



Non-Discrimination in an Employer-Sponsored Group Health Plan

There are two key non-discrimination rules that apply to employer-sponsored group health plans.

- The ERISA non-discrimination rules which have been around for years.
- The IRS non-discrimination test which previously applied only to employers with self-insured group health plans and not to employers with fully-insured group health plans.

This paper summarizes both non-discrimination rules.

ERISA non-discrimination

The U.S. Department of Labor (DOL) enforces the non-discrimination provisions that are part of ERISA. Under 29 C.F.R. §2590.702(d), all similarly situated employees must be treated the same for purposes of eligibility and participation in a group health plan. However, similarly situated employees can be grouped according to the following bona fide employment-based classifications:

1. Full-time versus part-time status,
2. Different geographic location,
3. Membership in a collective bargaining unit,
4. Date of hire,
5. Length of service,
6. Current employee versus former employee status, and
7. Different occupations.

These bona fide employment-based classifications do not appear to be changed by the new healthcare reform law.

Non-ERISA plans, such as those sponsored by government entities or churches, are not required to comply with these provisions.

IRS non-discrimination

The Internal Revenue Service (IRS) enforces the non-discrimination requirements set out at 26 U.S.C. §105(h). Under this law a group health plan cannot favor highly compensated employees based on (i) eligibility to participate and (ii) benefits provided under the plan. Employers are required to self-test for discrimination by asking the following questions:



1. Are at least 70% of all employees eligible to participate in the plan?
2. Alternatively, are at least 80% of all eligible employees participating in the plan?
Employees are not eligible to participate if they: (i) have less than 3 years of service, (ii) are under the age of 25, (iii) are part-time or seasonal workers, (iv) are covered by a collective bargaining agreement, or (v) are non-resident aliens. (These eligibility criteria were changed by the healthcare reform law.)

Self-funded or self-insured group health plans were required to comply with this discrimination testing for many years. The healthcare reform law requires fully-insured plans to also comply with this testing. However, the healthcare reform law also changed who is eligible to participate so question #2 of the self-test must be revised.

As a result, IRS Notice 2011-01 says the IRS will not enforce the non-discrimination requirement until new regulations are published. The IRS has not set a time line for issuing new regulations, but the consensus view is that this non-discrimination requirement will not be enforced until late 2014 or more likely 2015.

All group health plans, including those offered by governmental entities and churches, must comply with this non-discrimination requirement.

Do you have questions about the information in this paper? Would you like to know more about this important topic?

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