Benefits and Employment Briefing

QUARTERLY NEWSLETTER

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Continued on page 2

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Continued on page 5

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Continued on page 7

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Continued on page 9

DOL Proposes Expansion of HRA Use for Small Employers

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Continued on page 10

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Raw Data: Explosion in Claims, Attention, and Recovery

The EEOC's Fiscal Year (FY) 2018 numbers aren't yet official -- the EEOC's Office of Enterprise Data and Analytics has to validate them before they can be finalized. But even if the final statistics are adjusted slightly in the near future, the EEOC's October data release presents stark evidence that the #MeToo movement is not just a passing fad. Among the most significant statistics that should capture the attention of every employer:

- **Sexual harassment charges** with the EEOC **increased by more than 12 percent** from FY2017. This represents the first increase in such charges in five years—and a massive increase at that.
- The EEOC's litigation attorneys filed 41 separate **sexual harassment federal lawsuits** on their own, which is **more than a 50 percent increase** from the previous year.
- **Reasonable cause findings** in sexual harassment cases increased from 970 to nearly 1,200, an **increase of over 23 percent**.
- Successful **conciliation proceedings** (a formalized mediation process run by EEOC personnel) jumped from 348 to nearly 500, a **43 percent increase**.
- In FY2017, the EEOC recovered $47.5 million for the victims of sexual harassment through **administration enforcement proceedings and litigation**. In FY2018, that number increased to nearly $70 million, a **leap of over 22 percent**.
- Finally, one of the more interesting statistics demonstrates the heightened interest that the general public has when it comes to sexual harassment. The EEOC reported that **website visits to its sexual harassment page more than doubled** over the past year.

What's Next?

Given the increased interest and awareness of sexual harassment in the workplace, it was no surprise that the EEOC announced late last year that it was putting the finishing touches on updated guidelines on the subject for the first time in over 20 years. Acting EEOC Chair Victoria Lipnic acknowledged that "the update comes up at a time of burgeoning publicity for sexual harassment and assault in the workplace," though she said the timing of the update was "purely coincidental."

After several years of drafting and editing, which included incorporating public opinion on key issues, the Commission unanimously approved the new guidelines in early November 2017. The draft guidelines—some 70 pages in length—were then sent to the White House's Office of Management and Budget, with an expectation that they would be quickly approved and released to the public. Almost a year later, we're still awaiting the guidance's release.

The reason for the holdup is uncertain. Acting Chair Lipnic told Bloomberg Law in June that she has been "very persistent in trying to move it along," but the guidance remains mired in administrative red tape. Some suspect that the delay is political in nature, as the White House awaits the seating of a new EEOC General Counsel and two Republican nominees to the five-person Commission. If that's the case, it's unlikely we will see any movement until after the midterm elections, and possibly until next year's Congress begins its 2019 session.

What Should Employers Do? A 5-Step Plan

The delay in the guidance's release is no excuse to sit idly by and wait, however. As the raw statistics described above show, the modern sexual harassment revolution is in full swing. For that reason, we recommend that you immediately implement a five-step plan to address this issue before you become another statistic.

Step One: **Make Sure Your Policies Match Modern Standards.** If you haven't updated your sexual harassment policy in the past several years, you might be behind the curve. Recent court decisions have placed greater responsibility on employers to establish policies that address sexual harassment in a more realistic and thoughtful manner. At a minimum, your policy should clearly indicate that you have "zero tolerance" for sexual harassment in any form. You should clearly define the term and provide examples of conduct that would run afoul of your standards (including, for example, boorish behavior, off-color jokes, unsolicited hugs or shoulder rubs, sharing pornographic images, etc.) so that there is no confusion.

Your reporting policy should encourage employees to report their concerns about potential harassment immediately. You should also provide several avenues for the employee to provide their report, whether through their immediate manager, a human resources representative, another manager, or even a hotline number or intranet reporting mechanism. Finally, your policy should clearly guarantee your workforce that they will not face retaliation as a result of their report. Providing this level of safety and security is important if you truly want to foster an open and respectful atmosphere.

Step Two: **Disseminate Your Policies in a Thoughtful Way.** Your policy is worthless if it sits on a shelf and is never accessed by your employees. You need to ensure that your workforce is aware of your position on sexual harassment if you want the policy to be effective. Most employers distribute the policy as part of the onboarding process and require new employees to sign an acknowledgment of receipt. And that's a good start – but it's just a start. You should take additional steps if you want the policy to truly become part of your workplace culture.

At the time of hire, a human resources representatives should take the time to specifically describe your harassment policy and start a conversation about your organization's zero-tolerance philosophy. That lets the new employee know right out of the gate that you take this issue seriously. If your organization has an intranet, you should consider hosting the policy there permanently so that it can be readily accessed by anyone at any time. You should periodically provide copies of the policy as a standalone document to all of your employees to remind them of their rights and responsibilities. A good way to accomplish this is by having one of your highest-level officials – if not *the* highest level executive – distribute the policy from their email account or via signed memorandum. By setting the tone from the top, your organization will send a signal to everyone that you take the subject matter seriously.

Step Three: **Train Your Managers to Address Issues and Avoid Common Mistakes.** Training your managers on your sexual harassment policy is a critical step. Your organization could be held automatically liable for any proven sexual harassment if carried about by a managerial employee, so all of your hard work in developing and disseminating your policy could be deemed irrelevant if your managers act inappropriately. You need to drill your policies into their minds on at least an annual basis through formal training sessions.

There are a few common mistakes to warn your managers about at these sessions. First, many companies get in trouble when managers ignore inappropriate behavior that they believe is "welcomed" by the victim, or if it appears to be part of a mutual and voluntary interaction. Your managers need to know that victims of harassment will often pretend to "go along" with the behavior for fear of losing their job, or simply because they want to appear to be part of the team, but that they will more than welcome managerial intervention that puts a stop to the conduct. Moreover, the conduct that your managers see out in the open, or hear about through the grapevine, is often just the tip of the iceberg, and it could signal that much worse behavior is taking place outside of your knowledge. For these reasons, your managers should be trained to address any behavior they witness or hear about, no matter if it appears that it is all in good fun and that no harm is occurring.

Second, it is common for some managers to allow extra leeway for certain employees because it is commonly accepted that their behavior is simply a harmless personal idiosyncrasy. Reports about misconduct or inappropriate behavior are met with a chuckle and a statement such as, “Oh, that’s just Harvey being Harvey!” It becomes commonly known around the workspace that you need to operate differently around that employee because they’ve been acting like that forever. “He likes to give hugs but he’s harmless,” or “Just don’t caught in his office one-on-one and you’ll be fine” are common sentiments in these workplaces. This is exactly the kind of attitude that leads to festering situations and that should be eradicated from your workplace. All employees should be held to the same standard, no matter how long their actions have been tolerated in the past.

***Step Four:* Promptly Investigate Any Issues Raised.** Once you receive a report of sexual harassment, it’s time to take immediate action. If you delay your investigation until work slows down or until an important project is completed, you will send a signal to your workforce that this isn’t a priority. Moreover, you could face hostile questioning under oath in a subsequent lawsuit about what you were doing that was so important that it trumped the well-being of your workers. Therefore, you should clear the decks and do everything reasonably possible to make the investigation your highest priority.

Your human resources department should take the lead in the investigation, as they are trained to carry out an effective and legally compliant inquiry. There is no cookie-cutter approach to investigations because they are all unique depending on the circumstances, but there are some common threads that accompany a reasonable examination:

- Try to obtain a written report from the victim so you have a clear and specific understanding of the issues at play, but don’t delay your investigation if for some reason a written report can’t be generated right away.
- All relevant witnesses should be interviewed, including those who might be able to provide a glimpse into the working relationship between the employees in question.
- To the extent you need to obtain evidence to support the claims or defenses – emails, texts, documents, photos, etc. – make sure you have reviewed them all before concluding your investigation.
- Make a clear record of your investigation by taking notes during your interviews and review of the evidence. This will help you sort out all of the claims as you conduct your review and will also serve as evidence that you are taking the matter seriously if you are later called into question for your role in the matter. Keep the notes focused on objective information and free of conclusions and opinions; you should be ready for your notes to be an exhibit in a lawsuit one day.
- During your investigation, you should take reasonable steps, if possible, to ensure that the victim is not forced to work side-by-side with the accused. This might mean reassigning the accused worker to a different assignment, but it might also mean suspending the accused (with or without pay) for that period of time.
- Finally, don’t ignore older complaints. You never know what you might find when you start exploring a situation involving an alleged harasser. For example, you might ask a witness if they’ve ever seen that employee do or say something inappropriate, and that witness might reluctantly tell you about some obscene behavior from the office holiday party three years ago. Just because it’s older news

does not make it irrelevant. Again, each situation is unique, and the specific facts and circumstances of the situation will dictate your response and how you factor that unearthed information into your decision.

Step Five: **Consistently Enforce Your Standards.** Finally, and perhaps most important, you need to take action against the accused employee if the allegations against them are substantiated through your investigation. If your workforce figures out that your policy is toothless, they will lose respect for your organization and will feel dissuaded from reporting other misconduct. This could lead to legal trouble, but also to flagging morale and high turnover among your key contributors.

Your goal in meting out a response is to take action sufficient to ensure that the behavior is not reasonably likely to occur again. In some situations involving mild misconduct, it might be sufficient to give a documented verbal warning to the employee along with an acknowledged reminder of your sexual harassment policy. In more severe or reoccurring situations, the only reasonable possible response is termination. In between the two are a whole host of possible options, including written warnings, mandatory professionalism classes, behavioral improvement plans, suspensions, demotions, and the like.

Some employers run into trouble when they inconsistently apply standards to high-performing or high-ranking individuals accused of harassment. When push comes to shove, these organizations value the contributions these employees make to the company's bottom line more than they value the ideals contained in the sexual harassment policy. There is no better way to hurt morale at your organization and neuter your harassment policies than to give a pass to a key executive accused of misconduct while coming down hard on a mid-level manager or hourly worker accused of similar behavior. On the other hand, your policy's effectiveness will be given a boost if your workforce sees it applied in an evenhanded manner, no matter who is accused of a violation.

Conclusion

When the EEOC releases more guidance, stand ready to further update your policy and processes. Until then, we recommend you take the above steps to ensure that you provide a safe and professional working environment for your employees.

Back to top

How Are You Planning Wellness Program Compliance for 2019?

You may have heard that the incentive portions of the wellness program regulations issued by the Equal Employment Opportunity Commission (EEOC) were recently vacated effective January 1, 2019. This news was welcomed by employers that found the regulations to be cumbersome to implement. However, it is still unclear where this decision leaves employers. With 2019 just around the corner, you may be asking yourself how to comply (or not comply) with these rules in the upcoming year. Although we anticipate that the EEOC will provide further guidance, it is nearly certain that it will not be ready prior to the New Year. Accordingly, we offer a few considerations for employers with wellness programs when designing their 2019 compliance strategy.

A Little Background

On May 17, 2016, the EEOC released final rules addressing wellness programs subject to the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA). The ADA prohibits discrimination based on a disability, so it applies to wellness programs that include biometric screenings or other medical exams and inquiries (for example, a health risk assessment). GINA regulates collection and use of genetic information and will apply to any program that asks employees for family medical history or in which spouses are asked to complete a health risk assessment. Under GINA, the EEOC considers a spouse to be the employee's family, so any request for medical history of the spouse is treated as genetic information of the employee. Wellness programs incorporating any of these designs would be subject to the ADA and GINA.

The new rules limited the amount of incentives that employers can offer employees to participate in a wellness program subject to the ADA or GINA. Specifically, the regulations established that participation in a wellness program will generally be considered voluntary if the maximum allowable incentive (or penalty) under the program does not exceed 30 percent of group health plan premiums for the plan in which the employee is enrolled. If the employee is not enrolled in the group health plan, the EEOC provides that the 30 percent is calculated based on premiums for self-only coverage under the lowest cost group health plan, and, if the employer does not offer a group health plan, it is calculated by reference to the premium cost for self-only coverage in the second lowest cost Silver Plan on the state or Federal health care Exchange where the employer is located.

This 30 percent incentive limit under the ADA and GINA was met with substantial pushback by advocacy groups arguing that the incentive limitation was too high to be considered “voluntary” for an employee to undergo a medical exam or inquiry in exchange for the information. In December 2017, a judge in the District of Columbia vacated the incentive limits established by the EEOC. The court found that the EEOC “failed to adequately explain its decisions to construe the term ‘voluntary’ in the ADA and GINA to permit the 30% inventive level adopted in both the ADA rule and the GINA rule.” The judge also ordered the EEOC to propose new rules by August 2018, but the EEOC subsequently responded that it does not have a fixed date by which it plans on releasing new proposed rules. Instead, the EEOC stated that new rules may not be published until 2021, though the court found this timeline to be “unacceptable” and “strongly encouraged” the EEOC to move up its deadline. Employers are permitted to continue relying on the rules through 2018.

2019 Wellness Program Compliance

The court’s decision to vacate the EEOC’s rules effective January 1, 2019, coupled with the EEOC’s position that it will not rush to issue new rules, leaves employers in limbo entering 2019. Accordingly, moving into the new year, employers have three basic options for their wellness program compliance.

1. **Continue complying with the EEOC wellness program rules until new rules are issued** – Many employers spent a significant amount of time and resources redesigning their wellness programs to comply with the EEOC’s new rules, and thus, may choose to simply continue complying with the vacated rules. The logic behind this option is two-fold. First, if your wellness program was redesigned and vetted over the past year for compliance with the new rules, it may not be practical to redo those administrative and logistical efforts. Second, until new rules are issued, the EEOC may be unlikely to challenge an employer that voluntarily complies with the vacated rules.
2. **Ignore the vacated rules and follow the HIPAA/ACA wellness rules** – Prior to the EEOC issuing the vacated rules, employers largely relied on incentive limits imposed under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) regulations, as amended by the Affordable Care Act (ACA). The HIPAA rules impose a 30 percent maximum incentive limit (50 percent for tobacco cessation programs) on “health-contingent” wellness programs, which require participants to attain a specified health-related outcome (for example, BMI below 30, weight-loss goals met, and tobacco-free). The HIPAA incentive limits do not apply to participatory wellness programs, which do not require attainment of a specified health-related outcome to obtain the reward (for example, classes in nutrition or healthy living, reward for participating in health assessment, and gym membership reimbursement). This option reflects how most employers complied with incentive limits prior to the issuance of the EEOC rules.

The HIPAA incentives are more generous than those allowed under the EEOC rules, which could raise some concerns for cautious employers. However, it is not clear how aggressive the EEOC will be in enforcing the application of the ADA and GINA to wellness programs under the current administration given the lack of guidance and uncertainty for employers in this area.

3. **Offer no wellness incentive or penalty for programs subject to the ADA or to GINA** – By not offering any incentive (or imposing any penalty) in connection with a wellness program subject to the ADA or GINA, an employer can isolate itself from these uncertain rules and from challenge by the EEOC as to incentive limits and voluntariness. This option will likely appeal to risk averse employers but may not appeal to employers with comprehensive programs that utilize incentives to spark employee interest and participation in their wellness activities and challenges.

The Takeaway

Given the fluctuating legal landscape surrounding wellness program compliance, it remains important to continually evaluate wellness program design and any wellness program changes. Once the incentive portions of the regulations are vacated on January 1, 2019, employers offering incentives under wellness programs subject to the ADA and GINA will be left in a position of uncertainty as to how much is permissible to offer. Also, it is important to note that because only the incentive portion of the rules were vacated, employers should continue to comply with the remainder of the EEOC regulations (for example, notice and nondiscrimination requirements). Employers should discuss their ongoing compliance strategy for wellness programs with their broker or ERISA counsel.

Back to top

IRS and PBGC Provide Relief for Victims of Hurricanes Florence and Michael

In the aftermath of Hurricane Florence and Hurricane Michael, employers in North Carolina, South Carolina, Florida, and Georgia are left to deal with the ongoing impact of the storms' physical damage and operational disruptions. Recognizing this turmoil, the Internal Revenue Service (IRS) and Pension Benefit Guarantee Corporation (PBGC) have temporarily extended filing deadlines and afforded other relief to employers affected by the natural disasters.

Who Is Eligible for the IRS Relief?

The President has declared major natural disasters in the areas affected by Hurricane Florence and Hurricane Michael. This declaration permits the IRS to postpone deadlines and provide certain other relief for taxpayers who reside or have a business in the designated disaster areas. Filing and penalty relief should automatically be provided to any taxpayer with an IRS address on record within the disaster areas. The IRS may also afford relief to taxpayers outside the disaster areas if records needed to meet a deadline during the postponement period were located in the affected areas.

The relief is available to any area designated by the Federal Emergency Management Agency (FEMA) as qualifying for individual assistance. The IRS maintains an updated list of eligible localities on its disaster relief page.

Specific Terms of the IRS Relief

For victims of Hurricane Florence located in North Carolina, the IRS relief postpones various tax filing and payment deadlines that occurred starting on September 7, 2018, giving affected individuals and businesses until January 31, 2019 to file returns and pay any taxes that were originally due during this period (the "postponement period"). For victims located in South Carolina, the postponement period is from September 8, 2018, through January 31, 2019. Filings that qualify for relief include the filing of the Form 5500 Annual Return/Report for employee benefit plans, quarterly estimated income tax payments due on September 17, 2018, and quarterly payroll and excise tax returns normally due on October 31, 2018. Businesses and individuals with filing extensions are also afforded the additional time if their extended filing deadline fell within the postponement period. The IRS has also alleviated penalties on payroll and excise tax deposits due on or after September 7, 2018, through September 23, 2018, so long as the deposits are made by September 24, 2018.

Victims of Hurricane Michael are provided similar relief, including relief for filing quarterly estimated income tax payments due on January 15, 2019, and the quarterly payroll and excise tax returns normally due on October 31, 2018, and January 31, 2019. The postponement period for impacted businesses and individuals located in Florida is from October 7, 2018, through February 28, 2019, while the postponement period for impacted businesses and individuals located in Georgia is from October 9, 2018, through February 28, 2019.

IRS Relief Triggered PBGC Relief

On July 2, 2018, the PBGC issued a Federal Register Notice explaining that it will provide certain disaster relief each time the IRS grants relief in response to a particular disaster. Accordingly, for disasters covered by an IRS disaster relief news release issued on or after July 2, 2018, the PBGC will provide the following relief during the postponement period announced by the IRS:

- A filing will not be subject to a late filing penalty under Section 4071 or 4302 of the Employee Retirement Income Security Act of 1974 (ERISA) for the relief period.
- A premium payment will not be subject to late payment penalty or interest charges under section 4007 of ERISA for the relief period.
- The extended due date for a filing or other action will apply for purposes of calculating any other due date that is based on the due date of the filing or other action.

The PBGC has specifically excluded the items below from relief, though relief may still be requested for these filings on a case-by-case basis.

- Advance notices of reportable events under ERISA section 4043 (Form 10-Advance)
- Notices of large missed contributions under ERISA section 303(k) (Form 200)
- Post-event notices for certain reportable events under ERISA section 4043
- Failure to make required contributions under $1 million (inability to pay benefits when due, liquidation, loan default, and insolvency or similar settlement)
- Actions related to distress terminations for which PBGC has issued a distribution notice

Employers should notify the PBGC of their eligibility for disaster relief as part of their Comprehensive Premium Filing. If the employer is unable to submit, or anticipates difficulty in submitting, the Comprehensive Premium Filing by the end of the relief period, it should notify the PBGC by sending an email to premiums@pbgc.gov. The email should contain the number of the applicable IRS News Release, plan identifying information (plan name, EIN, plan number), and the name and address of the person affected by the disaster. The PBGC encourages employers to notify the agency as soon as reasonably possible of the employer’s eligibility for disaster relief.

Employer Takeaways

Employers located in areas affected by Hurricane Florence and Hurricane Michael should assess their eligibility for relief, take advantage of any relief available, and continue to monitor for developments. Specifically, if you are located in the disaster area and receive a late filing or late payment penalty notice from the IRS that has an original or extended filing, payment or deposit due date falling within the postponement period, you should call the number on the notice to have the penalty abated. If applicable, employers should also notify the PBGC of their eligibility for disaster relief as soon as possible.

In addition to the filing and penalty relief provided by the IRS and PBGC, employers may also want to take advantage of IRS guidance to assist employees with rehabilitation-related expenses following the disaster. So long as the expenses are reasonable and necessary, the employer's payments will generally be qualified, meaning that those payments may be excluded from the employee's taxable income. The IRS has specifically commented that medical, temporary housing, and transportation expenses following a flood are qualified, and employers may deduct those costs as business expenses as long as they are reasonable. Employers have a variety of options in setting up a program to assist employees affected by natural disasters, and should engage their tax advisor or ERISA counsel to evaluate the specific requirements for establishing a program that fits their needs.

Back to top

IRS Extends Deadline to Furnish 2018 Health Coverage Forms to Individuals

The Internal Revenue Service (IRS) has extended the due date for employers and insurers to provide 2018 health coverage information forms to individuals. These entities now have until March 4, 2019, to provide Forms 1095-B and 1095-C to employees and covered individuals, which is a 30-day extension from the original due date of January 31. The IRS has also extended certain penalty relief to entities making good faith efforts to comply with the 2018 information reporting requirements, even if the information reported is incorrect or incomplete.

Information Reporting

The Patient Protection and Affordable care Act (ACA) requires insurers, self-insuring employers, other coverage providers, and applicable large employers (ALEs) to furnish statements to employees and covered individuals with information regarding the health care coverage offered to them. Specifically, Section 6055 of the ACA requires providers to report if they provide minimum essential coverage (MEC), and Section 6056 requires ALEs to report whether they offered MEC to full-time employees and their dependents. Forms 1095-B and 1095-C were designed to satisfy these information reporting requirements under the ACA.

The information reported on these Forms allows individuals to determine whether they are eligible to claim the premium tax credit on their individual income tax returns. Employers and providers are generally required to furnish these information statements to individuals on or before January 31 following the applicable reporting year. Forms 1095-B and 1095-C must also be filed with the IRS, generally on or before February 28 (March 31 if filed electronically) following the applicable reporting year.

Deadline Extension for Furnishing Statements

The IRS has extended the due date for furnishing 2018 Forms 1095-B and 1095-C to employees and covered individuals from January 31, 2019, to March 4, 2019. Employers and providers will not be granted additional extensions.

The IRS has not, however, extended the due date for filing 2018 Forms 1095-B and 1095-C with the IRS, which remains February 28, 2019 (if not filing electronically), or April 1, 2019 (if filing electronically). Employers can seek a 30-day extension for submitting these forms by filing a Form 8809, Application for Extension of Time to File Information Returns, on or before the applicable due date.

Penalty Relief for Good Faith Reporting Efforts

The IRS has also extended penalty relief for employers and providers that make good faith efforts to comply with the 2018 information reporting requirements, but that provide incorrect or incomplete information (both for furnishing to individuals and for filing with the IRS). To be eligible for the relief, reporting entities must make reasonable efforts to comply with the 2018 reporting requirements, including timely filing or furnishing of the information returns or statements. No relief is available for entities that fail to file an information return or furnish a statement by the due dates. This relief applies to missing and inaccurate taxpayer identification numbers and dates of birth, as well as other information required on the return or statement.

Next Steps

The 30-day extension for furnishing statements to individuals automatically applies to all entities subject to the ACA's reporting requirements, meaning you don't have to request it. In fact, the IRS has noted that it will not respond to employers' and providers' individual requests for extensions. Because of the extended deadline, employees and covered individuals may not receive Forms 1095-B or 1095-C by the time they are ready to file their 2018 individual income tax return. While the information on these statements is helpful in preparing individual returns, employees and covered individuals do not have to wait for Forms 1095-B or 1095-C to file. Individual returns can be prepared and filed using other health coverage information.

If you are subject to ACA reporting requirements, you should already be working with your TPA or ERISA counsel to gather and prepare required information for 2018 reporting. Timely reporting is crucial in order to take advantage of penalty relief offered by the IRS. Also, don't forget that the deadline for filing 2018 Forms 1095-B or 1095-C with the IRS has not been extended. Employers and providers must still file the 2018 returns with the IRS on or before their regular due date, though a 30-day extension may be available.

Back to top

DOL Proposes Expansion of HRA Use for Small Employers

The U.S. Departments of the Treasury, Health and Human Services (HHS), and Labor (DOL) jointly issued proposed regulations on October 29, 2018, that could significantly expand the opportunity for small employers to utilize health reimbursement arrangements (HRAs). The proposed rule was issued in response to an Executive Order signed by President Trump in October 2017 directing the agencies "to increase the usability of HRAs, to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage."

What Types of Health Arrangements Are Impacted?

The proposed rule applies to HRAs and other types of account-based group health plans. An account-based group health plan is an employer-provided plan that reimburses expenses for medical care, subject to a maximum fixed-dollar amount of reimbursements for a period. HRAs are funded solely by employer contributions (with no salary reduction contributions or other contributions by employees) and reimburses an employee solely for medical care expenses incurred by the employee, or the employee's spouse or dependents.

Other types of account-based health plans include the qualified small employer health reimbursement arrangement (QSEHRA), which is available to employers with fewer than 50 full-time and full-time-equivalent employees; employer payment plans, under which an employer reimburses an employee for premiums for individual health insurance coverage; and health flexible spending arrangements.

Reimbursements under these types of arrangements are excludable from employees' income and wages for federal income tax and employment tax purposes. The proposed rules would allow employers greater flexibility to fund health insurance coverage for employees through HRAs, other account-based group health plans, and individual health insurance policies.

What are the Key Changes?

To expand the use of HRAs, the proposed rule outlines two key changes to current law:

- Remove the current prohibition on integrating an HRA with individual health insurance coverage; and
- Expand the definition of "limited excepted benefits" to include HRAs that meet certain requirements.

To facilitate these changes, the proposed rule also:

- Clarifies the federal premium tax credit (PTC) eligibility for individuals offered an HRA integrated with individual health insurance coverage;
- Clarifies that integration of an HRA or a QSEHRA with individual health insurance coverage does not cause the individual health insurance coverage to become subject to the Employee Retirement Income Security Act of 1974 (ERISA) if certain requirements are met; and
- Establishes a special enrollment period that enables individuals to enroll when they become eligible for HRA or QSEHRA coverage that can be integrated with individual health insurance coverage.

Integration of HRAs With Individual Health Insurance Coverage

HRAs are subject to the Patient Protection and Affordable Care Act (ACA) requirement to cover certain preventive care services without any cost sharing, as well as the ACA's prohibition on annual dollar limits on essential health benefits. HRAs on their own cannot comply with these ACA mandates. Thus, HRAs are generally permitted only if they are "integrated with other group health plan coverage" that separately complies with the ACA mandates.

HRAs currently cannot be integrated with individual health insurance coverage to satisfy the ACA mandates, but the proposed "Integrated HRA" rules would permit employers of any size to offer a standalone HRA to employees and former employees who have individual health coverage.

To comply with the proposed rule, the following criteria must be met:

- **All individuals covered by the integrated HRA must be enrolled in individual health coverage.** All participants and any dependent covered by the Integrated HRA must be enrolled in individual health insurance coverage that does not consist solely of excepted benefits (for example, dental-only or vision-only coverage).
- **Employers must limit other coverage.** Employers cannot offer both the HRA integrated with individual health insurance coverage and a traditional group health plan to the same class of employees. The employee classes include (1) full-time, (2) part-time, (3) seasonal, (4) collectively bargained, (5) employees subject to a coverage waiting period, (6) employees under age 25, (7) non-resident aliens with no US-based income, (8) employees whose primary site of employment is in the same rating area and certain combinations of the various classes.
- **Same terms requirement.** The HRA must be offered with the "same terms" (amount and conditions) to all employees or retirees within a certain class.
- **Opt-out requirement.** All eligible employees must be permitted to opt out of the HRA coverage at least annually.
- **Substantiation and verification requirement.** Integrated HRAs must implement and comply with reasonable procedures to verify that individuals are enrolled in individual health insurance as part of each reimbursement request. These procedures can take the form of a document demonstrating that the individual is covered under an individual insurance policy (for example, an insurance card), or an attestation by the participant. Employers would be permitted to rely on this documentation unless it has actual knowledge that the individual is not enrolled in individual health coverage.
- **Notice requirement.** To ensure that individuals eligible for Integrated HRAs understand how such coverage could potentially impact their PTC eligibility, participants must be provided with a written notice describing the HRA upon initial eligibility and at least 90 days before the beginning of each plan year. The notice must describe the terms of the Integrated HRA

(including the individual insurance coverage and substantiation requirements), the dollar value available for reimbursement, the participant's opt-out rights, the PTC eligibility consequences, and several other required statements.

HRAs as Limited Excepted Benefits

As an alternative to the Integrated HRA option, the proposed rule would recognize certain HRAs as limited excepted benefits, which are generally exempt from compliance with the ACA mandates for group health plans. These stand-alone HRAs would allow participants to obtain reimbursement for certain qualified expenses, even if they choose not to enroll in an employer's group health plan coverage.

An HRA qualifies as a limited excepted benefit if it meets the following requirements:

- The HRA must not be an "integral part" of the employer's group health plan. This means that a plan sponsor must offer other group health plan coverage to the employees who are also offered the HRA for a particular plan year (though the employee is not required to enroll in the other coverage). The "other" coverage must not be another account-based group health plan or coverage consisting solely of excepted benefits;
- The amount made available under the HRA cannot exceed $1,800 per year (indexed for inflation after 2020);
- The HRA cannot provide reimbursement of premiums for individual health insurance coverage, coverage under a group health plan (other than COBRA or other group continuation coverage), or Medicare parts B or D; and
- The HRA must be made available under the same terms and conditions to all similarly situated individuals.

The proposed rule prohibits employers from offering both an HRA integrated with individual health insurance coverage and a limited excepted benefit HRA to any employee.

Premium Tax Credit Eligibility

Any employee who is covered by (or is offered but opts out of) an HRA that is integrated with individual health insurance coverage would not be eligible to receive a federal PTC for health insurance coverage purchased on an exchange if the HRA is "affordable" and provides "minimum value."

An integrated HRA would be considered affordable if the employee's required contribution is no more than 1/12 of the product of the employee's household income and the "required contribution percentage." An employee's required HRA contribution percentage would be the excess of:

- the monthly premium for the lowest-cost silver plan for self-only coverage available to the employee through the exchange for the rating area in which the employee resides; over
- the monthly self-only HRA amount provided by the employee's employer, or, if the employer offers an HRA that provides for the same dollar amount regardless of whether the employee elects self-only or other-than-self-only coverage, the monthly maximum amount available to the employee.

An HRA integrated with individual health insurance coverage that is determined to be affordable will also be deemed to provide minimum value under the ACA.

Exclusion from ERISA Coverage

The proposed rule clarifies that an employee's individual health insurance plan generally will not be subject to ERISA. However, to avoid being subject to ERISA, the following requirements must be met:

- The purchase of any individual health insurance coverage must be completely voluntary for employees;
- The employer cannot select or endorse any particular coverage or carriers (Note that this does not prevent an employer from providing general contact information regarding

availability of health insurance in a state or providing general health insurance educational information);
- Reimbursement for non-group health insurance premiums must be limited solely to individual health insurance coverage;
- The employer cannot receive any consideration in connection with the employee's selection or renewal of any individual health insurance coverage; and
- Participants must be notified annually that the individual coverage is not subject to ERISA.

New Special Enrollment Period

Under the proposal, an employee's access to, and enrollment in, an Integrated HRA or QSEHRA would be a triggering event for a new special enrollment period. The special enrollment period would be available for coverage offered both on and off the health insurance exchanges. The proposed coverage effective date for such enrollment would then be the first day of the month following the triggering event. The rules also propose an option for advance availability for the special enrollment period, which would allow qualified individuals and dependents to select coverage during a special enrollment period up to 60 days in advance of the triggering event.

What This Means for You

The proposed changes would apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2020, and the PTC provisions would apply to taxable years beginning on or after January 1, 2020. The proposed regulations present plan design opportunities for employers of all sizes, but particularly for small employers.

Employers should work with their broker or ERISA counsel to assess any new opportunities available to them under proposed rules. Employers establishing HRAs under the proposed rules will also need to begin preparing plan documents, as well as the required communications to employees that address the specific items enumerated in the proposed rule such as PTC eligibility and special enrollment periods.

Back to top