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Benefit Advisors Network *Inform on Reform* | Legal eBlast

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Simple Cafeteria Plans

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Effective January 1, 2011, the Patient Protection and Affordable Care Act permits eligible small employers to offer cafeteria plans to their employees without having to satisfy the cafeteria plan nondiscrimination requirements or the nondiscrimination requirements for group term life insurance and health care and dependent care flexible spending accounts.

As you may know, a cafeteria plan is a separate written plan under which employees are permitted to choose between at least one permitted taxable benefit (e.g., unreduced cash compensation), and at least one qualified benefit (e.g., health insurance).

Under the so-called "safe harbor" from the nondiscrimination testing requirements, the cafeteria plan and the underlying benefits will be treated as meeting the specified nondiscrimination requirements if the plan satisfies minimum eligibility and participation requirements and minimum contribution requirements.

Eligible Employer

An eligible employer is an employer that employed an average of 100 or fewer employees on business days during either of the two preceding years. If an employer was an eligible employer for any given year, then the employer remains an eligible employer until the employer employs an average of 200 or more employees during any year preceding any such subsequent year. **Note:** IRS tax controlled group rules apply.

Eligibility Requirements

The eligibility requirement is met only if all employees (other than excludable employees) are eligible to participate, and each employee eligible to participate can elect any benefit available under the plan. Excludable employees for purposes of a simple cafeteria plan are those who:

- have not attained age 21 before the end of the plan year;
- have fewer than 1,000 hours of service in the preceding year;
- have not completed one year of service as of any day during the plan year; or
- are union employees or nonresident aliens.

Minimum Contribution Requirements

The minimum contribution requirement is met if the employer provides a minimum contribution for each non-HCE[1] in addition to any salary reduction contributions made by the employee. The minimum must be able to be applied toward the cost of any qualified benefit (other than a taxable benefit) offered under the plan. The contribution must be equal to:

- A uniform percentage (not less than 2%) of the employee's compensation for the plan year, or
- An amount which is not less than the lesser of:

- 6% of the employee's compensation for the year, or
- 2x the amount of employees' salary reductions (employers cannot favor HCEs with respect to contribution rate).

We will continue to update our clients on new developments in this rapidly changing area of the law. In the meantime, please feel free to contact your Proskauer attorney or any member of our Health Care Reform Task Force should you have questions regarding any aspect of health care reform.

[1] An HCE, or highly compensated employee, for cafeteria plan purposes, is any employee who, for the prior year (or current year if a new employee) is an officer, 5% shareholder, or who received compensation greater than \$110,000 in 2010 (indexed for inflation) and who is among the top 20% of the employees ranked by compensation.

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