21st Century Cures Act & Impact of Fiduciary Rule on Agents

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TODAY'S PRESENTER

David C. Smith

Vice President, EbenConcepts

- David has nearly 20 years of experience in employee benefits with regulatory, business and industry perspectives. He has spoken extensively about wellness and its nuances and is always highly rated as a speaker before diverse audiences.
- David also serves as chairman of NAHU's Professional Development Committee

QSE HRAs

What every NAHU Member should know

Health Reimbursement Arrangements

- With numerous pieces of guidance issued since 2013, there have been two approaches with HRAs:

Integrated vs. Standalone

- Must be integrated with a group health plan
- Used to reimburse deductibles, coinsurance or copayments

- Generally prohibits payment of individual premiums through standalone HRA
- Exceptions for spousal coverage, retirees and Medicare enrollees

Standalone HRAs

- Employee must be covered on spouse's group health plan
- Employer can reimburse cost of being covered on spouse's plan
- Under other tax guidance, HRA reimbursement amount is likely taxable income

- Former employee eligible based on employer's definition of retiree
- Employer can reimburse all or a portion of the individual health insurance premiums or Medicare related costs
- Benefit is tax-free to retiree

- Employer had 1-19 employees at least half of previous calendar year
- Employer can reimburse all or a portion of the cost of Medicare related coverage (Part B, PDP, Supp premiums)
- Benefit is tax-free to employee

New Standalone HRA

- With the passage of the 21st Century Cures Act, a new type of Standalone HRA are permitted:

Qualified Small Employer Health Reimbursement Arrangements (**QSE HRA**)

Qualified Small Employer

- **Not an Applicable Large Employer (ALE)**
  - Average less than 50 FTEs during previous calendar year
    - Remember that ALE determination could include other employers based on common ownership or control rules
  - State definitions of small employer do not impact this law

- **Does not offer group health to any employee**
  - If currently offering health insurance, must terminate plan prior to offering benefits under QSE HRA

Eligible Employee

- **QSE HRA must be offered to all eligible employees**
  - Full-time (likely as defined under the ACA)
  - Non-seasonal
  - Employed 90 days

- **Employee covered on an individual health insurance policy or spouse's group health plan**
  - Employer must obtain proof of coverage and maintain records
    related to ongoing coverage

Benefits

- **QSE HRA pays or reimburses for any 213(d) health care expense**
  - Includes paying premium for individual coverage
- **Employer can set maximum benefit amount up to annual limits**
  - Annual maximum benefit of $4,950 for employee or $10,000 for family
    - Limits will increase in the same manner that HSA and FSA limits change currently
    - Amount could vary based on employee age
  - Maximum benefit prorated based on months that employee eligible during calendar year
  - Permitted to limit benefit to employee only
- **Employer must fund 100% of the QSE HRA's benefits**
  - No employee contributions allowed

Employer Reporting & Notice

- Report benefit amount on employee’s W-2
  - Separate reporting requirement than 12DD reporting created by the ACA

- Annual notice to all eligible employees
  - Who is eligible and QSE HRA benefits
  - Inform employee to notify Marketplace of QSE HRA benefit
  - Individual health insurance mandate and penalty reminder
  - Deadline: 90 days prior to beginning of calendar year

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QSEHRA

Small Employer HRA

Important Differences

- **Can the employer restrict the employee from using the money?**
  - No clear authority to limit reimbursements to:
    - only certain types of expenses (e.g. deductible, premiums) or
    - after some portion of expense has been paid (reimburse up to $300 of health insurance premium)
- **Can employer limit to monthly maximum benefit**
  - Despite prorated benefit limit, not clear employee
- **Employer must maintain coverage, expense records**
  - Records to substantiate health care expenses reimbursed or paid to employee
  - Maintain proof of coverage from eligible employee

Regulatory Relief

- **No continuation requirement**
  - Employer does not have to allow a previously eligible employee to continue to receive QSE HRA benefit
- **QSE HRA is not subject to ERISA mandates**
  - No requirement for written plan or summary plan description
  - But other mandates may still apply (e.g. HIPAA Privacy & Security)
- **Limited Penalties for Failure to Provide Notice**
  - $50 per employee
  - $2,500 calendar year maximum

Types of Standalone HRAs

	QSE HRA	Spousal HRA	Retiree HRA	Medicare HRA
Active Employees?	Yes	Yes	No	Yes
Employer Size	Non-ALE	All	All	1-19 EEs
Offer Group Health Plan	Prohibited	Required	Required	Required
Impact on Premium Subsidies	Complicated	APTC Prohibited	APTC Prohibited	n/a
Reimburse health premiums	Yes and other 213(d) expenses	Only cost of coverage on spouse’s plan	Yes	Medicare only
Flexibility to limit amount or benefits	No	No	Yes	Yes

QSE HRA vs. Premium Subsidies

- **Is Employer Coverage Affordable?**
  - Three “safe harbors” today to answer this question
  - New law creates a special way to assess affordability when there is a QSE HRA in place:

EMPLOYEE COST

Second Lowest Silver Plan for Self-Only

minus 1/12 of QSE HRA benefit

compared to 9.69% of EE’s household income

QSE HRA Impact

- **55 YEAR OLD EMPLOYEE**
  - Spouse who is same age with two children who are 20 years old or younger
  - Household Income: $60,000
  - Living in zip code 28755

Second Lowest Silver Plan for Self-Only	$980.98
1/12 of QSE HRA benefit	300.00
Net Cost of EE Only Coverage:	**$680.98**
9.69% of EE’s household income (monthly amount)	$484.50

EMPLOYER COVERAGE due to QSE HRA is unaffordable ($680.98 > $484.50)

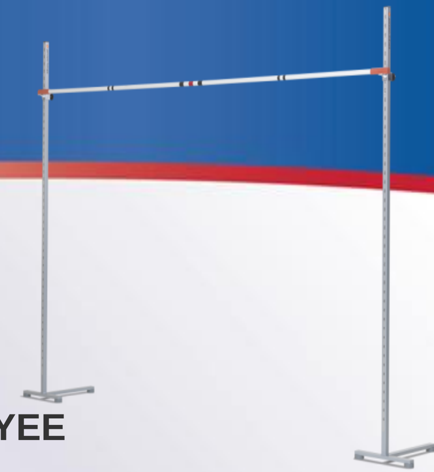
QSE HRA Impact

- **35 YEAR OLD EMPLOYEE**
  - Spouse who is same age with two children who are 20 years old or younger
  - Household Income: $60,000
  - Living in zip code 28755

Second Lowest Silver Plan for Self-Only	$537.56
1/12 of QSE HRA benefit	300.00
Net Cost of EE Only Coverage:	**$237.56**
9.69% of EE's household income (monthly amount)	$484.50

EMPLOYER COVERAGE due to QSE HRA is affordable ($237.56 < $484.50)

QSE HRA Impact



- **55 YEAR OLD EMPLOYEE**

Family Coverage Cost	$2,520.64
Household Income vs. FPL	247%
Premium Subsidy	$2,116.64
Net Cost to Household	**$404.00**
EMPLOYEE MUST PAY:	**$704.00**
Reimbursed via QSE HRA	**$300.00**

- **35 YEAR OLD EMPLOYEE**

Family Coverage Cost	$1,633.80
Household Income vs. FPL	247%
Premium Subsidy	none
Net Cost to Household	**$1,633.80**
EMPLOYEE MUST PAY:	**$1,633.80**
Reimbursed via QSE HRA	**$300.00**

Compliance Issues

QSE HRAs

Essential Information

- Not considered a Employer Payment Plan (EPP) or a standalone HRA under IRS Revenue Ruling 61-146 and Notice 2013-54

- Outside the regulation of:
  - ERISA
  - Public Health Services Act
  - Affordable Care Act
  - Age Discrimination (based on premium differences)

- Not as clearly outside the scope of HIPAA Privacy & Security regulations or other federal nondiscrimination laws

Some obvious questions

- Do they have the leeway allowed with other HRAs?
  - Can Employer limit the way that the funding is used by the employee (e.g. only premium)?
  - Can the employer limit the amount that an employee can use to a certain amount per month?
- If the employer allows premium payment and allows billing from the carrier and the HRA doesn't cover the full premium, what would be the logistics of paying the balance?

Some obvious questions

- How often must the employer check to make sure that the employee is covered?
- Do some states' laws prohibit this arrangement (or create an impediment)?
  - Example: Texas TDI Bulletin B-0028-06

Some obvious questions

- Is the QSE HRA subject to nondiscrimination testing under Sections 105(h) or 125?

QSE HRAs
Helping Employers Decide

Doing the Math, because otherwise they'll blame you

First… start with the numbers

- Look at plans and costs based on age
  - Using medium cost Silver Plans from the same carrier
  - Network Differences:
    - Individual: Only a limited network is available (3/5 hospitals in region and 45-50% physicians in-network)
    - Group: Broad PPO network is used (all hospitals and 99% of physicians)
  - Some other assumptions
    - Employees are paying 15% federal income tax and 4% state income tax
    - Owner is paying 25% federal income tax and 4% state income tax

Group vs. Individual

- Analysis – Four Employees + Owner Business located in 27604

Employee	Age	Household Size	Household Income
Lee (owner)	53	2	$90,000
Judy	60	2	$50,000
Allison	32	3	$95,000
Sam	55	2	$75,000
Marsha	47	3	$35,000

Group vs. Individual

- Monthly Premium – Individual vs. Group

Employee	Individual: $3,500 / 30% Silver Narrow PPO Network	Group: HSA $2,000 Silver Broad PPO Network
Lee	$1,617.48	$1,485.12
Judy	$2,151.88	$1,975.80
Allison	$1,340.37	$1,230.68
Sam	$1,768.12	$1,623.44
Marsha	$1,491.02	$1,369.00
TOTAL	$8,368.87	$7,684.04

Group vs. Individual

- **Option 1:** No Assistance
  - Two employees receive premium subsidies which saves $1,674 and $1,288 per month but everyone else pays the actual cost with after-tax dollars
  - Only the owner gets any favorable tax treatment, able to fully deduct the cost of the coverage for his household ($19,410) from his personal income tax "above the line" and saves him $5,629 on his tax bill

Employee	Monthly Cost
Judy	$477.92
Allison	$1,340.33
Sam	$1,768.08
Marsha	$203.00

Owner	Annual HC Premium
Lee	$19,410

Group vs. Individual

- **Option 2:** Business increases employees gross income to help

Employee	Premium Costs	Increase in Pay	ER FICA	EE Add'l Expense*	Net Monthly HC Costs
Judy	$5,735	$5,000	$383	$1,782	$210 (56%)
Allison	$16,084	$15,000	$1,148	$3,848	$924 (31%)
Sam	$21,217	$20,000	$1,530	$5,130	$1,213 (31%)
Marsha	$2,436	$2,000	$153	$763	$127 (38%)

* Employee's share of FICA, income taxes on higher income and for two receiving subsidies, increases in their cost

- Owner/Business pays **$45,213** annually in higher pay and FICA costs
  - Not tax deductible business expenses

Group vs. Individual

- **Option 3:** QSE HRA implemented by employer, who gives $750 per month to each employee + dependents

Employee	Monthly Premium Costs w/o QSE HRA	QSE HRA Benefit	Remaining Monthly Premium
Judy	$477.88	$750	$477.88 (same)
Allison	$1,340.37	$750	$590.37 (56% less)
Sam	$1,768.12	$750	$1,018.12 (42% less)
Marsha	$203.02	$750	$203.02 (same)

- Owner/Business pays **$36,000** annually in QSE HRA expenses
  - Which is also a tax-deductible business expense

Group vs. Individual

Option 4: Business puts a Group Health Plan in place, paying for 75% of the cost of coverage for its employees

Employee	Monthly Premiums	Employee Share	Ann. Pre-Tax Savings*	Net Mo. Cost to EE
Judy	$1,975.80	$493.95	$453.45	$382.07
Allison	$1,230.68	$307.67	$282.44	$237.98
Sam	$1,623.44	$405.86	$372.58	$313.93
Marsha	$1,369.00	$342.25	$314.19	$264.73

* FICA and annual income tax savings from pre-tax treatment of EE contributions

- ER share of Group Health Ins Premium (after tax savings from business expense and FICA) is **$54,142** annually

Compare Options Based on Cost Alone…

Employee	Option 1	Option 2	Option 3	Option 4
Judy	$478	$210	$478	$382
Allison	$1,231	$924	$590	$238
Sam	$1,623	$1,213	$1,018	$314
Marsha	$203	$127	$203	$265

	Option 1	Option 2	Option 3	Option 4
Company	$0	$45,213	$36,000	$54,142
Lee (Owner)	$13,781	$13,781	$13,781	$13,366

But it's more complicated than costs alone

- Interesting Analysis for most employers
  - Are plans too complicated or managed (Rx, gatekeepers)?
  - Are the networks broad enough to cover everyone's needs?
  - Which is better for the employee?
  - Which option is the best cost for the small business/owner?
  - How would this each option be administered and maintained?
    - What about new employees in a QSE HRA
  - Are you getting paid for your work?

Other Changes from the 21st Century Cures Act

Medicare Changes

- Restores Medicare Advantage open enrollment period similar to the open enrollment period that existed prior to the ACA
  - Beginning in 2019, Medicare Advantage or Part D enrollee will be able to elect to change her enrollment to either another Medicare Advantage Plan or to Medicare Parts A and B within:
    - First three months of the year if change made during Open Enrollment or
    - First three months of coverage for a newly eligible beneficiary who has enrolled in a Medicare Advantage plan
  - No restriction on changing enrollment between Medicare Advantage plans that include drug coverage and those that do not
- Allows Medicare beneficiaries with end-stage renal disease (ESRD) to enroll in Medicare Advantage plans beginning in 2021

Mental Health Parity Changes

- Increases compliance of the Mental Health Parity rules on group health plans by reviewing practices that limited available providers or paid Mental Health and Substance Abuse providers far less than market rates

Fiduciary Rule

Potential Impact on NAHU Members

Introduction

ON HOLD

- THIS RULE IS CURRENTLY PENDING REVIEW
- Broadening of Fiduciary Definition
  - DOL’s new rule broaden scope of advisors deemed to be IRA/plan fiduciaries
  - Mainly targeting broker-dealers (BDs) and registered reps (RRs) earning commission-based compensation
  - Impact registered investment advisers (RIAs)
    - Offering rollover advice
    - Managed account programs

New "Investment Advice" Definition

- Required Context for Investment Advice
  - Advisor acknowledges it is acting as a fiduciary under ERISA or IRC, or
  - Written or unwritten understanding that advice is based on <u>particular</u> investment needs of client, or
  - Advice is directed to <u>specific</u> person(s) regarding advisability of a <u>particular</u> investment decision
- Required Nature of Investment Advice
  - Advisor makes a "<u>recommendation</u>" for a fee or other direct or indirect compensation

Fiduciary Rule and Exemptions

- Need for “ERISA 406(b)” Exemptive Relief required for brokers and insurance agents, including advisors to HSAs
- Best Interest Class Exemption that says Advisor can earn variable compensation (such as commissions) for non-discretionary advice) that includes covered retail clients such as those setting up HSAs

Practical Impact with HSAs

- HSA investment options (such as mutual funds) which charge annual fees and separate administration fees create possible conflicts of interest
- Agents impacted if they provide information to their clients and/or their employees about HSAs that crosses the line from general investment education to investment advice, or if they benefit in some way from the advice being given.
  - Agent receiving compensation in the form of revenue sharing on specific HSA investments or products or
  - Agent receiving bonuses for steering employees toward particular HSA vendors
- General information on HSA investment lineups that are merely made available or provided as an option without an endorsement, and there is not say by employer or agent <u>should not</u> cause the fiduciary rule to kick in

Practical Impact with HSAs

- Employers, HSA vendors and agents should:
  - Ensure that the fees charged to participants within the HSA program are appropriate and fully disclosed.
  - Review education and communication materials and practices to make sure they do not constitute investment advice and recommendations.
  - Stay on top of changing investment options being offered to employees participating in the HSA plan.
  - Pass along information from the providers to prevent the appearance that you are not passing along what you know.

Main Advice relative to HSAs

“You don’t have to open an HSA or IRA if you don’t want to.”

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Thank You!

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