

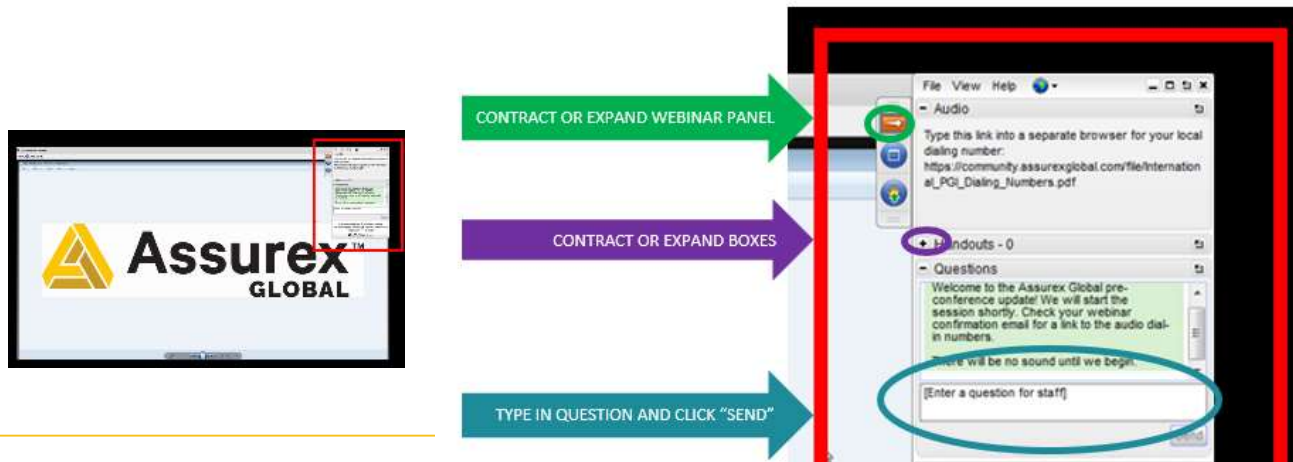
2021

Employee Benefit Nondiscrimination Rules Review

Presented by Benefit Comply

Employee Benefit Nondiscrimination Rules Review

- Welcome! We will begin at 3 p.m. Eastern
- There will be no sound until we begin the webinar. When we begin, you can listen to the audio portion through your computer speakers or by calling into the phone conference number provided in your confirmation email.
- You will be able to submit questions during the webinar by using the “Questions” or “Chat” box located on your webinar control panel.
- Slides can be printed from the webinar control panel – expand the “Handouts” section and click the file to download.



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Common Question: Can the employer differ _____ between classes of employees? Isn't that discriminatory?

Answer: Generally okay to differentiate eligibility, benefits and contributions between classes of employees so long as the employer doesn't discriminate against a protected class (e.g., age, race, religion, sex)

Benefit Nondiscrimination Rules

- To offer benefits on a **tax-favored basis**, plans must be structured in accordance with benefit nondiscrimination rules
 - Benefit nondiscrimination rules restrict the ability to favor highly compensated individuals or key employees on tax-favored basis
 - Monitored and enforced by the IRS
 - Failure risks the highly compensated and key employees being taxed on benefits received under the discriminatory plan

Benefit Nondiscrimination Rules

§125
Cafeteria Plan
Benefits

§105(h)
Self-Funded
Group Health
Plans

§129
Dependent
Care Account
Plans
(DCAPs)

§79
Life Insurance

Examples

Through a cafeteria plan, employer offers fully-insured medical, dental, vision, health FSA, HSA and dependent care FSA

- All benefits are aggregated and subject to §125 rules
- In addition, the health FSA is subject to §105(h) rules, and the dependent care FSA is subject to §129 rules

Employer offers fully-insured medical, dental and vision through a cafeteria plan. Employer also offers an HRA

- Medical, dental and vision plan are aggregated and subject to §125 rules
- The HRA is subject to §105(h) rules

Highly Compensated Individuals (HCIs)

§125

Officers

>5% shareholders

Highly compensated (2020 - \$125,000 in 2019; 2021 - \$130,000 in 2020)*

§129

>5% shareholders

Highly compensated (2020 - \$125,000 in 2019; 2021 - \$130,000 in 2020)*

§105(h)

5 highest paid officers

>10% shareholders

Top 25% highest-paid employees

Key Employee

§125 and §79

Officers with annual compensation in excess of \$185,000 for 2020 and 2021

>5% owners

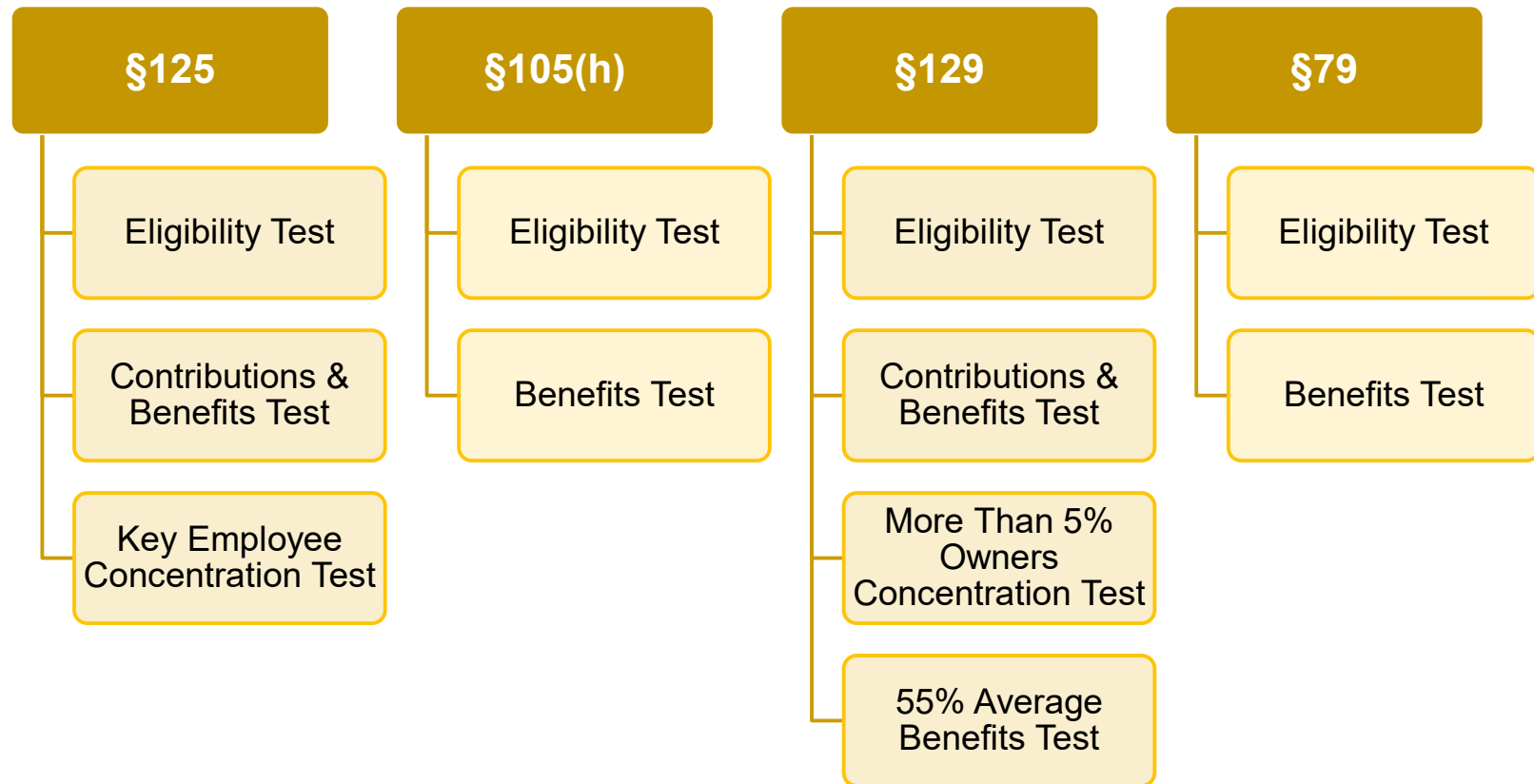
>1% owners with annual compensation in excess of \$150,000

**For §125 and §129, employers can make a top-paid election, choosing instead to count top-paid 20% as HCIs rather than using the compensation threshold*

Owners & Non-Employees

- Exclude Owners & Non-Employees
 - Owners (e.g., sole proprietor, partner or >2% S-Corp shareholder) cannot participate on the same tax-favored basis as employees and are not considered for purposes of discrimination testing
 - Non-employees (e.g., board members, independent contractors) cannot participate on the same tax-favored basis as employees and are not considered for purposes of discrimination testing

Nondiscrimination Tests



§125 Testing (3 Tests) – Cafeteria Plans

- Eligibility Test – Cannot discriminate as to eligibility to participate
 - Are enough non-HCIs eligible to benefit from the plan (including more generous contributions, if applicable)?
- Contributions & Benefits Test – Cannot discriminate as to contributions and benefits
 - Contributions and benefits must be available on a nondiscriminatory basis for similarly situated individuals, and HCIs cannot select more non-taxable benefits than non-HCIs
- Key Employee Concentration Test – Key employees cannot utilize more than 25% of the non-taxable benefits

****For a premium only plan (POP), it is only necessary to pass the eligibility test*

§105(h) Testing (2 Tests) – Self-Funded Group Health Plans

- Eligibility Test – Cannot discriminate as to eligibility to participate (or benefit)
 - Are enough non-HCIs eligible to benefit from the plan (including more generous contributions, if applicable)?
- Benefits Test – Plan benefits provided cannot discriminate in favor of HCIs (no discrimination on the face of the plan or in operation)
 - Are all participants eligible for the same benefits under the plan?
 - Are all benefits offered under the same conditions to all participants?
 - If optional benefits are offered, are all participants able to elect each benefit option for the same additional contribution?
 - Are disparate waiting periods being used?
 - Do benefits vary based on age, years of service, or compensation?

§129 Testing (4 Tests) – DCAPs

- Eligibility Test – Cannot discriminate as to eligibility to participate
 - Enough non-HCIs must be eligible to participate
- Contributions & Benefits Test – Cannot discriminate as to contributions and benefits
 - Enough non-HCIs must be offered the most generous annual limit and employer contribution
- More-Than-5% Owners Test – Owners cannot receive >25% of the benefits run through the plan
- 55% Average Benefits Test – Average benefits provided to the non-HCIs must be at least 55% of the average benefits provided to HCIs

§79 Testing (2 Tests) – Group Life Plans

- Eligibility Test – Cannot discriminate as to eligibility to participate or benefit
 - Enough non-key employees must be able to benefit
- Benefits Test – Cannot discriminate as to contributions and benefits
 - All benefits available to key employees must be available to all other participants

Discrimination Testing - Timing

- No Clear Penalty for Failure to Test
 - §125 and §129 tests must be passed as of the last day of the plan year
 - §105(h) and §79 tests must be passed on all days during the plan year
 - If audited, must show the plan met nondiscrimination requirements

Conservative approach

- Test at least annually
- Testing in the first half of the year leaves time to make corrections if needed

Practical approach

- Run tests initially, but if plans pass, test again when there are significant changes in structure or participation

Common Employer Scenarios

- Differing Waiting Periods – Salaried employees eligible date of hire; hourly employees eligible 1st of the month following 60 days
- Differing Eligibility – Managers are offered a basic and buy-up medical plan; all other full-time employees are offered the basic medical plan
- Differing Contributions – Employee contribution decreases with tenure
- Not Discriminatory
 - Employee contribution increases as wages increase (lower paid pay less)
 - Differing benefits or contributions for owners

Consequences for a Discriminatory Plan

- If plan adjustments are not made to bring the plan into compliance before the end of the plan year:
 - IRS could require retroactive taxation of benefits received by highly compensated and key employees
 - Employer may owe retroactive payroll taxes
 - Late penalties may apply for both

Discriminatory Plan Corrections



Exclude HCs or keys from participating, or from participating on a tax-favored basis

- i.e., employee contributions after-tax, impute income for employer's contribution

Limit amounts elected by HCs or keys on a tax-favored basis

Adjust eligibility rules to include additional non-HCs

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