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Patient Protection and Affordable Care Act: Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections

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General Comment

See attached file(s)

Attachments

IRS-2010-0015-0015.1: Comment on FR Doc # 2010-15278



August 26, 2010

VIA Electronic Submission to <http://www.regulations.gov>

Douglas H. Shulman
Commissioner
Internal Revenue Service
CC:PA:LPD:PR (REG-120399-10)
Room 5205
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

**Re: REG-120399-10 Written Comments on Interim
Final Regulations Regarding Affordable Care Act's
Rules on Lifetime and Annual Limits on Benefits**

Dear Commissioner Shulman:

Beneco appreciates this opportunity to comment on the interim final regulations which address the lifetime and annual limit provisions of the Patient Protection and Affordable Care Act (hereinafter the "Affordable Care Act") as requested by the Department of Treasury, the Department of Labor, and the Department of Health and Human Services (hereinafter the "Departments") in 75 Fed. Reg. 37188 (June 28, 2010).

Beneco is a service provider for health and welfare plans across the United States. Many of the companies that Beneco services have begun using HRA¹ plans to help their employees mitigate the effect of increasing health care costs. Due to the potential impact that this regulation may have on its clients, Beneco feels compelled to weigh in on this issue.

Discussion

As mentioned above, an employer choosing to offer an HRA (stand-alone or otherwise) to its employees typically does so to help its employees reduce the effect of increasing health care costs. This is accomplished when the employer reimburses its employees for qualifying medical expenses² incurred by the employee, his or her spouse, and qualifying dependents. In practice, the employer operates an HRA in one of two ways: (1) actual reimbursement by the employer out of the company's general assets, or (2) reimbursement from a trust or account which is funded by the employer to meet its

reimbursement obligations. In either case, an HRA is not generally required to reimburse a claim if there are not sufficient funds to pay the claim.

In the preamble to the interim final regulations, the Departments request comments regarding whether the lifetime and annual limitation prohibitions of section 2711 of the Public Health Service Act should apply to stand-alone HRAs that are not retiree-only plans. For the following reasons, Beneco believes that they should not.

A. Stand-Alone HRAs are Akin to FSAs, MSAs, and HSAs

Beneco believes that HRAs are subject to statutory provisions that require that the contributions and benefits be limited. The preamble to the interim final regulations provides that health flexible spending arrangements (“health FSAs”), Medical Savings Accounts (“MSAs”), and Health Savings Accounts (“HSAs”) would not be subject to the lifetime and annual limits restriction. The preamble goes on to state that this exclusion is due in part to the fact that these account-based plans “are subject to specific statutory provisions that require that the contributions be limited” and because “other rules apply to limit the benefits available.”

Beneco agrees that the reasoning for this exclusion is logical, but feels that it should be extended to stand-alone non-retiree HRAs. We believe in the case of FSAs, MSAs, HSAs, and HRAs there exists two conflicting statutory provisions that are irreconcilable. While it is true that HRAs are not subject to a specific dollar limitation, typically they are effectively limited by the nondiscrimination provisions under 26 U.S.C. § 105(h). Section 105(h) lays out both nondiscriminatory eligibility and nondiscriminatory benefits requirements that serve to limit the amount of reimbursement available. In practice, the nondiscrimination provisions of section 105(h) actually limit contributions and benefits to an amount that the employer determines it can afford to pay. Without an exclusion for stand-alone non-retiree HRAs from the lifetime and annual limit prohibition, the nondiscrimination provisions of section 105(h) would be in direct conflict with the prohibition and rendered useless.

B. A Prohibition Against Lifetime and Annual Limits Could Make Stand-Alone HRAs Impractical

Unlike a fully-insured group health plan, HRAs are self-insured medical plans for which the funding must be solely provided by the employer. Whether the employer chooses to pre-fund the plan by making periodic contributions to a trust, or pays reimbursement requests on an *ad hoc* basis through the company’s general assets, a prohibition against the employer putting a limitation on the amount available would amount to an open-ended commitment by the employer. Given the fact that most stand-alone HRA plans are sponsored by small employers, this requirement would likely cause a severe financial hardship on the part of a sponsoring employer. The possibility of this

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extreme hardship would most likely lead employers to terminate their HRA plans in order to avoid being put in such an unwelcome position.

Recommendation

For the forgoing reasons, Beneco urges the Departments to exempt stand-alone HRAs that are not retiree-only plans from the lifetime and annual limitation prohibitions of section 2711 of the Public Health Service Act.

If you have any questions or need additional information, please feel free to contact me at (800) 678-9181.

Respectfully submitted,

Beneco Systems, LLC

/s/
Juhl L. Stoesz, Esq.
Legal Counsel

¹ HRA means a health reimbursement arrangements within the meaning of IRS Notice 2002-45 and an accident and health plan within the meaning of 26 U.S.C. § 105.

² HRAs may be used to reimburse only substantiated medical expenses defined under 26 U.S.C. § 213(d).