

Newly Enacted “21st Century Cures Act” Provides New Health Insurance Option For Small Employers

Under the 21st Century Cures Act, signed into law on December 13, small businesses with fewer than 50 full-time employees that do not offer a group health plan for their employees can now offer a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA) to facilitate the purchase of individual health insurance coverage (or other qualified medical expenses). Prior to this new legislation, employers were generally prohibited from funding the purchase of individual health insurance coverage by their employees. The ability now to offer QSEHRAs provides a new option for small employers to facilitate employee access to health insurance, which may in turn assist in recruiting and retaining employee talent. QSEHRAs may be offered beginning January 1, 2017.

QSEHRAs are funded through pre-tax contributions made by the employer (no employee contributions are permitted). Employees may use the funds contributed to their QSEHRAs to cover the cost of individual health insurance policies, including health insurance policies purchased through the Affordable Care Act’s Health Insurance Marketplace, or other qualifying medical expenses.

QSEHRAs will be subject to an overall limit on annual contributions. Initially, an employer will be able to contribute up to \$4,950 toward employee-only qualified medical care expenses and up to \$10,000 toward family qualified medical care expenses. These limits are subject to an annual cost of living adjustment. These limits are prorated by month if an employee is not eligible for the QSEHRA for the entire year.

QSEHRAs will also be subject to a number of additional requirements, including:

- To receive reimbursement from the QSEHRA, an employee must submit proof to the employer that the employee has minimum essential health insurance coverage.
- Employers must provide these arrangements on the “same terms” to all eligible employees.
 - The phrase “same terms” is not defined in the law.
 - However, the law provides that variations in the arrangements are permitted if the variations are based on the price of an insurance policy, which in turn is based on age and number of family members covered.
- Employers may exclude from a QSEHRA otherwise eligible employees who:
 - Have fewer than 90 days of service with the employer;
 - Are under the age of 25;
 - Are part-time or seasonal;

- Are covered by a collective bargaining agreement that bargained accident and health benefits in good faith; or
- Are non-resident aliens with no earned income from sources within the U.S.

The law also contains important notice requirements for employers if they wish to establish a QSEHRA. Ninety days before the beginning of the year the QSEHRA is being offered, the employer must provide written notice of:

- The amount of the employee's permitted benefit for the year;
- A statement that the employee should inform the Health Insurance Marketplace of the QSEHRA when applying for insurance through the Marketplace; and
- A statement that employees may be subject to a tax for any month the employee does not have minimum essential health insurance coverage, and reimbursements during those months may constitute taxable income.
- As discussed in more detail below, there is transitional relief from these notice requirements for 2017.

The law contains other important provisions employers should consider when deciding whether to establish a QSEHRA:

- Employers must report on IRS Form W-2 the amount of permitted benefits provided to employees under a QSEHRA.
- QSEHRAs do not constitute group health plans under ERISA and are exempt from COBRA continuation coverage requirements.
- Unless changes are made to the law under the Trump administration, QSEHRAs count toward the calculation of the "Cadillac tax" on high-cost, employer-sponsored health coverage, which is scheduled to take effect in 2020.

Additional considerations for employers when deciding whether to provide a QSEHRA include:

- Without minimum essential health insurance coverage, employee reimbursements from a QSEHRA are includable in employees' gross income for tax purposes.
- If the employer's QSEHRA constitutes "affordable coverage," the employee is not eligible for tax credits on insurance purchased through the Marketplace.
- If the QSEHRA does not constitute "affordable coverage," then employees can receive tax credits on insurance through the Marketplace. However, the amount of tax credit that employees can receive is reduced dollar-for-dollar by the amount an employer contributes to the QSEHRA.
- The calculation for determining whether a QSEHRA constitutes "affordable coverage" is detailed in the law and will vary for each employee based on individual salary and the amount of the employee's permitted benefit.

Effective dates for the new law:

- QSEHRAs are available January 1, 2017, which may be too soon for employers who have already decided on their health insurance options for the coming year. However, employers may wish to consider if a QSEHRA is a viable option going forward.

- For those employers who want to establish a QSEHRA for 2017, the law provides transition relief from the 90-day advance notice requirements. Notice can be provided within 90 days of enactment of the law as opposed to 90 days before the beginning of the plan year, which otherwise would be impractical because the law was passed so soon before the beginning of the 2017 plan year.
- There is also transition relief for small employers that provided this type of HRA for employee health insurance in the past. These small employers will not be subject to penalties for prior years until January 1, 2017 (at which time these employers can provide QSEHRAs to avoid the penalties).

While the future of the ACA is somewhat in flux, QSEHRAs provide a viable option for small employers who are not required to provide health insurance under the ACA but, nevertheless, would find it in the businesses' best interest to provide some form of health insurance benefits to their employees.

Contact Brian Goodman, author of this article, or a member of the Boardman & Clark LLP Employee Benefits Practice Group if you have questions about establishing a QSEHRA for your business.

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