



# Non-Discrimination Testing (NDT)

## Overview of Tests

Non-Discrimination Testing consists of multiple tests and subtests within each category, and can be very complicated. We will do our best below to summarize the testing below. We will also outline several key definitions that are essential to understand.

### IMPORTANT DEFINITIONS

#### HCE - Highly Compensated Employees

- An Employees earning above the IRS-defined threshold (\$150,000 for 2024); or
- Employees owning more than 5% of the company.
- Family attribution rules apply when an employee is also related to an HCE. This can include a spouse, children, parents, and grandparents.

#### NHCE - Non-Highly Compensated Employees

An employee who earns less than the HCE threshold and isn't in a key ownership or leadership role.

#### HCI - Highly Compensated Individual

- One of the five highest-paid officers; or
- An individual owning more than 10% of the business; or
- An employee among the highest-paid 25% of all employees.

#### Non-Excludable Employees

These are employees who must be considered when performing tests even if they are not actively participating in the benefit plan. Typically they include full and part time employees, eligible employees or certain former employees.

#### Key Employee

Any employee during the plan year who meets one of the following criteria:

- Officer of the company earning more than \$215,000 (2024, adjusted annually).
- Owns more than 5% of the business, or more than 1% and earns over \$150,000 (2024).

### ELIGIBILITY TESTS

In very simple terms, these tests ensure that benefit plans are fair and non-discriminatory for one group of employees compared to another. This helps maintain compliance and promote equity among employees.

#### 105h Self-Funded Test

Ensures self-insured health plans do not favor HCI s in terms of eligibility or benefits. The plan must offer coverage to a nondiscriminatory group of employees, and the benefits provided must be uniform, ensuring they are not more favorable to HCIs.

#### Dependent Care FSA Test

Ensures that a minimum percentage of non-HCEs are eligible to participate in the plan and that benefits are provided fairly and without discrimination.



# ELIGIBILITY TESTS (CONTINUED)

## Health FSA Sub Tests

Plan may satisfy any of these subtests in order to pass.

- **70% Test:** Your plan benefits 70% or more non-excludable employees
- **70%/80% Test:** Your plan benefits 80% or more of your non-excludable workers who are eligible for the plan if at least 70% of your non-excludable workers are eligible.
- **Non-Discriminatory Classification Test:** Your plan benefits a class of employees that doesn't discriminately favor HCEs. You'll need to use bona fide employee classes, and your plan must have an acceptable ratio of benefiting NHCEs to HCEs.

## Cafeteria Plan Test

Ensures the plan does not favor HCEs or key employees. It must be offered to all employees except union employees and non-resident aliens, with consistent eligibility requirements for all. Premiums paid through the plan must be the same for all employees, and the waiting period must not exceed three years.

# BENEFIT (BENEFIT & CONTRIBUTION) TESTS

These tests ensure that benefits are fair and not more favorable to highly compensated or key employees. Plans fail if HCEs or key employees can access better benefits, maintaining compliance and equity.

## Health FSA

The Benefits Test for a Health FSA has two requirements:

1. **No Discrimination on the Face of the Plan**
2. **No Discrimination in Operation**

To pass, the plan must ensure:

- **Employee contributions are identical for each benefit level.**
- **Maximum benefits do not vary by compensation, age, or service.**
- **The same benefits are available to all participants.**
- **No disparate waiting periods are imposed.**

## 105h Self-Funded Test

The 105(h) Benefits Test ensures self-insured health plans do not favor HCEs. To pass:

1. **Employee Contributions:** Contributions must be the same for all employees.
2. **Benefit Limits:** Limits must be uniform and not vary by age, employment duration, or status.
3. **Waiting Periods:** Waiting periods must be equal for all participants.

## Cafeteria Plan Test

Ensures plans do not favor highly compensated or key employees in contributions or benefits. To pass:

1. **No Discrimination on the Face of the Plan:** Benefits and contributions must be uniform and not favor highly compensated employees.
2. **No Discrimination in Operation:** The plan must operate fairly for all participants.

A plan is deemed nondiscriminatory if it includes only health insurance and the employer:

- **Pays 100% of health benefit costs, or**
- **Pays 75% of the cost of the most expensive plan.**

For plans with additional benefits (e.g., FSAs), benefit dollars relative to compensation for highly compensated employees must not disproportionately exceed those for other employees.

## Dependent Care FSA Test

Ensures the plan does not favor HCEs or key employees. While having the same benefit maximum for all employees is required, the test also checks for equal access and fairness in plan design and operation

# UTILIZATION TESTS

Utilization tests focus on the actual elections and usage of benefits by participants rather than the plan's design. These tests evaluate whether the benefits are being utilized equitably across different employee groups. They apply only to specific types of plans, which we will outline below.

## Key Employee Concentration Test

### Benefits Subject to Test

This test applies to Cafeteria Plans, including the following benefits offered under such plans:

- Health FSAs (Flexible Spending Accounts)
- Dependent Care FSAs
- Other benefits provided through the cafeteria plan structure.

### Purpose of Test

The Key Employee Concentration Test ensures that no more than 25% of the total benefits provided under the plan are allocated to key employees. This test is specifically designed to prevent plans from disproportionately favoring key employees, ensuring equity and compliance.

## 55% Average Benefits Test

### Benefits Subject to Test

This test applies specifically to dependent care assistance plans offered under a cafeteria plan.

### Purpose of Test

Ensures that the average benefit provided to NHCEs is at least 55% of the average benefit provided to HCEs.

## 5% Owners Test

### Benefits Subject to Test

This test applies specifically to dependent care assistance plans offered under a cafeteria plan.

### Purpose of Test

Ensures that no more than 25% of the total benefits provided by the plan go to 5% owners (those owning more than 5% of the business) and their immediate family members.



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