Written Testimony
of
Scott A. Wold

Subcommittee on Health Care, District of Columbia, Census and the National Archives of the Committee on Oversight and Government Reform

"Obamacare: Why the need for waivers?"

March 15, 2011

I am an attorney and a shareholder of Hitesman & Wold, P.A., an employee benefits law firm located in Minneapolis, Minnesota. My law practice focuses almost exclusively on employee benefits. Over the past year, much of my work has related to the Patient Protection and Affordable Care Act ("PPACA").

After passage of PPACA, Darcy Hitesman (the other shareholder of Hitesman & Wold, P.A.) and I devoted a significant amount time reviewing and studying the legislation to determine its impact on our clients. Those clients include employers that sponsor group health plans, insurance companies that issue group health insurance, and service providers that provide insurance brokerage, consulting, and claims administration services to employers and their group health plans. Much of our efforts to become knowledgeable regarding PPACA's requirements focused on reviewing the regulatory guidance issued pursuant to the legislation. Accordingly, after PPACA was enacted, we closely monitored the issuance of regulations and other guidance by the respective agencies.

In addition to studying the legislation, much of my firm's work in the last year has involved advising clients regarding the requirements of PPACA and assisting them with compliance. As part of that work, I have had experience assisting group health plans (including a group health plan sponsored by the City of Cottage Grove, Minnesota) request waivers from the annual limit restrictions contained in Section 1001 of PPACA. I am presenting testimony regarding these waivers, including the process for obtaining them.

Shortly after their issuance on June 28, 2010, I became aware of and reviewed the interim final regulations issued by the Internal Revenue Service (IRS), Department of Labor (DOL), and Department of Health and Human Services (HHS) under PPACA's provisions relating to preexisting condition exclusions, lifetime and annual limits, rescissions, and patient protections. At the time, I noted that the regulations gave authority to the Secretary of HHS to establish a program to provide waivers from PPACA's annual limit restrictions. This provision was noteworthy because I work with several employers that sponsor limited benefit plans. PPACA's annual limit restrictions were of special concern to employers that sponsor limited benefit plans because typically a key feature of a limited benefit plan is a fairly low (in comparison to traditional major medical plans) annual limit on benefits.[1] The possibility of a waiver program was welcome news to these employers because it would allow them to continue to sponsor these plans at least on a temporary basis.

Another significant aspect of the regulations was the treatment of health reimbursement arrangements (HRAs). HRAs are defined contribution, account-based group health plans that reimburse medical expenses incurred by

[1] This feature allows plan sponsors to keep the cost of coverage under the limited benefit plan low in comparison to the cost of traditional major medical coverage.

employees and their dependents.[2] HRAs include a variety of plan designs – they may be used to supplement other group health coverage by reimbursing out-of-pocket medical expenses not reimbursed by the other plan, to provide funds for post-employment health expenses, to provide benefits in lieu of traditional group health plan coverage, etc. In general, HRAs are group health plans subject to PPACA although, depending on the plan design, some HRAs are exempt from most of PPACA's requirements.[3] A significant number of our clients sponsor, or work with employers who sponsor, HRAs.

The annual and lifetime limit restrictions were of special interest to me due to their impact on HRAs. By definition, the benefits provided by an HRA are limited by the contributions made to the plan by the employer (that is the reason HRAs are considered defined contribution plans). Accordingly, the amount of benefits or reimbursements an HRA participant may receive during a year is generally limited by the amount in the participant's account at the beginning of the year plus the additional contributions allocated to the account throughout the year. It appeared, therefore, that all HRAs impose an annual limit on benefits that would be subject to the new annual limit restrictions. Because an HRA could not comply with the annual limit restrictions, my clients and I were interested to learn whether the agencies had exempted HRAs from them.

The agencies did, in fact, provide an exemption for two categories of HRAs (that were not already exempt): (1) those "integrated" with another group health plan and (2) those that constitute flexible spending arrangements under Section 106 of the Internal Revenue Code. With respect to other HRAs (such as "stand-alone" HRAs that are not retiree-only), the agencies requested comments regarding application of the annual and lifetime limit restrictions. Although the regulations created the possibility that the annual limit restrictions would apply to some HRAs, my expectation was that, before the annual limit restrictions became effective, the agencies would issue additional guidance regarding the application of the rules to these other HRAs.

I subscribe to several services that provide daily or weekly updates regarding developments in employee benefit law. In addition, Darcy Hitesman is an author and speaker for the Employee Benefits Institute of America. From these sources, I became aware in September, 2010, that HHS had established the waiver program and issued guidance regarding applying for waivers.

In late October, my firm began to focus on the need for some of our clients to apply for waivers because the lack of additional guidance from HHS regarding HRAs.[4] There was an initial question of whether waivers were available for HRAs. The HHS guidance from September did not address this issue. The guidance referred to limited benefit plans and mini-med plans, but was silent regarding HRAs. To seek some clarification, my firm contacted HHS and inquired whether HRAs were eligible for the waivers. We were informed that HRAs were eligible.[5] We then distributed a communication to all of our clients recommending they should consider seeking a waiver from the annual limit restrictions for their HRAs.

I and my firm have assisted (directly or indirectly)[6] numerous HRAs seek and obtain waivers (including an HRA sponsored by the City of Cottage Grove, Minnesota). At this time, we have also assisted one limited benefit plan

---

[2] A participant's HRA account balance may carry over from year to year.

[3] Exempt HRAs include HRAs that are exempt from HIPAA, including retiree-only HRAs and HRAs that constitute HIPAA excepted benefits.

[4] The annual limit restrictions were/are applicable as of the first plan year beginning on or after September 23, 2010.

[5] To the extent there was still a question whether HRAs were considered to be subject to the annual limit restrictions, HHS's response to our inquiry confirmed that HRAs are subject to the restrictions.

[6] In some cases, we prepared and submitted the application on behalf of the employer sponsoring in the plan. In other cases, we prepared a template application for use by our clients who provide services to employers (e.g., brokers/consultants and third party administrators) who in turn made the template application available for use by their

obtain a waiver and expect to assist several more with their applications for the waiver. To my knowledge, none of the applications with which I provided assistance (directly or indirectly) have been formally denied. However, they have not all been issued. Furthermore, I have encountered several issues or difficulties with the process.

As mentioned above, it was not clear whether HRAs were even eligible for waivers. Neither the regulations nor the HHS guidance regarding the waiver program mentioned HRAs. As a result, many employers were surprised to learn that they could (and should) apply for a waiver. HHS's failure to clearly address the availability of waivers for HRAs likely resulted in many sponsors of HRAs not requesting a waiver.

A significant issue faced by many employers who sponsor HRAs was whether a waiver is needed for their particular HRA. The interim final regulations provided an exemption from the annual limit restrictions for HRAs that were "integrated" with other group health plan coverage. However, the regulations did not define the term "integrated" or otherwise describe the concept of an integrated HRA. Although many HRAs are provided in conjunction with other coverage (e.g., the expenses that are reimbursable under the HRA are expenses that would be covered under the medical plan but for the cost-sharing requirements), without any guidance from the agencies regarding what constitutes an integrated HRA, in many cases employers had to guess whether their HRAs are integrated. We took a conservative position on this issue, recommending a waiver be obtained unless the HRA was part of the other group health plan and all participants of the HRA were also covered under the other group plan.

Even after applications were filed for HRAs, HHS did not provide any assistance with this issue. In many cases, upon receiving a waiver application for an HRA, HHS would send a form response reminding the applicant that no application was needed if the HRA was integrated. However, this response provided no further guidance regarding what HHS considered to be an integrated HRA and HHS would not comment further when asked for additional guidance.

Another issue arose with respect to the content of the application. The HHS guidance released in September regarding the waiver program contained few details regarding the information that was required as part of the application and no application form was provided. Although we were able to put together an application that we thought satisfied the requirements of the program, in most cases HHS requested additional information before it considered the application to be complete.

In some cases, HHS responded by requesting an entirely new application be completed. For most of the applications with which we provided assistance, the filing deadline was December 1, 2010. HHS released an application form on or about December 8, 2010. Even though no such application form was available at the time they filed their applications, many employers were asked to complete the new application form.[7] This requirement added to the time and expense incurred by employers to obtain the necessary waiver.

Another issue that some of our clients encountered was that HHS allowed another party to withdraw their applications. In Minnesota, the state retirement system (Minnesota State Retirement System or MSRS) has established an HRA called the Health Care Savings Plan. The Health Care Savings Plan is administered by MSRS and funded through a trust established by MSRS. However, governmental employers in the state (e.g., cities, counties, school districts) decide on an individual basis whether to participate in the plan and choose or

---

clients. In the latter case, I was typically consulted with respect to any questions or requests made by HHS with respect to an application submitted by the employer.

[7] I assisted with the completion of this form in several cases.

establish some of the particular terms of their plan.[8] We recommended that employers participating in the Health Care Savings Plan should obtain a waiver with respect to their participation in the plan. In several (but not all) of these cases, HHS appeared to take the position that MSRS was the proper party to submit the application and contacted MSRS. MSRS informed HHS that the Health Care Savings Plan did not need a waiver because it was exempt.[9] As a result, it is my understanding that HHS treated the employer's application to have been withdrawn based solely upon the request of MSRS (i.e., without the employer's consent).[10]

Some type of relief from the annual limit restrictions is needed. Because the agencies did not delay the effective date of the rules as they did for another PPACA requirements (e.g., the nondiscrimination requirements for fully insured plans), if a plan is subject to the annual limit restrictions and did not obtain a waiver, the plan is out of compliance and the employer is subject to penalties.

For HRAs, relief should be provided in the form of non-enforcement pending further guidance. Although some employers requested waivers, many employers likely did not request a waiver either because they were unaware of the need to obtain a waiver for an HRA or because they took an aggressive approach and treated their HRAs as integrated HRAs, despite the lack of a definition of "integrated." Other employers sought the waiver, but had their application withdrawn for them. The waiver process is inefficient and, in some cases, inconsistent. A uniform non-enforcement position pending guidance would put all HRA sponsors in the same position while we await additional guidance regarding whether all HRAs are exempt from the annual and lifetime limit restrictions. If no such exemption is provided by the agencies, legislation should be passed providing the exemption.

For employers that sponsor limited benefit plans or mini-med plans, ongoing relief from the annual limit restrictions is needed, whether in the form of waivers or a non-enforcement position. Under PPACA, the limited benefit plan or mini-med plan will eventually need to be eliminated. Employers need to time to determine whether to replace those benefits with PPACA-compliant benefits or to not provide benefits to the employees who in the past have been offered the limited benefit or mini-med plan.

I recognize that the agencies, including HHS, have a difficult task implementing PPACA. Employers that must comply with the law also have a difficult task ensuring they are in compliance. My hope is that my testimony about our experience with respect to waivers from the annual limit restrictions will lead to a better process so that all employers are treated fairly and are able to be in compliance.

Respectfully submitted,

Scott A. Wold

---

[8] For example, individual employers decide who will participate and the levels of contribution. In addition, each employer is responsible for many of the plan sponsor responsibilities including nondiscrimination testing, application of COBRA, calculation and reflection of GASB liabilities, etc.

[9] MSRS reportedly informed HHS that the Health Care Savings Plan is a retiree-only plan and, therefore, exempt. However, the terms of the Health Care Savings Plan allow current employees to receive benefits from the plan in certain cases. See http://www.msrs.state.mn.us/hcsp/reimb.htmls.

[10] It is also our understanding that the employer was not informed of the withdrawal or the basis for it. Only upon follow up with respect to the status of the requested waiver was the employer informed by HHS of this information.