Qualified Small Employer HRAs Face Steep Compliance Path

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Passed in December 2016, the 21st Century Cures Act backtracked in part on an abiding ACA principle – namely, that employers could not reimburse employees for their individual health insurance premiums through a "standalone" health reimbursement account (HRA) or employer payment plan (EPP). Specifically, the Cures Act carves "Qualified Small Employer Health Reimbursement Arrangements" or QSE HRAs — out from the ACA definition of group health plan subject to coverage mandates, permitting their adoption by eligible small employers, subject to a number of conditions. The provisions are effective for plan years beginning after December 31, 2016.

The compliance path for QSE HRAs is steep enough that they may not be adopted by a significant number of eligible employers. Below we list the top five compliance hurdles that small employers will face:

1. **Requirement that no group health plan be maintained.**

In order to be eligible to maintain a QSE HRA an employer must not have more than 50 full-time employees, including full-time equivalents (measured over the preceding calendar year), and in addition it must not maintain any group health plan for employees. Small businesses are more likely than not to offer some health coverage to employees, although eligibility may be limited as in a "management carve-out" arrangement. Business owners may be reluctant to part with group coverage, such that QSE HRAs may have most appeal to small employers that never offered coverage at all.

2. Confusion over impact on premium tax credits.

A significant amount of confusion exists as to whether QSE HRA benefits impact an employee's eligibility for premium tax credits on a health exchange. The confusion is natural as the applicable rules are quite confusing. Fundamentally, if a QSE HRA benefit constitutes "affordable" coverage to an employee (which requires a fairly complicated calculation), then the employee will be disqualified from receiving premium tax credits. If a QSE HRA is not affordable (that calculation again), then the QSE HRA benefit will reduce, dollar for dollar, the premium tax credit amount for which the employee qualified. We have only statutory text at this point and regulations will no doubt provide more clarity, but small employers may still struggle to understand the interplay of these rules and may be even less equipped to assist employees with related questions.

3. Annual notice requirement.

A small employer maintaining a QSE HRA must provide a written notice to each eligible employee 90 days before the beginning of the year that:

- Sets forth the amount of permitted benefit, not to exceed annual dollar limits that are adjusted for inflation (currently $4,950 for individual and $10,000 for family coverage);
- Instructs the employee to disclose the amount of their QSE HRA benefit when applying for premium tax credits on a health insurance exchange; and
- Reminds the employee that, if he or she is not covered under minimum essential coverage (MEC) for any month a federal tax penalty may apply, and in addition contributions under the QSE HRA may be included in their taxable income. (The QSE HRA is not itself MEC.)

If compliance with the annual notice requirements under SEP and SIMPLE plans is any guide, small employers may find it difficult to consistently provide the required written notice. The Cures Act imposes a $50 per employee, per incident penalty for notice failures, up to $2,500 per person. Penalty relief is available if the failure is demonstrated to have been due to reasonable cause and not willful neglect.

4. Annual tax reporting duties.

Small employers must report the QSE HRA benefit amount on employees' Forms W-2 as non-taxable income. ACA tax reporting for providers of "minimum essential coverage" (MEC), namely, providing Form 1095-B to each eligible employee and transmitting copies of all

employee statements to the IRS under transmittal Form 1094-B –would not appear to be required for sponsors of QSE HRAs, as MEC reporting will be done by the individual insurance carriers. Clarity on this point would be welcome.

5. Lack of financial incentive for benefit advisers.

Small employers will (reasonably) look to health insurance brokers for guidance and clarification on these complex issues. They will also need assistance with QSEHRA set-up, including shopping TPAs to compare services and fees, educating employees on enrollment and use, handling service issues during the year, and satisfying the annual notice requirement and annual tax reporting duties. Unfortunately, the benefit broker and adviser community has little financial incentive to recommend QSEHRAs, because commissions are based on a relatively low annual administrative fee and do not provide reasonable compensation for this work. This in turn could result in low uptake by small employers.

https://www.congress.gov/114/bills/hr34/BILLS-114hr34enr.pdf

http://healthaffairs.org/blog/2016/12/09/cures-act-offers-tax-favored-vehicle-for-small-employers-to-pay-premiums-and-more/

https://www.irs.gov/pub/irs-pdf/f1095b.pdf

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