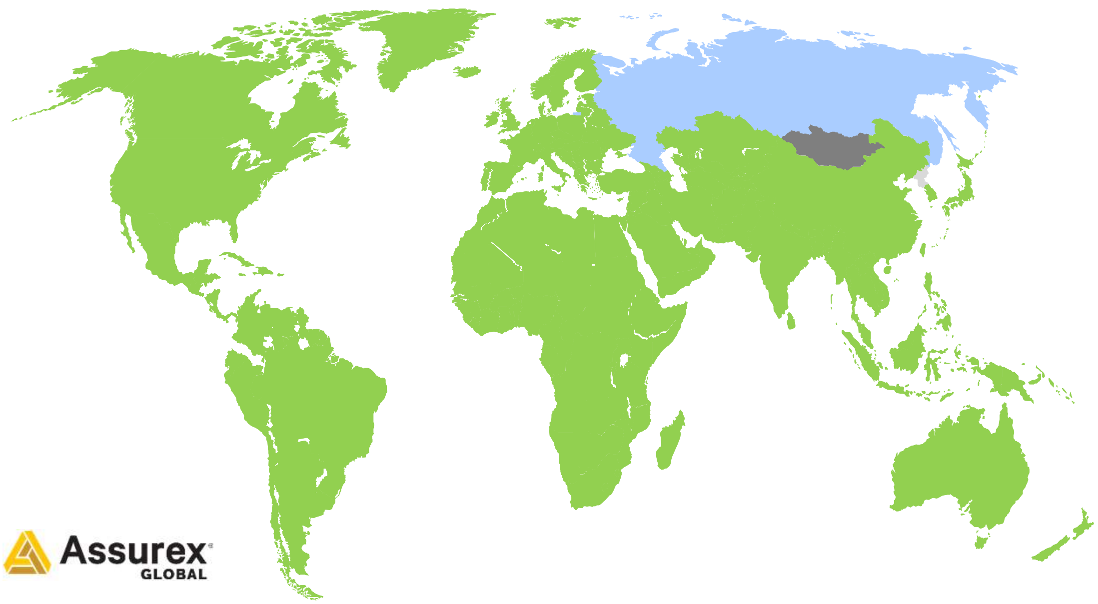
Nondiscrimination Rules

Presented by Lumelight

June 2026

Thank you to the following Assurex Global Partners for sponsoring today's webinar

- C3 Risk & Insurance Services
- CCIG
- Christensen Group Insurance
- Collier Insurance
- Cottingham & Butler
- Cragin & Pike, Inc.
- The Daniel & Henry Co.
- Dean & Draper Insurance Agency
- Gibson Insurance Agency
- Henderson Brothers, Inc.
- Houchens Insurance Group
- The IMA Financial Group
- INSURICA
- Kapnick Insurance Group
- The Mahoney Group
- The MJ Companies
- Oswald Companies
- The Partners Group
- The Plexus Groupe R&R Insurance
- RCM&D
- Scott Insurance
- Snellings Walters
- Starkweather & Shepley
- Sterling Seacrest Pritchard
- Unison Risk Advisors
- WA Group
- Watkins Insurance Group
- Wells Insurance



= Assurex Global territories
= Non-Assurex Global agreement territories
= Sanctioned territories (Iran, North Korea & Russia)

Assurex Global is an exclusive partnership of the most prominent independent insurance agents, brokers, and technical specialists in the world.

Assurex GLOBAL

Benefit Differentiation – When is it Permissible?

Assurex GLOBAL

Benefit Differentiation

COMMON QUESTION: Can we differ -------------- (e.g., waiting period, benefits, employer contributions, opt-out incentives) for Employee A?

ANSWER: Not a good idea

- Differing benefits on an employee-by-employee basis risks claims of discrimination against a protected class (e.g., gender, age, health status)

Assurex GLOBAL

Benefit Differentiation

- **ERISA** requires benefits to be offered uniformly within bona fide classes
- **HIPAA** rules prohibit discrimination based on health status
- The **Age Discrimination in Employment Act (ADEA)** prohibits discriminating against older employees
- The **Americans with Disabilities Act (ADA)** prohibits discriminating based on a disability
- **Medicare Secondary Payer (MSP)** rules prohibit differentiating based on Medicare-eligibility and/or incenting individuals to waive the employer's plan in favor of Medicare
- **Title VII** prohibits discrimination in compensation, terms, conditions, and privileges of employment based on race, color, religion, sex, and national origin.
- The **Genetic Information Nondiscrimination Act (GINA)** prohibits discrimination based on genetic information

Benefit Differentiation

COMMON QUESTION: Can we differ ------------- (e.g., waiting period, benefits, employer contributions, opt-out incentives) for different classes/categories of employees?

ANSWER: Generally yes, subject to tax benefit nondiscrimination rules, which restrict the ability to favor highly compensated or key employees

Tax Benefit Nondiscrimination Rules

Tax Benefit Nondiscrimination Rules

- IRS permits large dollar amounts contributed toward benefits to be excluded from employees' taxable wages and employer payroll taxes BUT benefits cannot overly favor highly compensated or key employees
  - Monitored and enforced by the IRS
  - Failure risks the highly compensated and key employees being taxed on benefits received under the discriminatory plan

Assurex GLOBAL

Tax Benefit Nondiscrimination Rules

Tax Benefit Nondiscrimination Rules

- §125 Cafeteria Plan Benefits
- §105(h) Self-Funded Group Health Plans
- §129 Dependent Care Account Plans (DCAPs)
- §79 Life Insurance
- §127 Educational Assistance Programs
- §137 Adoption Assistance Programs

Examples

Fully-insured medical, dental, vision, life, health FSA, HSA and DCAP offered through a cafeteria plan

- Aggregated benefits are subject to §125 rules
- Life insurance is subject to §79
- Health FSA is subject to §105(h) rules
- DCAP is subject to §129 rules

Fully-insured medical, dental and vision offered through a cafeteria plan + an HRA

- Medical, dental and vision plan are aggregated and subject to §125 rules
- HRA is subject to §105(h) rules

Assurex GLOBAL

HSAs

- Not Run Through Employer's Cafeteria Plan
  - Subject to comparability rules, which generally require uniform employer HSA contributions by tier of coverage
- Run Through Employer's Cafeteria Plan (More Common)
  - Not subject to any nondiscrimination rules on its own, but aggregated with other benefits run through the employer's cafeteria plan for purposes §125 discrimination testing

Assurex GLOBAL

Highly Compensated Individuals (HCIs)

Highly Compensated Individuals (HCIs)

§125

- Officers
- >5% shareholders if also employees
- Highly compensated (2026 – $160,000 in 2025)*

§129

- >5% shareholders if also employees
- Highly compensated (2026 – $160,000 in 2025)*

§105(h)

- 5 highest paid officers
- >10% shareholders if also employees
- Top 25% highest-paid employees

For §125 and §129, employers can make a top-paid election, choosing instead to count top-paid 20% as HCIs rather than using the compensation threshold

Highly Compensated Individuals (HCIs)

Example 1: 500 employees, all earn $125,000 or less

- No HCIs other than any officers under §125 and §129
- Top 25% highest paid (125 employees) are HCIs under §105(h)

Example 2: 500 employees, all of whom earn >$180,000

- All are HCIs under §125 and §129 unless top-paid election is a made (top-paid 20% (100 employees) are then HCIs)
- Top 25% highest paid (125 employees) are HCIs under §105(h)

Key Employees

- §125 and §79
  - Officers with annual compensation >$235,000 (during 2025) for 2026
  - >5% owners if also employees
  - >1% owners with annual compensation >$150,000

Owners & Non-Employees

- Exclude/Ignore Owners & Non-Employees
  - Owners (e.g., sole proprietor, partner or >2% S-Corp shareholder) cannot participate on the same tax-favored basis as employees and are not considered for purposes of discrimination testing
  - Non-employees (e.g., board members, independent contractors) cannot participate on the same tax-favored basis as employees and are not considered for purposes of discrimination testing

Common Employer Scenarios

- **Differing Waiting Periods** – Salaried employees eligible date of hire; hourly employees eligible 1st of the month following 60 days
- **Differing Eligibility** – Managers are offered a basic and buy-up medical plan; all other full-time employees are offered the basic medical plan
- **Differing Contributions** – Employer contribution increases with tenure

Permissible?
MAYBE…depends on the mix of highly compensated and non-highly compensated employees eligible/participating

Assurex GLOBAL

Nondiscrimination Tests

- **§125**
  - Eligibility Test
  - Contributions & Benefits Test
  - Key Employee Concentration Test
- **§105(h)**
  - Eligibility Test
  - Benefits Test
- **§129**
  - Eligibility Test
  - Contributions & Benefits Test
  - More Than 5% Owners Concentration Test
  - 55% Average Benefits Test
- **§79**
  - Eligibility Test
  - Benefits Test

For a premium-only plan (POP), only necessary to pass the eligibility test

Assurex GLOBAL

Discrimination Testing – Data Required

- Employee census (all employees)
- Annual compensation for all employees and designate any officers
- Benefit offerings
- Benefit eligibility for all employees
- Actual participation/elections by employees

TIPS

- Make sure to include all entities within the same controlled group or affiliated service group
- For §125 testing, include all benefits run through the employer's cafeteria plan

Discrimination Testing – Timing

- No Clear Penalty for Failure to Test
  - If audited, must show the plan met nondiscrimination requirements (keep applicable data for 7 years)

Conservative approach	Practical approach
• Test at least annually • Testing in the first half of the year leaves time to make corrections if needed	• Run tests initially, but if plans pass, test again when there are significant changes in structure or participation

Assurex GLOBAL

§125 Testing – Cafeteria Plans

Eligibility Test

- Cannot discriminate as to eligibility to participate
- Consider all employees except:
  - Employees covered by a collectively bargained plan;
  - Nonresident aliens with no U.S. source income; and
  - Employees participating in the cafeteria plan as COBRA participants

Contributions & Benefits Test

- Cannot discriminate as to contributions and benefits
  - Uniform availability
  - Highly compensated participants (HCPs) cannot utilize more non-taxable benefits than non-HCPs

Key Employee Concentration Test

- Key employees cannot utilize >25% of non-taxable benefits

Assurex GLOBAL

§125 Eligibility Test

Non-HCIs who are eligible to participate / All non-excludable non-HCIs

– divided by –

HCIs who are eligible to participate / All non-excludable HCIs

Ratio/Percentage that must be met depends on employer's total number of employees and number of HCIs versus non-HCIs

§125 Eligibility Test

- Separate testing groups needed, for example:
  - Different benefits offered to different entities within the same controlled group
  - Diffferent benefits for hourly versus salaried employees

↓

- Total employees = 300 (200 in Group A, 100 in Group B)
- Total eligible employees = 250 (175 in Group A, 75 in Group B)
- Total HCIs = 50 (35 in Group A, 15 in Group B), assume all HCIs eligible

Group A

140/300 ÷ 35/50

Group B

60/300 ÷ 15/50

Assurex GLOBAL

§125 Contributions & Benefits Test

- Availability – Subjective
  - All similarly situated employees must get the same employer contribution OR have a uniform opportunity to elect benefits
  - "Similarly Situated" – generally should use separate testing groups for the eligibility test if differences other than between tiers of coverage or geographical locations

- Utilization – Mathematical

Benefits elected by HCIs ÷ HCIs' compensation	Benefits elected by non-HCIs ÷ Non-HCIs' compensation

Percentage for HCIs must be less than percentage for non-HCIs

§105(h) Testing – Self-Funded Group Health Plans

Eligibility Test

Cannot discriminate as to eligibility to benefit

- Consider all employees except the following, but only if not eligible to participate:
  - Employees with <3 years of service;
  - Employees <25 years of age; and
  - Part-time or seasonal employees

Benefits Test

Benefits provided cannot discriminate in favor of HCIs

- Are all participants eligible for the same benefits under the plan?
- Are all benefits offered under the same conditions to all participants?
- Are disparate waiting periods being used?

Assurex GLOBAL

§129 Testing – DCAPs

Eligibility Test	Cannot discriminate as to eligibility to participate
Contributions & Benefits Test	Cannot discriminate as to contributions and benefits
More-Than-5% Owners Test	Owners cannot receive >25% of the benefits run through the plan
55% Average Benefits Test	Average benefits provided to the non-HCIs must be at least 55% of the average benefits provided to HCIs

Assurex GLOBAL

Consequences for a Discriminatory Plan

- If plan adjustments are not made before the end of the plan year and a plan fails any of the applicable discrimination tests:
  - Highly compensated and key employees may be taxed retroactively on all benefits elected/received
  - Employer may owe retroactive payroll taxes
  - Late penalties may apply for both

Assurex GLOBAL

Corrections – Current Plan Year

- Reduce the amount or percentage of tax-favored benefits available to highly compensated or key employees to provide a passing result

	Options For Corrections
Plan Premiums	• Handle remaining employee contributions after-tax • Impute taxable income for remaining employer contributions • Include previously made contributions in the employees' taxable income
FSA or HSA	• Limit further tax-favored contributions • Return already contributed (but unused) amounts as taxable income • Include already reimbursed amounts in employees' taxable income
HRA	• Include previously reimbursed amounts in employees' taxable income • Do not provide any further reimbursement for the remainder of the plan year

Assurex GLOBAL

Strategies to Fix Future Plan Years

Exclude HCIs or keys from participating, or from participating on a tax-favored basis (i.e., employee contributions after-tax, impute income for employer's contribution)

Limit amounts elected by HCIs or keys on a tax-favored basis

Adjust eligibility rules to include additional non-HCIs

Questions

Webinar Wrap-Up

Thank you to the following Assurex Global Partner Firms for sponsoring this event:

- C3 Risk & Insurance Services
- CCIG
- Christensen Group Insurance
- Collier Insurance
- Cottingham & Butler
- Cragin & Pike, Inc.
- The Daniel & Henry Co.
- Dean & Draper Insurance Agency
- Gibson Insurance Agency
- Henderson Brothers, Inc.
- Houchens Insurance Group
- The IMA Financial Group
- INSURICA
- Kapnick Insurance Group
- The Mahoney Group
- The MJ Companies
- Oswald Companies
- The Partners Group
- The Plexus Groupe
- R&R Insurance
- RCM&D
- Scott Insurance
- Snellings Walters
- Starkweather & Shepley
- Sterling Seacrest Pritchard
- Unison Risk Advisors
- WA Group
- Watkins Insurance Group
- Wells Insurance

A link to the recording of today's session will be available early next week from the Assurex Global Partner Firm who invited you to today's event.

Assurex GLOBAL

Assurex Global in Numbers

30k+ Employees

100+ Partner Firms

$47B Annual Premium

$5B Annual Revenue

730+ Partner Offices

175 Countries