Health Care Reform

Simplifying Reform - Guidance Issued on HRAs, FSAs & Premium Reimbursement Plans

The DOL recently issued Technical Release 2013-03 which answers a question that has been unclear since the Affordable Care Act (ACA) was passed. Can employers pay for the purchase of individual health insurance plans for employees on a tax free basis? The DOL's answer to this question is no.

Background

The Affordable Care Act (ACA) amends the Public Health Services Act (PHSA) to impose certain "market reform" requirements on group health plans. Two of these requirements directly affect an employer's ability to pay for individual health insurance policies.

1. PHSA §2711 provides that a group health plan may not establish any annual limit on the dollar amount of benefits for essential health benefits.

PHSA §2713 requires non-grandfathered group health plans to provide certain preventive services without imposing any cost-sharing requirements.

Beginning in 2014 the individual heath insurance market will change dramatically. Individual health insurance policies will be offered with no medical underwriting and no pre-existing limitations. Individuals who qualify may also be able to collect subsidies (federal premium tax credits and cost sharing reductions) when purchasing individual health insurance through a public (State and Federal) Exchange.

Individual Health Insurance Strategies Considered by Employers

Employers (and a number of vendors) have proposed a variety of strategies which involve employer payment of individual health insurance premiums on a tax free basis, including paying premiums through Health Reimbursement Arrangements (HRAs), Premium Reimbursement Plans, and the use of Section 125 plans. Technical Release 2013-03 addresses each of these approaches in detail. The result of this guidance is the DOL makes clear that due to the ACA change to the PHSA, employers will not be able to pay for employee's individual health insurance policies on a tax free basis.

<u>HRAs</u>

Previous DOL guidance released earlier this year clarified that an HRA is considered a health plan, and thus is subject to ACA market reforms including the prohibition on annual and lifetime maximums. Since HRAs, by definition, limit the benefits paid to some maximum amount, they would generally violate PHS Act §2711.

However, the DOL guidance created exceptions for HRAs that are integrated with a group health plan and for retiree only HRAs. Importantly, the guidance stated that an HRA cannot be integrated with an individual health insurance policy. Technical Release 2013-03 clarifies and expands on this earlier guidance.

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To avoid violating the PHSA, an integrated HRA must meet certain criteria:

- The employer must offer a group health plan that is more than just excepted benefits.
- The employee receiving the HRA must be actually enrolled in a group health plan, regardless of whether the employer sponsors the plan. For example, the HRA may be offered only to employees who are enrolled in other non-HRA group coverage, such as a plan maintained by the employer of the employee's spouse.
- Under the terms of the HRA, an employee must be permitted to opt out of and waive future reimbursements from the HRA at least annually.

Upon termination of employment, either the remaining amounts in the HRA are forfeited, or the employee must be permitted to opt out of and waive future reimbursements from the HRA.

If the HRA is integrated with a health plan that does not provide minimum value it must meet one additional requirement.

HRA reimbursements must be limited to one or more of the following: co-payments, co-insurance, deductibles, and premiums under the non-HRA group coverage, as well as medical care (as defined under Code § 213(d)) that does not constitute essential health benefits.

Finally, integration does not require that the HRA, and the coverage with which it is integrated, share the same plan sponsor, the same plan document or governing instruments, or file a single Form 5500.

A stand-alone HRA, or an HRA that reimburses only individual health insurance premiums, will not meet these requirements and violates PHSA §2711.

Treating an HRA as an FSA

The argument has been made by some vendors that an HRA can be treated as an FSA and thus would not be subject to PHSA §2711 requirements. The guidance states that even if an HRA is considered an FSA, the plan is subject to the ACA market reform rules. This clarifies that employers are not allowed to pay for individual coverage on a tax-free basis through this type of program. The guidance specifically states that it *"would not exempt the HRA from compliance with the other market reforms…which the HRA would fail to meet because the HRA would not be integrated with a group health plan. This analysis applies even if an HRA reimburses only premiums."*

Premium Payment Plans

A 50 year old IRS revenue ruling (Revenue Ruling 61-146) permitted employers, under certain circumstances, to pay individual health insurance premiums for employees on a tax free basis. These arrangements have always been considered employer sponsored plans even though they were made up of individual health insurance policies, and thus been subject to a variety of legal and regulatory obligations. These obligations made the strategy administratively challenging and many advisors considered it risky for employers.

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Now, Technical Release 2013-03 makes it clear that these arrangements fail to meet the PHS Act §2711 prohibition on lifetime maximums. The bottom line is that employers may no longer pay for individual health insurance policies on a tax free basis without violating PHS Act §2711.

Section 125 Plans and Health FSAs

Proposed Section 125 regulations released in 2007 permitted an employee to pay for individual health insurance premiums on a pre-tax basis through a Section 125 plan. Under the 2007 proposed rules, the employer was required to get substantiation of the employee's payment of the individual premiums before making a pre-tax payroll adjustment for the reimbursement. Section 125 rules do not allow an employee's Health FSA dollars to be used to pay for individual health insurance premiums.

However, the ACA has added Code §125(f)(3) to prohibit individual health insurance policies offered through a public (state or federal) exchange from being a "qualified benefit" under a Section 125 Cafeteria plan. If carriers continue to sell individual insurance polices outside the exchange, these policies may still be paid by the employee with pre-tax dollars through a Section 125 cafeteria plan.

After-Tax Payroll Deductions for the Payment of Individual Health Insurance

The guidance goes on to state that an employer "*may establish payroll practices of forwarding post-tax employee wages to a health insurance issuer at the direction of an employee without establishing a group health plan, if the standards of the DOL's regulation at 29 C.F.R. §2510.3-1(j) are met*." These DOL regulations limit the employer involvement in the arrangement. Specifically:

- Participation in the program must be voluntary.
- The employer cannot endorse the program.
- The sole functions of the employer are to permit the insurer to publicize the program to employees and to collect premiums through payroll deductions and remit them to the insurer.

The employer receives no consideration in the form of cash or otherwise in connection with the program.

Limited Guidance on EAP Plans

Technical Release 2013-03 also contained guidance on the treatment of EAP plans as an excepted benefit. This distinction is important because if an EAP is not an excepted benefit, it will be subject to many of the ACA requirements applicable to full medical plans.

The DOL gives very little guidance on this question and essentially lets employers decide if their EAP provides "significant" medical benefits. Specifically the guidance states – "*Until rulemaking is finalized, through at least 2014, the Departments will consider an EAP to constitute excepted benefits only if the EAP does not provide significant benefits in the nature of medical care or treatment. For this purpose, employers may use a reasonable, good faith interpretation of whether an employee assistance program or EAP provides significant benefits in the nature of medical care or treatment*"

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Many advisors believe that most EAP plans, even those that offer some minimal health benefits (such as a number of visits to a counselor), will eventually be considered an excepted benefit under the final rules. Employers who offer an EAP with more comprehensive benefits should seek the advice of legal counsel regarding the application of various ACA rules.

Summary

While the rules related to individual health insurance policies may seem complex, the end result is fairly straight forward. Employers will not be allowed to pay for their employee's individual health insurance on a tax free basis without violating the PHSA. Technical Release 2013-03 can be found at http://www.dol.gov/ebsa/newsroom/tr13-03.html.

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