

HEALTH & WELFARE PLAN LUNCH GROUP

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ALSTON & BIRD LLP


One Atlantic Center
1201 W. Peachtree Street
Atlanta, GA 30309-3424
(404) 881-7885
E-mail: john.hickman@alston.com

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1. February 2019 H&W Update Call

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<h2>February 2019 H&W Update Call</h2> <p>© Alston & Bird LLP 2019</p> <p>John Hickman Ashley Gillihan Carolyn Smith</p>	
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<h2>The ACA and its Constitutionality</h2>	
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How did we get here?

- NFIB v. Sebellius
 - Individual mandate unconstitutional under Commerce Clause *BUT a valid exercise of Congress' taxing authority*
- TCJA
 - Through reconciliation, Congress eliminated the individual mandate penalty *but not the mandate itself*



How did we get here?

- 20 states and 2 individuals filed suit in Northern District of Texas claiming that:
 - Individual mandate, as amended by TCJA, is unconstitutional; not severable from ACA
- Stay issued on December 30 pending appeal
- **THIS MEANS THAT THE ENTIRE ACA REMAINS IN FULL EFFECT IN ALL 50 STATES!**



Where are we going?

- Appeal to 5th Circuit
 - Ruling likely sometime in late 2019
- Will it go to the Supremes?
 - If 5th Circuit affirms, then Supremes likely to grant cert; decision sometime in 2020
 - If 5th Circuit reverses, then ?



What if decision is upheld?

- No changes in health plans likely before 2021, at the earliest.
- And even then, will plans make extensive changes once the ACA is gone? All we can do is speculate!



What if decision is upheld?

- Changes in plan design we may see if ACA ends:
 - Imposition of annual and lifetime limits on benefits
 - Increased OOP maximums
 - Emergency care allowed amount calculations
 - Higher out of network coinsurance
 - Allowed amount flexibility
 - Increased premiums
 - Affordability, as defined by the Government, no longer an issue
 - Longer waiting periods
 - E.g. first of month following 90 days as opposed to 90 days
 - Greater restrictions/limitations on services provided by chiropractors
 - No SBCs



What if decision is upheld?

- (Popular) plan designs driven by ACA that are less likely to be impacted if ACA is gone:
 - 100% Preventive care
 - It may not continue to be as expansive as required by ACA but plans will likely continue to provide 100% coverage
 - Limitations on Pre-ex exclusions
 - Dependent child coverage to age 26
 - We may see marriage and/or “other coverage” exclusions but coverage will likely otherwise continue for children until age 26
 - Minimum value coverage (or something close to it)



What if decision is upheld?

- Areas of uncertainty
 - Terms of eligibility driven by employer “mandate”?
 - Will we see pre-ACA definitions of full-time employee?
 - Hard to take away what has already been given.
 - Likely to see some traditional exclusions reinstated:
 - Seasonal
 - Temporary employees
 - Fully insured markets—especially individual and small group market rules?
 - Resurgence of HRAs?
 - Integration rules go away, which could lead to more “stand alone” HRAs for groups offered coverage solely because of the employer “mandate”
 - Smaller employers may use HRAs to pay premiums for individual coverage without the limitations otherwise imposed on permissible premium reimbursement HRAs by the recent proposed rules



What do we do in the meantime?

- Well, nothing for the time being
 - It is status quo until the appeal process plays out
- But, we should be contemplating NOW the impact should the decision be upheld



Not All Fun and Games at Dave & Busters

- 12/7/18 Court preliminarily approved estimated \$7.4 M settlement proposal for employees whose jobs were interfered with on account of health care (ERISA 510 claim)



EEOC Wellness Regulations

- AARP – EEOC has authority to limit incentives under wellness programs but limits in regs are too high
- In August, 2017, district court held that EEOC had failed to provide a reasoned explanation for the limits in the regs. *AARP v. EEOC*, 267 F. Supp. 3d 14 (D.D.C. 2017).
 - At that time, did not vacate regs
 - Remanded regs to EEOC for further consideration
 - EEOC has withdrawn the incentive portions of the regulations



EEOC Wellness Regulations

- Unlikely to get new final EEOC wellness regulations for at least several years
- Employers' claim that insurance safe harbor applies may have to overcome Chevron deference
 - Some pre-regulation authority in *Broward County v Seff*
- Otherwise, statute will still require wellness programs subject to ADA to be "voluntary" – but not clear what this means
 - In particular, not clear if large incentive renders the program involuntary
 - *EEOC v. Orion Energy Sys., Inc.*, 208 F. Supp. 3d 989 (E.D. Wis. 2016) said amount of incentive does not affect whether voluntary
 - Decided under standard that will be in effect in 2019
 - But, just one district court case



DOL Enforcement: Acosta v Macy's

- DOL filed complaint where employer plan required completion of smoking cessation course and cessation of smoking
- Must reimburse surcharges: elimination of surcharge prospectively insufficient
- ERISA plan asset issue (careful drafting required)
- Separately, DOL extracts \$160k settlement and assesses 30k 502(l) penalties for a different employer's wellness program violation.
 - <https://www.dol.gov/newsroom/releases/ebsa/ebsa20181130>



Cross Plan Offsetting Issues

- *Peterson v United* (8th Cir 2019)
 - Not allowed when not specifically authorized in plan
 - But even if authorized . . .
 - Concerns where provider may balance bill
 - Concerns if plan assets used to benefit insurer or another plan
 - Best argument can be made where offset within a plan or offset within an insurer with respect to physician that has agreed not to balance bill



NEW PROPOSED HRA REGULATIONS



How We Got Here

- ACA Requirements
 - PHSA 2711 prohibition on annual or lifetime caps
 - PHSA 2713 required preventive care
- Agency Guidance (2013-54 and its progeny) affects HRAs for active employees
 - Prohibits reimbursement of individual major medical policies
 - Prohibits stand-alone general purpose HRAs



Current HRA Structures

- 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



New Proposed HRA Regulation in a Nutshell

- Effective 1/1/2020 (taxpayers cannot rely on proposed regulation)
- Allows for two additional types of HRAs
 - Individual Coverage HRA (ICHRA)
 - Available when no other GHP offered
 - Excepted Benefit HRA (EBHRA)
 - up to \$1800
 - Available to those for whom other GHP offered



ICHRA – Integrated with Individual Market Insurance HRA

Enrollment:

- Must be enrolled in individual health insurance coverage
- Must verify enrollment
- Employer cannot offer ICHRA to same employees if offer another GHP providing non-excepted benefit coverage to same class of employees
- Class
 - Employer can divide employees only into specific classes
 - Must offer ICHRA on same terms to all employees within same class
 - Exceptions for age, family size, former employees
 - Permissible classes: Full-time, part-time, seasonal, collectively bargained, under age 25, within 90-day waiting period, foreign & work abroad, and working in same rating area
 - Unclear if permissible: hourly versus salaried, CBA by CBA, geographic location



ICHRA – Integrated with Individual Market Insurance HRA

- Can reimburse:
 - Premiums/contributions for individual health insurance (IM) and
 - Unreimbursed medical expenses
 - Not applicable to GHP coverage or Medicare
 - Presumably the small employer rules in final regs and Notice 2015-17 continue to apply
- Substantiation
 - Must have reasonable procedure to verify enrollment in individual health insurance
 - Must verify all expenses being reimbursed
- Notice
 - Must provide QSEHRA-like written notice to participants at least 90 days before start of plan year and no later than date on which participant first eligible
- Opt Out
 - Employers must allow participants to opt out at least annually and at termination
 - Because ICHRA coverage can cause individual to be ineligible for premium tax credit



ICHRA – Integrated with Individual Market Insurance HRA

- 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.



EBHRA - Excepted Benefit HRA

- New excepted benefit category
 - Employer cannot offer both an ICHRA and EBHRA to same class of employees
 - Requirements:
 - Must offer other major medical coverage
 - FSA-like “footprint” rule
 - \$1,800 annual limited (subject to indexing) not including any carryover
 - Must be made available to all similarly situated employees
 - Can reimburse:
 - Medical expenses or
 - Premiums/contributions for COBRA, excepted benefit coverage, or STLDI



Looking Ahead: Comments Under Proposed HRA Rule

- Comments relating to ICHRA
 - Additional classes should be allowed
 - STLDI premiums should/should not be allowed?
 - Confirm compatibility with HSAs of ICHRA limited to HDHP and excepted benefits
- Comments relating to EBHRA
 - STLDI premiums should/should not be allowed?
 - What is scope of excepted benefit coverage that should be allowed
- Comments related to ERISA applicability
 - Expand scope of exception - carve out “private exchanges”
 - Expand salary reduction exception to apply to coverage beyond IM
- Comments related to Notice 2018-88 and 4980H and Nondiscrimination
 - Consider offer of HRA to be made regardless of whether IM is purchased
 - Allow safeharbor silver plan amount for affordability determination
 - Allow flexibility under IRC 105(h) to increase benefit based on age



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
- ICHRA may be a good fit for individuals to whom coverage is not otherwise extended
- EBHRA may be an excellent addition where an HSA is not otherwise offered



Looking Ahead: Planning for 2020

HRA Type	Eligible expenses	FSA Compatible	HSA Compatible	COBRA	4980H credit	Impact of other employer GHP eligibility for class	Nondiscrimination requirement
ICHRA	IM and OOP medical, no GHP	Y	Likely yes if restricted to HDHP IM	Y to HRA. Possibly on IM unless ERISA n/a. If ERISA n/a, unclear	possible	ICHRA not available	Possibly IRC 105(h)(or 4980H FT/PT definitions) and consistency within class
QSEHRA	IM and OOP medical, no pre-tax GHP	N, employer/controlled group) cannot sponsor other GHP	Likely yes if restricted to HDHP IM	No	n/a	QSEHRA not available	Must be extended to all non-excludable employees
Retiree Only HRA	All 213 expenses	Y	Likely yes if restricted to HDHP IM and post deductible	Y	n/a	No impact	IRC 105(h)
EBHRA	OOP and , COBRA, and excepted benefit coverage (including STLDI)	Y	Yes if limited to permitted excepted benefits	Y	no	Other GHP eligibility required	IRC 105(h)
Limited Purpose HRA	Vision and dental expenses only	Y	Yes	Y	no	No impact	IRC 105(h)
Integrated HRA	OOP medical only, no IM	Y	Likely yes if restricted to HDHP IM and post deductible	Y	possible	Required to be integrated	IRC 105(h)



Question & Answer



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