

Health Care Reform's Impact On Flexible Benefits

By Rich Glass, JD



Rich Glass is chief compliance officer for Infinisource, Inc. He is a licensed attorney and brings more than 17 years of legal expertise, specializing in benefits, human resources and related regulatory compliance. He has testified before the IRS and has provided comments on regulations issued by several governmental authorities. He is a member of the Thompson Publishing Group's Health Plan Advisory Panel and serves as contributing editor of Thompson's Flex Plan Handbook. He is a frequent speaker and author on various benefits, employment law and compliance issues.

Flexible benefits will need to be just that, because change is coming in this area now that President Obama has signed the Patient Protection and Affordable Care Act (PPACA), Pub. L. 111-148, and the Health Care and Education Tax Credit Reconciliation Act of 2010, Pub. L. 111-152 (Reconciliation Bill) into law. The Reconciliation Bill makes technical corrections to the PPACA.

While health care reform is now the law of the land, the dust has hardly settled. All told, these two laws will dramatically change the health care landscape in the years to come.

Following is a brief time line of the major provisions relating to health flexible spending accounts (FSAs), health reimbursement arrangements (HRAs), health savings accounts (HSAs) and cafeteria plans. (See Tab 300, ¶291 and ¶292 of the *Handbook*, respectively, for more on FSAs, HRAs and HSAs.)

Following is a brief time line of the major provisions relating to health flexible spending accounts (FSAs), health reimbursement arrangements (HRAs), health savings accounts (HSAs) and cafeteria plans. (See Tab 300, ¶291 and ¶292 of the *Handbook*, respectively, for more on FSAs, HRAs and HSAs.)

Changes Taking Effect on Jan. 1, 2011

Over-the-counter (OTC) drugs

Over-the-counter medicines or drugs are not eligible for reimbursement under a health FSA, HRA, HSA or Archer MSA without a doctor's prescription. Insulin remains reimbursable. This is in section 9003 of the PPACA.

HSA excise tax

The excise tax for non-medical HSA and Archer MSA distributions increases from 10 percent to 20 percent. This is in section 9004 of the PPACA.

New safe harbor for small employer cafeteria plans

The Code Section 125 nondiscrimination rules do not apply for cafeteria plans (and some plans offered through a cafeteria plan, such as group term life insurance, self-insured medical and dependent care assistance) if certain requirements are met. (See App. A for Section 125; see Tab 700 for a discussion of nondiscrimination rules.)

This is being hailed as a "SIMPLE" cafeteria plan, but requires more than seven pages of rules. For example, all non-excludable employees must be eligible to participate, and the employer must make a minimum level of contribution.

Eligible employers must have 100 or fewer employees during either of the two preceding years (provided it is a full year). This is in section 9022 of the PPACA.

Changes Taking Effect on March 23, 2012

New explanation of coverage document

The plan administrator (self-insured plans) or the insurance carrier (fully insured plans) must give a coverage summary to all applicants and enrollees, at initial

See *Health Care Reform*, p. 4

Editorial Advisory Board

MARIANNA G. DYSON, ESQ.

Miller & Chevalier Chartered
Washington, D.C.

RICHARD F. FEDERICO

Managing Partner, Workplace Innovation
Trumbull, Conn.

DAVID R. FULLER, ESQ.

Morgan, Lewis & Bockius, LLP
Washington, D.C.

RODNEY D. GARCIA

The Collins Firm
McLean, Va.

JERRY E. HOLMES, ESQ.

Morgan, Lewis & Bockius, LLP
Washington, D.C.

KAREN KIRKPATRICK

Infinisource, Inc.
Coldwater, Mich.

SUSAN NASH, ESQ.

McDermott Will & Emery
Chicago, Ill.

ANDREW SHERMAN

The Segal Company
Boston, Mass.

SUSAN SEITEL

WFC Resources, Inc..
Minnetonka, Minn.

VALERI STEVENS,

APM, FLMI, CEBS, APA, EA
Main Street Benefits
Torrance, Calif.

Health Care Reform (continued from p. 3)

enrollment and open enrollment. This is in addition to the summary plan description (see ¶821).

Eligible employers must have 100 or fewer employees during either of the two preceding years (provided it is a full year)

The Department of Health and Human Services will provide standards by March 23, 2011. The document can be no more than four pages long and address covered benefits, exclusions, cost sharing and continuation. A \$1,000 penalty applies for each failure to provide. This provision actually dictates that the wording must be in at least 12-point font. This is in section 1001 of the PPACA.

Changes for Plan Years Starting on Jan. 1, 2013 Or After

Health FSA limit

Contributions are capped at \$2,500 each year, indexed for the Consumer Price Index starting in 2014. This is in section 9005 of the PPACA, as amended by section 1403 of the Reconciliation Bill.

Unanswered Questions Remain

Many, many questions remain to be answered. Examples of gray areas include the following:

- When does the \$2,500 health FSA limit take effect for non-calendar plan years?
- What form of documentation will be required for a doctor-recommended OTC drug to be viewed as a prescribed drug, and therefore reimbursable?
- What will happen to the Inventory Information Approval System, which was set up to auto-adjudicate OTC drugs, medicines and other items when an authorized debit card is used?
- What additional guidance will there be on the SIMPLE cafeteria plan?

Other health care reform changes will indirectly affect flexible benefits, like the calculation of the so-called Cadillac plan tax, which would include the value of health FSAs as well as the value of HRAs and HSA contributions.

Some of the outstanding questions may take years to answer fully, but there is time — health care reform has a very long implementation schedule. 🏠

Exciting Products for Human Resources!

Available from Thompson Publishing Group



Employee Handbook Builder

<http://handbookbuilder.com>

Use this advanced online system to build an employee handbook covering both federal and state-specific issues.

- Written by top employment attorneys from Jackson Lewis LLP
- Saves you time and money
- Complies with federal and state law
- Multi-state handbook option

HR Forms Online

<http://thompsonhrforms.com>

Forms, checklists, letters and policies to make HR easier.

- Easy to download
- Ready to use
- Approved by HR legal experts
- Saves you time and money
- From a source you trust

 **THOMPSON**
Insight you trust.

Disability bias claims up 10%. Find out how to protect yourself at www.thompson.com/disability