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Labor and Employment Alert: 21st Century Cures Act

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On December 13, 2016, President Obama signed the 21st Century Cures Act (H.R. 34) into law. The 21st Century Cures Act contains two provisions that relate to group health coverage.

Small Employer HRAs

Starting with the publication of IRS Notice 2013-54, the IRS prohibited standalone health reimbursement arrangements (HRAs). In particular, IRS Notice 2013-54 was meant to prevent employers from reimbursing employees for premiums for individual health insurance. The IRS classified the practice as a group health plan that failed to satisfy certain patient protection provisions of the Affordable Care Act (ACA), namely the prohibition on imposing an annual limit on minimum essential coverage and mandating the provision of preventive coverage at no cost to participants. Under this interpretation, an employer that offered a standalone HRA would be subject to an excise tax of \$100 per day per impacted employee.

Because the practice of using standalone HRAs was common among small employers, the IRS issued guidance in IRS Notice 2015-17 suspending the application of the excise tax to small employers through June 30, 2015 to allow additional time for small employers to cease using standalone HRAs.

The 21st Century Cures Act further suspends the application of the excise tax through December 31, 2016 and adds a new permissible form of standalone HRA, the qualified small employer health reimbursement arrangement (QSEHRA). Beginning January 1, 2017, a small employer will be able to establish a QSEHRA that can be used by its employees to pay for medical care expenses, including paying premiums for individual health insurance policies.

In order to constitute a QSEHRA, the following requirements must be satisfied:

- The QSEHRA can only be offered by “small employers.” A small employer for this purpose is any employer (i) that is not an applicable

large employer under the ACA (generally meaning it has fewer than 50 full-time employees or full-time employee equivalents); and (ii) it does not offer a group health plan to any of its employees.

- The QSEHRA can only reimburse actual medical expenses, specifically including premiums for individual health insurance policies.
- The QSEHRA must be offered on the same terms to all of the small employer's employees, with the following exceptions:
 - The small employer is permitted to exclude the following employees: (i) employees who have not completed 90 days of service; (ii) employees who are under age 25; (iii) part-time or seasonal employees; (iv) employees covered by a collective bargaining agreement; and (v) nonresident aliens without earned income from sources within the United States.
 - The small employer may vary the benefit based on the cost of health insurance tied to the employee's age or the number of family members covered by the QSEHRA.
- The QSEHRA must be 100% funded by the small employer. As is the case with all HRAs, employee contributions are not permitted.
- Reimbursements from the QSEHRA cannot exceed \$4,950 for employee-only coverage or \$10,000 for family coverage. These amounts are pro-rated for partial years and will be indexed for inflation in future years.
- The small employer must provide a notice to its employees. The written notice must be provided at least 90 days before the beginning of the year (or by March 12, 2017 for 2017 QSEHRA arrangements and upon eligibility for individuals who become eligible during the year). The notice must contain the following information: (i) the amount of the benefit under the QSEHRA; (ii) a statement that if the employee intends to apply for advance payment of the premium tax credit (i.e., a federal subsidy) for health insurance in the Marketplace, the employee must inform the Marketplace of the amount of the benefit under the QSEHRA; (iii) a statement informing the employee that if he does not have minimum essential coverage for any month, he may be subject to a tax under section 5000A and reimbursements from the QSEHRA may be includible in gross income.

Small employers considering establishing a QSEHRA for its employees will want to take into consideration that eligibility for a QSEHRA will impact an employee's eligibility for a federal subsidy for the purchase of individual health insurance through the Marketplace.

- If the QSEHRA benefit makes health insurance "affordable" (i.e., single silver coverage would, with the QSEHRA benefit, cost no more than 9.69% of the employee's household income), the employee will not be eligible for a federal subsidy.
- If the QSEHRA benefit does not make health insurance "affordable" (i.e., single silver coverage would, with the QSEHRA benefit, cost more than 9.69% of the employee's household income), the employee can still get a federal subsidy but the amount of the federal subsidy will be reduced by the amount of the QSEHRA benefit.

The 21st Century Cures Act further amends the definition of "group health plan" under ERISA to exclude QSEHRAs. This revision means that QSEHRAs are not subject to COBRA or ACA group health plan provisions (other than the Cadillac excise tax which will apply in 2020 unless further delayed or repealed).

Mental Health Parity

Mental health parity has proven elusive. We continue to see many arrangements that contain questionable quantitative treatment limits or non-comparable non-quantitative treatment limits. The 21st Century Cures Act tasks the HHS, DOL and Treasury with coming up with additional guidance on compliance with the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). The guidance is supposed to help health plans, patients and health care providers identify compliant and non-compliant plan designs with a particular focus on determining parity in non-quantitative treatment limitations such as standards for medical necessity, preauthorization, provider reimbursement rates, fail-first therapy and step therapy. The guidance will include “clarifying information and illustrative examples” of how a health plan should provide individuals and their representatives access to plan information to verify a plan’s compliance with the MHPAEA. This [chart](#) provides more details on the mental health parity provisions of the 21st Century Cures Act.

Expect the government’s focus on mental health parity to continue. Congressional action to amend or even repeal the ACA will not impact the mental health parity standards applicable to group health plans. You should verify and monitor your health plan’s compliance with the government’s evolving views of mental health parity.