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Roadmap for Designing Legally Compliant HRAs, Including Qualified Small Employer HRAs, Post-ACA

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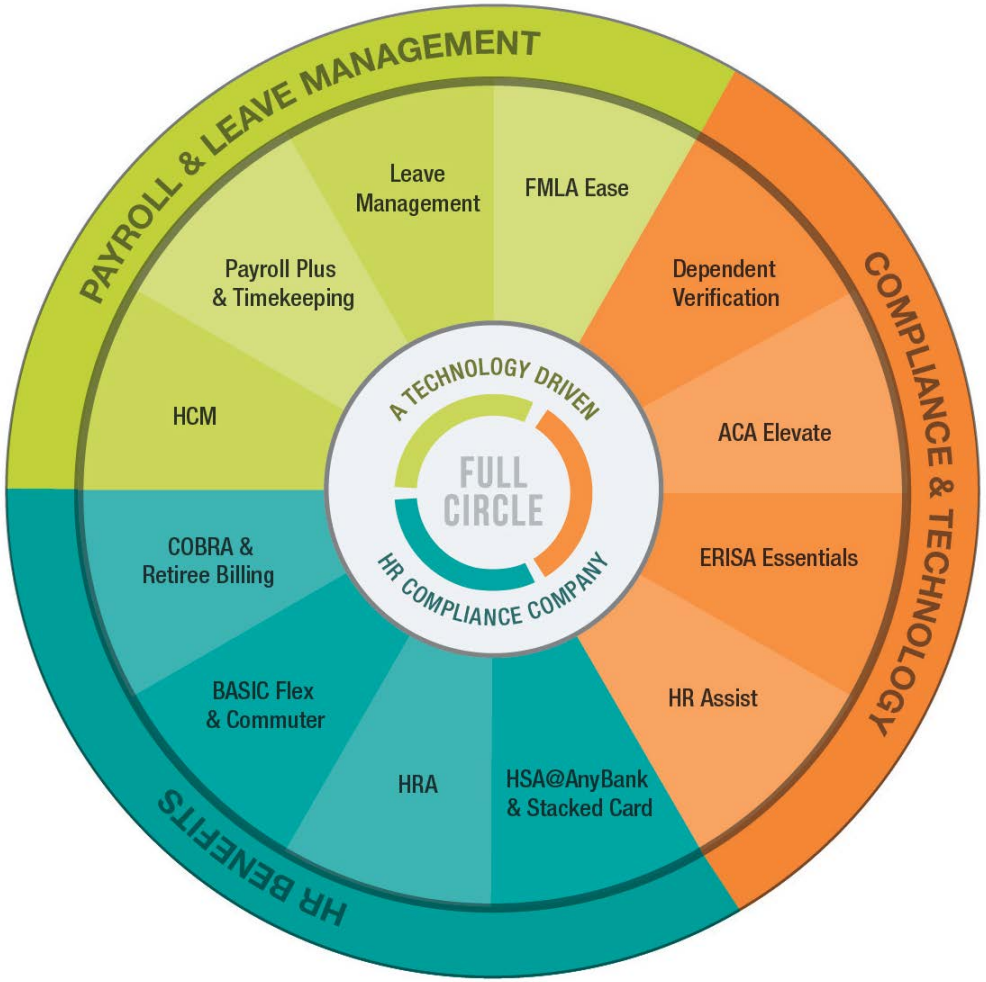
HR Solutions Come Full Circle



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BACKGROUND

Background

- A Health Reimbursement Arrangement ("HRA") is an employer-funded arrangement that reimburses employees for certain medical care expenses incurred by employees, spouses, and dependent children under the age of 27
- Typically, an employer creates a notional (i.e., unfunded, bookkeeping) HRA account for participating employees

Background

- An HRA must be paid for solely by the employer and may not be provided under a salary reduction arrangement or as part of a Section 125 cafeteria plan
- There is no specific Code section governing HRAs, but the IRS confirmed the tax-favored treatment under §§105 and 106 of the Code in various guidance (*e.g.*, IRS Notice 2002-45)

Background

- Amounts in an employee's HRA account that are not used to reimburse the employee during the plan year (or coverage period) may be carried over to subsequent plan years (or coverage periods). But, an HRA is not required to offer a carryover, and limitations on carryovers are generally permissible if uniformly applied

LAWS THAT IMPACT HRAS

ERISA

ERISA

- HRAs are employee welfare benefit plans that are subject to ERISA, unless the sponsor of the HRA is a governmental or church employer. The following ERISA requirements apply to HRAs:
  - HRAs must be maintained using a written plan document
  - Form 5500 requirement (but generally, HRAs are not required to provide Summary Annual Reports)

ERISA

– ERISA disclosure requirements:
  - SPD and Summary of Material Modifications (“SMM”)
  - Participant requests for information
  - Summary of Benefits and Coverage (“SBC”). An SBC is not required for an HRA that covers only excepted benefits, or a retiree-only HRA. Additionally, the SBC requirement can usually be satisfied by denoting the HRA’s benefit on the SBC for an integrated group health plan

ERISA

- Claim and appeal procedures
- If the HRA has “plan assets,” the following requirements apply:
  - Exclusive benefit;
  - Trust requirement; and
  - Bonding

Generally, if benefits are paid on a pay-as-you-go basis out of the employer’s general assets, the HRA will not have “plan assets” (but a separate fund maintained by a TPA could create plan assets)

ERISA

- Fiduciary duty rules
- Civil and criminal enforcement rules
- Record retention requirements (generally records should be maintained for seven or eight years)

COBRA

COBRA

- An HRA is generally a “group health plan” under COBRA. If the sponsor of the HRA employs more than 20 employees, the HRA is likely subject to COBRA. Administering COBRA for an HRA can be challenging:
  - HRAs with spenddown features are still required to offer COBRA
  - Each qualified beneficiary has an independent right to elect COBRA, which can lead to a “mushrooming effect”

COBRA

- How to determine the applicable premium:
  - Past-cost method – the applicable premium equals the cost to the plan for similarly-situated beneficiaries for the preceding 12-month determination period adjusted by the percentage increase (or decrease) in the implicit price deflator of the GNP
  - Actuarial method – the applicable premium equals a reasonable estimate of the cost of providing coverage for such period for similarly-situated beneficiaries

COBRA

- Retiree-only HRAs are not necessarily exempt from COBRA
- Some of these COBRA uncertainties may be alleviated by:
  - Linking the COBRA election for the HRA with the COBRA election for coverage under the employer's group health plan
  - Offering a spenddown feature as an alternative to COBRA

MEDICARE SECONDARY PAYER RULES

Medicare Secondary Payer Rules

- An HRA is a group health plan that is subject to the Medicare Secondary Payer ("MSP") reporting requirements
- HRAs that are linked to another group health plan must be reported separately from the other group health plan
- There is an exception for HRAs with an annual benefit of less than $5,000 (including carryovers)

Medicare Secondary Payer Rules

- The entity responsible to report coverage under the HRA is the “Responsible Reporting Entity” (RRE)
- The RRE is generally the “entity serving as an insurer or third party administrator for a group health plan.” For a group health plan that is self-insured and self-administered, the RRE is the plan

MEDICARE PART D

Medicare Part D

- Under Medicare Part D, sponsors of group health plans must notify Part D eligible individuals and CMS whether prescription drug coverage under the group health plan is creditable or noncreditable
- For purposes of Medicare Part D, a group health plan specifically includes “account-based medical plans,” such as HRAs

Medicare Part D

- A combined disclosure notice covering both the HRA and another group health plan is permissible if:
  - The non-HRA plan is a non-account-based plan; and
  - The Part D eligible individuals participate in both the HRA and non-account-based plan
- Stand-alone HRAs must likely provide a separate stand-alone disclosure, if the HRA provides coverage for prescription drugs

Medicare Part D

- No exception for HRAs sponsored by governmental or church employers

HIPAA

HIPAA

- An HRA is subject to the following HIPAA requirements:
  - Portability rules (i.e., special enrollment rights and nondiscrimination requirements).
    Exceptions:
    - HRAs with an annual benefit of $500 or less (and no carryovers), if the employer also makes major medical coverage available to all employees eligible for the HRA
    - Retiree-only HRA
    - HRAs covering only excepted benefits

HIPAA

- Administrative simplification rules (privacy, security and breach notification rules)
    - An HRA that covers fewer than 50 participants that is self-administered by the employer-plan sponsor is exempt from the administrative simplification rules
- Offering an HRA in connection with another self-funded group health plan can streamline HIPAA compliance with respect to the HRA

AFFORDABLE CARE ACT

Affordable Care Act

- HRAs are subject to the ACA's market reforms, except for:
  - HRAs providing coverage of only excepted benefits (e.g., limited-scope dental or vision HRA). These HRAs must meet one of the following requirements:
    - Participants are permitted to decline coverage under the HRA; or
    - The HRA is administered under a separate contract from the employer's other group health plan
  - Retiree-only HRAs

Affordable Care Act

- HRAs by design violate certain ACA market reforms:
  - HRAs impose an annual maximum benefit that applies to all eligible medical expenses, including essential health benefits
  - HRAs would not cover preventive-care services on a first-dollar basis to the extent the HRA's annual limit was exceeded

Affordable Care Act

- Integration – an HRA that is integrated with another group health plan that complies with the ACA is permissible. To be integrated, an HRA must satisfy all of the following requirements:
  - The employer sponsoring the HRA must offer a group health plan (other than the HRA) that does not consist solely of excepted benefits

Affordable Care Act

- Employees (and their spouses and children) enrolled in the HRA must be enrolled in another group health plan that does not consist solely of excepted benefits (this other group health plan need not be sponsored by the same employer that sponsors the HRA)
- The HRA must be available only to employees (and their spouses and children) who are actually enrolled in another group health plan (again, it doesn't need to be a group health plan sponsored by the same employer that sponsors the HRA)

Affordable Care Act

  - Employees (and former employees) must be offered the opportunity to permanently opt-out of and waive future reimbursements under the HRA
- HRAs cannot be integrated with individual health insurance policies obtained on or off the Marketplace

Affordable Care Act

- Employer Payment Plan (“EPP”) – any arrangement under which the employer reimburses an employee for some or all of the premium expenses incurred for an individual health insurance policy or the employer uses its funds to directly pay the premium for an individual health insurance policy covering the employee

Affordable Care Act

- Employer payment plans, like non-integrated HRAs, violate the ACA market reforms prohibiting annual dollar limits and requiring first-dollar coverage of preventive services

Affordable Care Act

- Exceptions to the integration requirements for HRAs and EPPs
  - Medicare and Tricare Premium Reimbursement Plans (but watch out for Medicare and Tricare Secondary Payer rules)
  - Certain 2% S-corporation shareholder-employee healthcare arrangements
  - Qualified Small Employer HRAs

OTHER LAWS

Other Laws

- PCORI Fee
- Newborns' and Mothers' Health Protection Act
- Mental Health Parity and Addiction Equity Act
- Women's Health and Cancer Rights Act
- Family Medical Leave Act
- Uniformed Services Employment and Reemployment Rights Act
- Age Discrimination in Employment Act
- ADA/GINA

QUALIFIED SMALL EMPLOYER HRAS (QSEHRAS)

QSEHRAs

- QSEHRAs are stand-alone HRAs that can reimburse active employees for the cost of individual health insurance premiums
- QSEHRAs may only be sponsored by employers that are not subject to the pay or play penalty (non-applicable large employers)
- QSEHRAs provide a valuable tool to small employers, but are subject to rigid legal requirements

QSEHRAs

- Eligible employers (which include all entities in the same controlled group) must:
  - Be non-applicable large employers; and
  - Not offer any other group health plan, which includes major medical plans, health FSAs, HRAs, and excepted benefits (limited-scope dental and vision plans). Sponsoring a retiree-only plan is permissible

QSEHRAs

- All employees must be eligible for a QSEHRA, except for employees:
  - Who have not completed 90 days of service
  - Who have not attained age 25 before the beginning of the plan year
  - Who work part-time (less than 25 hours per week)
  - Who work on a seasonal basis (less than 7 months per year)

QSEHRAs

- Eligible reimbursements:
  - Individual major medical health insurance premiums
  - Any medical expense under Section 213(d) of the Code
- 2018 reimbursement (benefit) maximums (annually increased by cost-of-living adjustments):
  - $5,050 for self-only coverage
  - $10,250 for family coverage

QSEHRAs

- Coverage requirement – In order to be eligible for reimbursement from a QSEHRA, the employee (or any dependent) must be enrolled in minimum essential coverage ("MEC") during the month of the reimbursement. This requires proof:
  - Annually; and
  - Upon request for each reimbursement

QSEHRAs

- Notice requirement:
  - Who must receive the notice:
    - Each eligible employee at least 90 days before the beginning of each plan year
    - For new employees (hired midyear), the notice must be provided on or before the first day the employee becomes eligible for QSEHRA

QSEHRAs

- Content requirements:
  - The amount of the permitted benefit for which the employee might be eligible and the date on which the QSEHRA is first provided to the eligible employee
  - A statement that:
    - The employee must inform the Marketplace (to which the employee applies for a premium tax credit) of the amount of the QSEHRA benefit
    - The QSEHRA benefit may affect the employee's eligibility for and the amount of any premium tax credit
    - The employee should retain the notice because it may be necessary in calculating the employee's premium tax credit

QSEHRAs

  - If the employee didn't have MEC at the time of the reimbursement that the reimbursement may be taxable, and that the employee may be liable for an individual shared responsibility penalty

- Reporting requirements
  - The total amount of the employee's permitted QSEHRA benefit must be reported on the employee's Form W-2 using Code "FF"
  - QSEHRAs are subject to the PCORI fee
  - Form 1095-B is not required

QSEHRAs

- Other laws:
  - They are subject to some laws:
    - ERISA (plan document, SPD, and reporting requirements)
    - HIPAA privacy, security, and breach notification requirements
  - They are not subject to other laws:
    - PHSA (ACA mandates)
    - COBRA

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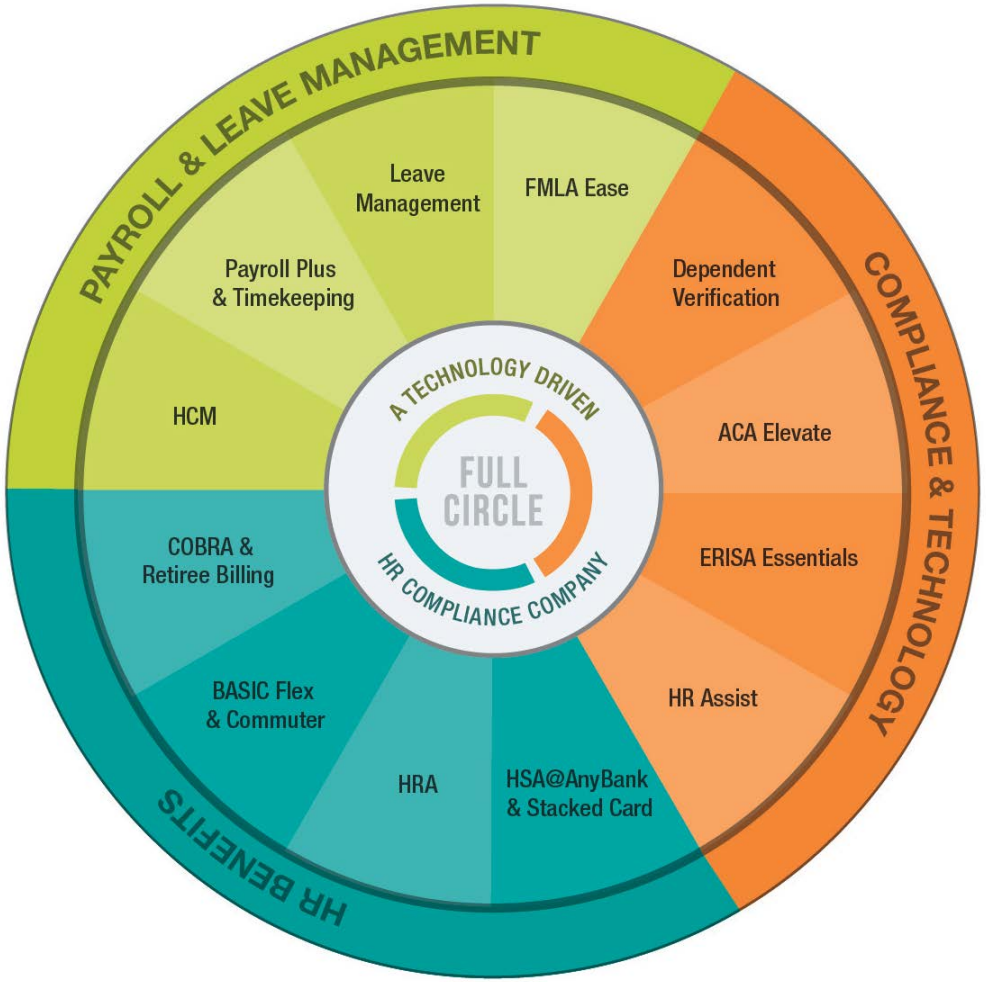

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