



Employer Contributions: All You Need to Know!

**Presented by
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TODAY'S PRESENTER



Danielle Capilla, JD

- Danielle Capilla, formerly of United Benefit Advisors, oversaw all compliance and operational initiatives and addressed the complex issues of health care reform by bringing her legal experience with a specific emphasis on health care.
- Prior to joining UBA, Danielle was an attorney and senior writer analyst for the health law division of Wolters Kluwer Law and Business. She was also the lead editor of the Wolters Kluwer health law blog and a senior writer and analyst of the Health Reform WK-EDGE, the Health Law Daily, and numerous other publications.
- Danielle graduated from DePaul University College of Law with a health law certificate and she has an undergraduate degree in sociology and business from Tulane University. Danielle is an adjunct professor at DePaul University College of Law.

AGENDA

- Contributions – Generally
- Contributions – HIPAA
- Contributions – 125 & 105 Overview
- Contributions – Cafeteria Plans
- Contributions- Self Funded Plans
- Contributions- Making Changes
- Contributions – Pay Shortages

Plan Contributions

- Employers who are designing a health and welfare benefit plan for their employees often wonder about the rules relating to setting premiums for employees. Employers generally have significant flexibility in this part of their plan's design.
- Charging all employees a flat amount for their health plan
- Charging employees a percentage of the premium for the health plan, with the percentage changing as employees move between tiers (self, self plus one, self plus family)
- Giving employees a set dollar amount that they can use to offset the cost of whatever plan and plan tier they enroll in

Plan Contributions

Employers are also interested in setting different contribution structures for different groups of employees.

- Sometimes this is due to a geographic difference between employees, job types, staff versus management, and more.
- Employers may wish to give lower-paid employees more employer-provided money.
- Employers may wish to give managers or executive staff more employer-provided money
- Employers have member level rates but wish to provide all employees with a flat contribution amount

Plan Contributions- Generally

Contribution Types:

- Seed Contributions
 - Employers contribute a fixed amount toward a specified benefit for all employees
- Matching Contributions
 - Employers match the amount employee contributes towards a benefit (Unlikely with major medical plans)
- Contingent Contributions
 - Employee contributes \$x amount, and in return, employer contributes \$Y amount

Plan Contributions – Generally

- The UBA Health Plan Survey (surveying 20,000 plans of mostly small to mid-size employers) shows the following contribution splits:

- 2015

- Employer \$367
- Employee \$140

Carriers are looking for employers to take on at least 50% of the contribution

- 2016

- Employer \$367
- Employee \$144

From 2016 to 2017, employees experienced an 11% year over year increase while employers experienced a .9% year over year increase

- 2017

- Employer \$370
- Employee \$161

Plan Contributions- Generally

Employers should be aware that there are different nondiscrimination requirements to consider.

- HIPAA
 - Applies to all plans
- Section 125
 - Applies to plans run through a 125/POP plan, and employees are allowed to pay for benefits on a tax-free basis
- Section 105
 - Applies to self-funded plans
- ADEA, and more!

Plan Contributions- HIPAA

HIPAA

- Employers have discretion when structuring their benefits plans and may make distinctions among employee populations regarding access to and the level of benefits offered.
- Plans may differ among employees only on “*bona fide employment-based classifications*” consistent with the employer’s usual business practice.
- Examples that would satisfy this requirement include salaried, hourly, full-time, part-time, type of job, geographic location, date of hire, division, subsidiary, business unit, and profit center distinctions.

Plan Contributions- HIPAA

- Violating HIPAA nondiscrimination requirements can trigger numerous potential penalties, including an excise tax penalty of **\$100 per day per affected plan participant**. Employers and plan administrators are expected to self-report these compliance failures using IRS Form 8928.
- Historically, enforcement of the filing requirement and collection of the excise tax has been light, but the IRS is now indicating that it expects employers to report failures and pay fines as applicable.

Plan Contributions- 125 & 105

- Section 125 & Section 105
 - **Generally = the plan cannot favor highly compensated individuals.**
- Innocent plan design can lead to an employer failing the nondiscrimination requirements under Section 125 or 105(h) without the employer intentionally favoring the highly compensated employees.
- Many employers also erroneously assume that none of their employees fall into the “highly compensated” category, so the rules do not apply to them.

Plan Contributions- 125 & 105

As a best practice, **any time an employer has a plan design with different levels of employer contributions**, the employer should run the applicable testing to ensure its plan is compliant.

Plan Contributions- Cafeteria Plans

Under Section 125, benefit plans cannot discriminate in favor of highly compensated individuals or key employees.

Highly compensated individuals are defined as:

- Officers
- Five percent shareholders
- Highly compensated employees (HCEs)*
- Spouses or dependents of any of the preceding individuals

Plan Contributions- Cafeteria Plans

Under Section 125, benefit plans cannot discriminate in favor of highly compensated individuals or key employees.

Highly compensated employees (HCEs)

Highly compensated means any individual or participant who – for the prior plan year or the current plan year in the case of the first year of employment – had annual compensation from the employer in excess of the compensation amount specified in the Internal Revenue Code and, if elected by the employer, was also in the top-paid group of employees for the year. For 2018, the applicable compensation amount is \$120,000.

Plan Contributions- Cafeteria Plans

Under Section 125, benefit plans cannot discriminate in favor of highly compensated individuals or key employees.

Key employees are participants who, at any time during the plan year, are one of the following:

- Officers with annual compensation greater than an indexed amount (\$175,000 for 2017)
- Five percent owners of the employer
- One percent owners having compensation in excess of \$150,000

Plan Contributions- Cafeteria Plans

Under Section 125, benefit plans cannot discriminate in favor of highly compensated individuals or key employees. **There are 3 tests that are applicable to 125 plans.**

- Eligibility test
- *Contributions and benefits test*
- Concentration test

Plan Contributions- Cafeteria Plans

Contributions & Benefits Test

A Section 125 cafeteria plan cannot discriminate in favor of highly compensated participants with regard to contributions and benefits.

A cafeteria plan must satisfy this component with respect to both benefit availability and benefit utilization.

This means that a cafeteria plan must give each similarly situated participant a uniform opportunity to elect qualified benefits; further, highly compensated participants must not disproportionately elect qualified benefits.

Plan Contributions- Cafeteria Plans

Employer contributions are disproportionately utilized by highly compensated participants if the aggregate contributions utilized by highly compensated participants, measured as a percentage of aggregate compensation of highly compensated participants, exceed the aggregate contributions utilized by non-highly compensated participants measured as a percentage of the aggregate compensation of non-highly compensated participants.

Aggregate employer contributions used by highly compensated participants

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Aggregate employer contributions used by non-highly compensated participants

Plan Contributions- Cafeteria Plans

Practical impact: unless all employees are offered the same employer contribution, it can be very difficult to “spot” a discriminatory plan design.

Two employers with the same plan design could have a different outcome of the testing based on their employee demographics and enrolled pool of plan participants.

Plan Contributions- Cafeteria Plans

Consequences of Failing the Section 125 Nondiscrimination Tests

As a practical matter, the IRS has not recently focused on cafeteria plan nondiscrimination testing. However, if the IRS audits an employer, the employer will need to furnish the results of the required testing and documentation of the employer's corrective actions in response to any failed tests.

Plan Contributions- Cafeteria Plans

Consequences of Failing the Section 125 Nondiscrimination Tests

A highly compensated participant or key employee in a discriminatory cafeteria plan must include in gross income the value of the taxable benefit with the greatest value that the employee could have elected to receive, even if the employee elects to receive only the nontaxable benefits offered. This requires both the employer and the affected employees to amend past tax filings to account for undeclared gross income, unpaid Social Security, FICA, FUTA and more.

Plan Contributions- Self Funded

Under Section 105(h), plans cannot discriminate in favor of highly compensated individuals.

For purposes of Section 105(h), a **highly compensated individual** is an individual who is:

- One of the five highest-paid officers
- A shareholder who owns more than 10 percent of the value of stock of the employer's stock
- Among the highest-paid 25 percent of all employees (other than excludable employees who are not participants)

Plan Contributions- Self Funded

If the plan fails the nondiscrimination tests, then highly compensated individuals' excess reimbursements will be taxable. If the plan is discriminatory, then non-highly compensated individuals will not lose their tax benefits and the plan will not lose its status as a valid Section 105 plan.

Amounts that are excess reimbursement are includable in a highly compensated individual's income; the excess reimbursement calculation varies based on whether the benefits were paid to highly compensated individuals due to either discriminatory coverage for failing to meet the Eligibility Test, or discriminatory benefits for failing to meet the Benefits Test, or both.

Plan Contributions- ADEA

Employers with member level rates (age banded rates) for employees sometimes provide all employees with an equal percentage contribution, but others might wish to provide a flat contribution amount.

- The ADEA is not violated when the benefits provided to older workers are equal to the benefits provided to younger workers

Plan Contributions- ADEA

If an employer charges older employees more for the same benefit, they should be able to generally show that

- The benefits become more expensive w/ increasing age
- Benefit is part of a bona fide plan
- Actual amount of cost incurred on behalf of the older worker is no less than is made for the younger worker (employer is paying as much for older workers than younger)
- Benefits are more expensive, only to the extent needed to achieve approximate equivalency
- You don't use age brackets larger than 5 years

Plan Contributions- Changes

Can an employer change their contribution level mid-year?

YES!

Depending on the types of changes that are made to a plan, an employer generally must provide notice within one of three time frames:

- 60 days **prior to** the change
- No later than 60 days **after** the change (or, within 60 days of the change)
- Within 210 days after the end of the plan year

Plan Contributions- Changes

A decrease in employer contribution would be a material reduction in covered services or benefits so notice should be provided within 60 days of the change in employer contribution.

Depending on the changes that are made to a plan, an employer must provide notice within one of three time frames:

- 60 days **prior to** the change
- No later than 60 days **after** the change (or, within 60 days of the change)
- Within 210 days after the end of the plan year

Plan Contributions- Changes

As a best practice, an employer should give advance notice of the change.

For practical purposes, employees should be told prior to the first increased withholding; angering them so they feel inclined to complain to the DOL is never an optimal situation.

Be aware that this can trigger a cafeteria plan qualifying event “significant cost change”

Plan Contributions- Changes

A plan may permit individuals to make election changes due to significant cost changes. For this rule to apply the following must be met:

- A benefit plan must be an eligible qualified benefit other than a health FSA.
- The cafeteria plan document must include language regarding significant cost changes.
- The cost-change being passed on in the form of changed participant contributions must be significant.
- A determination must be made whether any alternative coverage is similar.

Plan Contributions- Changes

Employees would only be permitted to revoke or drop coverage due to a cost change if no similar coverage option is available, which is defined as “coverage of the same category of benefits for the same individuals.”

If an employer offers two medical plans, one that is expensive and one that is inexpensive, regardless of the cost change, an employee would only be permitted to switch to the other plan, not revoke coverage entirely.

This rule would apply even if the two medical plans were very different, such as an HMO versus a high deductible health plan (HDHP).

Plan Contributions- Pay Shortage

Plan participants who have a low rate of pay, take an unpaid leave of absence, are paid based on commissions, are tipped employees, or who have a wage garnishment, might not earn enough at times to pay for their cafeteria plan elections.

- Sometimes the pay shortage will be combined with or is the result of an event that causes a loss of benefit eligibility.
- Sometimes though, a participant will remain eligible for the plan.
 - Employers are left to determine how to handle the pay shortage.

Plan Contributions- Pay Shortage

The IRS has not provided guidance or regulation for handling pay shortages without a loss of benefit eligibility.

As a result, employers often refer to the rules provided for handling employee contributions during an employee's unpaid Family Medical Leave Act (FMLA) leave.

- Pre-payment
- Pay-as-you-go on an after-tax basis
- Catch-up salary reduction upon return from leave

Plan Contributions- Pay Shortage

Employers should ensure that they have a written policy that is available to employees regarding pay shortages in relation to benefit elections.

- The written policy should be uniformly enforced for all employees.
- Employers may set a time limit for the employee to catch up on contributions before terminating coverage, as well as a maximum period of time over which employees may spread payments.
- Thirty or 60 days is likely to be a reasonable time limit to allow employees to make up missed payments.

Plan Contributions- Pay Shortage

- Employees should be allowed uniform periods of time to pay back missed contributions; for instance, management should not be given three months to pay back missed contributions when other staff members are only given one month (or vice versa).
- Employers should also have a written policy regarding the order of benefit funding in case an employee has elected multiple benefits (such as health, life insurance, dental, or disability).
- It would be in many employers' best interest to require that health coverage be funded first for purposes of health care reform.

RESOURCES

<https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/hipaa-compliance>



QUESTIONS?

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