

Elise Feldman Testimony for The Committee on Small Business Subcommittee on  
Economic Growth, Tax, and Capital Access, Hearing titled "Cafeteria Plans: A  
Menu of Non-Options for Small Business Owners

Thursday, March 16, 2017

Room 2360 Rayburn House Office Building

My name is Elise Feldman, President of Feldman Benefit Services, Inc. with offices in Springfield, New Jersey and Boca Raton, Florida. I am a Certified Pension Consultant and Accredited Investment Fiduciary. I also own Outsource, Inc., a Human Resources consulting firm. I am most pleased to be sharing my testimony with the Committee and thank you for inviting me to do so.

Our firm is a full-service actuarial and employee benefits company, which clients are small to mid-sized businesses, ranging in size from 1 - 3,000 employees. The majority are closely owned, generally 1 - 10 owners and under 100 employees (unless a professional service firm such as accounting or legal which would have more partners.)

We have approximately 350 clients. The primary services we provide are in regard to qualified retirement plans. In addition, we provide services for non-qualified deferred compensation plans and certain welfare benefit plans. We either provide "full service" or consulting services for Section 125 Cafeteria Plans.

The Section 125 Plan services include annual testing (eligibility, key employee and concentration tests), annual compliance letters, and for those with flexible spending accounts, we provide reimbursement handling. When over 100 employees, we prepare the 5500 Annual Reporting Forms. Through providing these services, I have seen first-hand how the existing laws and regulations that apply to cafeteria plans impact the decisions that small business owners make with respect to the benefits that they offer.

As a result of current laws and regulations, owner-employees cannot participate in a Section 125 plan they sponsor for their employees unless they are a C Corporation. Very few small businesses are organized as C-Corporations. Rather small businesses tend to be organized as Sub Chapter S Corporations, LLCs or LLPs. Our small business clients tend to have a "paternalistic" attitude towards protecting their employees, as they recognize the business would not be as successful were it not for their efforts. As a result, these employers want to offer benefits to their employees. In addition to other benefits they may provide, the most common (and, to employees, perhaps the most valuable) benefit that our clients tend offer is health insurance, though with a premium sharing arrangement, with the employer paying part of the premium and the employee paying the rest. However, if the business does not sponsor a Section 125 plan, the employees will only be able to pay their portion of the premium with after-tax dollars. Thus, it makes good financial sense to encourage small businesses to sponsor Section 125 plans which can allow, among other things, the employees to pay their share of premium on a pre-tax basis.



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In addition to health insurance premium payments, those employers that sponsor Section 125 plans can make a number of other benefits available to employees, such as the Medical Reimbursement benefit as well as the Dependent Care benefit. These benefits give the employees an opportunity to provide better health care for themselves and their family members, because the Section 125 plan structure enables the employees to do so more easily and more affordably (because the contributions are made on a pre-tax basis). The option to take advantage of these benefits is generally appreciated by the employees.

However, while sponsoring a Section 125 plan can be good for employees, under current law, small businesses owners who incur the expense and administrative burden of setting up a plan must do so with the understanding that they will not be able to participate in the plans themselves. For these owner-employees, their ability to utilize the benefits, most importantly the medical reimbursement and dependent care provisions, is solely because of their small size and form of entity. Had these individuals been employees and not owners, or had the business been a C-Corporation this would not be the case.

I would like to give you an example: On Monday, I had a meeting with an attorney in my office building, and I mentioned that I was coming here today. He then mentioned that his wife did not believe him when he told her he could not be in one of these plans.

Interestingly, even if the lawyer had been allowed to participate in the plan, assuming he was not an owner of a pass-through entity, he would have only been allowed very few benefits in the plan because of the onerous discrimination tests imposed on cafeteria plans (absent the firm adopting a SIMPLE cafeteria plan). For instance, if I and my company's Actuary who is also an owner, were allowed to participate in our cafeteria plan, the discrimination tests would fail. Correction by lowering the amount the two owners put in would enable it to pass the concentration test. Alternatively, if we were allowed to participate, we could decide to change to the SIMPLE cafeteria plan which would require the company to put in contributions for our employees, but in exchange we would not be required to do the overly complex and frankly unfair tests imposed by the cafeteria plan rules on small businesses.

Because the law firm upstairs has more owners and fewer employees, the way the testing works in the context of a small business would have caused their testing results to not come in as well as my company's and the contributions for the owner-employees would have been far more restricted.

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Each year, as we offer Section 125 services for our clients, we get the same routine questions from both the employer and employees.

The owner-employee asks "when will I be able to participate?", as well as "when will we be able to offer over-the-counter medications again?"

As the medical and pharmaceutical industries have now adjusted so that medications which were previously only available by prescription can now be obtained over the counter, the financial dynamics have changed. Eye drops, allergy, and stomach medications, to only name a few types, must be paid for with after-tax dollars. Restoring the pre-tax benefit for over the counter medications would enable employees to better afford their medications. Employees who feel better, work better, are healthier, and more productive.

Lastly, employees ask if there will be any significant increases to both the annual medical reimbursement and dependent care limits. Health care costs continue to rise. More dual income families are now in the workforce, and the cost of providing child care has continued to increase. The dependent care limits, however, have remained unchanged since the 1980's. Increasing the amount that employees can contribute to their Section 125 plans for these purposes will help employees cover these necessary costs.

I welcome the opportunity to answer your questions.

