

Benefit Concentration Test Applies to All Flex Plans

Non-discrimination tests apply to all Section 125 flexible benefit plans, even “Premium Only Plans”.

The Benefit Concentration Test (also called “Key Employee Concentration Test”) requires that no more than 25% of pre-tax benefits are utilized by Key Employees.

For purposes of this test, a Key Employee is defined as:

- (1) an officer with annual compensation greater than \$130,000 for 2004 - the limit is indexed periodically,
- (2) a more-than-5% owner of the employer, or
- (3) a more-than-1% owner of the employer with annual compensation in excess of \$150,000 for 2004 - the limit is indexed periodically.

Determining officers and stockholders can be tricky. Officers are defined not only by title, but by duties. Stockholder status may be accorded a non-stockholder by attribution (see Q&A, this issue).

If a plan initially fails the Benefit Concentration Test, there are sometimes remedies other than reducing the pre-tax election of the key employees.

ProBenefits performs the Benefit Concentration Test multiple times during the plan year to help maintain audit-readiness of our clients’ flex plans even as people, positions, compensation, and premium rates change.



Quickies

♦ Summer Camps as Child Care

Summertime often raises the question, “Is summer camp expense reimbursable from the Child Care FSA?” Short answer: day camps, yes; overnight camps, no. [Click for Details.](#)



Your Questions Answered

I am the sole owner of an S-corporation. I understand that I am not eligible to participate in my company’s flex plan. Can I nevertheless participate through my spouse, who is a bona fide employee of our company?

Your question reflects your knowledge that owners of entities with “pass-through taxation” (proprietors, partners, greater-than-2% stockholders of subchapter S corporations, and some others) are ineligible to participate in a Section 125 flexible benefit plan. Only common law employees can participate.

In some cases (a proprietorship, for example), an owner’s employed spouse can participate, covering the owner as a dependent. However, in your case as owner of a sub-S corporation, your spouse – though a legitimate non-owner employee – is nevertheless *deemed* to be an owner via stock attribution.

The attribution rules of Internal Revenue Code section 318 deem an individual to own the stock of his spouse, parents, children, or grandchildren. ([Click for more info on attribution rules.](#))

So, in your case, neither you nor your spouse can participate in your company’s flex plan.

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