

## Cafeteria plans, HRAs and Health Care Reform

There are several provisions in the Patient Protection and Affordable Care Act and Health Care Act and Reconciliation Act (PPACA) that impact account-based plans like Health Care Reimbursement Account plans (HRA) and/or Cafeteria plans. Many of the requirements only extend to HIPAA Portability-covered plans (which tend to include most HRAs and very few Cafeteria plans) while some requirements only apply to Cafeteria plans that include a health care flexible spending account (HCFSAs) feature.

This article will explain which PPACA requirements impact HRA and/or Cafeteria plans. In the chart below, we summarize the main requirements that apply to HRA and/or Cafeteria plans and provide the effective dates of the requirements. Rules that apply differently to grandfathered plans are noted under the effective date (see "Grandfathered Plans" section below for more information on grandfathered plans).

Note that a description of what plans are covered by HIPAA Portability is provided in the "HRA and Cafeteria plans subject to HIPAA Portability" section below. Other requirements that likely will not affect most HRAs and Cafeteria plans are listed separately below as well as other provisions that apply in the future where we are waiting further guidance that may restrict what plan-types are affected.

**Table of PPACA Requirements Applicable to HRAs and/or Cafeteria plans**

Requirement	Plans Affected	Effective Date
Adoption assistance increased to \$13,170 for 2010 (increased by \$1,000)	All Cafeteria plans with adoption assistance accounts	January 1, 2010
<i>Optional</i> health coverage of dependent children to age 26	All HRA and Cafeteria plans with a HCFSAs	March 30, 2010
<i>Required</i> health coverage of dependent children to age 26	HRA and Cafeteria plans with a HCFSAs subject to HIPAA Portability	Plan years beginning after September 23, 2010  Grandfathered plans in existence on March 23, 2010 (that meet other requirements under applicable regulations) must provide dependent child coverage if the child is not eligible for other employer-sponsored health plans coverage.

Requirement	Plans Affected	Effective Date
Coverage of preventative care without cost-sharing	HRA and Cafeteria plans with a HCFSAs subject to HIPAA Portability	Plan years beginning after September 23, 2010  Not applicable to grandfathered plans in existence on March 23, 2010 (that meet other requirements under applicable regulations).
Internal and external appeal processes for health claims	HRA and Cafeteria plans with a HCFSAs subject to HIPAA Portability	Plan years beginning after September 23, 2010  Not applicable to grandfathered plans in existence on March 23, 2010 (that meet other requirements under applicable regulations).
No reimbursement of over-the-counter drugs without a prescription	All HRA and Cafeteria plans with a HCFSAs	January 1, 2011
Simple Cafeteria plans (optional arrangement)	Cafeteria plans	January 1, 2011
\$2,500 limit on employee contributions to HCFSAs	Cafeteria plans with a HCFSAs	January 1, 2013
Health plans offered through an exchange are not a qualified benefit in a cafeteria plan	Cafeteria plans	January 1, 2014

Many of the provisions described above are fairly straight-forward. A few items, however, require a further explanation and are described below:

*Appeal processes for health care claims.* This may be the most difficult provision for account-based plans to adhere to. Grandfathered plans are not required to meet this provision. Plans may want to review the grandfathering procedures and distribute notices to participants that they are a grandfathered plan in order to avoid these requirements.

HRA and Cafeteria plans with a HCFSAs subject to HIPAA Portability and ERISA were already required to follow most of the internal appeal processes required under PPACA. PPACA adds some new requirements to the internal appeals procedures, adds a new external appeals process and creates additional requirements to provide notices in other languages if a certain percentage of employees

speak a non-English language<sup>1</sup>. The external health care appeals process for most cafeteria plans with a HCFA and HRAs will likely follow federal (as opposed to state) requirements for the external appeals process (more guidance on the external appeals process is expected in the near future). Non-ERISA covered plans will likely be required to meet the applicable external state appeal process. This will require updates to both plan documents and summary plan descriptions and arrangements with an independent review organization to review the external claims.

*Dependent child coverage.* Dependent child coverage to age 26 may be optional or required depending on whether the plan is subject to HIPAA Portability. HIPAA Portability-covered plans are required to cover children until their 26th birthday if the plan provides coverage for children. Non-HIPAA Portability plans have the option to extend health coverage for children or to continue covering children as provided under the definition of dependent in Code section 152 (as many plans traditionally defined dependent).

*No cost-sharing for preventative care.* This is unlikely to be an issue for most account-based plans. If an employer also offers a major medical policy, then there should be no unreimbursed preventative care expenses to submit to an HRA and/or cafeteria plan. If there is no major medical policy as a primary source of coverage, then cafeteria and/or HRA plans subject to HIPAA Portability will need to ensure reimbursements for preventative care are covered on a dollar-for-dollar basis (up to applicable maximum reimbursement amounts).

*Simple Cafeteria plans.* Cafeteria plans can avoid the complicated Cafeteria plan nondiscrimination rules by establishing minimum eligibility and contribution requirements for the plan. NOTE: Cafeteria plans with HCFA features that follow the minimum contribution requirements will very likely become subject to HIPAA Portability rules (minimum employer contributions for a simple Cafeteria plan are 2% of compensation or the lesser of: i) 6% of compensation or ii) two times the employee's salary reduction). See the section below on HIPAA Portability coverage for more information.

Whether a plan will require an amendment for all or some of the above provisions will depend upon how the plan is currently drafted. For example, plans that already exclude over-the-counter medications will not require an amendment to prevent coverage. However, it is likely that most (if not all) cafeteria and HRA plans will require modification to plan documents and summary plan descriptions to accommodate the new requirements.

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<sup>1</sup> For plans with less than 100 participants, if 25% or more of participants are literate only in the same non-English language relevant appeals procedures notices must be made available in that language. For plans with 100 or more participants, if the lesser of 10% of participants or 500 participants or more are literate only in the same non-English language relevant appeals procedures notices must be made available in that language.

## Grandfathered Plans

Plans in existence as of March 23, 2010 are grandfathered plans provided they meet several requirements: disclosure of grandfathered status to participants, maintenance of documents showing coverage in effect on March 23, 2010, no change in insurance or eligibility under the plan and no reductions in coverage.

## HRA and Cafeteria plans subject to HIPAA Portability

The following HRA plans and/or Cafeteria plans with a HCFSAs feature are **not** subject to HIPAA Portability:

- Plans that have less than two participants who are current employees as of the first day of the plan year;
- Plans that provide coverage (reimbursements) for benefits that are limited to dental, vision and long-term care benefits that are not an integral part of a group health plan; or
- The employer offers other group health plan coverage (that is not just dental, vision or long term care coverage) and the maximum benefit payable to a participant under the HRA or Cafeteria Health Care Reimbursement Account plan is less or equal to the greater of:
  - \$500 (plus any participant contribution, if applicable) or
  - two times the participant's salary reduction election for the year.

*HIPAA Portability does not apply to most Cafeteria plans.* We assume that most Cafeteria plans with a HCFSAs feature do not have employer contributions. Therefore, as long as the employer offers other group health plan coverage, the cafeteria plan will not be subject to HIPAA Portability.

*HIPAA Portability does apply to most HRA plans.* Since HRAs by definition are employer-only funded and most HRAs will have a maximum reimbursement amount greater than \$500, most HRAs will be covered by HIPAA Portability.

## Other HIPAA Portability Provisions

There are other provisions in PPACA that apply to HIPAA Portability-covered plans that we did not list above. Some provisions are generally inapplicable to account-based plans and others are applicable in beginning in 2012 or later and are awaiting further guidance. We expect that further guidance may better clarify how the provisions apply to account-based plans like cafeteria with a HCFSAs feature and HRA plans.

*Inapplicable provisions.* There are provisions in PPACA that apply to HIPAA Portability-covered plans not listed above because it is our assumption that the vast majority of HRAs and/or Cafeteria plans would meet these requirements. These requirements include (only applicable to HIPAA Portability-covered plans):

- No lifetime limits on the dollar amount of benefits (plan years beginning after September 23, 2010)
- Prohibition on pre-existing conditions (plan years beginning after September 23, 2010)
- Prohibition of discrimination based on health status, providers used (plan years beginning after September 23, 2010)
- Patient protections regarding choice of doctor, emergency services, etc. (plan years beginning after September 23, 2010)
- Requirement to meet non-discrimination rules of Code section 105(h) (HRA and Cafeteria plans with a HCFSAs feature subject to HIPAA Portability are already required to meet this rule)

In regulations that have been released in the past few months, much-needed clarification has been provided on several provisions of PPACA. Recent regulations clarified that the prohibition on annual limits does not apply to flexible spending arrangements as defined in Code section 106(c)(2) (this includes all Cafeteria plans that include a HCFSAs feature and the vast majority of HRA plans). It is likely that future regulations will further clarify how requirements impact Cafeteria and HRA plans.

*Awaiting guidance.* There are other provisions in PPACA that may apply to HIPAA Portability-covered HRAs and/or Cafeteria plans not listed above. Future regulations may contain clarification on how the provisions apply to account-based plans. The provisions include (only applicable to HIPAA Portability-covered plans):

- Uniform Summary of Benefits and Coverage (regulations to be released by March 30, 2011; summaries to be provided by plans by March 30, 2012)
- Annual reporting requirements (regulations to be provided by March 30, 2012)
- Cost-sharing limits (plan years beginning on or after December 31, 2013)
- Waiting periods over 90 days not permitted (plan years beginning on or after January 1, 2014)

## Conclusion

PPACA has significantly impacted the health insurance market and account-based plans were also impacted by the changes. It is likely that most (if not all) cafeteria and HRA plans will require modification to plan documents and summary plan descriptions to accommodate the new requirements. HIPAA Portability covered cafeteria plans with HCFSAs and HRA plans are the most affected by the changes.

For more information on many health care reform topics, see our "Health Care Reform Talk" blog at [www.healthcare-legislation.blogspot.com](http://www.healthcare-legislation.blogspot.com).