HEALTH & WELFARE PLAN LUNCH GROUP

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Summer 2019 Recap

Alston & Bird, LLP
H&W Lunch Group

Agenda

- Federal Legislative and Regulatory Developments
  - Importation of prescription drugs
  - Surprise Medical Bill Proposed Legislation
  - Prescription Drug Discount/Coupon Rules---Agencies Issue FAQ Guidance
  - Preventive Care/HSA guidance from IRS
  - HSA/FSA Executive Order
  - Cadillac Tax Status
  - Simple ACA Reporting Proposals
  - Contraceptives/Religious and Moral objections
  - Section 1557 proposed rules
  - State Law Developments

Federal Legislative/Regulatory Developments-Importation of Drugs

- Importation is generally illegal today
  - PIP exception-
    - FDA has discretionary power
    - Drugs for a serious medical condition for which there is no effective alternative in US
    - No more than 3 month supply
- Joint effort by FDA and HHS—Safe Importation Action Plan
  - Regulations that would call for pilot projects from stakeholders to import Canadian versions of FDA approved drugs
  - Pathway for manufacturers of FDA approved drugs to import foreign versions here

Federal Legislative/Regulatory-Surprise Medical Billing

- House and Senate discussion drafts; Senate working group bill
- Key Elements:
  - No balance billing for emergency services (including services at free-standing emergency clinics), air ambulance, and services by OON provider at In-Network Facility
  - Notice of out OON care in in-network facility once stabilized
  - OON expenses applied to in network OOP max
  - Allowed amount determined by statute—not plan (median in-network rate)
  - In and Out of Network deductible amounts on cards
  - Reporting by plans regarding in and out of network claims, differences between billed amount and benefit amount, and OON claims for care performed at in-network facility
- No bill as of yet
- States also passing laws

Federal Legislative/Regulatory-HHS Prescription Drug Coupon/Discount Program

- HHS 2020 Notice of Benefit Payment and Parameters modifies rule for qualified health plans regarding impact of coupons on OOP maximum when there is a generic equivalent.
- But in the process of modifying rule, they also noted the following in the preamble to the rules:
  - Where there is no generic equivalent available or medically appropriate… amounts paid toward cost sharing using any form of direct support offered by drug manufacturers must be counted toward the annual limitation on cost sharing!
- Potential HSA Conflict
- Agencies backing off rule—FOR NOW!

Federal Legislative/Regulatory-IRS Preventive Care/HSA guidance

- IRS issued Notice 2019-45
- Identifies certain services/drugs for chronic conditions that will be treated as preventive care.
- Notice provides an exhaustive list
  - Not consistent with industry standard (especially diabetes related services)
- Guidance to date is exhaustive

Federal Legislative/Regulatory-Executive Order to Make HSAs (and FSAs) Great Again

- Directs the secretaries to issue guidance regarding:
- Expand HSA access and availability
  - Preventive Care (notice 2019-45)
- Health FSA
  - Increase carry over amount
- Eligible Medical Expenses
  - Direct primary care arrangements
  - Health care sharing ministries

Federal Legislative/Regulatory-Cadillac Tax

- Currently set to begin in 2022
- House passed bill to repeal it
- Senate has not yet acted
  - Stakeholder group (economists, etc.) have sent letter to Senate warning of impact if they repeal it without alternative

Federal Legislative/Regulatory-Simple ACA Reporting Proposals

- Common Sense Reporting Act
  - Bipartisan proposal (Warner/Portman)
  - Simplifies 6055/6056 reporting as follows:
    - *Voluntary, prospective ESR/MEC reporting system.* Pre-Exchange Annual Enrollment reporting of MEC
    - *Reporting required only for certain employees.* Report only for those employees for whom the employer has received notice from Exchange.
    - *SSNs of spouses and dependents not required.*
    - *Electronic delivery.* Expand employers' ability to distribute electronic statements (e.g., Form 1095-C) to employees and covered individuals who "at any prior time" affirmatively consented to receive such statements electronically.

Federal Legislative/Regulatory-Contraceptive Exceptions

- Trump administration issued interim final regulations regarding contraceptive exceptions for religious and moral objectors
- DCs in California (9th Cir) and Pennsylvania (3rd) issued nationwide injunction against Trump Administration Rule (Massachusetts—1st Cir—originally tried to file suit but was rejected—only to have that overturned by 1st Cir). Appeals were filed in 3rd and 9th circuit.
- Then, 9th circuit upheld California case, but limited it to 5 states.
  - So what about Pennsylvania DC nationwide injunction?
- Then, Supreme Court refused to hear 9th circuit case.
- Then Trump Administration issued two new final rules.
- California and Pennsylvania filed new cases and two new injunctions issued:
  - California 13 states
  - Pennsylvania is nationwide
- Texas District court issued nationwide injunction against original contraceptive mandate—holding it violated religious freedom restoration act.
  - Prior 5th circuit decision had held Obama era rules did not violate RFRA.
- Readers of this slide are now very dizzy!

Federal Legislative/Regulatory-Section 1557 proposed rules

- Proposed rules drastically change 1557 rules
  - Health Insurers not subject to rules in capacity as claims administrator
  - Notice and tag lines requirement for all significant communications eliminated
  - Gender identity not included in "sex" definition

State Law Developments

- Reporting/Individual Mandates
  - Massachusetts reporting in 2018
  - Individual/reporting mandates in effect for 2019:
    - New Jersey (no reporting as of yet)
    - D.C. (no reporting as of yet)
    - Massachusetts reporting requirements
  - Individual Mandates in effect in 2020
    - California—ER Reporting
    - RI-ER Reporting
    - Vermont-ER reporting required only if 6055 goes away
- State AG enforcement of HIPAA against Washington State covered entity

Litigation

- Litigation against PBMs
  - Cost share exceeding cost of drug
- Wilderness Therapy
- The *Witt* Case
- 8th Circuit "cross plan" offsetting case
- Worker's sue Yale regarding its wellness program

Overview and HRA Historical Perspective: Current Permitted HRAs

- Retiree only HRAs
- Limited purpose (vision/dental) HRAs
- "Integrated" HRAs for individuals actually covered under another GHP
  - Limited reimbursement
    - Copayments, coinsurance, deductibles, and premiums under the non-HRA GHP and excepted benefits
  - Minimum value
    - Can reimburse any 213(d) expense other than individual medical insurance
- QSEHRAs

Overview and HRA Historical Perspective: Two New HRAs

- Effective 1/1/2020
- Allows for two additional types of HRAs
  - Premium Reimbursement HRA (aka Individual Coverage HRA or "ICHRA")
    - Available when no other GHP offered to class
  - Excepted Benefit HRA (up to $1800)
    - Available to those for whom other GHP offered
  - Employer cannot offer both an ICHRA and EBHRA to same class of employees
  - Final rule also addressed:
    - Special enrollment period for individual coverage and
    - ERISA status of HRA integrated individual coverage

ICHRA – Integrated with Individual Market Insurance

QSEHRAs Unleashed

- ICHRA allows QSEHRA capabilities (and QSEHRA-like requirements) without many QSEHRA limitations
  - ICHRA available to employers of all sizes
  - With ICHRA can offer other GHP to other classes or otherwise within controlled group
  - With ICHRA can offer excepted benefit GHP coverage to ICHRA eligible individuals
  - ICHRA Benefit not capped at QSEHRA limits
  - ICHRA Compatible with FSA
  - ICHRA Simpler nondiscrimination requirements than QSEHRA

ICHRA – Ten Basic Rules of Compliance

Rule 1: Enrollment in qualifying individual medical coverage (IMC):

Must be enrolled in qualifying individual health insurance coverage

- What Coverage Qualifies
  - Individual coverage means individual market medical coverage and includes grandmothered coverage, grandfathered coverage, insured school group coverage, Medicare supplement and Medicare Parts A, B, C, and D coverage
  - Medicare eligible individuals can participate without MSP concerns
- What Coverage Does NOT Qualify
  - STLDI, other GHP coverage, shared ministry coverage and excepted benefit coverage do not qualify

ICHRA – Ten Basic Rules of Compliance

Rule 2: Employer must verify enrollment in IMC

- Employer must verify enrollment initially and prior to reimbursement
- Attestation is adequate
- Agencies included model form
  - Is verification by debit card permitted? Workable?

ICHRA – Ten Basic Rules of Compliance

Rule 3: Employer cannot offer ICHRA to employees if employer offers another GHP providing non-excepted benefit coverage to same class of employees

- Employer for this purpose is common law employer and does not include controlled group
- FSA benefit is not considered GHP coverage for this purpose. Therefore can have an ICHRA and an FSA

ICHRA – Ten Basic Rules of Compliance

Rule 4: If eligible for an ICHRA, reimbursable expenses include individual medical coverage and other 213(d) medical expenses

- Eligible expenses include IMC premium and OOP medical expenses, vision, dental
- n/I specified disease or health indemnity coverage
- Can restrict expenses by plan design . . .
  - E.g., IMC premiums and vision/dental coverage only to preserve HSA eligibility
  - E.g., OOP expenses for those who have IMC coverage

ICHRA – Ten Basic Rules of Compliance

Rule 5: Must offer ICHRA on same terms to all employees within same class

- Exceptions for age, family size, former employees
- Permissible to offer a class an HSA eligible and non-HSA eligible ICHRA option
- ICHRA benefits could vary based on the number of covered dependents or coverage category.
- Age based variations in ICHRA benefits cannot exceed the 3:1 ratio allowed for individual market premium differences based on age.
- If coverage is provided to former employees, it must be provided based on the same terms and conditions as was provided to the class of employees to which the employee formerly belonged, and cannot vary based on compensation or years of service.
- ICHRA coverage could be pro-rated based on period of participation in the plan year.

ICHRA – Ten Basic Rules of Compliance

More on Rule 5 Class:

- Employer can divide employees only into specific classes
- Permissible classes: salaried/hourly, full-time/part-time, seasonal, collectively bargained, within 90-day waiting period, foreign & work abroad, temporary worker rule for employees of an entity that hired the employees for placement at another entity, and working in same rating area
- The final rules allow the class determination to apply with respect to new hires after a specified date (e.g., allowing the new ICHRA benefit to be extended prospectively while current employees retain eligibility under a traditional group health plan).

ICHRA – Ten Basic Rules of Compliance

More on Rule 5 Permissible Classes

Minimum participation rule applies to following classes:

- Salaried/hourly
- Full-time/part-time
- Same rating area

Minimum participation rule applies if traditional GHP offered to one class and ICHRA offered to another:

- Employers under 100 employees – minimum class size of 10
- Employers 100-199 employees – 10% of workforce
- Employees with 200 or more employees – 20 employees

ICHRA – Ten Basic Rules of Compliance

- Rule 6: Opt Out
  - Employers must allow participants to opt out of future reimbursements at least annually
  - Employee opt out applies to dependents
  - Because ICHRA coverage (or mere eligibility where coverage makes silver plan affordable) can cause individual to be ineligible for premium tax credit
    - Unlike QSEHRA, there is no offset – you are either eligible for PTC or not
  - At termination of employment, employer must allow opt out or forfeiture

ICHRA – Ten Basic Rules of Compliance

- Rule 7: Substantiation
  - Must have reasonable procedure to verify enrollment in individual health insurance
  - Must verify all expenses being reimbursed
  - Standard 213(d) reimbursement procedures could be applied (IIAS etc)

ICHRA – Ten Basic Rules of Compliance

Rule 8 Notice: Must provide written notice to participants at least 90 days before start of plan year (shorter period for 1/1/20) and no later than date on which participant first eligible addressing:

- the terms of the HRA, including the maximum dollar amount available;
- a specific contact person for additional information on the ICHRA;
- information related to the individual exchange special enrollment period (SEP) relating to eligibility to enroll in IMP coverage for a newly eligible ICHRA individual;
- the right to opt-out of and waive future reimbursement under the HRA;
- the premium tax credit may be available (i) if the participant opts out of and waives the HRA and (ii) the HRA is not "affordable" for purposes of Code Section 36B (the code section governing premium tax credits and subsidies).
- The employee's obligation to inform any Exchange of the of the terms of the HRA;
- A statement that it is the responsibility of the participant to inform the HRA if the participant or any dependent whose medical care expenses are reimbursable by the HRA is no longer enrolled in qualifying IMC. The final regulations require inclusion of additional information for Medicare beneficiaries.

ICHRA – Ten Basic Rules of Compliance

- Rule 9: ICHRA will constitute MEC and may also be affordable coverage (Notice 2018-88)
  - The ICHRA qualifies as minimum essential coverage (MEC).
    - Consequently, it counts toward 95% coverage eligibility requirement under Code Section 4980H(a) (aka the "sledgehammer") for that month.
  - It is also possible for the ICHRA to be considered affordable and minimum value for purpose of the tax under Section 4980H(b) (aka the "tackhammer" tax).
    - The ICHRA coverage is considered affordable for a month if the required contribution (the excess of the self only premium for the lowest cost silver plan in the applicable rating area over 1/12 of the annual reimbursement from the ICHRA for self only coverage) is less than the product of the required contribution percentage (9.86% in 2019) and 1/12 of the employee's household income.
    - Employers may continue to use the affordability safe harbors to determine affordability since they will not know the employee's household income.
  - Presumably all of the ACA reporting obligations apply

ICHRA – Ten Basic Rules of Compliance

- Rule 10: Supplemental cafeteria plan
  - Employees may pay the share of the IMC premiums not paid for by the ICHRA with pre-tax salary reductions through a "supplemental" cafeteria plan maintained by the employer.
    - Supplemental plan NOT allowed for QSEHRA
  - The supplemental cafeteria plan would only be available for IMC purchased *outside of the Exchange*.
  - Such an arrangement would not be considered to be traditional group health coverage disqualifying the individual from participating in an ICHRA

ICHRA – More on Compliance

- ERISA applies to the ICHRA
  - IMC may avoid ERISA if certain requirements met
  - ICHRA must have a plan document, SPD, Form 5500, SBC,
- Medicare Secondary Payer and Medicare Creditable Coverage
  - Special rule applies to ICHRA wrt MSP and non-duplication rules
  - No exception from Medicare secondary (MMSEA) reporting or creditable coverage notices
- HIPAA privacy and security applies to ICHRAs
  - Unless self administered with fewer than 50 participants this would trigger self funded plan sponsor obligations (policies and procedures, risk assessment, privacy notices, etc)
- COBRA applies to ICHRAs
  - But loss of coverage due to failure to continue IMC not a COBRA event

Other Provisions of ICHRA Rule

- State law limitations on employer funding of individual medical coverage would likely continue to apply
- Special Enrollment
  - Two new special enrollment periods for individual coverage
    - Where employer begins offering ICHRA or QSEHRA mid-year
    - Where employee becomes eligible for ICHRA or QSEHRA mid-year
- ERISA
  - Integrated individual coverage not subject to ERISA (even though employer funded) if:
    - Voluntary participation
    - No employer selection or endorsement (impact on private exchanges)
    - Limits on reimbursement
    - No consideration received by employer
    - Annual notification

EBHRA - Excepted Benefit HRA

- New excepted benefit category
  - Employer cannot offer both an ICHRA and EBHRA to same class
  - Requirements:
    - Must offer other major medical coverage
      - FSA-like "footprint" rule
    - $1,800 annual limited (subject to indexing) for all HRAs
      - not including any carryover.
      - Limit n/a FSAs or vision/dental HRAs
    - Must be made available to all similarly situated employees
    - Can reimburse:
      - Medical expenses or
      - Premiums/contributions for COBRA, excepted benefit coverage, or STLDI
      - Not eligible: IMC premiums and costs of Medicare Parts A, B, C, or D

Looking Ahead: Where is the Best "Fit" for New HRAs?

- ICHRA may be a good fit for small/medium sized employer
  - IM coverage availability and cost issues
  - Phased in implementation tolerated within class
- ICHRA may be a good fit for individuals to whom coverage is not otherwise extended
- ICHRA may help resolve 4980H issues for some employers
- EBHRA may be an excellent addition where an HSA is not otherwise offered

Looking Ahead: Where is the Best "Fit" for New HRAs?

- But imagine if you will, a universe where individual major medical coverage is competitive in price with group offerings . . .
  - HRA may expand reach of individual medical coverage well beyond current market

Looking Ahead: Planning for 2020

Combination table	ICHRA (requires purchase of individual major medical coverage)	EBHRA (requires eligibility (but not enrollment) for employer sponsored major medical coverage)	Health FSA (requires eligibility (but not enrollment) for employer sponsored group coverage including ICHRA)	HSA
General Purpose FSA	Compatible	Compatible	----------	Not Compatible
Limited scope vision/dental FSA or HRA	Compatible	Compatible	----------	Compatible
ICHRA	----------	Not compatible	Compatible	Can be structured to be HSA compatible by limiting ICHRA to coverage
EBHRA	Not compatible	----------	Compatible	Can be structured to be HSA compatible by limiting EBHRA to vision/dental coverage
Health fixed indemnity (e.g., cancer, HIP, CI)	Compatible, but ICHRA cannot fund health indemnity policy	Compatible, but EBHRA cannot fund health indemnity policy	Compatible but FSA cannot fund health indemnity policy	Compatible with specified disease, HIP, or vision/dental only coverage
Vision/dental expense incurred coverage	Compatible, and ICHRA can fund vision/dental expense incurred policy	Compatible, and EBHRA can fund vision/dental expense incurred policy	Compatible but FSA cannot fund policy	Compatible, but HSA can NOT fund policy
Accident and disability coverage	Compatible, cannot be funded by ICHRA	Compatible, cannot be funded by EBHRA	Compatible but FSA cannot fund policy	Compatible but HSA can NOT fund policy

ICHRA Implementation Issues

- Plan document: More than an HRA retread
- Plan design decisions
  - Eligibility and class/nondiscrimination requirements
    - Impact on 4980H
    - Impact on existing self funded plan(s)
  - Benefits (IMC only or all 213; HSA compatible)
  - HIPAA privacy
  - Substantiation
- Timing for ICHRA notice and IMC enrollment
- Supplemental cafeteria plan