

## Section 125 SIMPLE Cafeteria Plan Checklist

Effective as of plans beginning after September 23, 2010, a small employer may implement a simple Cafeteria Plan. To implement such a plan; the Employer must fill in the blanks and adopt by Corporate Resolution this Plan. Then attach the Standard Section 125 Plan documents and Summary Plan Descriptions provided and you have a valid, binding, and legal Section 125 Simple Cafeteria Plan:

**Eligible small employers.** An employer eligible to establish a simple cafeteria plan is any employer that, during either of the two preceding years, employed an average of 100 or fewer employees on business days. For purposes of this rule, a year may only be taken into account if the employer was in existence throughout the year. If an employer was not in existence throughout the preceding year, the employer may nonetheless be considered as an eligible employer if it reasonably expects to average 100 or fewer employees on business days during the current year.

If an employer has 100 or fewer employees for any year and establishes a simple cafeteria plan for that year, then it can be treated as meeting the requirement for any subsequent year even if the employer employs more than 100 employees in the subsequent year.

However, this exception does not apply if the employer employs an average of 200 or more employees during the subsequent year. This provision allows small but growing employers to continue to offer simple cafeteria plan benefits to employees without the concern of having to meet the discrimination requirements by having to switch to a classic cafeteria plan. Without this exception, the establishment of simple cafeteria plans could create a disincentive to increased hiring.

For purposes of determining the number of employees, the "controlled group" rules under Code Sec. 52, applying the rules of Code Sec. 1563, (except that a "more than 50 percent" threshold is substituted for "at least 80 percent" in Code Sec. 1563(a)(1), and Code Secs. 1563(a)(4) and (e)(3)(C) are disregarded) and Code Sec. 414 (relating to controlled and affiliated service groups) apply for purposes of determining an eligible employer. Thus, before establishing a simple cafeteria plan, a small employer needs to make sure that employees of an affiliate either are excluded or do not cause the employer to exceed the employer size threshold.

\_\_\_ (Y/N) As of this date \_\_\_\_\_ I certify that our Company has on average 100 or fewer employees.

\_\_\_ (Y/N) As of this date \_\_\_\_\_ I certify that our Company has met the exception on average of having less than 200 employees during the subsequent year.

**Contribution requirements.** A simple cafeteria plan must also meet rigid contribution requirements on the part of the employer. The contribution requirements are met if the employer is required by the plan, regardless of whether a qualified employee makes any salary reduction contribution, to make a contribution to provide qualified benefits on behalf of each qualified employee, in an amount equal to: (1) a uniform percentage (not less than two percent) of the employee's compensation for the year, or (2) an amount not less than the lesser of: (a) six percent of the employee's compensation for the plan year or (b) twice the amount of the salary reduction contributions of each qualified employee.

If the employer bases the satisfaction of the contribution requirements on the second option, it will not be treated as met if the rate of contributions with respect to any salary reduction contribution of a highly compensated or key employee is greater than that with respect to any other employee. Beyond this prohibition, the established contribution requirements are not to be treated as prohibiting an employer from making contributions to provide qualified benefits under the plan in addition to the required contributions.

For purposes of the contribution requirements, a salary reduction contribution is any amount contributed to the plan at the election of the employee and not includable in the employee's gross income under the cafeteria plan provisions. The terms "highly compensated employee" and "key employee" retain their definitions under the classic cafeteria plan provisions. A "qualified employee" is any employee who is not a highly compensated or key employee.

\_\_\_ (Y/N) As of this date \_\_\_\_\_ I certify that our Company had sufficient employer contributions and/or employee salary reductions.

**Eligibility, participation requirements.** A simple cafeteria plan must also satisfy minimum eligibility and participation requirements. The requirements are met if all employees who had at least 1,000 hours of service for the preceding plan year are eligible to participate and if each employee eligible to participate may elect any benefit under the plan, subject to terms and conditions applicable to all participants.

An employer may elect to exclude from the plan, regardless of the satisfaction of the 1,000 hour requirement, employees who have not attained the age of 21 before the close of the plan year, employees who have less than one year of service with the employer as of any day during the plan year, employees who are covered under a collective bargaining agreement if there is evidence that the benefits covered under the plan were the subject of good faith bargaining between employee representatives and the employer, or employees who are nonresident aliens working outside the United States whose income did not come from a U.S. source.

References to employers with regard to simple cafeteria plans include references to predecessors of such employers. This means that, among other considerations, for purposes of determining the qualification of a business that has recently changed ownership, the fact that the previous owner had 100 or fewer employees in a preceding year can be used to determine eligibility of the current ownership to establish a simple cafeteria plan. Also, any person treated as a single employer for purposes of the Work Opportunity Credit or for purposes of deferred compensation rules under Code Secs. 414(n) or (o) are to be treated as one person for purposes of simple cafeteria plans.

\_\_\_ (Y/N) As of this date \_\_\_\_\_ I certify that our Company met the minimal eligibility requirements set forth above and the definition of employee.

**Satisfaction of nondiscrimination tests.** Traditional cafeteria plans are subject to extensive, complicated nondiscrimination rules, which prohibit these plans from favoring highly compensated employees as to eligibility to participate, contributions, or benefits. If these nondiscrimination rules are violated, the value of the taxable benefits that the employee could have selected are included in the employee's income.

If the other simple cafeteria plan rules are met, the nondiscrimination requirements that apply to traditional cafeteria plans are deemed to be met. Mostly importantly, these include any nondiscrimination requirement applicable to a classic cafeteria plan under Code Sec. 125(b) (which consists of (1) an eligibility test, (2) a contributions and benefits test, and (3) a key employee concentration test). However, in addition, some of the nondiscrimination rules relating to certain cafeteria plan components are also deemed to be satisfied.

\_\_\_ (Y/N) As of this date \_\_\_\_\_ I certify that our Company have met all the discrimination tests as required under the Simple Cafeteria Plan.

Resolution: Our Company hereby adopts the provisions of this Section 125 Simple Cafeteria Plan effective as of the date below.

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Company: \_\_\_\_\_

Dated: \_\_\_\_\_