The Impact of the 21st Century Cures Act on Health Reimbursement Arrangements

Tucked into the 21st Century Cures Act, passed by Congress and signed into law this past December, is a provision that makes it possible for small employers to give money to their employees to buy health insurance, rather than offering a health plan. On the surface, it looks like an opportunity to free up small employers from burdensome insurance regulation. In reality, it is a complex set of regulations that congregations should review very carefully before making a change.

At the very least, congregations need to consider whether or not they are willing to drop all other health coverage, including the UUA plan, agree to make equal contributions for all staff, eliminate the ability of employees to make pre-tax contributions, and take on the additional administrative requirements that the Act imposes.

Contrary to what some callers have been suggesting the past two weeks, the new law does NOT free congregations to return to a policy of offering payments to employees to buy coverage elsewhere, unless ALL of the QSEHRA rules are followed. Penalties for that kind of payment arrangement have been suspended through 2016, but are back for 2017.

Keep in mind that the regulatory environment for the Affordable Care Act is very much up in the air as the new administration tests the limits of Executive Orders. The prudent course for congregations as small employers is to treat current law as law until it is formally changed.

The Law

The 21st Century Cures Act amends IRC section 9831, adding subsection (d), "Qualified Small Employer Health Reimbursement Arrangements". The new law removes the barrier to offering a freestanding HRA (one with no underlying group health plan), previously barred by the Affordable Care Act. The law goes into effect January 1, 2017. Congregations have until March 16, 2017 to elect a QSEHRA.

Requirements for a congregation to offer a QSEHRA:

The congregation must have fewer than 50 full-time equivalent employees – the easiest of the basic requirements.

The congregation may not offer any other health plan, not even for specific individuals, such as the minister.

The congregation can be the only source of funding. There can be no employee contributions.

The QSEHRA must be offered to all eligible employees on the same terms. There are exceptions for employees with less than 90 days of service, employees younger than 25, part-time and seasonal employees, union employees, and non-resident aliens.

The important details:

Unlike a current HRA, which continues to be legal for now, a QSEHRA is not a "health plan", freeing it from all ACA market reforms, including affordability and Minimum Essential Coverage. Any COBRA requirement is also eliminated.

Employees may use the funds to pay for any medical expense that qualifies under IRC section 213 (d), much as they do now with an HSA or FSA account.

In addition, and this is the big change with the new law, QSEHRA funds may be used to buy health insurance, with no requirement for an underlying group plan.

Employees are free to buy their own plan, on an Exchange, or anywhere else. There are no restrictions on the quality of the plan, other than possible tax consequences. "Plan" includes Medicare Parts B (doctor charges),C (Medicare Advantage plans), and D (prescription drugs).

For 2017, the annual employer contribution limit is $4,950 for single coverage, $10,000 for a family. Employers do not have to contribute the maximum amount.

Employers may adjust the amount offered amount based on the cost of coverage in a geographic area, the # of family members, and the number of months the employee will be active in the calendar year.

Administrative Requirements

You must give employees 90 days' notice prior to implementation. The notice must include: the amount of QSEHRA funding; warning that the employees must report QSEHRA funds as part of subsidy applications on an Exchange; a warning to employees that if the coverage they buy does not meet ACA minimum essential coverage requirements, the QSEHRA contributions become taxable income.

The congregation is responsible for QSEHRA contribution tracking.

The congregation is responsible for claims adjudication, including review of claims documentation.

W-2 reporting of contributions falls to the congregation.

Form 1094/1095 reporting is unclear at the moment. The new QSEHRA is not a "health plan", so 1094/1095 reporting is TBD.

The obvious problems for a congregation

A congregation cannot offer any other plan, including the UUA plan, not even if the minister wants to keep their plan. No exceptions.

The stated annual cap may not buy adequate coverage for anyone other than the youngest staff. And if an employee uses their QSEHRA funds to buy a high-deductible plan, they will either have to set aside part of their QSEHRA funds to cover out-of-pocket costs or face a real financial bind in the event of significant claims.

The congregation is on its own with IRS and DOL compliance, including making a determination on Minimum Essential Coverage and the related taxability of QSEHRA funds, accounting for fund deposits, and claims adjudication. If they are not prepared to take those tasks on, they will have to hire someone to handle them.

The Notice requirement is an annual event. By October 1 of each year, the congregation is responsible for notifying all employees of the QSEHRA terms for the next calendar year.

One small ray of sunshine

The law suspends any penalties accrued through December 31, 2016 for offering a standalone HRA, including the practice of giving employees a contribution toward buying individual health insurance on the Exchange or elsewhere. Keep in mind that the penalty clock starts ticking again on January 1, 2017.

Two cautions

The new QSEHRA provisions do not allow congregations to continue offering payments to employees to purchase their own insurance, if the congregation keeps any other health plan in place. In addition, the $100 per day per employee penalties begin accruing again on January 1, 2017. We will track Trump administration Executive Orders and follow-up actions by the IRS and DOL closely, to see if there is any movement to eliminate or not enforce those penalties.

A second IRS discussion we are tracking is the status of the rule that allows for tax-free reimbursement of an employee's cost to be on their spouse's GROUP plan, something that has been settled regulation since 1961. There are signs of movement inside the IRS to eliminate that provision in the situation where the spouse is using pre-tax funds to buy their coverage. This disagreement within the IRS has been simmering for a while, and it bears watching, something we will do through the Church Benefits Association.