



## Q&A: GOT NONDISCRIMINATION FRUSTRATION? | 12.6.17

Your questions answered by Pete Iverson, Esq., our in-house ERISA counsel

### We received several questions about gaining access to the Compliance Lunchbox presentation.

- » While we do not provide the presentation itself, you have access to a Takeaways flyer for each webinar, which includes all of the essential info from the presentation. Takeaways flyers from all of our Compliance Lunchbox sessions are available at [www.compliancedashboard.net/compliance-lunchbox](http://www.compliancedashboard.net/compliance-lunchbox).
- » If you registered for Compliance Lunchbox and can't be present for the live webinar, please watch for our follow-up email that will contain a link to the recorded webinar.

### Q: Is it necessary for a fully-insured plan that offers the same benefit/same contribution to all employees to go through Nondiscrimination Testing? (No FSA, just pre-tax premiums on medical, dental, etc.)

A: Prior to the passage of ACA, fully-insured plans were not subject to Nondiscrimination rules. ACA made those rules applicable to fully-insured plans. However, the IRS has not promulgated any regulations in that regard and has announced that compliance will not be required prior to issuance of the rules.

### Q: Can you confirm that both Health FSAs and Dependent Care FSAs have to do Nondiscrimination Testing?

A: Health FSAs are subject to both Section 125 and Section 105 Nondiscrimination Testing. Dependent Care FSAs are subject to certain Section 125 Testing, but specifics on how the testing applies to Dependent Care is outside the scope of the dashboard. Since a dependent care FSA is not considered a Health Plan, it would not be subject to Section 105 Testing. Your accountant or attorney should be able to guide you on testing for dependent care.

### Q: When you say a “plan must benefit X% of employees,” does that mean the number of employees available for enrollment, or is that number based on participation elections?

A: The regulations do not actually define what it means for a plan to “benefit” an employee. Conservatively, “benefit” should be taken to mean actual participation.

### Q: What's the penalty if no testing is done?

A: There is no penalty if the plan does not discriminate. If the plan does discriminate, the employer will not know it and will consequently end up in violation of its reporting and withholding obligations — perhaps for several years — and will be subject to interest and penalties for those violations.

### Q: What is the definition of a Key Employee under Section 105?

A: Section 105(h) does not distinguish between Highly Compensated Individuals and Key Employees. There is only a definition provided for HCIs.

### Q: If our plan is self-funded, do we go through both Nondiscrimination Tests?

A: A self-insured health plan only has to meet the Section 105(h) requirements. A Health FSA (which is always self-insured) would have to meet the Section 125 and the Section 105 requirements.

### Q: Is it advantageous to include the “top 20%” as part of the testing? Will that make for more or less HCIs?

A: If the number of employees in the group that exceeds the compensation threshold is more than 20% of all employees, then applying the additional 20% limit will reduce the number of HCIs. Note that this election must apply to all of the employer's plans subject to testing, including retirement plans.