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Office of Health Plan Standards and
Compliance Assistance
Employee Benefits Security Administration
Room N-5653
U.S. Department of Labor
200 Constitution Avenue, NW.
Washington, DC 20210
Attention: RIN 1210-AB43

Re: Final Interim Rules Regarding Requirements for Group Health Plan and Health Insurance Issuers Under the Patient Protection and Affordable Care Act Relating to Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections
Federal Register, Volume 75, No. 123, page 37188 (June 28, 2010)
Comments Regarding Certain Stand-Alone HRAs

Dear Sir or Madam:

Dorsey & Whitney LLP is a law firm whose clients include many employers to whom we provide advice on employee benefits, including group health plans. We are writing to comment on the interim final rules regarding restrictions on lifetime and annual limits found in section 2711 of the Public Health Service Act ("PHS Act") as added by the Patient Protection and Affordable Care Act ("PPACA"). The interim final regulations were published on June 28, 2010 in the Federal Register. 75 Fed. Reg. 37188. The comments below discuss the application of restrictions on lifetime and annual limits to certain stand-alone health reimbursement arrangements ("HRAs").

Background

Section 2711 of the PHS Act prohibits lifetime and annual limits on essential health benefits offered under group health plans. Section 1001 of PPACA, as amended by section 10101 of PPACA. In the preamble to the interim final regulations, the Departments of Health and Human Services, Labor and the Treasury ("the Departments") requests "comments regarding the application of PHS Act section 2711 to stand-alone HRAs that are not retiree-only plans." 75 Fed. Reg. 37188, 37191.

Some of our employer clients offer a stand-alone HRA that reimburses certain medical expenses (as defined in section 213(d) of the Internal Revenue Code) of current employees who are also eligible for the employer's major medical plan. These employees will participate in

the stand-alone HRA regardless of whether they choose to participate in the major medical plan. Employees who are not eligible for the employer's major medical plan are not eligible for the HRA. We believe that lifetime or annual limits on all benefits provided under a stand-alone HRA that is provided to all employees who are eligible for the employer's major medical plan (regardless of whether the employee actually elects to participate in the major medical plan) should not violate 2711 of the PHS Act.

Comment on Certain Stand-Alone HRAs

In the preamble to the interim final regulations, the Departments state that an HRA that is "integrated with other coverage as part of a group health plan and the other coverage alone would comply with the requirements of PHS Act section 2711, the fact that benefits under the HRA by itself are limited does not violate PHS Act section 2711 because the combined benefit satisfies the requirements." 75 Fed. Reg. 37188, 37190-91. We believe the type of HRA described above is very similar to this kind of integrated HRA because every employee who participates in the HRA has access to the employer's major medical plan that complies with section 2711 of the PHS Act. Therefore, like the integrated HRA discussed in the preamble, lifetime or annual limits on this type of HRA do not violate section 2711 of the PHS Act.

In this situation, as with the integrated HRA, the HRA is not the only group health plan offered to the employees; all employees who participate in the HRA are also eligible for the employer's PPACA-compliant major medical plan. Regardless of whether the eligible employee actually elects to participate in the major medical plan, the employee will automatically participate in the HRA. Permitting a stand-alone HRA of this kind to continue to impose annual and lifetime limits will allow the employer to offer the HRA to all benefit-eligible employees, not just those who elect to participate in the employer's major medical plan.

In contrast, applying the new restrictions on annual and lifetime limits to this type of stand-alone HRA will disadvantage employees and their dependents. Employers will, as a practical matter, be faced with two options if the restrictions on annual and lifetime limits are applied to these HRAs. The employer will either have to terminate the plan (because the employer cannot fund an unlimited HRA for all benefit-eligible employees) or modify the HRA so that it is integrated with the major medical plan and only available to employees who elect to participate in the major medical plan (so that the annual and lifetime limits can be maintained). Neither option is favorable to participants.

Conclusion

We request that the Departments issue guidance that stand-alone HRAs with lifetime or annual limits that are provided to all employees who are eligible for the employer's compliant major medical plan (regardless of the employee's actual election to participate in the major medical plan) do not violate section 2711 of the PHS Act.

In the event that the Departments decide to require stand-alone HRAs to eliminate annual and lifetime limits, we request the Departments issue transition relief for stand-alone HRAs. The deadline for open enrollment for calendar year plans is quickly approaching and

companies generally must make decisions about next year's plans far in advance of open enrollment. We therefore request that, if stand-alone HRAs are subject to restrictions on lifetime and annual limits, the Departments provide transition relief until the first plan year beginning on or after September 23, 2011 to allow employers with stand-alone HRAs to comply with the restrictions (if the Departments issue such guidance).

We appreciate the Departments providing a request for comments on the interim final regulations and the opportunity to comment. In addition, we welcome the opportunity to discuss this comment and any questions you may have regarding the comment.

Very truly yours,

Leslie J. Anderson