



## Compliance Corner Webinar:

### New Rules for the New Year and other Compliance Concerns

January 14, 2016

**Q: Can Medicare premiums be paid through an HRA?**

A: This is accomplished by a retiree only plan.

**Q: Can an employer with only 1 employee still pay the premium for an individual policy?**

A: Yes, as this isn't a group plan subject to ACA requirements. But, the employer may want to check with their tax advisor.

**Q: Can HRA funds be used to pay for premium?**

A: It's important to be clear that HRA funds cannot be used to pay for individual health coverage. HRA funds can be used to pay group premiums or excepted benefits.

**Q: Many employers want to reimburse employees to not take the plan or to reimburse for the spouse to not be on the plan under an HRA; would this new HRA ruling not allow this?**

A: Cash in lieu programs should be developed with legal guidance because of the complexities involved in offering a plan or cash. This requires a cafeteria plan, at a minimum. If you're asking if an HRA can be used only if an employee declines coverage under an employer sponsored plan, question 9 of Notice 2015-87 addresses it in detail.

The guidance notes that if the employee cannot use the funds to pay for coverage under the employer's plan but only through waiving coverage this becomes a choice between cash and coverage. This results in an effect of increasing an employee's contribution for health coverage beyond the amount of any salary reduction that would apply if the employee chose coverage. For a more detailed explanation, see question 9 of the notice.

**Q: Is there a resource that shows when individual premiums CAN be paid by employer? I.e., under 20 employer paying for Medicare supplement and drug card?**

A: No, there is no easy resource. The best assumption is that an employer can't pay for individual health insurance premiums since this is intended in most cases. If you're specifically asking about Medicare, you already cited the 20 employee or smaller employer distinction due to Medicare Secondary Payer rules.

**Q: How about the spouse of an employee reimbursed for Medicare supplement & Drug charges?**

A: This is best accomplished by a retiree only plan. It is permissible also for an employer with fewer than 20 employees who is not subject to Medicare Secondary Payer rules

**Q: If an employee opts out, there wouldn't be an employee contribution?**

A: That's true. But, the rules are recognizing that by opting out, the employee had to forego the employer's contribution to coverage.

**Q: Did I correctly understand that the affordability test for employees is now 9.66%? If the employee's share of the cost is less than 9.66% they are not eligible for subsidies?**

A: Correct.



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**Q:** In regards to STD/LTD premiums, what do you mean "when employer does not contribute directly or *indirectly*"?

**A:** Indirectly would be allowing for pre-tax payment of premiums by employees.

**Q:** For an ALE not offering coverage in 2016, do they minus the first 30 or first 80 FT employees to determine their penalty?

**A:** It's 30 for 2016 as the transition relief is expired.

**Q:** Congress suspended the HIT tax in 2017, so should employers expect a 3% reduction in 2017 rates?

**A:** I believe the carriers will use the monies to help stabilize rates.

**Q:** With the employer reporting delay are employees going to be required to include the 1095 Form with their personal tax filings?

**A:** No. This is stated in the instructions provided with the form.

**Q:** I thought that if you had an opt out feature in effect on 12/16/2015, you didn't have to include it until regulations have been issued. If you add it after 12/16/2015, you have to include in 2016.

**A:** An unconditional opt-out arrangement does not have to include the employee's required contribution if the plan was adopted before December 16, 2015.

**Q:** On that last slide of proposed changes, does the "no participation/no contributions requirements" apply to off exchange health plans or only on-exchange/SHOP ?

**A:** The slide refers to ALEs enrolled in the small group market in general. It is not specific to the SHOP.

**Q:** Will employer contributions to an HSA count towards affordability?

**A:** Employer contributions to HSAs do not count toward affordability because HSA amounts cannot be used to pay premiums, but can only be used toward the participant's (or his/her tax dependents') medical costs (i.e., cost-sharing expenses under the group health plan, or other medical expenses under code section 213(d) that are not covered under a group health plan). They can count toward meeting minimum value (MV).

**Q:** If the guidelines don't require participation or contribution requirements then the carriers won't be allowed to apply ratings for low participation? This is what is happening today and it usually means coverage is unaffordable for both the employer and the employee.

**A:** If you're in the large group market, carriers can rate up for participation. If employers aren't getting sufficient participation they can revisit the employer contribution level to entice more participants and thereby lower the "rate-up" for nonparticipation.

**Q:** Clarify "Proof of Good Faith Effort" or give an example.

**A:** We don't have anything. But, experts who work with the IRS have suggested that getting a code or 2 wrong is good



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faith, leaving boxes empty that should be completed is not good faith.

**Q:** Clarify if both the HRA and QHP have to be with the same employer in order for the HRA to be considered "integrated" spousal coverage through a different does not count?

**A:** Yes. The IRS guidance is ending the use of HRA funds for dependents and spouses who are not also enrolled in the integrated health plan.

**Q:** Notice 2016-4 must show good faith. Is this for the extensions or for the original dates?

**A:** Good faith applies but there will not be additional extensions, the dates are firm.

**Q:** Does NAHU expect VA to adopt the PACE Act to keep the small group market at 1-50 FTEs? if yes, when do you expect this to be effective?

**A:** HB 58 was introduced in Virginia and has been signed into law. It defines small group to "include employers who employ an average of 50 or fewer employees."

**Q:** Have you heard of anything in the works by carriers for Large Group ALE that are offering affordable coverage, but are consistently failing carrier participation guidelines, and therefore, getting declined by the carrier?

**A:** No, we haven't heard anything on this topic from the carriers. But, carriers cannot decline coverage for large employers. They can only rate up.

**Q:** If the employer offers money to be used for vision, dental and ancillary products in the event they waive medical coverage, would that be considered a Cafeteria Plan or HRA? How should this be written legally for the employer to be safe in case of audit?

**A:** This would still be considered an opt-out or "cash in lieu" plan. And, anytime you offer a choice between cash or benefits you need a cafeteria plan. If the flex contribution is not usable exclusively for medical care, it is not deemed a health flex contribution and does not impact affordability. (Example 2 of Q&A 8 of Notice 2015-87)

**Q:** can you please review the HRA scenario again? Seemed to be saying an ER could use promised HRA money to offset employee premiums.

**A:** HRAs can be used for group premiums or excepted benefits. HRAs cannot be used for individual coverage premiums.

**Q:** For groups 50-99, if a group qualifies for transition relief, do they have to provide coverage of off their 2015 renewal or can they prolong coverage until 2016

**A:** You are correct. If you walk through the transition relief requirements, you'll be able to determine when the plan is subject to the employer responsibility requirements. If they satisfy the relief they are not subject to assessment until their 2016 ERISA plan renewal date.

**Q:** When does NAHU expect the IRS to release guidance on section 105 non-discrimination rules as applied to fully insured plans?



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A: We don't believe it will happen this year.

**Q: We were advised that as long as there is a condition to an opt-out credit requiring proof of other coverage, we do not need to add the opt-out credit to the affordability testing amount. Can you confirm?**

A: The guidance says there will be more details forthcoming. Here's the overview of what Notice 2015-87 stated:

- Opt out or cash in lieu funding arrangements prior to 12-16-2015 are not considered for affordability nor are they reported
- Conditional opt out arrangements are not considered or reported. Conditional means the employer conditions the cash-out on other coverage
- Future guidance expected regarding unconditional opt out or "cash in lieu", Unconditional is provided to anyone who waives
- The \$200 employee premium contribution must be added to the \$200 opt out funds to determine affordability.  $\$200 + \$200 \times 9.56\%$  . (Question 9).

**Q: Will carriers be required to offer plans that don't meet participation? Will they be able to cancel those at year end?**

A: Carriers have to offer plans to ALEs whether participation is met or not – however they can rate up. The small employer that enrolls Nov 15-Dec 15 for Jan 1 does not have to satisfy participation. They should be renewed but some carriers may require new paperwork.

**Q: If an employer is a controlled group for purposes of determining ALE for the ESR do we then look at each group on its own to determine small or large group definition or do we have to look at the total FTE for all locations combined to determine group status?**

A: ALE status is determined by adding ALL employees, i.e. union, non- union, seasonal, part time and in all controlled groups combined. Penalties are assessed on an EIN basis. In controlled groups, the -30 offset will be pro-rated based on the size of the non -compliant EIN.

**Q: Is there a penalty to employers or carriers if there is a small employer that is part of an ownership group and on large employer coverage after 10/1/16**

A: Whether an employer is in the small or large group market doesn't really determine penalties. Penalty is determined if the employer is an ALE and if a FT employee is eligible for and accepts a subsidy.

**Q: Is the government developing a revised MV calculator? The non-GF thresholds are severely outdated.**

A: We haven't heard that there is a problem with the MV calculator.

**Q: Can you review Affordability rules if an employer is contributing to an HRA?**

A: Clarifies when HRA funds apply to affordability or minimum value

- If can reimburse premium or cost-sharing then counted toward employee's required premium contribution
- If plan doesn't allow premiums, then applies to minimum value (Question 7)
- Flex contributions that can be used as cash or non-health care benefits cannot be used for affordability purposes (Question 8 of Notice 2015-87)
- HRA available funds are subtracted from the employee only premium to determine affordability.



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- Example the employee contribution for single coverage is \$200 monthly and the employer makes \$1,200 AVAILABLE annually for premium or cost sharing.
- The \$100 monthly AVAILABLE HRA funds is subtracted from the \$200 health plan premium so that the cost to the employee is \$100 month. \$100 is what is used to calculate affordability.  $\$200 - \$100 \times 9.56\%$

**Q:** Can you clarify if an ALE must comply with the 2016 mandate calculation rules (30 versus 80) on 1/1/16 or on their Plan Year in 2016.

**A:** For 2016 the offset is -30 for all size ALEs. The - 80 was transition relief for 2015 only and only for employers who were 100 or more Ft including equivalents.

**Q:** Owner of Sub Chapter S had transition relief to pay individual premiums through company due to the flow through income.

**A:** 2% shareholder is an exception to the prohibition.

**Q:** Can an Employer pay for an employee's Medicare Supplement and PDP plan (not the Part B Prem)?

**A:** Under an HRA? If it's a retiree-only HRA plan, yes.

**Q:** Is there any new guidance issued that disallows this practice in 2016? Most CPAs don't have a clue about this.

**A:** Notice 2015-87 is one. IRS Notice 2013-54 is another.

**Q:** How does an ALE find out if they have VA or Tricare benefits eligible EEs and remove them from 50 head count?

**A:** Ask? I believe this is more of an issue if the employer is located in an area where this is more likely and where it is likely to impact whether the employer is an ALE or not. For example, if the employer has 1,000 employees, how likely are these select groups to drop the employer below 50?

**Q:** Can an employer contribute to HSA's of employees even there is no group plan, only individual plans?

**A:** HSAs are not tied to an employer's plan.

2. Does an employer have to make contributions to an employee's HSA?

No, employers are under no obligation to make any contributions to their employee's HSAs. Many employers find that making a contribution may help improve employee acceptance of adopting an HSA plan especially if they are transitioning from a more traditional type of health coverage. If an employer elects to contribute to an HSA outside of a cafeteria plan, the contributions must be comparable.

Source: <https://www.hsaresources.com/faq/#emp-02>

**Q:** How does your answer affect Single employee C Corps with the owner being the only employee for employer contributions to an individual policy?

**A:** A single employee does not constitute a group plan, so the ACA market reform rules aren't applicable.

**Q:** If you were a 50-99 and got transition relief then you have relief as a non-calendar year plan?

**A:** If the employer satisfied the relief, they are not subject to penalty until their 2016 ERISA plan year.



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Q: Did you say that anyone can contribute to an HSA? I do not think that an employer can contribute to an HSA account for an employee that has an individual HSA qualified health plan. I believe that an employer can only contribute to an HSA for an employee that is covered by the employer's group HSA qualified health plan. Would you please confirm this?

A: No. The employer may contribute to an employee's HDHP.