

For Employers Seeking Tax Favored DPC Vehicles Look to (EB)HRAs and telemedicine for HSAs

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05/02/2020

Outline

- Old traditional health reimbursement accounts (HRAs)
- Qualified Small Employer Health Reimbursement Accounts (QSEHRAs)
- Individual Coverage Health Reimbursement Accounts (ICHRAs)
- Excepted Benefit Health Reimbursement Accounts (EBHRAs)
- Broad (new) HSA exception for telemedicine
- Attendees will have a better idea of where each type of HRA is most likely to be used and how these new regulations interplay with the tax treatment of direct primary care when sponsored by an employer.

Tax Code Background

- Section 223(c) – “Gap Plan”
 - Definition effects HSAs
- Section 213(d) – “Medical Expense”
 - Definition effects HSAs, HRAs, FSAs

Health Reimbursement Accounts

- Qualified Small Employer HRAs (QSEHRAs)
 - On Dec 8, 2016 with the passage of [H.R. 34: 21st Century Cures Act](#) the potential for a \$100 per day fine for the less than fifty employers desiring to pay for DPC services with pretax dollars has largely been eliminated.
- Individual Coverage HRAs (ICHRAs)
 - Jan 2020 creation from prior executive order
- Excepted Benefit HRAs (EBHRAs)
 - Jan 2020 creation from prior executive order

QSEHRAs – Older option – still possible

"An arrangement is described in this subparagraph if—

- (i) such arrangement is **funded solely by an eligible employer** and no salary reduction contributions may be made under such arrangement,
- (ii) such arrangement provides, after the employee provides proof of coverage, **for the payment of, or reimbursement of, an eligible employee for expenses for medical care (as defined in section 213(d))** incurred by the eligible employee or the eligible employee's family members (as determined under the terms of the arrangement), and
- (iii) the amount of payments and reimbursements described in clause (ii) for any year **do not exceed \$4,950** (\$10,000 in the case of an arrangement that also provides for payments or reimbursements for family members of the employee)."

EBHRAs – new option – IF “on site”

EBHRAs with an on site **DPC clinic** are the best way for employers to pay for DPC in a tax advantaged way.

Federal Register – acknowledged the 213(d) question

"Some commenters requested that the Departments confirm that certain excepted benefits, including standalone dental coverage, hospital indemnity or other fixed indemnity coverage, and coverage for a specific disease or illness, provide medical care within the meaning of Code section 213(d) and, therefore, that expenses for these types of coverage are reimbursable by an individual coverage HRA. Some commenters requested that expenses paid with regard to direct primary care arrangements be recognized as expenses for medical care under Code section 213(d). In addition, one commenter requested clarification of whether payments for participation in health care sharing ministries qualify as medical care expenses under Code section 213(d)."

<https://www.federalregister.gov/documents/2019/06/20/2019-12571/health-reimbursement-arrangements-and-other-account-based-group-health-plans>

Federal Register – declined to make any changes to 213(d)

"An HRA, including an individual coverage HRA, generally may reimburse expenses for medical care, as defined under Code section 213(d), of an employee and certain members of the employee's family. Under Code section 213(d), medical care expenses generally include amounts paid (1) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure of function of the body; (2) for transportation primarily for and essential to medical care; (3) for certain qualified long-term care services; and (4) for insurance covering medical care. **Neither the proposed rules nor the final rules make any changes to the rules under Code section 213. Thus, any issues arising under Code section 213, and any guidance requested by commenters to address those issues, are beyond the scope of this rulemaking.** The Treasury Department and the IRS, however, appreciate the comments and plan to address some of these issues in future rulemaking or guidance."

<https://www.federalregister.gov/documents/2019/06/20/2019-12571/health-reimbursement-arrangements-and-other-account-based-group-health-plans>

Federal Register – Declined to change 223(c) for HSAs

"Finally, some commenters requested that direct primary care arrangements not be treated as a health plan or coverage under Code section 223, so that an individual may have a direct primary care arrangement without becoming ineligible for HSA contributions. **Similar to the discussion of Code section 213 in the preceding section of this preamble, neither the proposed rules nor the final rules make any changes to the rules under Code section 223.** Thus, any issues arising under Code section 223, and any guidance requested by commenters to address those issues, are beyond the scope of this rulemaking."

<https://www.federalregister.gov/documents/2019/06/20/2019-12571/health-reimbursement-arrangements-and-other-account-based-group-health-plans>

Federal Register – Questions about how broad EBHRAs could go

"Several commenters inquired whether an excepted benefit HRA could reimburse expenses related to participation in a health care sharing ministry or a direct primary care arrangement. One commenter asked whether reimbursement could be provided for categories of excepted benefits other than "limited excepted benefits," such as those in which benefits for medical care are secondary or incidental (for example, travel insurance). This commenter expressed concern that there could be potential conflicts under rules regarding taxable fringe benefits under the Code. Some commenters requested clarification more generally regarding whether an excepted benefit HRA may only reimburse excepted benefits that pay health benefits or all excepted benefits, with some advocating that excepted benefit HRAs be allowed to reimburse all expenses for all excepted benefits and some advocating that the excepted benefit HRA only be allowed to reimburse expenses for excepted benefits that are medical care."

<https://www.federalregister.gov/documents/2019/06/20/2019-12571/health-reimbursement-arrangements-and-other-account-based-group-health-plans>

Federal Register – Technically, No section 213(d) changes made for EBHRAs

The Departments clarify that an HRA, including an excepted benefit HRA, generally may reimburse medical care expenses of an employee and certain of the employee's family members (subject to the prohibition on the reimbursement of certain premiums that apply for excepted benefit HRAs).

Neither the proposed nor the final rules make any changes to the rules under Code section 213. Thus, any issues arising under Code section 213, and any guidance requested by commenters to address those issues, are beyond the scope of this rulemaking. The Treasury Department and the IRS, however, appreciate the comments and anticipate addressing some of these issues in future rulemaking or guidance."

<https://www.federalregister.gov/documents/2019/06/20/2019-12571/health-reimbursement-arrangements-and-other-account-based-group-health-plans>

Federal Register

For the purpose of this paragraph (d), **all individual health insurance coverage, except for coverage that consists solely of excepted benefits, is treated as being subject to and complying with PHS Act sections 2711 and 2713.**

(2) Requirements for an HRA or other account-based group health plan to be integrated with another group health plan. An HRA or other account-based group health plan is integrated with another group health plan for purposes of PHS Act section 2711 and paragraph (a)(2) of this section if it satisfies the requirements under one of the integration methods set forth in paragraph (d)(2)(i) or (ii) of this section. For purposes of the integration methods under which an HRA or other account-based group health plan is integrated with another group health plan, **integration does not require that the HRA or other account-based group health plan and the other group health plan with which it is integrated share the same plan sponsor, the same plan document or governing instruments, or file a single Form 5500, if applicable.** An HRA or other account-based group health plan integrated with another group health plan for purposes of PHS Act section 2711 and paragraph (a)(2) of this section may not be used to purchase individual health insurance coverage **unless that coverage consists solely of excepted benefits, as defined in [45 CFR 148.220](#).**"

<https://www.federalregister.gov/documents/2019/06/20/2019-12571/health-reimbursement-arrangements-and-other-account-based-group-health-plans>

(EB)HRA Take Home Point

- So when readers review the excepted benefits under [45 CFR 148.220](#) one of them should stand out -
- (a) Benefits excepted in all circumstances: #8 - "coverage for on site medical clinics."

Bizarre EBHRA IRS Tax Logic

- DPC is still NOT a 213(d) “medical expense”
- DPC is indeed a kind of “plan” under 223(c)
- This is NOT an insurance plan, but an “other”
- Certain “plans” are given favoritism for tax favored “first dollar” spending – now EBHRAs are in this new category (along with plans consisting solely of preventive care) – a type 213(d) alternative pathway

CARES Act

- SEC. 3701. EXEMPTION FOR TELEHEALTH SERVICES.
- (a) In General.—Paragraph (2) of section 223(c) of the Internal Revenue Code of 1986 is amended by adding at the end the following new subparagraph:
- “(E) SAFE HARBOR FOR ABSENCE OF DEDUCTIBLE FOR TELEHEALTH.—In the case of plan years beginning on or before December 31, 2021, a plan **shall not fail to be treated as a high deductible health plan by reason of failing to have a deductible for telehealth and other remote care services.**”
- (b) Certain Coverage Disregarded.—Clause (ii) of section 223(c)(1)(B) of the Internal Revenue Code of 1986 is amended by striking “or long-term care” and inserting “long-term care, or (in the case of plan years beginning on or before December 31, 2021) telehealth and other remote care”.
- (c) Effective Date.—The amendments made by this section shall take effect on the date of the enactment of this Act.

<https://www.congress.gov/bill/116th-congress/house-bill/748/text#toc-H5ED763AA3C204B7086BB5E00AC811E39>

Bizarre Telemed HSA Carve Out

- DPC is still NOT a 213(d) “medical expense”
- DPC is indeed a kind of “plan” under 223(c)
- This is NOT an insurance plan, but an “other”
- Certain spending plan categories are permitted on a first dollar basis as 223(c) gap plan exceptions – telemedicine spending (whether FFS or capitated) has been added to this list of exceptions

Post-CARES HSA Considerations

- What if you had a DPC membership where telemedicine visits had no per visit fee and in person visits had a small fee? (Hmm...)
- Is there a spending cap in place? (no)
- What are “other remote care services?”
 - Undefined by the CARES Act
 - Maybe RPM?
 - Maybe CCM?

Questions?