

Key Employee and Highly Compensated Individual Designations

Identify all Key Employees and Highly Compensated Employees in your organization applying the criteria below. An individual may simultaneously be both a Key Employee and a Highly Compensated Employee. An individual may meet the definitions below **by simply satisfying one** of the criteria in each category listed below. **NOTE: Sub S owners, partners, members of a limited liability company, and sole proprietors by law are not eligible to participate, are not employees and should not be listed.**

KEY EMPLOYEE

(as defined under Section 416(i)(I) of IRC)

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| 1. Officer and earns \$160,000 or more per year; OR |
| 2. 1% owner of the employer earning in excess of \$150,000 (or is considered as owning within the meaning of section 318); OR |
| 3. Owns (or is considered as owning within the meaning of section 318) 5% or more of stock; OR |
| 4. The spouse, lineal descendants (parents, children, or grandchildren), or lineal descendants of the spouse of one of the above. |

A. Please list all Key Employees

- | | |
|----------|----------|
| 1. _____ | 4. _____ |
| 2. _____ | 5. _____ |
| 3. _____ | 6. _____ |

HIGHLY COMPENSATED INDIVIDUAL (“HCI”)

(as defined under Section 414(q) of IRC)

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|--|
| 1. An Officer; OR |
| 2. Owns 5 % or more of stock; OR |
| 3. Any employee earning \$110,000 per year or more AND, if elected by the employer, in the top paid group (top 20 % ranked by annual compensation for preceding year or for current year if first year of employment); OR |
| 4. A spouse or dependent of one of the above. |

B. Please list all Highly Compensated Individuals

- | | |
|----------|----------|
| 1. _____ | 4. _____ |
| 2. _____ | 5. _____ |
| 3. _____ | 6. _____ |

Any changes to Plan Year elections, or any additions to who has been reported as a Key Employee and/or a Highly Compensated Individual on Page 2 of this worksheet, must be reported to our offices promptly. Approximately 60 days before your Plan Year ends, you will be sent a notice reminding you about the necessity to report any election changes and/or changes to the Key Employee and HCI designations. Any changes to Key Employee and HCI Designation and/or election changes made throughout the Plan Year may have an impact on the testing results as of the last day of the Plan Year.

I certify that I am authorized to complete and execute this document on behalf of the Employer and Plan. The above information I have provided to Benefits Design Group, Inc. is complete and accurate. I understand that Benefits Design Group, Inc. will perform nondiscrimination testing for the Plan based solely on the information I have provided and that Benefits Design Group, Inc. is not obligated and will not independently verify the information I have provided. The Employer and Plan will indemnify and hold Benefits Design Group, Inc. harmless from any consequences related to errors related to incomplete and/or inaccurate information.

 (“Employer”)

Date: _____

 Authorized Signature

 Print Name

 Title

Please complete and return this form within 10 days of the first day of your Plan Year. You may return this form by fax (608) 781-4576, e-mail skerr@bdgflex.com or by regular mail to our address at: Benefits Design Group, Inc., PO Box 370 Onalaska, WI 54650.

Please contact our offices at 1-800-554-7213 or 1-800-342-8235 if you have any questions or concerns.

Please note: This worksheet has been prepared in advance of the release of the final cafeteria plan regulations and the confirmed known effective date of those regulations. As a result, upon the release of the regulatory guidance, we may need to modify this request and ask you to report additional information or information in a modified format.

Useful Discrimination Testing Terms

Officer

- Any individual or participant who for the preceding plan year was an officer or new employees who are officers in the current plan year. Whether an individual is an officer is determined based on all the facts and circumstances.
- Generally, an “officer” means an administrative executive who is in regular and continued service and it implies a continuity of service, exclusive of those employed for a special or single transaction. An employee with the title of officer, but not the authority of an officer, is not considered to be an officer for Code § 125 purposes. Similarly, an employee who does not have the title of an officer, but who has the authority of an officer, is an officer.
- It appears that the limitation on the number of officers under Code § 416 does not apply when determining who is an officer for Code § 125 purposes.
- It also appears that there is **no exception for governmental entities** that sponsor cafeteria plans, so they too will have officers for purposes of determining who is a highly compensated participant. But for purposes of the Key Employee Concentration Test, the term key employee “shall not include any officer or employee of an entity referred to in section 414(d) (relating to governmental plans).” Code § 416(i)(1)(A).

Five Percent Shareholder

- An individual who either in the preceding or current plan year owns **more than** 5% of the voting power or value of all classes of stock of the employer. Note: An individual who owns exactly 5% of the share **would not** qualify under this definition.
- An individual’s stock ownership is determined without attribution. Therefore, the Code § 318 attribution rules will not apply in defining a more-than-5% shareholder. However, there is attribution via the spouse or dependent rule.

Spouse or Dependent (as defined in Code § 125(e)(1)(D))²¹ of an individual who is an officer, a more-than-5% shareholder, or highly compensated also falls within the group of highly compensated individuals subject to the cafeteria plan tests. The definition of dependent is the same as the one that applies when determining who is a tax dependent for health coverage purposes.

Compensation as defined in IRC § 415(c)(3). The Code specifically provides that in determining an employee’s compensation for these purposes, the following are counted (i.e., added back in): (a) salary reductions under a cafeteria plan (Code § 125); (b) compensation reductions under a qualified transportation fringe benefit plan (Code § 132(f)(4)); and (c) elective deferrals under a 401(k) plan, a salary reduction simplified employee pension plan (SARSEP), a Code § 408(p) SIMPLE plan, a Code § 403(b) tax-sheltered annuity, and a Code § 457 plan.

Parent-subsidiary Controlled Group is one or more chains of corporations connected through stock ownership with a common parent if: (1) 80% or more of the total combined voting power of all classes of stock entitled to vote (or 80% or more of the total value of all shares of all classes of stock) of each of the corporations, except the common parent corporation, is owned, directly or indirectly, by one or more of the other corporations; and (2) the common parent corporation owns, directly or indirectly, 80% or more of the total combined voting power of all classes of stock entitled to vote (or 80% or more of the total value of shares of all classes of stock) of at least one of the other corporations.

Brother-Sister Controlled Group is a group in which five or fewer individuals, estates, or trusts own, directly or indirectly, stock that possesses: (1) 80% or more of the total combined voting power of all classes of stock entitled to vote (or 80% or more of the total value of all shares of all classes of stock) of each corporation; and (2) more than 50% of the total combined voting power of all classes of stock entitled to vote (or more than 50% of the total value of all shares of all classes of stock) of each corporation, taking into account the stock ownership of each owner only to the extent that the level of ownership interest is identical with respect to each such corporation.

The five or fewer persons with respect to whom stock ownership is considered for purposes of determining whether the 80% requirement is satisfied must be the same persons whose stock ownership is considered for purposes of the greater-than-50% requirement. Thus the brother-sister controlled group should be of concern if five or fewer shareholders (1) own at least 80% of each corporation; and (2) own more than 50% of all corporations, taking into account identical ownership interests with respect to each corporation.

Combined Group is a controlled group that may be composed of an overlapping parent-subsidiary controlled group and a brother-sister controlled group. This occurs if: (1) each corporation is a member of either a parent-subsidiary controlled group or a brother-sister controlled group; and (2) at least one of the corporations is the common parent of the parent-subsidiary controlled group and is also a member of a brother-sister control group.