves. Therefore, even if they have no personal ownership of the S Corporation, the spouse, ascendant and descendant are considered to be owners through attribution.

Q: If the employer pays 80% of the health plan for full time employees, but part-time employees have to pay an additional portion of their premium, does the plan still automatically pass the Section 125 contributions & benefits testing.

Example: \$1,000 monthly health premium. Employer pays 80% or \$800. If an employee works 50%, they must pay 50% of the employer's \$800 premiums in addition to their original \$200 portion. Does the plan still automatically pass?

A: Under this example, the plan would not automatically pass the contributions and benefits test under the Section 125 testing because the employer does not pay 75% or more of the medical plan premium for part-time employees. For an employee who works 50%, the employer only contributes 40% of the medical plan premium.

Q: Is HSA nondiscrimination testing included with section 125 nondiscrimination testing or done separately?

A: Employers have a choice to either include HSA contributions as part of their Cafeteria Plan or to exclude them. HSA contributions are part of the Cafeteria Plan if the employer allows the employees to take pre-tax payroll deductions and sends them directly to an HSA in the employee's name.

If an employer provides employees this option, then the HSA contributions are part of the employer's Cafeteria Plan and are included in the Cafeteria Plan tests under Section 125 nondiscrimination testing. Both employee pre-tax payroll deductions and employer contributions to the HSA would be included in testing if the HSA contributions are part of the Cafeteria Plan.

If an employer does not provide employees this option, then the HSA contributions are not subject to testing. However, employers who contribute to employee HSAs and who do not include HSA contributions as part of their Cafeteria Plan have to ensure that they are not violating the comparability rule.

Q: Can you change from a pre-tax to a post-tax now to avoid failing?

A: If you mean retroactively changing deductions from pre-tax to post-tax, then yes, this will likely alleviate a failure. Changing future deductions from pre-tax to post-tax, however, may not be enough to alleviate a failure. The test results would have to be analyzed to know for sure, however.

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