

IRS Delays Notice Requirements for Qualified Small Employer Health Reimbursement Accounts

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Posted By: Kenneth A. Hoogstra

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The 21st Century Cures Act ("Cures Act"), signed into law by President Obama on December 13, 2016, included a provision that exempts qualified small employer health reimbursement arrangements ("QSEHRAs") from the Affordable Care Act's ("ACA's") group health plan rules. On February 27, 2017, the IRS extended the time for plan sponsors to provide the required QSEHRA notice to employees. This *Update* describes the general rules for QSEHRAs under the Cures Act, as well as the extension recently granted by the IRS.

Background – Health Reimbursement Accounts Under the ACA

A health reimbursement arrangement ("HRA") typically consists of an arrangement under which an employer reimburses medical expenses (whether in the form of direct payments or reimbursements for premiums or other medical costs) up to a certain amount. Under the ACA, employers are generally prohibited from establishing an HRA unless it is "integrated" with (that is, considered part of) the employer's ACA-compliant group health plan. This is because an HRA, standing alone, is a group health plan that will not satisfy several ACA requirements, such as the prohibition on annual or lifetime benefit limits. The IRS has also stated that a non-integrated HRA violates the ACA regardless of whether reimbursements or direct payments are treated as pre-tax or after-tax. An employer that offers a non-compliant HRA is subject to an excise tax under Section 4980D of the Internal Revenue Code ("Code") of \$100 for each day that it offered the non-compliant HRA.

For more information about HRAs under the ACA, including types of HRA arrangements that do not violate the ACA, see our June 11, 2015 Compensation & Benefits Legal Update.

HRAs for Qualified Small Employers Under the Cures Act

Under the Cures Act, a QSEHRA established by an eligible employer is not considered a group health plan for purposes of the ACA. As a result, the QSEHRA does not need to comply with the ACA's market reforms, and an eligible employer that establishes a QSEHRA is not subject to the Code Section 4980D excise tax. To be an eligible employer, a company must have fewer than the equivalent of 50 full-time employees and must not offer a group health plan to any of its employees.

A QSEHRA may pay and/or reimburse for medical care expenses, as defined in Code Section 213(d), including premium payments for individual health insurance policies covering the employee or enrolled family members, regardless of whether the policies are purchased through a broker or through a health insurance exchange. In addition, a QSEHRA must meet the following requirements:

1. It must be provided on the same terms to all eligible employees of the eligible employer;
2. It must be funded solely by the employer (*i.e.*, no salary reduction contributions);
3. It must require employees to provide proof of coverage before the payment or reimbursement of benefits; and
4. It must limit the amount of payments and reimbursements for any year to no more than \$4,950 for single coverage or \$10,000 for family coverage (prorated for partial-year coverage).

If an eligible employee enrolls in a health plan that qualifies as minimum essential coverage for the year, the QSEHRA benefit will not count as taxable income. Otherwise, the amount will count as taxable income. The employer must report the total amount of the QSEHRA benefit on each employee's Form W-2, regardless of whether the amount is taxable.

QSEHRA Notice Requirement

An employer that offers a QSEHRA must issue a specific written notice to all eligible employees. The notice must describe the benefits including the maximum annual benefit, state that the employee should disclose the amount of the QSEHRA benefit when purchasing coverage through a health insurance exchange and that the QSEHRA benefit will offset the amount of any premium tax credit, and state that if the employee is not enrolled in minimum essential coverage he or she may be subject to the individual mandate penalty under the ACA and that any reimbursements from the QSEHRA may be taxable income.

The QSEHRA notice must be provided no later than 90 days before the beginning of the QSEHRA plan year (or, if the employee becomes eligible during the QSEHRA plan year, by the date the employee becomes eligible to participate). However, an eligible employer that provides a QSEHRA for a year beginning in 2017 will not be treated as failing to timely furnish the initial written notice if the notice is furnished to its eligible employees no later than 90 days after the enactment of the Cures Act, which was March 13, 2017. An employer that fails to provide the required notice will be subject to penalties of \$50 per employee for each failure, capped at \$2,500 for all such failures during a calendar year.

Extension of QSEHRA Notice Requirement

On February 27, 2017, the IRS issued Notice 2017-20, in which it recognized that some eligible employers may find it difficult to comply with the QSEHRA notice requirement absent additional guidance concerning the contents of the notice. Therefore, the IRS provided that an eligible employer that provides a QSEHRA to its eligible employees for a year beginning in 2017 is not required to furnish the initial written notice to those employees until after further guidance has been issued by the IRS. That further guidance will specify a deadline for providing the initial written notice that is no earlier than 90 days following the issuance of that guidance. Employers may provide QSEHRA notice to their eligible employees before such further guidance, and may rely upon a reasonable good faith interpretation of the Cures Act to determine the contents of the notice.

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