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## Relief for Small Employers with HRAs

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On December 13, 2016, President Obama signed into law the “21st Century Cures Act” which allows small employers without group medical plans to reimburse individual premiums and other medical expenses of employees under health reimbursement arrangements (“HRAs”), effective with the 2017 plan year, and provides relief from penalties to all small employers reimbursing individual premiums of employees for earlier plan years. In addition, the Cures Act provides a medical innovation package that funds medical research, accelerates cutting-edge treatments for rare diseases, and makes significant reforms to the mental health system.

### The Issue

An employer cannot offer employees cash to reimburse the purchase of an individual policy, without regard to whether the employer treats the money as pre-tax or post-tax to the employee. Such arrangements are subject to the market reform provisions of the Affordable Care Act (“ACA”), including prohibition on annual limits and the requirement to provide certain preventive services without cost sharing

with which it cannot comply. Such an arrangement may be subject to a \$100/day excise tax per applicable employee (which is \$36,500 per year, per employee). There was relief from this rule afforded to small employers that expired July 1, 2015.

An HRA must also be integrated with a group medical plan.

### New Law

The Cures Act provides relief for small employers and HRAs which comply with all of the following:

#### 1. Employer eligibility

An employer must:

- have less than 50 full-time employees (including full-time equivalent employees) in the preceding calendar year; and
- not offer a group health plan to any of its employees.

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## 2. Employee eligibility

The HRA must be provided to all “eligible employees.” “Eligible employees” are all employees except that the following employees may be excluded:

- employees who have not completed 90 days of service;
- employees who have not attained age 25;
- part-time or seasonal employees;
- employees covered by a collective bargaining agreement; and
- employees who are nonresident aliens and receive no earned income from the employer which constitutes income from sources within the United States.

## 3. Consistent benefit amount

The HRA must be provided on the same terms to all eligible employees.

The employee’s “permitted benefit” can vary in accordance with the variation in the price of an insurance policy in the relevant individual health insurance market based on:

- the age of the eligible employee (and, in the case of an arrangement which covers medical expenses of the eligible employee’s family members, the age of such family members); or
- the number of family members of the eligible employee the medical expenses of which are covered under such arrangement.

The variation permitted under the preceding sentence shall be determined by reference to the same insurance policy with respect to all eligible employees.

## 4. Monthly limits

The monthly limits are as follows:

- \$412.50 (\$4,950 annually for someone covered by the HRA all year) in the case of an HRA that only provides for payments for the employee; and
- \$833.33 (\$10,000 annually for someone covered by the HRA all year) in the case of an HRA that also provides for payments or reimbursements for family members of the employee).

These amounts are subject to cost-of-living adjustments.

## 5. Source of contributions

Per existing HRA rules, contributions are made by employers and not employees (i.e., there are no salary reduction contributions).

## 6. Eligible Expenses

Expenses for medical care (as defined in Code Sec. 213(d)) incurred by the eligible employee or the eligible employee’s family members, including premiums for individual policies, can be reimbursed.

## 7. Substantiation

The employee must provide proof of coverage in order to be reimbursed.

## 8. Reporting

The amount is reported by the employer on FormW-2.

## 9. Federal Taxation

Contributions and benefits are non-taxable for federal taxation purposes provided the individual has minimum essential coverage.

Contributions are deductible to the employer provided the individual has minimum essential coverage.

If applicable, states will need to determine the tax impact under state income tax rules.

## 10. Notice Requirement

Not later than 90 days before the beginning each year (or, in the case of an employee who is not eligible to participate in the arrangement at that time, the date on which such employee is first eligible), the employer must provide written notice to employees including:

- A statement of the amount of the eligible employee's permitted benefit under the HRA for the year.
- A statement that the eligible employee should provide the information described in the bullet above to any Marketplace to which the employee applies for advance payment of the premium assistance tax credit.
- A statement that if the employee is not covered under minimum essential coverage for any month the employee maybe subject to the Individual Mandate tax for such month and reimbursements under the arrangement maybe includible in gross income.

Penalty for failure to notify, unless it is shown that such failure is due to reasonable cause and not willful neglect, is \$50 per employee per incident of failure up to \$2,500.

## Effect on Affordability

A qualified small employer HRA is treated as constituting affordable coverage for a month, thus rendering the individual ineligible for a subsidy in the Marketplace, if the excess of the amount that would be paid by the employee as the premium for such month for self-only coverage under the second lowest cost silver plan offered in the relevant individual health insurance market over 1/12 of the employee's permitted benefit does not exceed 1/12 of 9.5% of the employee's household income.

For any month that an employee is provided affordable individual health insurance coverage under a qualified arrangement, he is not eligible for a subsidy.

## Effective Date

The new rules outlined above apply to plan years beginning after December 31, 2016.

In addition, transition relief that expired in 2015 has been extended so that small employers can reimburse individual premiums without penalty for plan years beginning before December 31, 2016.

