

Retail Detail



San Francisco Makes an “Exception” for HRAs, Easing Compliance with the SF Health Care Law

By Kathleen Cahill Slaughter and Joshua M. Henderson

On July 24, 2013, we [reported](#) that the Affordable Care Act (“ACA”) generally prohibited the use of stand-alone Health Reimbursement Arrangements (“HRAs”) that were not integrated with group health plan coverage because the ACA prohibits annual dollar limits for essential health benefits. Retailers who historically used a stand-alone HRA were left questioning what they could do to comply with the San Francisco Health Care Security Ordinance (the “Ordinance”).

The San Francisco Health Care Security Ordinance requires retailers with 20 or more employees (50 or more for non-profits) to spend a minimum amount per hour paid for health care for their employees

Previously, retailers in San Francisco chose to offer HRAs, in part, because employees had historically low utilization rates, and there would be unused funds which could revert to the retailer. The ACA’s prohibition on annual dollar limits appeared to cut off this popular path to complying with the Ordinance.

There is now a solution for retailers with employees who do not work over 20 hours per week. Recognizing the problem that stand-alone HRAs have in complying with the ACA, the City of San Francisco has issued additional guidance authorizing retailers to satisfy the Ordinance’s health care spending requirement for up to 20 hours per week per covered employee by offering stand-alone HRAs that limit reimbursements to specified benefits such as dental and vision benefits. This design would make the HRA an “excepted benefit.” “Excepted benefits” are not subject to the ACA, so employers may offer this limited type of HRA without violating the ACA.

Under this approach, when setting up the HRA, retailers should be sure that the limited HRA:

1. provides full reimbursement without restrictions for all excepted benefits that qualify as health care expenditures;
2. provides a 90-day period for submitting claims after coverage ends; and
3. meets the City’s existing HRA rules, including:
 - notification and record-keeping requirements, and
 - rules requiring credits to remain available for 24 months during active employment and 90 days after employment terminates.

Excepted benefits include:

- vision benefits limited to treatment of the eyes;
- dental benefits limited to treatment of the mouth;
- medical indemnity insurance;
- long-term, nursing-home, home-health, or community-based care; and
- coverage limited to a specific disease or illness.

To rely on this 20-hour-per-week excepted benefit HRA to satisfy the City's spending requirement, the employer must adopt a plan document meeting the Ordinance's requirements before the first day of the plan year. The City will recognize an HRA with a plan year beginning between January 1, 2014, and March 31, 2014, if the plan is adopted by April 1, 2014. This gives employers a few months to decide whether to adopt an excepted-benefit HRA for the first quarter of 2014. Those employers who have already instituted less advantageous compliance options may not be able to cancel insurance related to those options.

Direct Payments Still Available

Retailers can still comply with the Ordinance by (i) directly reimbursing participants for excepted benefits that qualify as health care expenditures, or for insurance premiums paid for those excepted benefits or (ii) by paying into the City's Medical Reimbursement Accounts. Payments into MRAs, however, will not allow unused amounts to revert to the retailer.

Guidance for Compliance with Employees working over 20 hours per week

Retailers still need to be sure to satisfy the Ordinance for their employees who work over 20 but under 30 hours a week, and are therefore not eligible to participate in a retailer's group health plan. Those employers who set up an excepted benefit HRA for employees working between 20 and 30 hours a week may not actually spend enough per employee. The problem arises because HRA contributions for employees working more than 20 hours per week will only count toward the spending requirement when the employee is actually reimbursed, not when the account is credited.

Employee Assistance Programs and Limited Wraparound Plans

The DOL has issued proposed regulations that also recognize certain employee assistance programs as excepted benefits and contemplate an excepted benefit that would supplement individual exchange coverage starting in 2015. The City of San Francisco's guidance does not address whether these new excepted benefits are also health care expenditures that will count towards satisfying the Ordinance.

No Significant Changes Anticipated for the San Francisco Ordinance

More recently, the San Francisco Universal Healthcare Council (a 41-member group of stakeholders appointed by the city's mayor) came out with its recommendations. The Council had been formed to examine the problems with integrating the ACA with the existing obligations of the Ordinance. There was some hope that the Council's recommendations would bring relief to many San Francisco employers, but the Council recommended that the Ordinance remain intact despite the compliance challenges faced by employers who had been using stand-alone HRAs.

Compliance with the ACA Still in Question

Employers should also keep in mind that these stand-alone HRAs covering excepted benefits will not constitute minimum essential coverage allowing them to avoid a penalty under the ACA's employer mandate. In 2015, large San Francisco employers subject to the ACA's employer mandate should consider both federal and San Francisco requirements.

Planning is Key

Retailers should review their employees' average work hours for 2013 and consider setting up an excepted benefit HRA for those employees historically working under the 20 hours per week. For those employees working over 20 hours per week, but not enough hours to be eligible for group health insurance, we suggest a hybrid approach. In such a case, a retailer could supplement the excepted benefit HRA by payments into the City for any hours worked over 20 hours per week. Retailers should analyze each quarter's hours and pay directly into the City for any hours over 20 in order to ensure compliance with the Ordinance.

Kathleen Cahill Slaughter is a partner and *Joshua M. Henderson* is counsel in Seyfarth's San Francisco office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Kathleen Cahill Slaughter at kslaught@seyfarth.com or Joshua M. Henderson at jhenderson@seyfarth.com.

www.seyfarth.com



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