



**NON-DISCRIMINATION
TESTING CATALOG
OF SERVICES**

Mercer Marketplace 365+SM

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Non-Discrimination Testing Catalog of Services

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ACRONYMS USED

DCAPs: Dependent Care Plans (Dependent Care Flexible Spending Accounts)

HCE: Highly Compensated Employee

HCI: Highly Compensated Individual

HCP: Highly Compensated Participant

FSA: Flexible Spending Account

HRA: Health Reimbursement Arrangement

Keys: Key Employees

POP: Premium Only Plan

SIMP: Self-Insured Medical Plan

Non-Discrimination Testing Catalog of Services

Introduction

Mercer Marketplace understands that providing compliant and customer-focused administration is only half the story. The other half is proving it. At Mercer Marketplace, we provide complete non-discrimination testing services for your cafeteria plan, including FSAs as well as HRAs and self-insured medical plans.

This Catalog of Services will provide you an outline of each of the different types of testing formats we offer, an explanation of each type of test that can be performed. We also provide secure access where clients can retrieve current file templates, drop completed files, receive immediate results reports and review prior testing history done through the portal.

Why is Testing Required?

Because cafeteria plans, medical plans (including Medical FSAs), DCAPs and other benefit programs enjoy favorable tax treatment under the Code, non-discrimination rules were created by the IRS. These rules are generally designed to prevent plans from discriminating in favor of individuals who are either highly compensated or otherwise key to the business.

The tests are complicated but tend to carry three basic themes, all of which involve protecting employees who are not highly compensated or key to the business (i.e., non-HCEs/non-Keys):

- **Eligibility.** The first theme is that if enough non-HCEs cannot get into a plan, it will be discriminatory.
- **Benefits.** The second theme is that a plan will not pass the nondiscrimination tests if the HCEs/Keys are able to get more benefits than the non-HCEs.
- **Utilization.** The third theme is that a plan will not pass the nondiscrimination tests if the HCEs/Keys actually take more benefits under the plan. This is sometimes called a “utilization test” or “concentration test.”

When to Perform Testing

Under the 2007 proposed regulations, Code Section 125 nondiscrimination tests are to be performed as of the last day of the plan year, taking into account all non-excludable employees who were employed on any day during the plan year.

It is recommended that employers do one test mid-year in order to determine whether additional steps must be taken before the end of the plan year so that the plan passes the nondiscrimination tests and preserves the tax treatment for the key and highly compensated. A second and final test would then be conducted using information as of the last day of the plan year.

Controlled and Affiliated Service Groups

For plan-testing purposes, the Code treats two or more employers as a single employer if there is enough common ownership or a combination of joint ownership and common activity. These rules are described in Code §§414(b), (c), and (m), which are directly incorporated into the cafeteria plan rules. The determination of whether or not there is a controlled group of companies is the responsibility of the employer sponsoring the plan, along with their legal counsel, and is not a determination that can be made by WEX.

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POPFSA

The POPFSA option will provide results for your POP, Health FSA and Dependent Care FSA. Download the POPFSA template.

POP

Cafeteria Plan 25% Key Employee Concentration Test

This test is meant to ensure that Keys do not receive more than 25% of the aggregate benefits offered through the cafeteria plan. It determines the total value of non-taxable benefits provided under the cafeteria plan (whether funded by true employer contributions or employer contributions made through salary reduction elections) and tests whether Keys receive more than 25%.

Cafeteria Plan Eligibility Test

This is a three-part test to ensure that enough non-HCIs are eligible to benefit from the cafeteria plan. A plan will not be treated as discriminatory if:

- A. No employee is required to complete more than three years of service with the employer maintaining the plan as a condition of participation in the plan, and this employment requirement is the same for each employee.
- B. An employee who has satisfied the employment requirement of (A) above and who is otherwise entitled to participate in the plan commences participation no later than the first day of the plan year beginning after the date the employment requirement was satisfied - unless the employee was separated from service before the first day of that plan year.
- C. The plan benefits a group of employees who: (1) qualify under a classification established by the employer; and (2) the group of employees included in the classification satisfies the safe harbor percentage test or the unsafe harbor percentage component of the facts and circumstances test. This two-part test is referred to as the Nondiscriminatory Classification Test.

Cafeteria Plan Contributions & Benefits Tests – Availability & Utilization

Availability Test

The regulations provide two ways to satisfy the Availability Standard: (a) demonstrate that employer contributions are available on a nondiscriminatory basis; or (b) demonstrate that benefits are available on a nondiscriminatory basis.

In essence, the same qualified benefits must be available for similarly situated participants at the same cost. Also, the available employer contributions for similarly situated participants must be the same, and all participants must have the same options to use them.

Utilization Test

The actual election of qualified benefits through a cafeteria plan must not be disproportionate to HCPs.

Two ratios must be calculated and compared: (1) the aggregate qualified benefits elected (or employer contributions utilized, as applicable) by the HCPs divided by the aggregate compensation of the HCP group; and (2) the aggregate qualified benefits elected (or employer contributions utilized, as applicable) by the non-HCPs divided by the aggregate compensation of the non-HCP group. The HCP ratio must be less than or equal to the non-HCP ratio.

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Health FSA

Health FSA Eligibility Test (Section 105h)

A health FSA cannot discriminate in favor of HCLs as to eligibility to participate. A health FSA that satisfies any one of the three tests will pass the Health FSA Eligibility Test.

We suggest applying the third test, Safe Harbor Percentage test (Post-TRA Nondiscriminatory Classification Test), first. Given the low participation rates for health FSAs, the 70% and 70%/80% Tests will seldom be satisfied.

1. **The 70% Test Eligibility Test:** To pass, the health FSA must benefit 70 percent or more of all employees. **The 70%/80% Eligibility Test:** To pass, the health FSA must benefit 80 percent or more of all the employees who are eligible to benefit under the plan if 70 percent or more of all employees are eligible to benefit under the plan.
2. **The Safe Harbor Percentage Eligibility Test:** Health FSA plans that are unable to pass either the 70% Test or the 70%/80% Test should next try to pass the Safe Harbor Percentage Test (Post-TRA Nondiscriminatory Classification Test).

Health FSA Benefits Test

Under the Benefits Test, benefits provided under a health FSA must not discriminate in favor of participants who are HCLs. This requires that all benefits provided for participants who are HCLs must be provided for all other participants and that all benefits available for HCLs' dependents must also be available for dependents of all non-HCL participants.

The health FSA must satisfy the following conditions as a matter of plan design and in operation:

- the required employee contributions must be identical for each benefit level;
- the maximum benefit level that can be elected cannot vary based on percent 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.

DCAP

DCAP More-Than-5% Owners Concentration Test

DCAP benefits provided to more-than-5% owners cannot exceed 25% of the benefits provided for all employees under the plan. Because this test looks at amounts paid or incurred during the year, all benefits provided during the year should be taken into account, even if received by employees whose employment terminated during the year. The More-Than-5% Owners Concentration Test is a utilization test.

DCAP 55% Average Benefits Test

The 55% Average Benefits Test is meant to ensure that HCEs do not participate disproportionately. The 55% Average Benefits Test focuses on the average (per capita) benefit received by HCEs as compared to that received by non-HCEs. A plan meets the requirements if the average benefits provided to employees who are non-HCEs under all DCAP plans of the employer is at least 55 percent of the average benefits provided to HCEs under all DCAP plans of the employer.

DCAP Eligibility Test

The Eligibility Test ensures that a reasonable percentage of non-HCEs are eligible to participate in the DCAP. If not enough non-HCEs can get in, the DCAP will fail the Eligibility Test. Many employers automatically pass the Eligibility Test by plan design. If all employees are eligible to participate in the DCAP, the plan will automatically pass the Eligibility Test.

DCAP Contributions and Benefits Test

The Contributions and Benefits Test requires that benefits and contributions available to eligible employees under the DCAP do not favor HCEs. The test looks at the contribution and benefit level (not the utilization rate) for the different types of assistance available under the DCAP plan. It ensures that HCEs or their dependents aren't eligible to receive better benefits and aren't authorized to make lower contributions for equal benefits than non-HCEs.

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KeyDCAP

Download the KeyDCAP template.

Note: For all tests required for a POP plan, health FSA and DCAP FSA, test using the POPFSA by downloading the POPFSA template.

Cafeteria Plan 25% Key Employee Concentration Test

This test is meant to ensure that Keys do not received more than 25% of the aggregate benefits offered through the cafeteria plan. It determines the total value of non-taxable benefits provided under the cafeteria plan (whether funded by true employer contributions or employer contributions made through salary reduction elections) and tests whether Keys receive more than 25%.

DCAP More-Than-5% Owners Concentration Test

Under this test, DCAP benefits provided to more-than-5% owners cannot exceed 25% of the benefits provided for all employees under the plan. Because this test looks at amounts paid or incurred during the year, all benefits provided during the year should be taken into account, even if received by employees whose employment terminated during the year. The More-Than-5% Owners Concentration Test is a utilization test.

DCAP 55% Average Benefits Test

The 55% Average Benefits Test is meant to ensure that HCEs do not participate disproportionately. The 55% Average Benefits Test focuses on the average (per capita) benefit received by HCEs as compared to that received by non-HCEs. A plan meets the requirements if the average benefits provided to employees who are non-HCEs under all DCAP plans of the employer is at least 55 percent of the average benefits provided to HCEs under all DCAP plans of the employer.

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POP

Download the POP template.

Note: Use this option only if you are testing the premium only plan. This test does not include the FSAs.

Cafeteria Plan 25% Key Employee Concentration Test

This test is meant to ensure that Keys do not receive more than 25% of the aggregate benefits offered through the cafeteria plan. It determines the total value of non-taxable benefits provided under the cafeteria plan (whether funded by true employer contributions or employer contributions made through salary reduction elections) and tests whether Keys receive more than 25%.

Cafeteria Plan Eligibility Test

This is a three-part test to ensure that enough non-HCIs are eligible to benefit from the cafeteria plan. A plan will not be treated as discriminatory if:

- A. No employee is required to complete more than three years of service with the employer maintaining the plan as a condition of participation in the plan, and this employment requirement is the same for each employee.
- B. An employee who has satisfied the employment requirement of (A) above and who is otherwise entitled to participate in the plan commences participation no later than the first day of the plan year beginning after the date the employment requirement was satisfied - unless the employee was separated from service before the first day of that plan year.
- C. The plan benefits a group of employees who: (1) qualify under a classification established by the employer; and (2) the group of employees included in the classification satisfies the safe harbor percentage test or the unsafe harbor percentage component of the facts and circumstances test. This two-part test is referred to as the Nondiscriminatory Classification Test.

Cafeteria Plan Contributions & Benefits Tests – Availability & Utilization

Availability Test

The regulations provide two ways to satisfy the Availability Standard: (a) demonstrate that employer contributions are available on a nondiscriminatory basis; or (b) demonstrate that benefits are available on a nondiscriminatory basis. In essence, the same qualified benefits must be available for similarly situated participants at the same cost. Also, the available employer contributions for similarly situated participants must be the same, and all participants must have the same options to use them.

Utilization Test

The actual election of qualified benefits through a cafeteria plan must not be disproportionate to HCPs.

Two ratios must be calculated and compared: (1) the aggregate qualified benefits elected (or employer contributions utilized, as applicable) by the HCPs divided by the aggregate compensation of the HCP group; and (2) the aggregate qualified benefits elected (or employer contributions utilized, as applicable) by the non-HCPs divided by the aggregate compensation of the non-HCP group. The HCP ratio must be less than or equal to the non-HCP ratio.

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HRA

Download the HRA Test template. For clients offering both the POPFSA and HRA, a combined testing option is available entitled POPFSA&HRA. Both the POPFSA and HRA fees will apply to the POPFSA&HRA Test.

HRA Eligibility Test

An HRA cannot discriminate in favor of HCIs as to eligibility to participate. An HRA that satisfies any one of the three tests will pass the HRA Eligibility Test.

1. **The 70% Eligibility Test:** To pass, the HRA must benefit 70 percent or more of all employees.
2. **The 70%/80% Eligibility Test:** To pass, the HRA must benefit 80 percent or more of all the employees who are eligible to benefit under the plan if 70 percent or more of all employees are eligible to benefit under the plan.
3. **Safe Harbor Percentage Eligibility Test:** HRA plans that are unable to pass either the 70% Test or the 70%/80% Test should next try to pass the Safe Harbor Percentage Test (Post-TRA Nondiscriminatory Classification Test).

HRA Benefits Test

Under the Benefits Test, benefits provided under a HRA must not discriminate in favor of participants who are HCIs. This requires that all benefits provided for participants who are HCIs must be provided for all other participants and that all benefits available for HCIs' dependents must also be available for dependents of all non-HCI participants.

The Benefits Test consists of two subtests: one tests for discrimination on the face of the plan, and the other tests for discrimination in operation. Both must be passed in order for the HRA to pass the Benefits Test.

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SIMP

Download the Self-Insured Medical Plan Tests template. Note: A “Self-insured medical plan” is defined as either a health, dental, vision or other self-insured medical benefit plan. Each plan would be tested separately using a separate template.

Self-Insured Medical Plan Eligibility Test

A Self-Insured Medical Plan cannot discriminate in favor of HCIs as to eligibility to participate. A Self-Insured Medical Plan that satisfies any one of the three tests will pass the Self-Insured Medical Plan Eligibility Test.

1. **The 70% Eligibility Test:** To pass, the Self-Insured Medical Plan must benefit 70 percent or more of all employees.
2. **The 70%/80% Eligibility Test:** To pass, the Self-Insured Medical Plan must benefit 80 percent or more of all the employees who are eligible to benefit under the plan if 70 percent or more of all employees are eligible to benefit under the plan.
3. **Safe Harbor Percentage Eligibility Test:** Self-insured medical plans that are unable to pass either the 70% Test or the 70%/80% Test should next try to pass the Safe Harbor Percentage Test (Post-TRA Nondiscriminatory Classification Test).

Self-Insured Medical Benefits Test

Under the Benefits Test, benefits provided under a Self-Insured Medical Plan must not discriminate in favor of participants who are HCIs. This requires that all benefits provided for participants who are HCIs must be provided for all other participants and that all benefits available for HCIs' dependents must also be available for dependents of all non-HCI participants.

The Benefits Test consists of two subtests: one tests for discrimination on the face of the plan, and the other tests for discrimination in operation. Both must be passed in order for the Self-Insured Medical Plan to pass the Benefits Test.