Morgan Lewis

alert

employee benefits lawflash

October 18, 2013

Guidance on the Application of Certain ACA Market Reforms to Employer Health Plans

Plan sponsors should review their health reimbursement arrangements, employer payment plans, health flexible spending arrangements, and employee assistance programs to ensure they comply with ACA market reforms.

On September 13, the U.S. Department of the Treasury and the Internal Revenue Service (IRS) issued Notice 2013-54.[1] On the same day, the U.S. Department of Labor (DOL) issued virtually identical guidance in its Technical Release 2013-03.[2] Both documents (collectively, the Guidance) provide critical information and supplement earlier agency pronouncements on the application of certain market reform provisions under the Affordable Care Act (ACA) to health reimbursement arrangements (HRAs), employer payment plans, health flexible spending arrangements (FSAs), and employee assistance programs (EAPs). The Guidance provides some relief from these market reforms, but significant and complicated compliance traps remain, particularly for stand-alone HRAs, employer payment plans, and nonexcepted FSAs. Plan sponsors should consult the Guidance and review their plans in order to avoid penalties for noncompliance with the ACA market reforms, as penalties can amount to up to $100 per day, per violation, per affected individual. The Guidance is effective for plan years beginning on or after January 1, 2014.

Stand-alone HRAs for current employees will not comply with the ACA.

Stand-alone HRAs will not satisfy the ACA's prohibition on annual dollar limits or the requirement that certain preventive services be provided without cost sharing. However, building on earlier guidance, an HRA can be "integrated" with other group health plan coverage and satisfy the ACA in conjunction with that plan, even if the other plan does not (1) share the same plan document, (2) file a single Form 5500, or (3) have the same plan sponsor. In general, to be integrated, an HRA must meet the following criteria:

- The employer must offer a group health plan that provides coverage beyond excepted benefits.
- The employee receiving the HRA must actually be enrolled in such a group health plan, regardless of whether the employer sponsors that plan. For example, the HRA may be offered only to employees who are enrolled in other non-HRA group coverage, such as a plan maintained by the employer of the employee's spouse.
- Under the terms of the HRA, an employee must be permitted to opt out of and waive future reimbursements from the HRA at least annually.
- Upon termination of employment, either the remaining amounts in the HRA are forfeited or the employee must be permitted to opt out of and waive future reimbursements from the HRA.

If the HRA is integrated with a health plan that does not provide minimum value under the ACA, it must meet the following additional requirement:

1. View Notice 2013-54 at http://www.irs.gov/pub/irs-drop/n-13-54.pdf.
2. View Technical Release 2013-03 at http://www.dol.gov/ebsa/newsroom/tr13-03.html.

 © 2013 Morgan, Lewis & Bockius LLP

- HRA reimbursements must be limited to reimbursements of one or more of the following: (1) co-payments, co-insurance, deductibles, and premiums under the non-HRA group coverage or (2) “medical care” (as defined under Internal Revenue Code 213(d)) that does not constitute essential health benefits.

The opt-out/waiver/forfeiture requirements are in recognition of the fact that HRA coverage will constitute minimum essential coverage that would preclude eligibility for premium assistance on an Exchange.

Plan sponsors need to immediately review any existing stand-alone HRAs offered to current employees to make sure they are properly integrated in 2014 or are terminated before the last day of the 2013 plan year. (Earlier guidance provided that certain unused amounts credited to an HRA before January 1, 2014 could continue to be used after 2013 without violating the ACA.) Even if properly integrated, almost all current HRAs will, at a minimum, need to add the opt-out/waiver/forfeiture provisions as these are not typical HRA design elements.

The future of HRAs established in accordance with San Francisco’s Health Care Security Ordinance looks bleak. Without further relief, these arrangements will no longer be permitted in 2014, and employers may need to offer appropriate group health coverage or make direct payments to the City of San Francisco to meet the requirements of the ordinance.

HRAs and employer payment plans cannot be integrated with individual market coverage.

The Guidance also clarifies that group health plans providing tax-preferred health coverage—including, but not limited to, HRAs—cannot be integrated with individual market coverage. This means that any group health plan that facilitates the purchase of individual market coverage on a tax-preferred basis, whether inside or outside an Exchange, will not comply with the ACA’s market reforms. This includes so-called “employer payment plans” that reimburse employees’ substantiated premiums for individual coverage on a tax-favored basis, effectively ending those plans for current employees. However, as the Guidance also makes clear, an employer arrangement that pays for such coverage on an after-tax basis is usually not a group health plan and therefore is not subject to the ACA market reforms.

Retiree-only stand-alone HRAs continue to be acceptable.

The rules described above, however, do not apply to stand-alone HRAs covering fewer than two current employees, such as a retiree-only stand-alone HRA. The Guidance reaffirms that such plans are not subject to the ACA annual limit or preventive care rules. The Guidance also clarifies that a retiree-only stand-alone HRA constitutes minimum essential coverage in satisfaction of the ACA’s individual mandate. This means not only that a participant in such a plan is not subject to the individual mandate penalties but also that the participant will not be eligible to receive a premium subsidy through an Exchange. An employer payment plan reimbursing retirees for health premiums would also be excepted from ACA mandates under the retiree-only plan rule. Because HRA coverage will constitute minimum essential coverage that would preclude eligibility for premium assistance on an Exchange, consideration should be given to adding an opt-out/waiver right, even though such a feature would not be required from a legal standpoint.

Exchange coverage cannot be purchased pre-tax under a cafeteria plan.

The ACA provides, and the Guidance reaffirms, that, for plan years that begin after December 31, 2013, Exchange coverage is not a “qualified benefit” that can be purchased pre-tax under Internal Revenue Code section 125 for most employers. The Guidance includes a limited exception to this rule for non-calendar year plans that pre-date September 13, 2013 (such as Massachusetts Connector plans). This exception provides that such plans can allow the purchase of Exchange coverage through a cafeteria plan for the duration of the plan year beginning in 2013 but that the premium tax credit cannot apply to such Exchange coverage. However, this prohibition on Exchange coverage through a cafeteria plan does not address other individual market coverage. Until further guidance is issued, it may be possible for an employer to allow employees to use their cafeteria plan to purchase, on a pre-tax basis, non-Exchange individual coverage.

© 2013 Morgan, Lewis & Bockius LLP

Morgan Lewis

The ACA market reforms do not apply to nonexcepted health FSAs.

The Guidance confirms that the ACA market reforms do not apply to health FSAs, as long as the FSA is an excepted benefit. A health FSA meets this standard only if the employer also makes available other nonexcepted group health plan coverage and if the maximum benefit payable from the FSA does not exceed either two times the participant's salary reduction election for the year (or, if greater, $500 plus the amount of the participant's salary reduction). The Guidance also clarifies that this relief is only available to health FSAs offered through an Internal Revenue Code section 125 plan, effectively prohibiting an employer from taking advantage of the special health FSA rule to maintain a nonintegrated HRA with employer contributions of $500 or less. Finally, the Guidance states that a health FSA that does not qualify as an excepted benefit fails to meet the ACA mandates. Sponsors of health FSAs will want to make sure that each employee who is offered the opportunity to contribute to a health FSA is also eligible for other nonexcepted group health coverage and that the FSA itself satisfies the maximum benefit requirements.

EAPs are generally excepted benefits.

The Guidance provides welcome clarification on the status of EAPs by extending the existing EAP/health savings account concept. Specifically, EAPs will be considered excepted benefits that are not subject to the ACA requirements as long as they do not provide "significant benefits in the nature of medical care or treatment." Until further rulemaking is issued—and at least through 2014—this standard will continue to be based upon a reasonable, good-faith interpretation of significant medical care or treatment. An EAP satisfying this rule will not constitute minimum essential coverage that would preclude eligibility for a subsidy on the Exchanges, nor will it permit an employer offering only an EAP to escape the first part of the shared responsibility excise tax. The fact that an employer has determined that its EAP provides medical benefits and is thus subject to ERISA does not necessarily mean that the EAP provides "significant" medical benefits for this purpose.

Contributions to an integrated HRA count toward the determination of a plan's value or affordability but do not count toward both.

If an employer offers a primary eligible employer-sponsored health plan and an HRA that would be integrated with that primary coverage if the employee enrolled, special rules apply in determining whether the employer-sponsored health coverage provides minimum value or is affordable for purposes of eligibility for a subsidy on an Exchange (and, by extension, for purposes of determining whether the employer shared responsibility excise tax applies). If the employee may use the HRA only to reduce cost sharing for covered medical expenses under the primary employer-sponsored plan, HRA contributions count only toward the minimum value requirement. If the employee may use HRA contributions to pay premiums and cost sharing under the primary employer-sponsored plan, such HRA contributions count only toward the affordability requirement. The Guidance provides that HRA contributions do not count toward the minimum value or affordability requirements of a health plan offered by another employer. In addition, the HRA contributions do not count toward the minimum value or affordability requirements of the non-HRA coverage sponsored by the same employer if the employer conditions HRA contributions on the employee electing coverage under non-HRA coverage from another employer or any other source.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

Chicago

Andy R. Anderson	312.324.1177	aanderson@morganlewis.com
Brian D. Hector	312.324.1160	bhector@morganlewis.com
Marla J. Kreindler	312.324.1114	mkreindler@morganlewis.com
Julie K. Stapel	312.324.1113	jstapel@morganlewis.com

New York

Craig A. Bitman	212.309.7190	cbitman@morganlewis.com

© 2013 Morgan, Lewis & Bockius LLP

Morgan Lewis

Gary S. Rothstein	212.309.6360	grothstein@morganlewis.com
Palo Alto		
Zaitun Poonja	650.843.7540	zpoonja@morganlewis.com
Philadelphia		
Robert L. Abramowitz	215.963.4811	rabramowitz@morganlewis.com
Brian J. Dougherty	215.963.4812	bdougherty@morganlewis.com
Amy Pocino Kelly	215.963.5042	akelly@morganlewis.com
Robert J. Lichtenstein	215.963.5726	rlichtenstein@morganlewis.com
Joseph E. Ronan, Jr.	215.963.5793	jronan@morganlewis.com
Steven D. Spencer	215.963.5714	sspencer@morganlewis.com
Mims Maynard Zabriskie	215.963.5036	mzabriskie@morganlewis.com
David B. Zelikoff	215.963.5360	dzelikoff@morganlewis.com
Pittsburgh		
Lisa H. Barton	412.560.3375	lbarton@morganlewis.com
John G. Ferreira	412.560.3350	jferreira@morganlewis.com
R. Randall Tracht	412.560.3352	rtracht@morganlewis.com
Washington, D.C.		
Althea R. Day	202.739.5366	aday@morganlewis.com
David R. Fuller	202.739.5990	dfuller@morganlewis.com
Mary B. (Handy) Hevener	202.739.5982	mhevener@morganlewis.com
Claudia L. Hinsch	202.739.5155	chinsch@morganlewis.com
Gregory L. Needles	202.739.5448	gneedles@morganlewis.com

About Morgan, Lewis & Bockius LLP

With 25 offices across the United States, Europe, the Middle East, and Asia, Morgan Lewis provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labor and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. Our international team of lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—more than 1,600 legal professionals total—serves clients from locations in Almaty, Beijing, Boston, Brussels, Chicago, Dallas, Dubai,* Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Moscow, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, Washington, D.C., and Wilmington. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.

IRS Circular 230 Disclosure

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein. For information about why we are required to include this legend, please see http://www.morganlewis.com/circular230.

*In association with Mohammed Buhashem Advocates & Legal Consultants

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes. Links provided from outside sources are subject to expiration or change. © 2013 Morgan, Lewis & Bockius LLP. All Rights Reserved.