Compliance Update

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Agencies Release Guidance on HRAs, FSAs, and Employer Payment Plans

On Friday, September 13, 2013, the IRS released Notice 2013-54 and the DOL issued Technical Release 2013 -03 in substantially identical form. This guidance, which is generally effective January 1, 2014, provides much needed clarification on the application of certain provisions of the ACA (annual limits and preventive care) to account-based plans such as HRAs and FSAs, and other types of arrangements that reimburse premiums (referred to in the guidance as "Employer Payment Plans").

The guidance indicates that the agencies are generally viewing HRAs, FSAs, and Employer Payment Plans as group health plans for purposes of the ACA. This means that these arrangements will qualify as "minimum essential coverage" for covered employees (i.e., it will preclude employees from receiving a premium credit), unless they are "excepted benefits" under HIPAA. This also means that these arrangements will need to comply with the ACA's annual limit and preventive care requirements, unless they are integrated with a compliant group health plan (or are "excepted benefits"). The guidance confirms that "retiree-only" HRAs and most health FSAs offered through a Section 125 cafeteria plan continue to be "excepted benefits."

Notably, the guidance provides that a group health plan, including an HRA, will not be considered "integrated" with an individual health insurance policy for purposes of satisfying the ACA's annual limit rules or preventive care rules. **This means that employers will not be permitted to reimburse employees for the cost of individual insurance premiums on a non-taxable basis.** In other words, the so-called "defined contribution HRA" model does not work if the HRA reimburses individual insurance policies.

The guidance permits employers to offer employees the choice of taxable compensation (cash) or an after tax payment to be applied to health coverage. The guidance also permits employers to establish a payroll practice of forwarding employee contributions to an insurance carrier without the arrangement being considered a group health plan; however, the arrangement generally must comply with the rules for "voluntary" plans under ERISA, with one such requirement being that the employees pay 100% of the cost of the coverage. **These rules generally eliminate tax preferences for employers that wish to reimburse employees for the cost of individual health insurance policies.**

The guidance provides clarification on a number of other issues, including when an HRA will be considered "integrated" with a group health plan for purposes of satisfying the annual limit and preventive care requirements. One of the requirements to be an "integrated" HRA is that participants must have the ability to opt-out of the HRA. This is because the benefits provided by the HRA generally will constitute minimum essential coverage, which will preclude the individual from claiming a premium tax credit. The guidance further clarifies that a retiree covered by a standalone HRA for any month will not be eligible for a premium tax credit to purchase subsidized coverage through a Marketplace.

The guidance provides that at least through 2014, coverage under an employee assistance program (EAP) will be considered an “excepted benefit” (and therefore exempt from the annual limit and preventive care rules) as long as the EAP does not provide significant treatment in the nature of medical care or treatment. For this purpose, employers may use a reasonable, good faith interpretation of whether an EAP provides significant benefits in the nature of medical care or treatment.

This latest guidance has widespread implications for employers and plan sponsors. We will issue a more formal alert in the near future. In the meantime, please let us know if there are any questions.