



# Benefit Differences and Discrimination Considerations

Employers that sponsor group health plans are often interested in offering benefits to different groups of employees in distinct ways. There are several reasons that employers consider this, and common examples include:

- Employers with multiple locations or in multiple states wanting to offer different benefit plans at each location or within each state. This can be due to differences in state laws, premium differences across each group or the type of employee population at each location with different benefit needs.
- Employers wanting to offer longer tenured employees richer benefits or lower premiums to reward their years of service.
- Employers wanting to offer certain point solutions (i.e., on-site clinics, diabetes care, muscular/skeletal care) at a location with greater health needs.
- Employers wanting to offer richer benefits to employees who work more hours, such as those who work 40+ hours a week (with more basic benefits for employees working 30-39 hours a week).
- Employers wanting to offer different premium amounts to different employee populations based on job type or method of payment (i.e., hourly versus salary).

There are no specific rules that require an employer to offer benefits uniformly; however, there are several non-discrimination rules that must be reviewed any time an employer isn't offering benefits uniformly across locations or employees. Some rules look only to the design of the plan, while others require a review of both the design and the actual participation or operations.

**The four main rules to consider are:**

- HIPAA, which prohibits discrimination on the basis of a health factor.
- Section 1557 of the ACA, which prohibits discrimination on the basis of race, national origin, sex, age or disability.
- IRS Section 125, which prohibits employers from favoring or disproportionately offering benefits pre-tax to certain groups of highly paid or key employees.
- IRS Section 105(h), which applies to self-funded and level-funded plans and prevents employers from favoring or disproportionately offering benefits to certain groups of highly paid or key employees.

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If any employer is considering a benefit plan design that is not 100% uniform for all employees, then the following decision tree should be considered:

**Does the difference discriminate on the basis of a health factor?**

**Does the difference discriminate on the basis of race, sex, gender, national origin, age or disability?**

**Does the difference lead to better/richer/less expensive benefits for highly compensated and key employees?**

**Does the difference in the self-funded plan lead to better/richer/less expensive benefits for highly compensated and key employees?**

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There are some plan designs that will fail regardless of the employer’s specific population, and others might be acceptable for one employer and not another, based on the distribution of their highly compensated and key employees. For instance, no employer can pay for individual Marketplace coverage for high-cost claimants, as this is discrimination based on a health factor (even if the Marketplace plan is richer) and violates other regulations related to individual premium reimbursements.

An employer with a spread of highly paid employees across multiple locations might be able to lower premium contributions for employees at a certain location without violating Section 125 or 105(h). A different employer might fail those same tests if the location with the lower premium has a heavy concentration of highly compensated employees. Similar logic would apply if an employer wanted to implement a richer benefit plan at one location or for a certain population of employees.

To determine if a plan is discriminatory under Section 125 or 105(h), the testing must be run on the specific employee population. An employer or a broker cannot “eyeball” a plan and determine if it is discriminatory or not, in part because a specific employer’s census data is key to running the testing, and every census is unique.

Below are common plan design considerations that are either prohibited under these non-discrimination rules or require testing to ensure compliance with the applicable regulations:

### HIPAA

- Charging tobacco users higher premiums without a bona fide wellness program.
- Offering "special" plans to employees with high claims to keep them off the main group health plan(s).
- Paying for individual Marketplace coverage for high-cost claimants.
- Prohibiting individuals who ski/skydive/ride motorcycles from participating in the health plans.

### ACA SECTION 1557

- Excluding coverage for the treatment of gender dysphoria.
- Limiting medical exams (i.e., pelvic/prostate/breast) based on gender assigned at birth or recorded gender.

### SECTION 125

- Providing executives with additional group health plan benefits outside of the group health plan offered to rank and file employees.
- Potential triggers include:
  - Different premiums for different locations
  - Different premiums based on years of service
  - Different premiums based on how employees are paid.

### SECTION 105(h)

- Providing executives with additional group health plan benefits outside of the self-funded or level-funded group health plan offered to rank and file employees.
- Potential triggers include:
  - Different premiums for different locations
  - Different premiums based on years of service
  - Different premiums based on how employees are paid.



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## Your Contact

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### Employee Name

Title of Employee

**M** 978-302-7156 **D** 617-570-9100

[employee.name@aleragroup.com](mailto:employee.name@aleragroup.com)

### Company Name

1234 Main Street, Suite 1234

City, ST 01234

123-456-7890 | [website.com](https://www.website.com)

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