CARLTON FIELDS

Health Care Reform for FSA and HRA Sponsors - Part I

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This alert should be of interest to employers that offer a health flexible spending account (FSA) or health reimbursement arrangement (HRA). NOTE: References to "FSA" do not include dependent care assistance, adoption assistance, or other flexible spending accounts. The 2010 Patient Protection and Affordable Care Act (commonly known as ACA) is clearly focused on health insurance, with the majority of its provisions applying to insurance companies and self-insuring organizations offering health insurance to groups or individuals. However, when defining the health plans to which ACA applies, many provisions were left applicable to FSAs and HRAs. These arrangements have generally been considered health plans by other laws (such as COBRA), but it is not as easy to satisfy ACA requirements with these arrangements that are largely used to reimburse relatively minor expenses that are not covered by the main group health plan. This alert is Part I of a series focusing on these account-based arrangements. This alert focuses on some of the requirements currently applicable to HRAs and FSAs - coverage limits, eligibility, claims requirements and annual limits. **Coverage and Eligibility** We will start with two "easy items." Effective 1/1/10, FSAs and HRAs can only reimburse over-the-counter medications that are insulin or are prescribed. Effective in 2013, employee contributions to an FSA must be limited to $2,500 annually. Most plan sponsors know about ACA's requirement that health plans cover children to age 26, but do they know that this could apply to an FSA and HRA? The ACA rule is that plans covered by (Health Insurance Portability and Accountability Act) HIPAA Portability that cover children must cover those children until their 26th birthday or the end of calendar year in which the child turns 26. This means that an HRA or FSA that is subject to HIPAA Portability and that reimburses for expenses of an employee's child must permit those expenses until the child is 26. An FSA or HRA is subject to HIPAA's Portability requirements if it could result in available benefits exceeding the greater of 200% of or $500 more than the employee election, or if there is not other coverage available that is subject to HIPAA Portability. Thus, HRAs that provide more than $500 in benefits, FSAs with significant employer contributions, and HRAs and FSAs that are not provided with other medical insurance that is subject to HIPAA Portability will generally be subject to HIPAA's Portability requirements. **Claims Requirements** ACA's enhanced claims procedures have been in effect for plan

years beginning after ACA's 2010 enactment, and these ACA requirements apply to HRAs and FSAs. For this reason, FSA and HRA sponsors should be using model denial/adverse benefits notices when denying reimbursement requests. In addition, the ACA requirement that health plans contract with independent review entities does technically apply to FSAs and HRAs. ACA requires health plans to contract with at least two independent review organizations by 1/1/12 and three independent review organizations by 7/1/12. The regulatory agencies indicate that compliance will be determined on a case-by-case basis; a failure to contract with three independent review organizations may not mean that the plan has automatically violated external appeals requirements, but it is advisable to show an investigation or an attempt to contract with these organizations. **Annual Limits** Considering the relatively limited benefits provided by FSAs and HRAs, not to mention the $2,500 limit on employee contributions to an FSA, application of ACAs prohibition on annual limits would appear to be a death knell for these arrangements. There is relief available for some HRAs and FSAs, but employers must make sure their arrangements qualify for that relief. Regulations exempt FSAs "as defined in Code section 106(c)(2)" from these limits. IRC 106(c)(2) describes the standard FSAs that are most commonly used, but employer contributions to the FSA can create problems. The exemptions for HRAs are much more limited, exempting...

- HRAs that received waivers;
- HRAs that satisfy general IRS requirements, existed prior to 10/23/10, satisfy applicable notice requirements and, "[a]llows participants to carry forward unused amounts". While it is arguable that this should apply to an HRA that does not carry forward unused balances, conservative employers that otherwise qualify for this exemption should amend their HRAs to provide carryovers; and,
- HRAs "integrated with other coverage as part of a group health plan" that complies with ACA.

While not specifically addressed by authorities, it appears arguable that an HRA that limits carryovers to 500% of the standard annual benefit could be exempt as an FSA under IRC 106(c)(2), but at this time, we are not sure how "aggressive" this stance is. We hope the above highlights the care HRA and FSA sponsors should use in operating those arrangements. In the next alert, we will discuss upcoming W-2 requirements and several other ACA aspects. For more information, please contact the Carlton Fields attorney with whom you usually work, or the author of this Legal News Alert.

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