

## “Simple Cafeteria Plans” Available in 2011

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The health reform bill (HR 3590) signed into law on Tuesday, March 23, 2010 included a provision creating “simple cafeteria plans” for small businesses, effective for years beginning in 2011. Simple cafeteria plans will be treated as meeting nondiscrimination requirements applicable to cafeteria plans if they meet certain minimum eligibility and participation and minimum contribution requirements. This safe harbor would also cover nondiscrimination requirements applicable to certain benefits offered under the cafeteria plan, including group term life insurance, coverage under a self insured group health plan and benefits under a dependent care assistance program.

### Eligible Employers

An employer is eligible to sponsor a simple cafeteria plan if, during either of the preceding two years, the business employed 100 or fewer employees on average (based on business days). For a new business, eligibility is based on the number of employees the business is reasonably expected to employ. Businesses maintaining a simple cafeteria plan that grow beyond 100 employees can continue to maintain the simple arrangement until they have exceeded an average of 200 or more employees during a preceding year. The usual employer aggregation rules under IRC Sections 52 and 414 apply for purposes of determining an eligible employer.

### Eligible Employees

All non-excludable employees who had at least 1,000 hours of service during the preceding plan year must be eligible to participate in a simple cafeteria plan.

Excludable employees are those who:

- have not attained age 21 before the end of the plan year;
- have less than one year of service as of any day during the plan year;
- are covered under a collective bargaining agreement; or
- are nonresident aliens.

Each eligible employee must be able to elect any benefit available under the plan under the same terms and conditions as all other participants.

### Minimum Contribution Requirement

Employer contributions to a simple cafeteria plan must be sufficient to provide benefits to non-highly compensated employees (NHCEs) of at least:

- A uniform percentage (at least two percent) of compensation, whether or not the employee makes salary reduction contributions to the plan; or

- The lesser of a 100% matching contribution or six percent of the employee's compensation.

Additional contributions can be made, but the rate of any matching contribution for HCEs or key employees cannot be greater than the rate of match for NHCEs.

### **Nondiscrimination Safe Harbors**

Simple cafeteria plans are treated as meeting the nondiscrimination requirements of IRC Section 125(b), including the concentration test that currently limits key employees' benefits to 25% of the total of all benefits provided for all employees under the plan. Nondiscrimination tests applicable to individual benefits are also treated as satisfied, including the Section 79(d) rules for group-term life insurance, the Section 105(h) rules for self-insured medical expense reimbursement plans, and the dependent care rules of Section 129(d)(2),(3) and (8).

These nondiscrimination rules have discouraged utilization of cafeteria plans by small businesses because even uniform benefits could prove to be discriminatory. For example, if a small office with two key employees and two non-key employees provided identical dollar amounts of benefits to all employees under a cafeteria plan, the concentration test would be failed because 50% of total benefits go to the key employees. The new simple cafeteria plan safe harbor addresses the problem - at least for small employers organized as traditional C corporations.

### **Participation by Self-employed Individuals Still Prohibited**

Unfortunately, the bill does not eliminate the requirement that cafeteria plan participants be "employees". As under current law, "self-employed"

individuals (including sole proprietors, more than two percent shareholders in a Subchapter S corporation, members of a limited liability company and partners in a partnership) will continue to be precluded from participating in a cafeteria plan. Since many small business owners are self-employed, failure to lift this restriction severely limits the usefulness of simple cafeteria plans. ASPPA's Government Affairs Committee will continue to work to get legislation that lifts the restriction on participation by the self-employed.



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