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REFORM UPDATE

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THE 21ST CENTURY CURES ACT

On December 13, 2016, President Obama signed into law the 21st Century Cures Act. This legislation helps support medical breakthroughs on some of the biggest health challenges facing our country today. The Cures Act makes significant investments in innovative technologies and research that could cure Alzheimer's, end cancer, and treat opioid addiction.

The legislation also includes guidance on the following issues that may impact employers:

- Health Reimbursement Arrangements (HRAs) for small employers
- Mental Health Parity directives
- Health Insurance Portability and Accountability Act (HIPAA) directives on permitted uses and disclosure of Protected Health Information (PHI)

In addition to this guidance, the 21st Century Cures Act also includes a directive to investigate the cost and benefits of extending telemedicine coverage under Medicare.

HEALTH REIMBURSEMENT ARRANGEMENTS (HRAS) FOR SMALL EMPLOYERS

The 21st Century Cures Act includes a section on the new HRA rules called the Small Business Healthcare Relief Act. The Relief Act applies to plan years beginning on or after January 1, 2017. It allows small employers to establish qualified HRAs that reimburse employees eligible for qualified medical expenses, such as individual insurance premiums. This is an exception to the ACA requirement that an HRA must be integrated with a comprehensive health plan. These HRAs can stand alone.

Employers must meet the requirements explained below to offer these standalone HRAs.

Eligible Employers

Employers are eligible if they are small employers, not ACA Applicable Large Employers (ALEs). ALEs employ at least 50 full-time equivalent employees on average in the prior calendar year. IRS control group rules determine whether an employer is an ALE. Smaller employers that are part of a larger control group would not be eligible to offer the standalone HRA.

To be eligible, employers cannot offer a group health plan. A qualified HRA must be funded solely by employer contributions and must be available to all eligible employees.

Eligible Employees

Eligible employees include all employees with the exception of:

- Newly hired employees that have not completed 90 days of service.
- Employees under the age of 25.
- Part-time (30 hours or less a week) and seasonal employees.
- Employees covered by a collective bargaining agreement if health benefits are part of negotiations.
- Employees who are non-resident aliens with no U.S.-source income from the employer.

In order to participate in the standalone HRA plan, eligible employees must prove they and any participating family members have enrolled in minimum essential coverage (MEC).

HRA Annual Limits

The Cures Act sets annual maximum limits for the benefits available under these small employer standalone HRAs. For 2017 the maximum limit for an employee electing single coverage is $4,950. The maximum limit for family coverage is $10,000. Both amounts will be indexed annually.

The annual limits must be prorated for partial years of coverage. In general, the employer's annual contribution must be the same for all eligible employees. Certain variations are permitted for HRA funds that reimburse the cost of individual market coverage. Employer contributions can vary based on the age of the eligible employee, the age of covered family members, or the number of covered family members.

Notice Requirements

Employers must notify eligible employees that a qualified HRA is available at least 90 days before the beginning of the plan year or at the point an employee becomes eligible during the year. The notice must state the following:

- The amount available under the HRA for the year.
- Anyone receiving federally subsidized coverage must disclose the HRA contribution to the Marketplace.
- Anyone without minimum essential coverage (MEC) may have to pay an individual mandate penalty and any reimbursement from the HRA may be included in gross income that month.

Employers who do not notify employees may have to pay a penalty of $50 for each employee. Penalties are capped at $2,500 a year. The penalty will not apply if the notice is provided by April 1, 2017.

Federal Premium Subsidy Reduction

If an employee participates in a qualified standalone HRA and is eligible for a premium subsidy, the premium subsidy will be reduced by 1/12th of the employer's annual HRA contribution. For example, if an employee's subsidy is $250 a month and 1/12th of the employer's annual HRA contribution is $200, the employee's subsidy will be reduced to $50 a month.

An employer will also need to determine whether the standalone HRA is considered "affordable." An HRA provides affordable coverage for any month where the difference between the cost of coverage under the

second-lowest-cost silver plan in the Marketplace and the employer's HRA contribution does not exceed 9.69 percent of the employee's household income for 2017. If the standalone HRA provides "affordable" coverage, the employee's subsidy in the Marketplace will be reduced to zero that month.

Reporting Requirements

Employers need to report amounts available under a qualified standalone HRA on employees' Form W-2. It appears it will be reported for informational purposes in Box 14. Employees must also report the amount available under a qualified HRA, likely as part of their subsidy application.

Impact of Other Laws

These standalone HRAs will not be considered group health plans under ERISA. As a result, these HRAs need not comply with the ACA's market reforms. Employers do not need to include these HRAs for ACA reporting as a self-insured plan. Qualified standalone HRAs will not be subject to COBRA continuation requirements. It is not clear if these standalone HRAs will be subject to the Cadillac tax (if it is ever implemented).

MENTAL HEALTH PARITY DIRECTIVES

The Cures Act also includes provisions to help group health plans comply with the Mental Health Parity and Addiction Equity Act (MHPAEA). The Act requires the Departments of Labor (DOL), Health and Human Services (HHS), and Treasury to explain MHPAEA regulations and offer examples of compliant and non-compliant plan provisions.

The guidance should specifically include:

- Examples illustrating requirements for information disclosures and non-quantitative treatment limitations
- Descriptions of violations revealed through DOL investigations

The compliance program guidance must also include recommendations to advance mental health parity compliance. The Departments should encourage employers to develop and use internal controls that monitor adherence to applicable statutes, regulations, and program requirements.

The guidance requires the Departments to establish interagency agreements with one another and also if possible, to share compliance and noncompliance findings related to MHPAEA. If the Departments determine that a plan or insurer has violated the mental health parity requirements under the MHPAEA, ERISA, or the Code at least five times, the appropriate agency (that is, DOL, HHS, or Treasury) must audit the plan's or insurer's plan documents in the plan year after the Department's determination to improve compliance.

Complying with the MHPAEA is complicated. The final rules are outlined in our *Benefit Advisor* at http://www.mcgrawwentworth.com/Benefit_Advisor/2014/BA_Issue_1.pdf. The government has made this a priority in recent years because it believes most plans are not meeting the requirements. These directives to issue more detailed, practical guidance should help covered entities comply.

HIPAA DIRECTIVES ON PERMITTED USES AND DISCLOSURE OF PHI

The Cures Act acknowledges the health care community's confusion regarding permissible practices under HIPAA's Privacy and Security Rules and permitted practices specifically related to patients undergoing mental health treatment. The legislation directs the Department of Health and Human Services to make resources available to help employers determine appropriate uses and disclosures of PHI. Guidance must be issued for situations that:

- Require a patient's consent.
- Require allowing a patient the opportunity to object.
- Involve professional judgment regarding whether a patient would object when:
  - the patient lacks the capacity.
  - an emergency treatment situation arises.
- Involve uses or disclosures in a patient's best interest, based on professional judgment.

This guidance also must clarify permitted disclosures to the following:

- An adult or minor patient's family member, caregiver, or other individual involved in the patient's care.
- Family members and caregivers of the patient (or others) when the patient presents a serious and imminent threat of harm to self or others.
- Law enforcement and the patient's family members or caregivers when the patient is admitted to or released from a facility for an emergency psychiatric hold or involuntary treatment.

Health care providers need clarity on permitted uses and disclosures of PHI, especially when the patient is being treated for mental health issues. Additional practical guidance would be helpful.

CONCLUDING THOUGHTS

The 21st Century Cures Act affects employers. It permits standalone HRAs that reimburse premiums for individual coverage. Non-ALEs can now establish these tax-favored accounts if they meet certain requirements.

The Act also requires the Departments to release more guidance and practical examples on both MHPAEA rules and HIPAA permitted uses and disclosures of PHI.