P. Expenditures and Enforcement Guidance for 2014

The following guidance addresses questions regarding HCSO compliance in 2014. Some answers are relevant for calendar year 2015 as well. Please contact the OLSE at 415-554-7892 if you have additional questions about HCSO compliance or reporting for 2014.

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1. Q: Given that new contributions to stand-alone medical HRAs are no longer permitted by the federal Affordable Care Act as of January 1, 2014, and given that funds contributed to a revocable HRA must remain available to employees for a minimum of 24 months to count as Health Care Expenditures under the HCSO, what can employers do with unexpired funds remaining in the pre-2014 accounts?

A: To have these prior HRA allocations remain valid Health Care Expenditures that count toward the Employer Spending Requirement of the HCSO, there are three acceptable scenarios:

a) The employer can maintain the HRAs (without making any new contributions) and keep funds allocated prior to January 1, 2014 available to Covered Employees for a minimum of 24 months from the date of contribution.

b) The employer can close the HRAs and make replacement Health Care Expenditures on behalf of the affected Covered Employees in the amount of any unused HRA funds that had not been available for 24 months from the date of contribution.

c) As of July 26, 2014, an amendment to the HCSO provides that a Covered Employee may "knowingly, voluntarily, and permanently waive in writing the unused portion" of a Revocable Expenditure made before January 1, 2014. If the employee waives the balance in the account, the employer may now close the HRA without making additional Health Care Expenditures equivalent to the amount of unused funds. On or after the date of this guidance, a waiver is only effective for if the employee chooses to sign the Employee Voluntary HRA Opt-Out Form. The form is available on the OSLE HCSO website.

2. Q: What factors will OLSE consider when determining whether a Revocable Expenditures to an excepted benefits HRA is "reasonably calculated to benefit the employee" in 2014?

A: OLSE considers an employer's revocable contributions to an excepted benefits HRA to be reasonably calculated to benefit the employee if:

a) The expenditures do not exceed the employer's Spending Requirement for an employee who works an average of 20 hours per week;

b) Subject to the federal tax rules for HRAs, the contribution may be used without restriction for full reimbursement of all excepted benefits that are also qualifying Health Care Expenditures" under the HCSO (see Section O, Question 3(a) for a list of those excepted benefits); and

c) The employee has at least a 90-day grace period after a contribution expires to submit claims for reimbursable expenses that the employee incurred before the contribution expired.

3. Q: What happens if an employer makes Revocable Expenditures to an employee's excepted benefits HRA account that exceed the Required Health Care Expenditures for a 20-hour-per-week employee? Will the OLSE still count those expenditures toward the Employer Spending Requirement?

A: Excess contributions will be credited toward the Employer Spending Requirement in the amount that the employee actually uses the excess contributions. To receive credit for excess contributions, the employer must request credit by April 30, 2015 and provide supporting documentation of the employee's actual use. See Section J for more information about the reporting requirements. Take the following example:

A Medium-Sized employer allocated Revocable Expenditures for 30 Hours Payable per week to an excepted benefits HRA for all of calendar year 2014. The total amount allocated is:

$1.63 expenditure rate x 30 hours x 52 weeks = $2,542.80

During the calendar year, the employee receives reimbursements for qualifying excepted benefits in the amount required for 22 Hours Payable ($1.63 x 22 hours x 52 weeks, or $1,864.72).

In this scenario, the OLSE would count the full amount for an average of 22 Hours Payable per week, or $1,864.72, as valid Health Care Expenditures. Unless the employer makes another kind of Health Care Expenditures for the remaining 8 average Hours Payable per week ($588.08), the employer will be required to make remedy payments and be subject to penalties.

4. Q: What reporting does the OLSE require if an employer chooses to make revocable contributions to an employee's excepted benefits HRA account in excess of an average of 20 hours per week for 2014?

A: If an employer makes revocable contributions to an excepted benefits HRA for more than an average of 20 hours per week for any of its Covered Employees, the OLSE will require that employer to answer additional questions on the 2014 HCSO Annual Reporting Form. Employers will be required to provide aggregate information on allocations, reimbursements, and "true-up" spending, if applicable.

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5. Q: If an employer makes revocable contributions to an excepted benefits HRA in excess of 20 hours per week, and the employee does not use the full amount allocated by the end of calendar year 2014, can that employer make additional expenditures to "true up" at the end of the year?

A: Yes, for calendar year 2014 only, these employers may make additional Health Care Expenditures in the manner described below to "true up" by April 10, 2015.

If, at the end of calendar year 2014, an employee has not used the full amount of revocable contributions to an excepted benefits HRA, and those contributions exceeded the Required Health Care Expenditures for an employee working on average 20 hours per week, the employer may make replacement Health Care Expenditures equivalent to the unused amount in excess of 20 hours. Replacement Health Care Expenditures must be made by April 10, 2015 for the OLSE to count those expenditures toward the 2014 Employer Spending Requirement.

If the employer does not make sufficient replacement expenditures, the employer will not satisfy its Employer Spending Requirement for 2014, and penalties will apply.

Take the following example:

A Medium-Sized employer allocated Revocable Expenditures for 30 Hours Payable per week to an employee's excepted benefits HRA account for all of calendar year 2014. The total allocated is:

$1.63 expenditure rate x 30 hours x 52 weeks = 2,542.80

The employer only reimburses the employee the amount required for 15 Hours Payable:

$1.63 rate x 15 hours x 52 weeks = $1,271.40

The employee did not "actually use" any of the funds allocated in excess *of 20 hours per week.*

In this scenario, the employer would be required to make replacement Health Care Expenditures on behalf of the employee for all hours in excess of 20 hours per week. Thirty hours per week allocated minus 20 hours per week assumed to be "reasonably calculated to benefit the employee" results in an excess of 10 hours per week.

10 per week remaining x $1.63 x 52 weeks = $847.60

The replacement Health Care Expenditures of $847.60 must be made by April 10, 2015, to be counted toward the employer's 2014 Spending Requirement.

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