Segal Consulting

update

Public Sector Benefits Compliance News

February 15, 2017

21st Century Cures Act Enhances Mental Health Parity Oversight and Creates New Small Employer Health Reimbursement Arrangement

On December 13, 2016, the 21st Century Cures Act was signed into law by President Obama.[1] The Act contains a number of provisions in various areas of health law, including changes to the approval process for new medications and medical devices by the Food and Drug Administration and increased funding for cancer research. It also addresses two topics of significance to sponsors of employee benefit plans. First, the law includes a number of provisions designed to improve compliance with the Mental Health Parity and Addiction Equity Act (MHPAEA). Second, the law allows small employers that are not subject to the Affordable Care Act's employer shared responsibility penalty (generally, those with fewer than 50 full-time employees) to establish Qualified Small Employer Health Reimbursement Arrangements, which can reimburse employees for qualified medical expenses, including insurance premiums. This *Update* summarizes these two sections of the Act.

MHPAEA Enforcement

The 21st Century Cures Act requires the federal departments implementing the MHPAEA — the Departments of Labor, Treasury and Health and Human Services (HHS) — to take certain steps within the next year designed to strengthen enforcement of the MHPAEA. Of particular interest to plan sponsors, the agencies must:

- Solicit public feedback on how to improve the process that participants can use to request information from a health insurer or health plan about the insurer's or the plan's compliance with the MHPAEA.
- Issue guidance to help group health plans and insurers comply with the MHPAEA. This guidance must include examples illustrating compliance with the MHPAEA requirements relating to nonquantitative treatment limits and information disclosure. Examples of nonquantitative treatment limits are medical management standards, formulary designs, step-therapy protocols, network admission standards and factors used in setting provider reimbursement methodologies.

The Act also requires the departments to audit the plan documents of any health insurer or group health plan that has violated the MHPAEA at least five times. This is in addition to enforcement authority available under current law.

New Law Highlights:

- The new law requires the federal government to issue guidance to help plan sponsors comply with the MHPAEA.
- The law signals Congress's interest in providing additional oversight of MHPAEA enforcement efforts.
- Small employers will now be able to offer HRAs that reimburse employees for individual market insurance premiums.

NEW! On February 27, 2017, the IRS released Notice 2017-20, which extends the period for an employer that provides a QSEHRA to give an initial written notice about the QESHRA to eligible employees. The extension is from March 13, 2017 to at least 90 days after additional guidance is issued on the contents of the QSEHRA notice. Notice 2017-20 also provides transition relief from penalties for failure to furnish the written notice until further guidance is issued. Notice 2017-20 will be published in the March 13, 2017 Internal Revenue Bulletin 2017-11.

[1] When the 21st Century Cures Act (Public Law 114-255) is available online, it will be accessible from the Government Printing Office website.

Finally, the law clarifies that if health insurers or health plans provide coverage for eating disorders, including residential treatment, the insurer or plan must provide coverage consistent with the MHPAEA.

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21st Century Cures Act Modifies Existing Law Concerning HRAs

Health Reimbursement Arrangements (HRAs) are popular group health plans that provide employees with a spending account up to a defined dollar limit to reimburse them for qualified medical expenses. HRA contributions must be made exclusively by an employer or other plan sponsor; no participant pre-tax or after-tax contributions are permitted. Balances remaining in an HRA at the end of a coverage period may be carried forward if permitted under the plan documents. Because HRAs are group health plans, they are subject to both the Employee Retirement Income Security Act (ERISA) and the Affordable Care Act, including the Affordable Care Act's ban on annual dollar limits. Previous guidance had prohibited HRAs from reimbursing participants for the cost of individual insurance coverage obtained through a state Exchange or other individual market, either on a pre-tax or post-tax basis, unless the plan was a retiree-only plan.[2] The new law reverses that existing guidance for small employers, with some caveats, which are discussed below.

New Qualified Small Employer Health Reimbursement Arrangements

As noted in the opening paragraph of this *Update*, the 21st Century Cures Act establishes a new type of HRA called the Qualified Small Employer Health Reimbursement Arrangement (QSEHRA), effective for years beginning after December 31, 2016.[3] Small employers may offer a QSEHRA if they are not subject to the Affordable Care Act's employer shared responsibility provisions. This generally includes employers that employ fewer than 50 full-time or full-time equivalent (FTE) employees during the previous calendar year. An employer that uses a QSEHRA may not offer a group health plan to any of its employees. Like existing HRAs, only employer contributions may be used to fund the account. No salary reductions are permitted.

"Small employers [those with fewer than 50 full-time or full-time equivalent employees] may offer a QSEHRA if they are not subject to the Affordable Care Act's employer shared responsibility provisions."

The maximum reimbursement from the QSEHRA for an individual is $4,950 per year ($10,000 per year for family coverage), indexed annually. Reimbursement amounts offered under the plan must generally be the same for all eligible employees, although the statute permits some differences in specific situations, including for collectively bargained employees.

The QSEHRA may reimburse employees and their dependents for qualified medical expenses, as defined under IRC Section 213(d). This would include expenses for unreimbursed medical expenses (*e.g.*, deductibles, coinsurance and copayments) as well as premiums for health coverage, including individual insurance premiums and coverage purchased on a state Exchange or the federal Marketplace.

Employers would be required to provide a notice to eligible employees not later than 90 days before the beginning of the year, which describes the amount of the benefit, a statement that the employee should provide that information to any health insurance Exchange/Marketplace to which the employee applies for a premium assistance tax credit, and a statement concerning the employee's obligation under the Affordable Care Act individual mandate to obtain health coverage. Failure to provide the notice would result in an excise tax penalty of $50 per employee up to a maximum of $2,500. Employers would also have to report the amount of the contribution on an employee's Form W-2.

A QSEHRA is not subject to ERISA or to the group health plan provisions of the Affordable Care Act. It is also not subject to the continuation coverage provisions of the Consolidated Omnibus Budget Reconciliation Act (COBRA).

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[2] For a summary of that guidance, see Segal Consulting's February 23, 2016 *Update*, "Additional Guidance on Health Reimbursement Arrangements."

[3] See a new Internal Revenue Code (IRC) Section 9831(d).

The Act addresses the impact of a QSEHRA on an employee's right to obtain subsidized coverage under a state Exchange or federal Marketplace. It provides that an employee is only eligible for a premium assistance tax credit if the cost of purchasing standard coverage from an Exchange/Marketplace using funds from the QSEHRA is not affordable, and includes a formula to use to calculate affordability. Generally, the higher the amount of the QSEHRA, the less likely that an employee would be able to obtain a premium assistance tax credit to assist with the purchase of coverage in a state Exchange or the federal Marketplace.

Implications of the QSEHRA Coverage Option

Prior to the 21st Century Cures Act, small employers could not reimburse employees for the cost of individual insurance premiums. Many small employers provided group health coverage to employees through a multiemployer health plan, the small group market or the small business exchange created by the Affordable Care Act. In 2017, small employers will have another option for providing health coverage, through a QSEHRA.

Employers interested in the QSEHRA would generally include those who would be interested in a defined contribution approach to health care, where they can establish the amount that they will contribute to coverage and place the remaining responsibility on the employee. While certain small employers may wish to provide a QSEHRA, the effectiveness of the QSEHRA may be limited because an employer may not offer another group health plan to their employees and the maximum contribution ($4,950/$10,000) may be insufficient to allow employees to purchase individual coverage. In addition, employers would not be able to use a QSEHRA for part of their workforce and not others, as they would be prohibited from offering group health plan coverage to any of their employees if they offer a QSEHRA. Moreover, using a QSEHRA does not remove employers completely from health care responsibilities, as they still would have notice and verification responsibilities with respect to the account.

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How Segal Can Help

Segal works with plan sponsors and their attorneys on compliance issues. We can assist plan sponsors in complying with the MHPAEA. We can also assist small employers interested in exploring the feasibility of offering a QSEHRA, and explain to large employers and plans the implications of the QSEHRA as health reform efforts begin under the Trump Administration.

Questions?

For more information about how this new law may affect your plan, please contact your Segal consultant or the Segal office nearest you.

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