

## Health Care Reform Update: What's Coming in 2014 for HRAs and Cafeteria Plans

### WEBCAST Q&As

Thursday, October 24, 2013

#### HRAs

**Q: Is a medical expense reimbursement plan (employer contribution only) under 105(h) covered by the HRA rules?**

Yes. A medical expense reimbursement plan is also known as an HRA.

**Q: How does ACA impact Section 105 plans? Can a husband/wife business purchase health insurance on an exchange and still keep the Sec.105 plan?**

For purposes of the annual dollar limit prohibition, an employer-sponsored HRA cannot be integrated with individual market coverage or with individual policies provided under an employer payment plan, and, therefore, an HRA used to purchase coverage on the individual market under these arrangements will fail to comply with the annual dollar limit prohibition.

NOTE: However, assuming the husband and/or wife is the owner of the business and not an employee then the HRA could be considered an excepted benefit. We would recommend having an attorney assist with the determination of whether the HRA is actually considered an excepted benefit.

**Q: May choose not to provide coverage for a particular condition/EHB." -- I thought this was already true of all health plans listed in the 2nd bullet. Does 2013-54 change this for only HRAs?**

Notice 2013-54 did not change this rule. Self-insured plans, grandfathered plans and large group health insurance plans may choose not to provide coverage for a particular condition/EHB whereas Self-insured plans, grandfathered plans and large group health insurance plans may choose not to provide coverage for a particular condition/EHB.

**Q: You had mentioned that if a group has company sponsored health plan with an HRA attached to it, that if there is an employee who doesn't take the groups medical, but takes a spousal plan, if that spousal plan is a MV plan, they could use their company's HRA plan. I didn't think this was possible and if so it's great news for us, but I wanted to see if I heard correctly.**

Yes that is possible.

**Q: If we have a stand-alone HRA that only reimburses the participant up to 80% of the deductible for a high deductible health plan, is this an excepted benefit? we have two employees and offer an hra to them. one employee is now on medicare and other us not. Can we offer the hra to the employee that is on hra and give the other employee money to pay insurance prem with post tax dollars**

This is not an excepted benefit and should instead be designed as an integrated HRA. Medicare coverage, unfortunately, would not allow that employee to participate in the HRA - the coverage is not a "group health plan" offered by an employer. Paying premiums on a post-tax basis is permissible.

#### HRA Spend-down

**Q: If 2013-54 is not prospective, do you mean that if we had a health ins prem reimbursement arrangement, then those reimbursements were taxable?**

The guidance does not discuss penalties.

**Q: For stand-alone HRAs that have to be discontinued on 1/1/14, for remaining balances that need to be drawn down, can the participant incur expenses after 01/01/14 to be applied towards the remaining balance?**

It seems like this is what would be intended by a spend-down but we have very limited guidance on how the spend-down arrangements work unfortunately.

### **Reimbursement**

**Q: Can the employer offer to reimburse with employer contributions, the health insurance deductible?**

Yes. This may be accomplished a number of ways including an integrated HRA, and a health FSA.

**Q: So to clarify - an HRA, even if integrated with a medical plan, can't be open to all 213 expenses?**

If it is a "minimum value required" HRA it can be open to all 213(d) expenses. The "minimum value not required" integrated HRA must be limited to reimbursements of copays, co-insurance, deductibles, premiums, and medical care that do not constitute essential health benefits.

**Q: Can an employer offer to reimburse the employee's health insurance deductible and co-pays through an FSA?**

Yes. The health FSA should be designed as an excepted benefit.

**Q: We offer premium payment options through the cafeteria plan. So, if an employee has an outside health policy on their dependent child, can they still run it through the cafeteria plan and get reimbursed for it?**

Reimbursing a parent for premiums for the dependent child health policy is an "Employer Payment Plan" under Notice 2013-54 (it's non-employer sponsored hospital and medical insurance). Notice 2013-54 seems to provide that any "Employer Payment Plan" is a group health plan and further provides that the employer payment plans cannot integrate with the health and medical plans so the employer payment plans themselves would be subject to the prohibition on annual limits and preventive care requirements (not possible to meet).

**Q: What is the employer only offers insurance to their employees thru "SHOP". Is that considered a group medical plan sponsored by the employer and then allows the employer to offer employees an FSA as an expected benefit?**

This is a great question. The departments do seem to indicate that SHOP coverage is a group health plan and that this would enable those employers to offer a health FSA as an excepted benefit.

**Q: If there are no employer contributions into a PRA – Premium Reimbursement Account – and employees can opt in or out, can this type of account still be used to reimburse health plan premiums for individual policies? Are there any circumstances or criteria in which this could still work for health plan premiums?**

We think IRS Notice 2013-54 makes it painfully clear that pre-tax reimbursement of individual health policies by employers is no longer possible.

**Q: Can I elect an FSA with my employer who doesn't offer group coverage if I have an individual policy from the exchange?**

No. A health FSA may be considered to provide only excepted benefits if other group health plan coverage (not limited to excepted benefits) is made available for the year to employees by the employer.

### **Reimbursement of Premiums**

**Q: A client wants to reimburse employees for individual medical health premiums. This cannot be done through a HRA, correct?**

No. An employer may no longer assist employees on a pre-tax basis, through an HRA, with the employee's purchase of individual medical health care premiums.

**Q: Can you have POPs for health premiums AND have an HRA for excepted benefits (and co-pays for doctor visits, etc.)?**

Yes. There is nothing prohibiting an employer from offering both a POP and an HRA as long as the employer also provides a group health plan and the HRA is integrated with that plan.

**Q: What is your opinion on the ability to reimburse Medicare premiums deducted on Social Security and a Medicare supplement? Would this be prohibited as well under the premium reimbursement guidance?**

Reimbursing for premiums for Medicare is an "Employer Payment Plan" under Notice 2013-54 (it's non-employer sponsored hospital and medical insurance). Notice 2013-54 provides that any "Employer Payment Plan" is a group health plan and further provides that the employer payment plans cannot integrate with the health and medical plans so the employer payment plans themselves would be subject to the prohibition on annual limits and preventive care requirements (not possible to meet).

**Q: Could a Caf Plan reimburse for the cost of a state sponsored health insurance policy?**

Not on a pre-tax basis for the reasons set out above.

**Q: PRA – Premium Reimbursement Account – If there are no employer contributions into this account and employees can opt in or out, can this type of account still be used to reimburse health plan premiums for individual policies?**

No - not for health/hospital premiums.

**Q: PRA – Premium Reimbursement Account – Are there any circumstances or criteria in which this could still work for health plan premiums?**

Essentially only a POP - pretax payment of employer premiums.

### **90 day Waiting Periods**

**Q: If we have a premium only Section 125 plan that is used in conjunction with a health insurance policy, can the Section 125 plan have a different service requirement (i.e., one that exceeds 90 days) than the health insurance policy?**

Yes, as long as the section 125 plan is only offering excepted benefits.

**Q: Waiting periods cannot exceed 90 days - does that mean it can't be first of the month following 90 days because it would technically exceed 90 days?**

The waiting period must not exceed 90 days. If under these facts, the waiting period is 91 days, that would be a violation of the waiting period under the PHS Act.

**Q: Do we have to implement the max 90 day waiting period need to take effect on 1/1/14 for a non-calendar year plan (ie renewing in June 2014)?**

PHS Act section 2708 provides that, for plan years beginning on or after January 1, 2014, a group health plan or health insurance issuer offering group health insurance coverage shall not apply any waiting period that exceeds 90 days. If the start of your plan year is June 2014, then the 90 day waiting period would go into effect then.

#### **Health FSAs as Cafeteria Plans under Section 125**

**Q: I'm a little confused about the Section 125 plan as an excepted benefit, but the only benefit (pre-tax payment of health insurance premiums) under the plan is linked to a benefit that must comply with ACA (health insurance).**

IRS Notice 2013-54 limited the ability of employers to assist with individual/non-employer sponsored premiums. An employer may still offer a POP, a premium only plan, as defined in Treas. Reg. section 1.125-1(a)(5) which is "a cafeteria plan that offers as its sole benefit an election between cash (for example, salary) and payment of the employee share of the employer-provided accident and health insurance premium (excludible from the employee's gross income under section 106). Additionally, a SHOP Premium Reimbursement Plan must may be offered under a section 125 cafeteria plan.

**Q: So, are you saying that as long as the employee makes a salary reduction election under a cafeteria plan they can pay for individually owned policies ?**

No. A cafeteria plan may not be used for premiums of individually owned health policies.

#### **Waived Medical Coverage**

**Q: Employer offers other group health coverage and offers FSA. What if someone declines medical coverage - can they enroll in FSA?**

Yes. As per IRS Notice 2013-54, "a health FSA may be considered to provide only excepted benefits if other group health plan coverage not limited to excepted benefits *is made available* for the year to employees by the employer" (emphasis added). For the FSA to be considered an excepted benefit, the employee must only make available/offer group health plan coverage. If someone is offered group medical coverage, then they can enroll in an FSA regardless of whether they enroll. However, the employer can also make enrollment in employer's group health plan a prerequisite from enrollment in the FSA.

**Q: The employer does not sponsor a group health insurance plan. Can a health FSA, funded solely by employee pre-tax salary deductions, reimburse the employee for the following expenses: Out of pocket dental and vision expenses that are not covered by insurance; Premiums for medigap**

**supplementary insurance policies; Premiums for health insurance provided by spouse's employer; Can an HRA pay for the same enumerated expenses?**

No. An employee may not enroll in a FSA without also being offered a group health plan. Under the new regulations and outlined in IRS Notice 2013-54, a stand-alone HRA may never be offered to an employee.

**Q: Can an HRA be integrated with a spouse's health plan or must it be integrated only with the employer's health plan? Sorry if this is a stupid question!**

Yes, an HRA may be integrated with a spouse's group health plan. These rules are complicated and there are no stupid questions!

**Q: If my employer and my spouses' employer both offer a group plan but I choose to purchase an individual policy off the exchange, would I be eligible to enroll in my employer sponsored FSA?**

Possibly. While under section 125, the employer must only provide an employee with a group health plan option, the employer can dictate that an employee must be enrolled in the employer's group health plan to be eligible to participate in the FSA.

**Q: Can you clarify: employers must offer group health coverage, but employees do not have to opt in to the employer coverage in order to be qualified for HRA from employer and the benefits of the HRA? The HRA is still owned by the employer, correct?**

No. Employees are ONLY eligible for the HRA if they are actually enrolled in a group health plan (other than an HRA).

**Annual Limit Prohibitions**

**Q: Can you clarify the 2x the part's salary vs \$500? Is 100% of employee contributions the cap?**

It may be beneficial to summarize the regulation, 26 C.F.R. §54.9831-1(c)(3)(v), in another way. The regulation states that the maximum benefit payable to any participant is the greater of:

- (1) two times the participant's salary reduction election (same as a 100% employer match) under the arrangement for the year

OR

- (2) \$500 plus the amount of the participant's salary reduction election.

Examples that would comply with Maximum Benefit Payable:

- A one-for-one employer match of salary reduction elections (employer \$1000, employee \$1000).
- An employer contribution of \$500 or less (employer \$500, employee \$200; employer \$500, employee \$0).

**Q: When you say \$500 for FSA to be excepted, is that \$500 the employer contribution?**

Yes, as long as the employees can't take the \$500 as cash (which would make leaving it in the plan a salary reduction) or taxable benefit.

**Q: How does the \$500 limit work for non-calendar plans?**

Plan year is irrelevant for the \$500 limit clarified under IRS Notice 2013-54.

**Q: Can you do a non-integrated HRA with a max of \$500 reimbursement?**

No, as per the guidance under IRS Notice 2013-14, stand-alone HRAs that are not integrated with a group health plan will not be permitted. Since HRA benefits are limited to the dollars within the HRA, and HRAs do not provide preventive care services without cost-sharing in all instances, a stand-alone HRA cannot comply with the preventive services requirements as required by the ACA.

**Q: What if the FSA is completely EE funded?**

For plan years beginning after December 31, 2012, the amount of the salary reduction is limited by Code § 125(i) to \$2,500 (indexed annually for plan years beginning after December 31, 2013). See IRS Notice 2012-40, 2012-26 IRB 1046, for more information about the application of the limitation. The employer must still offer another group health plan that is not excepted benefits.

**Q: What if the FSA is entirely employer funded? Where does the \$500 amount fit in?**

If the question focuses solely benefits that cannot be taken as cash, the maximum employer contribution is \$500.

**Excepted Benefits-General**

**Q: You've lost me on the meaning of "excepted benefit." Can you explain the importance of whether something is an "excepted benefit" of not?**

Excepted benefits are extremely important, because excepted benefits are not subject to the prohibition on annual limits, preventive care requirements and most other health care reform provisions. Excepted benefits are defined under Treas. Reg section 54.9831-1(c).

For a more expansive discussion on excepted benefits, go to our article, "[Account-Based Health Reimbursement Plans and IRS Notice 2013-54](#)".

**Excepted Benefits Dental/Vision**

**Q: What about a "dental-only" HRA, or a "vision-only" HRA? Are these excepted benefits? Many of our employer clients have these instead of traditional insurance plans for dental or vision.**

HRAs for dental and vision benefits are permissible and may be considered excepted benefits as long as the plan meets the qualifications below.

Treas. Reg section 54.9831-1(c)(3):

(i) In general.— Limited-scope dental benefits, limited- scope vision benefits, or long-term care benefits are excepted if they are provided under a separate policy, certificate, or contract of insurance, or are otherwise not an integral part of a group health plan as described in paragraph (c)(3)(ii) of this section. In addition, benefits provided under a health flexible spending arrangement are excepted benefits if they satisfy the requirements of paragraph (c)(3)(v) of this section.

(ii) Not an integral part of a group health plan.—For purposes of this paragraph (c)(3), benefits are not an integral part of a group health plan (whether the benefits are provided through the same plan or a separate plan) only if the following two requirements are satisfied—

(A) Participants must have the right to elect not to receive coverage for the benefits; and

(B) If a participant elects to receive coverage for the benefits, **the participant must pay an additional premium or contribution for that coverage.**

Consequently, in order for dental or vision benefits provided through an HRA to be excepted from the ACA, employees that elect to have dental or vision coverage provided by the HRA must be charged a premium or contribution. This is problematic since an HRA must be paid for solely by the employer and not provided pursuant to salary reduction election or otherwise under a [Code section] 125 cafeteria plan. Notice 2013-54 did not address this issue and it is unclear whether further guidance will be released.

HRAs that wish to offer benefits as excepted coverage could reimburse premiums for individually owned dental/vision policies that are not an integral part of a group health plan.

**Q: Can employers even require an employee to pay a premium for the HRA if they are not on COBRA?**

The answer to this question is not addressed in the existing guidance unfortunately.

**Q: So are you saying that a Cafeteria Plan can only cover non-pediatric dental and non-pediatric vision? We can no longer have a Cafe Plan to cover out-of-pocket expenses for traditional medical expenses?**

No to both questions. Section 125, cafeteria Plans may cover non-pediatric dental and non-pediatric vision and cafeteria plans may still be used to cover out-of-pocket expenses (as defined by section 213(d)) via a health FSA as long as that plan is set up to only offer excepted benefits.

The market reforms do not apply to a group health plan in relation to its provision of benefits that are excepted benefits. A health FSA is excepted benefits if the employer also makes available group health plan coverage that is not limited to excepted benefits and the health FSA is structured so that the maximum benefit payable to any participant cannot exceed two times the participant's salary reduction election for the health FSA for the year (or, if greater, cannot exceed \$500 plus the amount of the participant's salary reduction election). See 26 C.F.R. §54.9831-1(c)(3)(v), 29 C.F.R. §2590.732(c)(3)(v), and 45 C.F.R. § 146.145(c)(3)(v). A health FSA that is considered to provide only excepted benefits is not subject to the market reforms and can reimburse any 213(d) expense.

**Q: Can you have one Excepted Benefit for Dental and one for Vision each having a \$500 ER contribution?**

I do not believe there is clear guidance that this would be permissible.

**Q: If the employer charged a premium of \$1.00 for year or month could they offer an HRA that covers dental and vision?**

Possibly. Although it is unclear how an employer could offer an HRA, which can only be funded by employer contributions and then require employees to pay a premium. Hopefully, the IRS will be provided some guidance on how dental and vision HRAs premiums are supposed to be collected.

**Q: With respect to the HRAs, we have a client that has established an HRA for reimbursement of dental expenses only. There is no insurance tied to this - they simply reimburse dental expenses up to \$800 each year. Is this no longer permissible effective January 1, 2014? Would a similar**

**arrangement through an FSA (entirely funded by the employer, limited to dental expenses) be permissible?**

First, for any dental benefit offered through a health FSA to qualify as an excepted benefit, a separate group health plan must be offered to the employee. Secondly, if you set it up specifically as a health FSA with \$800 contribution, you would be in violation of the maximum annual benefit. However, if you structured the benefit as a salary reduction (cash option), an \$800 salary reduction (cash) benefit would be permissible.

See questions above for the issues with dental-only HRAs.

**Q: Forfeiting the remaining amounts in the HRA balance is now required? Doesn't that undermine the benefit of HRAs for retirement, etc?**

Stand-alone HRAs that are not structured as excepted benefits must either be terminated or spent down as was described in FAQs about [Affordable Care Act Implementation Part XI](#). ftwilliam.com has prepared model spend-down amendments for our welfare plan document subscribers. Retiree-only HRA plans are excepted benefits and would therefore not be subject to health care reform rules and the spend-down rules.

**Q: Is there a run out time for customers that currently have an HRA?**

The guidance in Notice 2013-54 is not prospective. We would generally recommend updating HRAs and/or cafeteria plans as soon as possible.

If you are asking specifically with regards to the spend-down, unfortunately there is extremely limited guidance on how long the plans can be spent-down and how the reimbursements should work. Plans may want to consider freezing existing stand-alone HRAs until more guidance is received.

### **Part-time Employees and ACA**

**Q: So, a HCFSA that covers some part time employees who are not eligible for the main medical plan would mean that the HCFSA is NOT an excepted benefit?**

We believe this is correct. The excepted benefits rules require having another group health plan made available "to employees" - if a group of employees is not eligible for the group health plan we do not think they should be eligible for the health FSA.

### **General**

**Q: Is there a way to print out the power point?**

<https://www.ftwilliam.com/webinar.html>

**Q: When must plan documents reflect all this? If a customer has an HRA and their plan is effective July 2013-to June 2014 do they have to change it before January or do they have until June 30, 2013?**

I would recommend changing the plan effective no later than December 31, 2013 (this would comply with the spend-down timeframes - which currently do not account for non-calendar plan years).

**Q: We are a non profit church and have only two employees, one is on medicare. Is the church mandated to participate in the new health care?**

The employer mandate to provide health insurance only applies to large employers (50 full-time employees or full time equivalents).

**Q: May a cafeteria plan use employer and employee contributions but require the employee to use employer dollars first to cover major medical premiums. Any excess can be used for other benefits (Dependent Care) or paid to employee as taxable?**

I think you are suggesting that employer dollars would not be made to the health FSA. That is permissible.

**Q: Is there a pre-tax, account-based option that employers will be able to use to help employees purchase coverage (possibly outside of the public exchange) that will satisfy both the employer shared responsibility provisions and the ACA market reforms?**

No. If employers want to assist employee's purchase coverage, they may only do this on a post-tax basis.

**Q: Can I elect an FSA with my employer who doesn't offer group coverage if I have an individual policy from the exchange?**

We really would need more facts to answer this question. If an employer is offering an FSA, they also must be offering group health coverage to their employees.

**Q: If a company's insurance covers preventive care then the FSA would not have anything to cover would then be excepted?**

This is certainly logical but Notice 2013-54 comes to a different conclusion and states "[b]ecause a health FSA that is not excepted benefits is not integrated with a group health plan, it will fail to meet the preventive services requirements."

**Q: So if you have a full flex plan where the employer gives flex credits, if ee1 chooses to use 1900 toward premiums and 100 to fsa this would be excepted but if ee2 already has coverage and uses the full credit of 2000 for fsa then the fsa is not excepted?**

The excepted benefit regulations do not clarify whether the nonelective employer contributions can be looked at from the plan as a whole or for each participant. We recommend structuring health FSAs so that no employee could exceed the excepted benefit minimums.

## **WRAP**

**Q: Would a wrap document make sense for an employer with less than 100 employees?**

Typically a small employer would adopt a wrap to help conform with ERISA plan document and SPD requirements.

**Q: A health care FSA is an ERISA welfare plan right? perhaps a topic for another session, don't know why you would wrap otherwise you are subjecting the employer to two Forms 5500 filings.**

A health care FSA/Cafeteria plan is an ERISA welfare plan in general. Some exceptions apply for governmental and certain churches.