

Employee Benefits Nondiscrimination Rules



Presented By
Matthew Cannova & Seth Capper
Maynard Cooper & Gale, P.C.
September 2022



Best Lawyers



AGENDA

- ▼ **Inflation Reduction Act – Provisions Affecting Employee Benefits**
- ▼ **Employment Discrimination Considerations (Title VII, etc.)**
- ▼ **HIPAA Nondiscrimination**
- ▼ **ACA Section 1557 Nondiscrimination**
- ▼ **105(h) Nondiscrimination for Self-Funded Plans**
- ▼ **125 Cafeteria Plan Nondiscrimination**
- ▼ **Retirement Plan Nondiscrimination**

Inflation Reduction Act – Employee Benefits Implications

- ▼ Retiree Medicare Rx Supplemental Programs – Provides government with the ability to negotiate prices of select Medicare medications and penalizes drug makers that increase prices for Medicare drugs by more than the inflation rate
 - ▼ Phased in approach
- ▼ Rx OOP Cap for Medicare enrollees – Caps Medicare enrollees' out-of-pocket spending on drugs at \$2,000 a year and
- ▼ Insulin Spending Cap for Medicare Enrollees – Caps the cost of insulin at \$35 per month for Medicare enrollees starting in 2023.
- ▼ These ONLY apply to **Medicare**
 - ▼ May see cost-shifting, resulting in higher costs outside of Medicare

Inflation Reduction Act – Employee Benefits Implications

- ▼ Pre-deductible Insulin – Provides a safe harbor for all plans that allows HDHPs to cover any insulin dosage before the individual meets the plan’s deductible
- ▼ ACA Exchange Subsidies – Implements a three-year extension (through 2025) of the ACA premium tax credit increase under the American Rescue Plan Act of 2021 (“ARPA”)
- ▼ Increased funding for IRS enforcement actions – Includes almost \$80 billion in new funding for the IRS
 - ▼ **\$46 billion** is allocated to enforcement

Employment Discrimination Considerations

- ▼ Title VII – prohibits employment discrimination based on race, color, religion, sex and national origin
 - ▼ **LGBTQ Discrimination?**
 - ▼ In *Bostock v. Clayton County* (06/15/2020), the U.S. Supreme Court held that Title VII protects LGBTQ employees from discrimination based on sex.
 - ▼ Impact: Same-sex spouse exclusions, gender re-assignment
- ▼ GINA – prohibits discrimination based upon genetic information
 - ▼ Limitations on requests for such information
- ▼ ADA – prohibits discrimination based upon a disability
 - ▼ Reasonable Accommodation
- ▼ ADEA – prohibits discrimination based upon age
 - ▼ Discrimination would not have occurred “but for” employee’s age

HIPAA Nondiscrimination Rules

- ▼ May not discriminate based on “health factors” with regard to eligibility, benefits, or premiums/contributions
- ▼ Health Factors
 - ▼ Health status, Medical condition (including both physical and mental illnesses), Claims experience, Receipt of health care, Medical history, Genetic information, Evidence of insurability*, or Disability
- ▼ *Evidence of insurability* includes—
 - ▼ Conditions arising out of acts of domestic violence; and
 - ▼ Participation in activities such as motorcycling, snowmobiling, all-terrain vehicle riding, horseback riding, skiing, and other similar activities
- ▼ Wellness Program Exception

HIPAA Nondiscrimination Rules

- ▼ Eligibility – Requires same eligibility conditions for **similarly situated individuals**
- ▼ Benefits – Benefits provided under a plan must be uniformly available to all **similarly situated individuals**
- ▼ Premiums – May not require an individual to pay a premium or contribution that is greater than the premium or contribution for a **similarly situated** individual enrolled in the plan based on any health factor that relates to the individual or a dependent of the individual

Similarly Situated Individuals

- ▼ Distinction between groups of participants must be based on a **bona fide employment-based classification** consistent with the employer's usual business practices
- ▼ Based on all the relevant facts and circumstances
 - ▼ Relevant facts and circumstances include whether the employer uses the classification for purposes independent of qualification for health coverage (for example, determining eligibility for other employee benefits or determining other terms of employment)
 - ▼ Examples of classifications that, based on all the relevant facts and circumstances, may be bona fide include full-time versus part-time status, different geographic location, membership in a collective bargaining unit, date of hire, length of service, current employee versus former employee status, and different occupations
 - ▼ A classification based on any health factor is not a bona fide employment-based classification
- ▼ Nothing prohibits more favorable treatment of individuals with adverse health factors

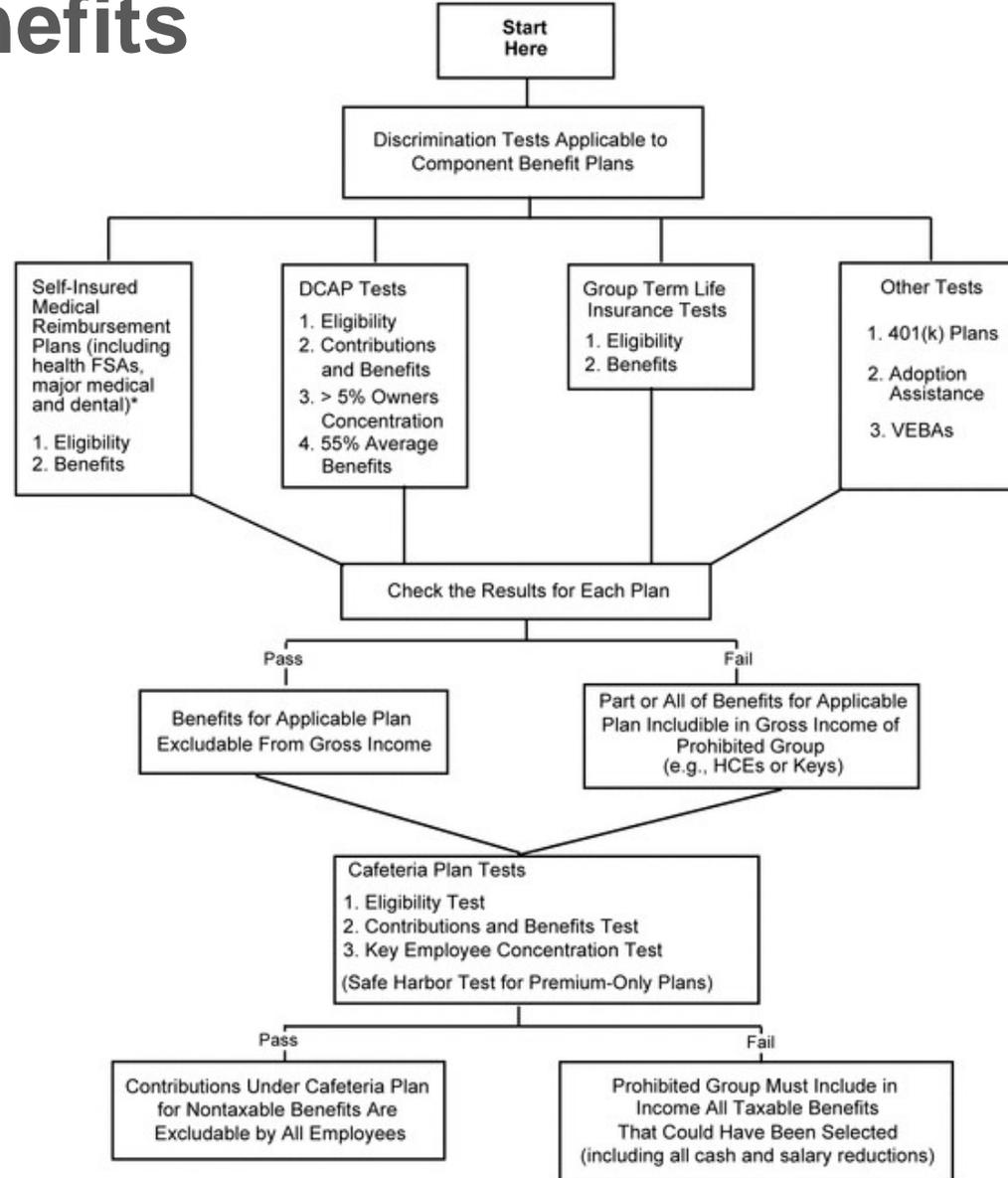
ACA Section 1557 Nondiscrimination Rules

- ▼ ACA Section 1557 prohibits discrimination on the basis of race, color, national origin, sex (generally including sexual orientation/transgender), age, or disability in certain health programs and activities
 - ▼ Includes notice requirements, grievance and remedial measures, and enforcement procedures
- ▼ Flip flop of rules between Obama, Trump, and Biden administrations
 - ▼ **Biden rules, Executive Order, and HHS statement indicate focus on discrimination based on sexual orientation or gender identity consistent with U.S. Supreme Court's decision in *Bostock***

ACA Section 1557 Nondiscrimination Rules

- ▼ Rules apply to “[a]ny entity that operates a health program or activity, any part of which ***receives federal financial assistance from HHS***”
 - ▼ Includes most health insurers (including when acting as TPA of self-funded plan)
 - ▼ May apply to employer directly if receiving federal financial assistance in connection to health plan
- ▼ “Federal Financial Assistance” includes any grant, loan, credit, subsidy, contract (other than procurement contracts), or any other arrangement where the federal government provides funds, services of federal personnel, or real or personal property
- ▼ Proposed rules specify that ACA Section 1557 generally does not apply to an employer with regard to its employment practices, including the provision of employee health benefits

Nondiscrimination Tests for Health and Welfare Benefits



Section 105(h) Nondiscrimination Rules

- ▼ Nondiscrimination for **Self-Funded** Group Health Plans
- ▼ May not discriminate in favor of Highly Compensated Individuals (HCIs)
 - ▼ The five highest paid officers of the employer
 - ▼ A shareholder who owns more than 10% of the value of the employer's stock
 - ▼ An individual who is among the highest-paid 25% of all employees
- ▼ Applies to Eligibility and Benefits
- ▼ Consequence of Failure = HCIs taxed on the value of benefits

Section 105(h) Nondiscrimination Rules

▼ Eligibility Test

1. The plan benefits 70% or more of all nonexcludable employees
2. The plan benefits 80% or more of all nonexcludable employees who are eligible to benefit — IF 70% or more of all nonexcludable employees are eligible to participate under the plan
3. The plan benefits a nondiscriminatory classification of employees set up by the employer **which is found by the Internal Revenue Service** not to be discriminatory in favor of HCIs (applying the same standards as are applied under section 410(b)(1)(B) – relating to qualified pension, profit-sharing and stock bonus plans)

Section 105(h) Nondiscrimination Rules

▼ Benefits Test

- ▼ Plan benefits will not satisfy the nondiscriminatory benefits requirements unless all the benefits provided for participants who are HCIs are provided for all other participants
- ▼ Two components of the Benefits Test —
 - (1) nondiscrimination on the face of the plan, and
 - (2) nondiscrimination in operation

▼ Common Issue → Varying Premium Levels

▼ Satisfying the Benefits Test through disaggregation

ACA Nondiscrimination Requirements for **Fully-Insured** Group Health Plans

- ▼ **DELAYED – IRS Notice 2011-1**
- ▼ Applies rules “similar” to the rule in Code § 105(h) to fully-insured health plans
 - ▼ Prohibits discrimination in favor of highly compensated employees with respect to eligibility and benefits
- ▼ Does not apply to grandfathered health plans
 - ▼ 105(h) continues to apply to self-funded plans regardless of whether the plan is a grandfathered health plan
- ▼ If issued, employers will be given time to comply with the regulations

Section 125 Cafeteria Plan Nondiscrimination

- ▼ Cafeteria Plans may not discriminate in favor of Highly Compensated Individuals (HCIs) or Key Employees as to eligibility, contributions, or benefits.
- ▼ Consequence of Failing:
 - ▼ In general, HCIs/Keys who made pre-tax salary reductions will be taxed on the amount of those salary reductions.
- ▼ Testing generally must be run on the last day of the plan year
 - ▼ Of course, employers should monitor compliance with testing criteria during the plan year.
 - ▼ Employers cannot fix nondiscrimination problems after year-end.
- ▼ *Concept: Cafeteria Plan “party”...*

Section 125 Nondiscrimination

Three Cafeteria Plan Tests

Eligibility Test

Contributions and Benefits Test

Key Employee Concentration Test

“Highly Compensated Individuals” include—

Officers

More than 5% shareholders

Highly compensated under Code § 414(q) (\$130,000 in 2021; \$135,000 in 2022)

Spouses or dependents of the above

125 Nondiscrimination – Eligibility Test

(1) Employment Requirement

- No employee may be required to complete 3+ years of employment, and the same employment requirement applies to all employees (but the employer could have separate cafeteria plans...).

(2) Entry Date Requirement

- Participation must commence no later than the first day of the first plan year beginning after the date the employment requirement was satisfied.

(3) Two-part Nondiscriminatory Classification Test

- Bona fide business classification for those included or excluded from the plan; and
- Sufficient ratio of eligible non-HCIs to eligible HCIs (a numeric test).

125 Nondiscrimination – Eligibility Test

- ▼ *Eligibility Test: “Have enough non-HCIs been invited to the party?”*
- ▼ Two-Part Nondiscriminatory Classification Test:
 1. Cafeteria Plan does not discriminate in favor of HCIs if the plan benefits a group of employees who qualify under a “reasonable classification.”
 - ▼ Examples → Specified job categories, salaried vs. hourly, geographic location, and similar bona fide business criteria
 2. The group of employees included in the classification must satisfy either the “safe harbor percentage test” or “unsafe harbor percentage.”
 - ▼ Premium Only Plan (“POP”) Safe Harbor
 - ▼ Issues:
 - ▼ Which employees can be excluded for testing purposes?
 - ▼ What does it mean to “benefit” under a cafeteria plan?

125 Nondiscrimination – Contributions and Benefits Test

- ▼ Contributions and Benefits Test – Two Parts:
 1. Availability Test
 2. Utilization Test
- ▼ *Availability Test: “What drink options are available to each person and at what cost?”*
- ▼ *Utilization Test: “How much is each group drinking?”*
- ▼ Discrimination in Operation – Cafeteria plan must also not discriminate in favor of HCs in actual operation.
- ▼ Contributions and Benefits Test Safe Harbor

125 Nondiscrimination – Contributions and Benefits Test

- ▼ Either qualified benefits and total benefits, or employer contributions allocable to qualified benefits and total benefits, must not discriminate in favor of HCPs.
- ▼ Tests are run based on “similarly situated” participants:
 - ▼ When determining whether participants are “similarly situated,” reasonable differences in plan benefits may be taken into account, such as variations based on geographical location or to employees with family coverage versus employee-only coverage.
- ▼ Are benefits or contributions available to similarly situated participants on a nondiscriminatory basis?
- ▼ Actual utilization (election) of benefits or contributions must not be disproportionate by HCPs vs. non-HCPs.

125 Nondiscrimination – Key Employee Concentration Test

- ▼ **Key Employee Concentration Test**: If the qualified benefits provided to Keys exceed 25% of the total of all such benefits provided for all employees under the plan, the plan will fail the key employee concentration test
- ▼ **“Key Employees” include—**
 - ▼ Officers with annual compensation in excess of the dollar limit for that year (\$180,000 for 2019)
 - ▼ More-than-5% shareholders
 - ▼ More-than-1% shareholders with annual compensation greater than \$150,000 (not indexed)

Nondiscrimination of Underlying Benefits

▼ Health FSAs (105(h) Tests):

- ▼ Eligibility Test
- ▼ Benefits Test

▼ DCAPs (aka Dependent Care FSAs):

- ▼ “Eligibility Test
- ▼ Contributions and Benefits Test
- ▼ More-Than-5% Owners Concentration Test
- ▼ 55% Average Benefits Test

▼ Health Savings Accounts (HSAs):

- ▼ Comparability Rules

▼ Group Term Life Insurance:

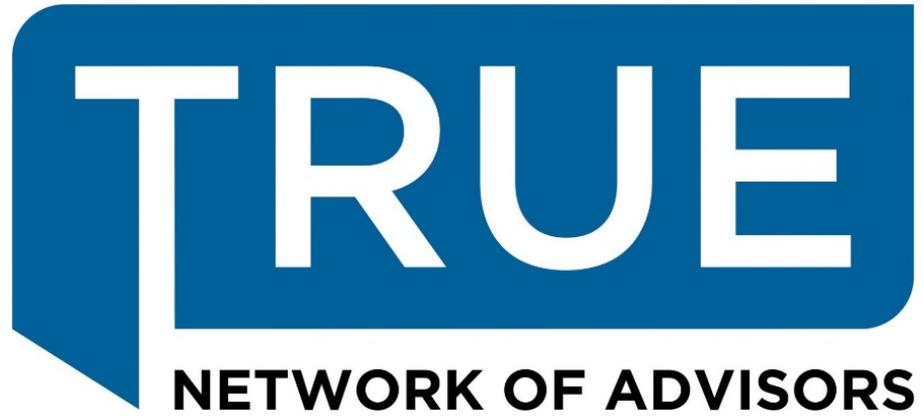
- ▼ Eligibility Test
- ▼ Benefits Test

Retirement Plan Nondiscrimination

- ▼ **Minimum Coverage Requirements under Code § 410(b)**
- ▼ **General nondiscrimination principles under Code § 401(a)(4) and top-heavy rules under Code § 416**
- ▼ **Actual Deferral Percentage (ADP) and Actual Contribution Percentage (ACP) Testing**
- ▼ **Safe Harbor Plan Designs**
- ▼ **Correcting Retirement Plan Nondiscrimination Mistakes:**
 - ▼ **IRS Employee Plans Compliance Resolution System (EPCRS) → SCP, VCP, or Audit CAP**

Selected Limits for Health and Welfare Plans

	2020	2021	2022
Annual Cost Sharing Limit (self-only coverage)	\$8,150	\$8,550	\$8,700
Annual Cost Sharing Limit (other than self-only)	\$16,300	\$17,100	\$17,400
HDHP Out-of-Pocket Maximum (self-only coverage)	\$6,900	\$7,000	\$7,050
HDHP Out-of-Pocket Maximum (family coverage)	\$13,800	\$14,000	\$14,100
HDHP Minimum Deductible (self-only)	\$1,400	\$1,400	\$1,400
HDHP Minimum Deductible (family)	\$2,800	\$2,800	\$2,800
Maximum Annual HSA Contributions (self-only)	\$3,550	\$3,600	\$3,650
Maximum Annual HSA Contributions (family)	\$7,100	\$7,200	\$7,300
Maximum HSA Catch-Up Contribution	\$1,000	\$1,000	\$1,000
Health FSA Maximum	\$2,750	\$2,750	\$2,850
Health FSA Rollover Maximum	\$550	\$550	\$570
Employer Mandate Penalty A (Fail to Offer)	\$2,570 per FTE	\$2,700 per FTE	\$2,750 per FTE
Employer Mandate Penalty B (Unaffordable)	\$3,860 per EE	\$4,060 per EE	\$4,120 per EE
414(q) Highly Compensated Employee Threshold	\$130,000 (for 2021 determinations)	\$130,000 (for 2022 determinations)	\$135,000 (for 2023 determinations)



MAYNARD
COOPER GALE

ALABAMA | CALIFORNIA | FLORIDA | GEORGIA | IOWA
NEW YORK | TENNESSEE | TEXAS | WASHINGTON DC

MAYNARDCOOPER.COM