WageWorks

September 9, 2014

The Honorable Jacob J. Lew
Secretary, U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Sylvia Mathews Burwell
Secretary, U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C., 20201

The Honorable Thomas E. Perez
Secretary, U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: **Flexible Spending Arrangements**

Dear Messrs. and Madame Secretaries:

WageWorks, Inc. ("WageWorks") is writing to request a modification to the current guidance that provides that certain health flexible spending arrangements ("FSAs") will be considered excepted benefits and not subject to the market reforms under the Patient Protection and Affordable Care Act ("ACA"). We request modification to provide that an FSA would be considered excepted benefits regardless of whether the employer offers health coverage to those eligible for an FSA. There is ample policy justification for allowing FSAs to be considered excepted benefits regardless of whether the employer provides major medical coverage, particularly since after the enactment of the ACA, the concerns that FSAs would be used to replace traditional employer-sponsored health coverage have been eliminated.

WageWorks is one of the nation's leading independent providers of consumer-directed spending solutions and services. WageWorks represents more than 3.8 million FSAs, health savings accounts ("HSAs") and health reimbursement arrangements ("HRAs") for more than 45,000 employer plan sponsors nationwide. WageWorks appreciates the previous guidance that the U.S. Departments of the Treasury, Health and Human Services and Labor (the "Agencies") have promulgated pursuant to the ACA that will make FSAs available to more employees, such as the permitting FSAs to provide for a carryover of not more than $500 in unused account balances to the following year.[1] However, WageWorks is concerned that other provisions, as described below, place unnecessary limits on these arrangements so they cannot be widely available to all workers.

[1] IRS Notice 2013-71 2013 IRB 532.

Background

A health FSA is a benefit program that provides employees with coverage under which — (A) specified incurred expenses may be reimbursed (subject to reimbursement maximums and other reasonable conditions), and (B) the maximum amount of reimbursement which is reasonably available to a participant for such coverage is less than 500 percent of the value of such coverage.[2] In most health FSAs, employees are allowed to make salary reduction contributions to the FSA, and the employee is able to be reimbursed for qualified medical expenses on a tax-advantaged basis. The medical expenses reimbursed from the health FSA are typically the deductible and co-payment amounts not paid under major medical coverage or other medical expenses that are not covered under major medical coverage.

Health FSAs are subject to a number of requirements under section 125 of the Code, such as a prohibition of the use of the FSA as a means of deferring compensation and the requirement that the FSA provide uniform coverage to all participants. The ACA added a new requirement that limits the amount of employee salary reduction contributions to a health FSA of $2,500 each year.[3] Under recent well-received guidance, the IRS permitted FSAs to provide an up to $500 carryover of unused funds in the FSA for use in the following year.

Health FSAs will be exempt from other ACA provisions if they meet certain conditions. A health FSA is exempt from the ACA market reform requirements, such as the prohibition on lifetime and annual limits, if the health FSA satisfies the requirements to be considered an "excepted benefit" as defined by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

A health FSA will be considered a HIPAA excepted benefit if[4]:

(i) other major medical coverage is made available to the class of participants, and
(ii) the employer contributions, if any, do not exceed $500 or are made on a dollar-for-dollar matching basis with salary reduction contributions.

If these requirements are not satisfied for all members of a class, the health FSA will not be considered an excepted benefit for any member of the class and the prohibition on lifetime and annual limits will apply. If the FSA violates the annual limit rule, it will be subject to a $100 per day excise tax under Code section 4980D. This means that, unless relief is granted, the health FSA effectively could not exist since the FSA is only permitted an annual salary reduction of up to a fixed amount. It would be considered to have an annual limit.

Current Concerns

Employers currently are restructuring their health benefit plans to comply with the various provisions of the ACA. For example, an employer may choose to only provide benefits to full-time employees, in order to comply with ACA's employer shared responsibility provision, which would require a large employer to offer health care coverage to its full-time employees and their dependents, and choose not to provide health care coverage to part-time employees, leaving these employees to purchase coverage from an exchange. Small employers, since they are not subject to the employer shared responsibility provision, may not provide health care coverage to any of their employees, particularly if these employees could receive subsidies if coverage is purchased through

---

[2] § 106(c)(2) of the Internal Revenue Code ("Code").
[3] §125(i)(1) of the Code.
[4] 26 C.F.R. §54.9831-1(c)(3)(v), 29 C.F.R.; §2590.732(c)(3)(v), and 45 C.F.R. §146.145(c)(3)(v).

an exchange. Large employers may also decide not to provide coverage to all or some of their employees, regardless of the penalty for not complying with the employer mandate if these employees could receive subsidies for coverage purchased under an exchange.

In those instances where an employer does not provide coverage for all or some segment of their employees, the employer may be precluded from offering a health FSA to these employees, since the health FSA would not be considered an excepted benefit. The FSA would not be considered an excepted benefit because other major medical coverage is not made available to the entire class of participants in the health FSA. Since it would not be an excepted benefit, the employer's health FSA would be subject to ACA's market reforms and would necessarily fail to comply with ACA's prohibition on lifetime and annual limits and be subject to the excise taxes imposed on those non-compliant plans. Consequently, employers that do not provide major medical coverage to all of their employees may be unable to offer an FSA to those employees who are not receiving major medical coverage. It is these employees, who are likely receiving coverage through insurance purchased through an exchange, who would benefit from an FSA. Since the coverage offered under the exchanges may have higher deductibles and co-pays, the use of an FSA provides a budgeting tool for large health care expenses and assists in assuring workers obtain needed medical care and comply with treatment protocols for chronic illnesses.[5] Unfortunately, unless the definition of when an FSA is an excepted benefit is modified to eliminate the requirement that the FSA be paired with major medical coverage for the entire class of employees covered by the FSA, then these employees will not have the opportunity to participate in an FSA.

Requested Modification of Guidance

We request that the Agencies modify the current definition of excepted benefits under HIPAA to consider salary reductions to an FSA to be an excepted benefit regardless of whether the employer also offers major medical coverage to the employees covered by the FSA. The Agencies have the authority to amend the definition of excepted benefits and have exercised that authority under numerous circumstances where rigid application of the pre-ACA excepted benefit rules would result in employees losing out on important benefits. WageWorks believes that our request to modify the definition of excepted benefits would be within the Agencies' authority. Our request is

[5] http://www.healthpocket.com/obamacare/on-exchange-health-plans#.U6RlhPldVZg
The average out-of-pocket costs below were based on government data for the 2014 individual and family marketplace containing qualified health plans sold on exchanges in 34 states.

Average cost-sharing for an individual in each metal plan

Cost-sharing category	Deductible	Annual cap on out-of-pocket costs
Bronze	$5,081	$6,267
Silver	$2,907	$5,730
Gold	$1,277	$4,081
Platinum	$347	$1,855

similar to comments filed by the Employers Council on Flexible Compensation on February 21, 2014.[6]

As stated above, there are a number of reasons why an employer would not provide major medical coverage to all employees. In some cases, it may be more financially advantageous for employees to purchase coverage under an exchange, particularly where premium subsidies may be available that would significantly reduce the cost of coverage for low-income employees. In addition, smaller employers that will not be subject to penalties under the employer mandate may decide that their employees will have greater choices for health coverage under an exchange than would be available if the employee was limited to the coverage options available only for the small employer. Access to a health FSA would assist these employees just as much as those who have employer-provided coverage, and in some cases, would provide greater assistance. For example, coverage purchased through the exchange is likely to require payment of minimum deductibles and co-payments that may be substantial (as referenced previously) and the use of an FSA provides a budgeting tool for large health care expenses and assists in assuring workers obtain needed medical care and comply with treatment protocols for chronic illnesses.

The concern that by having all FSAs considered excepted benefits would result in employers dropping major medical coverage for their own employees in favor of having employer coverage solely through reimbursements from an FSA is mitigated by changes made by the enactment of ACA. Large employers will be subject to significant shared responsibility penalties if they do not provide minimum value health insurance for their full-time employees or only offer coverage through an FSA. As such, it will be unlikely that most employers would drop major medical coverage in favor of only offering an FSA. In addition, employers may not offer coverage to part-time employees after full implementation of ACA because low-paid part-time employees may have more affordable coverage available to them under the exchanges. Also, there is no shared responsibility excise tax liability for failure to offer coverage to part-time employees. These employees should not be precluded from having access to an employer-provided FSA.

Employers also will be less likely to view FSAs as an adequate replacement to their major medical plans since the amount of annual salary reduction contributions to an FSA has been limited to $2,500 by the ACA. Even with the availability of a $500 carryover of unused amounts, the amounts available under an FSA for medical reimbursements will be limited. Furthermore, there will still be the requirement that to be an excepted benefit, employer contributions, if any, must not exceed $500 or must be made on a dollar-for-dollar matching basis with salary reduction contributions. This means that the FSA balance for any employee could not exceed $5,000 plus any rollover amount of $500 or less. Therefore, the concern that employers will drop major medical coverage in favor of providing health coverage by reimbursements from an FSA appears to be limited since the implementation of the ACA. It is more likely that an employer will offer the opportunity for employees to contribute to an FSA as a way to give employees the ability to pay deductibles and co-payment amounts in a tax-effective manner.

---

[6] See attached letter from the Employers Council on Flexible Compensation, dated February 21, 2014 regarding the Departments' Proposed Rule, "Amendments to Excepted Benefits" (Federal Register, December 24, 2013).

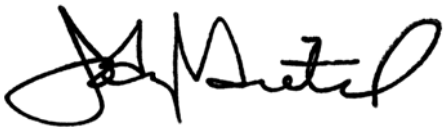
We appreciate the many instances where the Agencies have provided guidance that will result in better means of Americans being able to access health care coverage in a financially advantageous manner.

We believe that employees should not be limited from being able to access a health FSA simply based on whether their employer offers underlying coverage to a whole class of employees. Rather, allowing employers to offer FSAs to all employees, regardless of whether the employee is also eligible to receive other health coverage from the employer, will give employees the opportunity to pay for all the costs of health care coverage in a tax effective manner.

Conclusion

Health FSAs provide an opportunity for employees to pay for certain health care expenses on a tax-favored basis. The modification of the definition of excepted benefits under HIPAA to include FSAs funded solely with salary reductions, regardless of whether paired with other group health coverage, will provide more employees the opportunity to participate in an FSA. We appreciate the opportunity to offer our suggestions and are happy to meet with representatives of the Agencies to discuss these issues further.

Sincerely,



Jody L. Dietel, ACFCI, CAS
Chief Compliance Officer

Cc: George Bostick, Treasury
Rachel Levy, Treasury
Mark Iwry, Treasury
Kevin Knopf, IRS