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American Benefits Council

Preparing for PPACA

Session #25: Application of the Market Reforms to HRAs, FSAs, EAPs, EPPs and 125 Plans

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Overview

- Pre-ACA rules permit broad use of tax-advantaged employer funding vehicles for health
- ACA makes important changes to the manner in which employers may use tax-advantaged dollars to pay for employee's health coverage
- What worked in the past may not work today (or tomorrow)
- Certain open issues
- Potential downstream implications for participants and beneficiaries

Examples of Arrangements That Worked Pre-ACA

- Premium-only 125 cafeteria plan or “POP”
  - Whereby employer does not sponsor a plan or otherwise subsidize coverage directly, but allows an employee to pay for individual insurance on a pre-tax basis through the employer’s 125 cafeteria plan

Examples of Arrangements That Worked Pre-ACA

- Stand-alone health reimbursement arrangement
  - Employer does not sponsor a major medical group health plan, but makes available a defined amount of tax-free employer money to assist the employee in the purchase of health insurance and/or to meet other IRC section 213 out-of-pocket expenses

Examples of Arrangements That Worked Pre-ACA

- Direct employer premium subsidy/reimbursement for individual insurance
  - Employer does not sponsor a major medical group health plan, but agrees to reimburse (tax-free) a stated amount of premium expense incurred by the employee in connection with his or her purchase of individual insurance
  - Basis: 1961 IRS Revenue Ruling regarding "employer payment plans" or "EPPs"

The Guidance:

- IRS Notice 2013-54 (*September 13, 2013*)
- DOL Technical Release 2013-03 (*September 13, 2013*)

And….

- ACA FAQ #11 (*January 24, 2013*)
- IRS Notice 2013-71 (*October 31, 2013*)

* *Note: Guidance generally takes effect for 2014 plan years*

The Guidance:

- Material implications for the following types of plans:
  - Health reimbursement arrangements (HRAs)
  - Employer payment plans (EPPs)
  - Cafeteria plans, including premium-only plans (POPs)
  - Health flexible spending arrangements (FSAs)
  - Health savings accounts (HSAs)
  - Employee assistance programs (EAPs)

Health Reimbursement Arrangements (HRAs)

Stand-Alone HRAs

- Guidance says an employer cannot offer a stand-alone HRA (because it fails the ACA's market reforms), unless:
  - Retiree-only
  - Used only to fund HIPAA-excepted coverage
- To use an HRA otherwise, it must be integrated with minimum essential coverage (MEC)

Stand-Alone HRAs

- Some employers may have considered eliminating employer-sponsored group health plan coverage and establishing stand-alone HRAs for their employees… …with the idea being that employees could use HRA dollars to purchase individual insurance (either on or off the Exchanges)…

- Guidance indicates approach is not permissible

Stand-Alone HRAs

- ***Takeaway:*** Cannot offer a stand-alone HRA for active employees for general purpose medical expenses (premiums or otherwise). The HRA needs to be sufficiently integrated with other qualifying group health plan coverage

EXCEPTION: Retiree-Only Stand-Alone HRAs

- Retiree-only HRAs remain permissible
- Why? Because plans that cover only retirees do not have to meet the ACA market reforms
- BUT….
  - The HRA will constitute "minimum essential coverage" under the ACA
  - Retirees who have not yet reached age 65 can use the coverage to satisfy the individual mandate
  - Retirees who enroll in the HRA will not be eligible to receive any federal premium subsidies and cost-sharing reductions for exchange-based insurance

EXCEPTION: Retiree-Only Stand-Alone HRAs

- ***Takeaway*** – Can use retiree-only HRAs still, but be VERY careful about the downstream implications to pre-65 retirees because of likely adverse consequences to subsidy eligibility

EXCEPTION: HRAs For HIPAA-Excepted Coverage

- Guidance appears to permit the continued use of HRAs in connection with HIPAA-excepted coverage
- Thus, appears may be used:
  - As premium financing vehicle for HIPAA-excepted insurance
  - As vehicle to meet employee's out-of-pocket costs associated with HIPAA-excepted coverage

EXCEPTION: HRAs For HIPAA-Excepted Coverage

- ***Takeaway*** – HRAs remain a viable vehicle for financing an employee's medical costs associated with HIPAA-excepted coverage (usually premium costs and possibly other out-of-pocket medical costs)

Integrated HRAs

- As noted, HRAs that are integrated with a group health plan are permissible
- Guidance sets forth specific tests for determining whether an HRA is sufficiently integrated
- Can satisfy either of the following tests:
  - Minimum Value Required
  - Minimum Value NOT Required

Tests for Integrated HRAs: Minimum Value Required

Criteria	"Minimum Value" Test
1	ER must offer a group health plan to the EE that provides MV
2	EE must be enrolled in group health plan coverage that provides MV
3	HRA must be available only to EEs who are enrolled in MV group health coverage
4	EE must be permitted annually to permanently opt out of and waive future reimbursements
5	Upon termination, all amounts in HRA are forfeited, or EE must be permitted to permanently opt out of and waive future reimbursements

Tests for Integrated HRAs: Minimum Value NOT Required

Criteria	"Minimum Value NOT Required" Test
1	ER must offer a group health plan to the EE that can't be excepted benefits only, i.e., need not be MV
2	EE must be enrolled in group health plan coverage that isn't excepted benefits only
3	HRA must be available only to employees enrolled in non-HRA group coverage
4	EE must be permitted annually to permanently opt out of and waive future reimbursements
5	Upon termination, all amounts in HRA are forfeited, or EE must be permitted to permanently opt out of and waive future reimbursements
6	HRA can only reimburse the following: co-payments, co-insurance, deductibles, and premiums under the non-HRA group coverage, as well as medical care that does not constitute EHBs

HRAs - Other Important Considerations

Q: **What happens if an HRA allows for reimbursement of expenses for essential health benefits (EHBs) not covered by the integrated major medical plan**

HRAs - Other Important Considerations

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A: Depends on whether the plan provides minimum value (MV). Guidance indicates that the integrated HRA/major medical plan violates the prohibition regarding the use of annual dollar limits on EHBs if the major medical plan does NOT provide MV

HRAs - Other Important Considerations

Q: **What rules apply to current non-integrated HRAs with account balances that carry over to 2014?**

HRAs - Other Important Considerations

Q: **What rules apply to current non-integrated HRAs with account balances that carry over to 2014?**

A: Unclear

HRAs - Other Important Considerations

Q: **What happens if an employer offers a stand-alone HRA – or an HRA that is not sufficiently integrated with qualifying major medical coverage?**

HRAs - Other Important Considerations

Q: **What happens if an employer offers a stand-alone HRA – or an HRA that is not sufficiently integrated with qualifying major medical coverage?**

A: Penalties are generally $100 per day, per affected individual. Also can affect employee's ability to get coverage on the Exchanges

Employer Payment Plans (EPPs)

Employer Payment Plans (EPPs)

- What is an EPP?
  - Per the guidance: "[G]roup health plans under which an employer reimburses an employee for some or all of the premium expenses incurred for individual health insurance … or arrangements under which the employer uses its funds to directly pay the premium for an individual health insurance policy covering the employee"
  - Basic structure:
    - ONLY funded by nonelective employer dollars, i.e., no employee salary reduction or pre-tax contributions
    - No corresponding use of an HRA or the like

EPPs

- Some wondered whether EPPs could be a means for allowing employers to provide their employees with employer-sponsored coverage… while eliminating the need to provide an employer-sponsored group health plan

- Guidance indicates that EPPs would violate the ACA's market reforms

EPPs

- ***Takeaway*** – Employers cannot merely reimburse employee's individual insurance premiums for MEC *on a tax-free basis*, even if done so outside of an HRA or other tax-favored basis
  - Presumably, still permissible with respect to HIPAA-excepted coverages and retiree-only coverage

Cafeteria Plans, Including Premium-Only Plans (POPs)

Cafeteria Plans

- Pre-ACA, could permit employees to utilize an employer's "POP" to pay for individual insurance from pre-tax wages
- The guidance reiterates express statutory prohibition against allowing POPs to be used by an employee to pay for individual insurance purchased on a public exchange
  - Exception for SHOP small group coverage

Cafeteria Plans

- But what about individual insurance purchased outside of a public exchange?
- Unclear. It appears the answer may be that POPs cannot be used with respect to individual insurance – even if purchased outside of a public exchange – but we understand the regulators are continuing to consider this question

Cafeteria Plans

- ***Takeaways –***
  - An employee cannot access a cafeteria plan or POP to pay for individual insurance purchase from a public exchange.
    - ***Note***: Limited transition relief for non-calendar year plans in effect as of September 13, 2013
  - The law is unclear as to whether an employee may utilize a cafeteria plan or POP to pay on a pre-tax basis for individual insurance purchased outside of a public exchange

Health Flexible Spending Arrangements (FSAs)

Flexible Spending Accounts (FSAs)

- Permissible under ACA if HIPAA-excepted
- Must meet the following requirements:
  1. Other group health plan coverage not limited to excepted benefits is made available for the year to employees by the employer
  2. The FSA is structured so that the maximum benefit payable to any participant cannot exceed two times the participant's salary reduction election for the arrangement for the year (or, if greater, cannot exceed $500 plus the amount of the participant's salary reduction election)

Stand-Alone FSAs

➢ *Takeaways*

- HIPAA-excepted FSAs remain viable; BUT remember need to offer MEC at the same time to preserve HIPAA-excepted status
- FSAs can include some limited employer money

Health Savings Accounts (HSAs)

Health Saving Accounts ("HSAs")

- HSAs generally are not group health plans, therefore they are NOT subject to these rules
  - Note: The corresponding high-deductible health plan is a group health plan

Employee Assistance Plans (EAPs)

Employee Assistance Programs ("EAPs")

- Welfare programs that provide employees with access to referral or counseling services for problems such as alcoholism, drug abuse, financial issues, or legal issues

- September 2013 Guidance:

  - Benefits under an EAP will be considered HIPAA-excepted benefits, and thus not minimum essential coverage and not subject to the market reforms, if the EAP does not provide significant benefits in the nature of medical care or treatment

  - At least through 2014, employers may use a reasonable, good faith interpretation of whether an EAP provides "significant benefits in the nature of medical care or treatment"

Questions?

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