

COMPLIANCE ALERT

Friday, December 09, 2016

Congress Passes Law Expanding use of HRAs by Small Employers

On December 7, 2016, the Senate passed the 21st Century Cures Act (“Cures Act”), an omnibus measure that includes the Small Business Healthcare Relief Act (“Relief Act”), which significantly expands small employers’ options for providing health coverage. The Cures Act passed both houses of Congress by a wide margin and the President has indicated that he will sign it into law. Once signed, the law will be effective for plan years beginning on or after January 1, 2017. The Relief Act is Title XVIII of the Cures Act and starts on page 824.

The HRA Relief Act allows small employers—defined as those who are not applicable large employers (“ALEs”)—to establish a qualified health reimbursement arrangement (“HRA”) that reimburses eligible employees and their family members for medical expenses, including individual health insurance premiums, up to a specified annual limit. In general, an employer is an ALE if it employed at least 50 full-time equivalent employees on average in the prior calendar year.

Eligible Employers

An eligible employer cannot be an ALE and cannot offer a group health plan to any of its employees. A qualified HRA must be funded solely by employer contributions (i.e., no salary reduction contributions) and must be available to all “eligible employees.”

Eligible Employees

“Eligible employees” include all employees of the employer, except for employees in the following categories, who may be excluded:

- Those who have not completed 90 days of service;
- Those under the age of 25;
- Part-time and seasonal employees;
- Those covered by a collective bargaining agreement, if accident and health benefits were the subject of good faith negotiations; and
- Nonresident aliens with no U.S.-source income from the employer.

To participate, eligible employees must demonstrate that they and any participating family members have enrolled in minimum essential coverage (“MEC”).

Annual Limit

Amounts available under a qualified HRA cannot exceed \$4,950 per year, as indexed (\$10,000 if the HRA also covers family members). The annual limits are prorated for partial years of coverage. The employer's annual contribution must be the same for all eligible employees; however, certain variations are permitted with respect to HRA funds that are available for reimbursement of individual market coverage. Employer contributions to a qualified HRA may vary in accordance with the price of an individual market health insurance policy based on the age of the eligible employee (and the age of covered family members) or the number of an eligible employee's covered family members. For example, an employer contribution equivalent to 80% of the cost of age-banded coverage up to \$4,950 per year would be permissible.

Notice Requirements

Employers must notify eligible employees of the availability of a qualified HRA at least 90 days prior to the beginning of the plan year or upon eligibility for employees who become eligible during the year. The notice must state: (1) the amount available under the HRA for the year; (2) that employees receiving federally subsidized coverage must disclose the HRA contribution to the Marketplace; and (3) that if the employee does not have MEC, an individual mandate penalty may apply and any reimbursement from the HRA may be included in gross income that month.

Failure to provide the notice as required may result in a penalty of \$50 per employee, not to exceed \$2,500 per year. Employers offering qualified HRAs early in 2017 will not be exposed to penalties for failure to provide a notice to employees upon becoming eligible so long as notice is provided by April 1, 2017.

Federal Premium Subsidy Reduction

Employees participating in a qualified HRA will have their monthly federal premium subsidy for Marketplace coverage reduced by 1/12th of the employer's annual HRA contribution. For example, if an employee's subsidy is \$250 per month and 1/12th of the employer's annual HRA contribution is \$200, the employee's subsidy will be reduced to \$50 per month.

In addition, if the HRA provides "affordable" coverage, the employee's subsidy will be reduced to zero that month. An HRA provides affordable coverage in any month where the difference between the cost of coverage under the second-lowest-cost silver plan in the Marketplace and the employer's HRA contribution does not exceed 9.5% (9.69%, as indexed for 2017) of the employee's household income.

Example: In 2017, if the second-lowest cost silver plan in the employee's Marketplace is \$300 per month, 1/12th of the employer's annual HRA contribution is \$100 and the employee earns \$2,100 per month, the employee will not be eligible for a federal premium subsidy because $\$2,100 \times 9.69\% = \203 , which exceeds the \$200 difference between the applicable Marketplace plan and the employer's monthly HRA contribution.

Reporting Requirements

The Relief Act requires employers to report amounts available under a qualified HRA on employees' Form W-2. Presumably, it will be reported for informational purposes in box 14. Employees will also be required to report the amount available under a qualified HRA, likely as part of their subsidy application.

Effect on Other Laws

Under the Relief Act, qualified HRAs will not be considered group health plans under ERISA and, with the exception of the Cadillac tax, will not be subject to the ACA's market reforms, including ACA reporting for self-insured plans. Thus, qualified HRAs will not be subject to COBRA continuation requirements. Also, given the incoming Administration, it's not clear whether the Cadillac tax will survive long enough to see its intended effective date of 2020.

Thoughts from Trion's Attorneys

The Relief Act will be well-received by many small employers, although the extent to which the qualified HRA approach will provide a major advantage over traditional group health insurance (which allow pre-tax contributions) is unclear. Employers should work with their trusted benefit advisors when considering their approach. It is also likely that the Internal Revenue Service will release additional guidance in the following months.

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