Home Care Professionals Series, Part 3

What Heath Benefits Are Creditable Under the WPA?

Executive Summary. Health benefits come in many different forms, each of which can be a creditable expense under the Wage Parity Act ("Act" or "WPA"). Some forms require detailed plans and government filing each year, and must be funded with premiums paid for on a regular basis by a home care agency. Others cap the amount an agency may contribute and only pay or reimburse health expenses as they occur. Each form of health benefit has its own characteristics, advantages and disadvantages, and tax consequences, both to the agency and the worker. Beyond the WPA, to be exempt from penalties under the Affordable Care Act ("ACA"), the health benefit provided must also (i) constitute "minimum essential coverage" under the ACA; (ii) be "affordable" as defined in the ACA; and (iii) provide "minimum value" coverage (meaning that it covers at least 60% of expenses, determined on an actuarial basis).

What Are the Comparison Factors For Different Types of Health Benefits?

Health benefits (*e.g.*, medical, dental, vision, hospitalization, prescription drug – but *not* long-term care benefits or insurance) may be offered in many different ways, through many different types of arrangements, and the specific nature of the benefit and the delivery vehicle will determine whether it is properly designed for purposes of the Tax Code, ERISA, the ACA, and the WPA. For home care agencies concerned about meeting the requirements of each of these laws, the comparative features of each type of health benefit arrangement are set forth below, in addition to the reasons to use a voluntary employees' beneficiary association (a "VEBA") to delivery certain of these benefits.

1. Why Use a VEBA? – A "VEBA" is a type of trust that is tax-exempt under section 501(c)(9) of the Internal Revenue Code (sometimes referred to as a "501(c)(9) trust") that may be used to provide certain benefits, including health benefits, to employees. The trust may provide benefits directly, or may purchase insurance, or a combination of both. Either way, the trust steps into the position of the agency under the arrangements described above, while the agency makes contributions to the trust to enable it to pay for the benefits.

(a) *Funded* – Yes. The VEBA has no source of funds other than contributions (and investment earnings). Employee contribution may also be required.

(b) *Maximum Agency Contribution under the Tax Code* – There is no maximum contribution *per se*. However, deductible contributions are limited as described in (d), below. In addition, the agency will usually want to avoid making contributions that will generate taxable income to the VEBA. Even though the VEBA is a tax-exempt trust, it will be taxable on its income (including employee contributions) once the claim reserve reaches its prescribed limit (either the

actuarially-certified amount or the 35% mentioned paragraph (d), below).

(c) *Tax Consequences to Worker* – None. Just as with the other arrangements described above, reimbursements received are nontaxable (unless reimbursing expenses that have already been deducted by the worker). If employees are required to make contributions, those can be made on a pre-tax basis under a cafeteria plan.

(d) *Tax Deduction to Agency* – Deductible contributions to the trust are generally limited to the amount of benefits paid out by the trust for the year. Contributions made to create a reserve for administrative expenses and incurred but unreported ("IBNR") claims may also be deducted, up to the amount actuarially certified to be necessary for the reserve. (Alternatively, up to 35% of the prior year's claims may be contributed without actuarial certification.)

(e) *Advantages/ Disadvantages* – Advantages: (i) tax exempt accumulation of funds (subject to limits); (ii) full WPA credit for agency contributions; (iii) ability to "pre-fund" benefits, subject to limits described above. Disadvantages: (i) Set-up and administrative costs; (ii) VEBA benefits must satisfy nondiscrimination requirements; (iii) funds not permitted to be directly or indirectly returned to agency.

(f) *Wage Parity Act Credit per Hour of Service* – Yes. An agency's contributions are creditable towards the WPA $4.09(NYC)/$3.22 (LI, Westchester) package (the "WPA Package"), so long as some benefit is provided to all employees working WPA-covered cases.

(g) *Affordable Care Act Penalties Avoided* – Yes, if the coverage that is provided by the VEBA (i) constitutes "minimum essential coverage" under the ACA; (ii) is affordable as defined in the ACA; and (iii) provides "minimum value" (meaning that it covers at least 60% of expenses, determined on an actuarial basis). Coverage is considered "affordable" if (A) the annual cost to the worker of the lowest-cost employee-only coverage is not greater than a prescribed percentage of W-2 income, or, (B) for hourly employees with variable hours, the monthly cost is not greater than the product of 130 hours multiplied by the employee's lowest hourly rate of pay during the month (or the rate at the start of the coverage period if less); for 2016, that percentage is 9.66%.

2. Why Use Health Insurance? Typically purchased by the payment of a premium by the agency (with or without contribution from the worker), a health insurance policy (including HMOs and other similar organizations) can satisfy an agency's obligation under the ACA and provide comprehensive insurance coverage to participating workers. Health insurance can also be purchased by a VEBA to which the agency makes contributions, as described in paragraph 1, above.

(a) *Funded* – Yes. Through purchase of insurance.

(b) *Maximum Agency Contribution under Tax Code* – No. Unlimited. However, if purchased through a VEBA, contributions to the VEBA may be limited, as described above.

(c) *Tax Consequences to Worker* –None. Agency-premium is tax-free and worker co-premium, if any, can be offered as a pre-tax deduction from wages under a cafeteria plan. (Only reimbursement for previously-deducted expenses are taxable to the worker.)

(d) *Tax Deduction to Agency* – Yes. Agency's direct payments of premiums are tax-deductible.

(e) *Wage Parity Act Credit per Hour of Service* – Yes. Agency's direct payments of premiums are creditable toward the WPA Package.

(f) *Affordable Care Act Penalties Avoided* – Yes. Provided the policy (i) constitutes "minimum essential coverage" under the ACA; (ii) is affordable as defined in the ACA; and (iii) provides "minimum value."

3. Why Use a Health Reimbursement Account (HRA)? – A HRA is a type of employer-reimbursement plan created with agency-credited amounts only.

(a) *Funded* – Generally, no. Bookkeeping accounts are kept by the agency for each worker and the worker is credited with a prescribed amount, but no real "account" exists to which actual "contributions" are deposited and from which reimbursements are made. A HRA can be created under a cafeteria plan or outside of a cafeteria plan. They may also be "funded" by creation of a trust or other account to which amounts are actually deposited by the agency to be used for reimbursing medical expenses; see paragraph 1, above, regarding VEBAs.

(b) *Maximum Benefit under Tax Code* – None. (Contributions made to a funded arrangement, however, may be limited.)

(c) *Tax Consequence to Worker* – None. As an "accident or health plan", the reimbursements received by a worker for medical expenses are nontaxable (except to the extent that the reimbursed expense has been deducted by the worker in a prior year).

(d) *Tax Deduction to Agency* – Yes. Benefit reimbursements paid by the Agency are deductible expenses. If the account is funded, however, such as with a VEBA, the deduction for contributions to that trust for a year are limited as described in paragraph 1(d), above.

(e) *Advantages/Disadvantages* – Not subject to the "use it or lose it" requirement that applies to Health FSAs (see paragraph 3, below), so unused amounts may freely be carried forward to the following year. An HRA (as a self-insured medical reimbursement plan) is subject to nondiscrimination requirements, violation of which results in reimbursements to the highest-paid 25% of eligible workers being taxable, to the extent they are discriminatory. A Limited-Purpose HRA pays or reimburses benefits for "permitted insurance" (*i.e.*, covering only a specific disease or illness or providing a fixed amount per day – or other period – of hospitalization) or "permitted coverage" (through insurance acceptable for an HRA, but not long-term care insurance or services).

(f) *Wage Parity Act Credit Per Hour of Service* – Yes. Amounts reimbursed to a worker for eligible benefits are creditable toward the WPA Package. Unused credits cannot be currently creditable, but, if carried forward, are creditable in subsequent periods when

reimbursement for eligible benefits are paid. If a VEBA is used, the agency contributions to the VEBA are creditable as described above.

(g) *Affordable Care Act Penalties Avoided* – No. Unless provided in conjunction with a plan that (i) constitutes "minimum essential coverage" under the ACA, (ii) is affordable for the worker; and (iii) provides "minimum value" (meaning that it covers at least 60% of expenses, determined on an actuarial basis).

4. Why Use a Flexible Spending Account (FSA)? – A Health FSA is a type of employer-reimbursement program covering eligible health related expenses that are not otherwise covered or reimbursable by insurance.

(a) *Funded* – No. A FSA benefit must be provided through a cafeteria plan. This is not a "funded" plan, however. Bookkeeping accounts are kept by the agency for each worker and the worker is credited with an amount, but no real "account" exists to which actual "contributions" are deposited and from which reimbursements are made. If a truly "funded" arrangement is established by creation of a trust or other account to which amounts are actually deposited, the arrangement becomes a "welfare benefit fund." A welfare benefit fund creates unnecessary complications for a FSA. For example, if a trust is used to accumulate agency contributions to be used to pay reimbursements under a FSA, the trust is itself a taxable entity, requiring tax returns to be filed annually; the trust will be subject to tax on its earnings and, in some cases, on the agency's contributions. (Even if a VEBA trust were to be used – see paragraph 1, above – all of the described advantages would not apply in the case of a FSA.) Any type of funding would increase the agency's reporting obligations under ERISA (including requiring audited financial statements.) Finally, given the limits on the ability to carry forward unused benefits (see below), together with the agency's inability to recoup amounts that are contributed, advance funding can be less desirable for a FSA. In light of the complications a trust adds, even though it is theoretically permitted, little practical reason exists to use a trust to deliver FSA benefits.

(b) *Maximum Contribution under Tax Code* –Yes. $2,500 maximum (indexed to $2550 for 2016) for "contributions" made by workers pursuant to salary reductions, which the agency can then match. If the worker does not elect salary reduction, or elects to defer less than $500, the agency can only make a $500 maximum contribution for that worker for the calendar year.

(c) *Tax Consequence to Worker* – None. Salary-reductions made under a FSA under a cafeteria plan are made on a pre-tax basis for the worker; additional agency-provided credits are also nontaxable to the worker. Reimbursements for medical expenses are generally nontaxable, unless reimbursing a previously-deducted expense.

(d) *Tax Deduction to Agency* – Yes. An agency may deduct amounts paid or reimbursed to the worker for eligible medical expenses (as opposed to amounts that it contributes to "fund" the account, such as by contributing to a trust; contributions to a welfare benefit fund are limited.)

(e) *Advantages/Disadvantages* – Usefulness of a Health FSA is limited because of the $500 agency contribution maximum, unless the FSA provides for worker salary reduction elections (those are limited as well). The full amount of the annual benefit must be available to reimburse eligible expenses incurred by the worker at any time during the year (while the worker is covered by the plan), though with two exceptions, unused credits are forfeited if not used by the end of the year and may not be carried forward to the next year. The two exceptions – either (but not both) of which may be provided by the FSA document – are: the FSA may provide a "grace period", allowing expenses incurred during the first 75 days of a year to be reimbursed out of a leftover credit from the preceding year; amounts left over at the end of the "grace period" are then forfeited. Alternatively, an FSA may allow up to $500 of unused credit to be carried over to the following year and added to that following year's credit. A "limited purpose" health FSA can be used in conjunction with an HSA (described below), whereas a general purpose FSA cannot. A limited purpose health FSA pays or reimburses benefits for "permitted coverage" (but *not* through insurance or reimbursements for long-term care services).

*(*f) *Wage Parity Act Credit per Hour of Service* – Yes. Agency's amount of reimbursements paid are creditable to the WPA Package.

(g) *Affordable Care Act Penalties Avoided* – No; unless provided in conjunction with a plan that (i) constitutes "minimum essential coverage" under the ACA, (ii) is "affordable" as defined in the ACA; and (iii) provides "minimum value" (meaning that it covers at least 60% of expenses, determined on an actuarial basis).

5. Why Use a Health Savings Account (HSA)? – Resembles an Individual Retirement Account ("IRA") used for retirement benefits, but is established for the purpose of paying healthcare expenses that are not covered by an agency's high-deductible health plan ("HDHP"). Worker eligibility for an HSA is limited as described in paragraph (e), below.

(a) *Funded* – Yes. A trust is established with a financial institution, much like the one created for an IRA. Contributions can be made by the worker or by the agency (or both).

(b) *Maximum Contribution under the Tax Code* – Yes. Deposits to an eligible worker's HSA for 2016 are limited to $3,350 for workers having single coverage under a HDHP, or $6,700 for workers with family coverage (plus an additional $1,000 "catch up" if the worker is age 55 or older).

(c) *Tax Consequences to Worker* – None. Contributions made by a worker are tax-deductible by the worker. Contributions made by the worker's agency during a month are excluded from the worker's income, just as health insurance coverage would be excluded, so long as (i) the worker is an "eligible worker" for that month, and (ii) the contribution to the HSA for the month does not exceed 1/12 of the applicable annual limitation (*i.e.*, $279 or $558 for workers with single coverage, or family coverage, respectively).

(d) *Tax Deduction to Agency* – Yes. The agency's contributions are deductible by the agency.

(e) *Advantages/Disadvantages* – In order to be an "eligible worker" for purposes of an HSA contribution, a worker cannot be covered by any health coverage that is not a

HDHP, or a limited purpose FSA or HRA as described above. A worker covered under a HDHP must satisfy a deductible of at least $1,300 (for single coverage) or $2,600 (for family coverage), and satisfy an out-of-pocket maximum of at least $6,550 (for single coverage) or $13,100 (for family coverage). An HSA can relieve some of that financial burden, while there is still the HDHP insurance to cover significant expenses.

(f) *Wage Parity Act Credit per Hour of Service* – Yes. An agency's contributions to a worker's HSA are creditable towards the WPA Package.

(g) *Affordable Care Act Penalties Avoided* – No. Unless provided with a plan that (i) constitutes "minimum essential coverage" under the ACA, (ii) is affordable for the worker; and (iii) provides "minimum value", all as described above.

6. Why Use General Preventive Care Health Care? – If all home care workers working Medicaid-funded episode of care hours do not participate in a health benefit arrangement of some type offered by an agency, (regardless whether they elect not to participate because of a co-premium they must pay or they do not meet an hours-worked requirement that must be met to participate), in order to satisfy the requirements of the Wage Parity Act, they must receive some health benefits. Otherwise the agency must pay the non-participating workers a cash benefit per hour worked equal to the agency contributions being made to the health benefit arrangement for a participating worker.

(a) *Funded* – Maybe. Preventive health benefit may be funded with insurance or may be unfunded, depending on the specific manner in which the benefit is provided.

(b) *Maximum Agency Contribution under the Tax Code* – None.

(c) *Tax Consequences to Worker* – None. Agency-provided preventive health benefit is not taxable. Alternative cash payment *is* taxable. If worker has the choice, then the worker will be taxed on the cash benefit *whether or not elected*, unless provided through a cafeteria plan.

(d) *Tax Deduction to Agency* – Yes. Premiums or amounts paid by agency for workers' preventive health benefit, or additional cash wages paid in lieu thereof, are both deductible by the agency.

(e) *Advantages/ Disadvantages* – Making some type of preventive care health benefit available to all workers maintains the health of the agency's workers.

(f) *Wage Parity Act Credit per Hour of Service* – Yes. Health premiums or amounts paid by the agency are creditable to the WPA Package. Alternative cash wages constitute additional wages and are also creditable to the WPA Package.

(g) *Affordable Care Act Penalties Avoided* – No. Unless provided with a plan that (i) constitutes "minimum essential coverage" under the ACA, (ii) is affordable for the worker; and (iii) provides "minimum value".

The Bottom Line

To decide on the most suitable health benefit arrangements to provide its home care workers, an agency first has to avoid ACA penalties by providing a plan that (i) constitutes "minimum essential coverage"; (ii) is affordable for the worker; and (iii) provides "minimum value" (meaning that it covers at least 60% of expenses, determined on an actuarial basis). Thereafter, the agency must compare the advantages and disadvantages of an FSA, HRA, HSA, health insurance policy or another preventive health care benefit arrangement, as well as whether to use a VEBA to fund the benefits, and decide which best suits the agency's needs.

If you have any questions regarding this article or would like our advice about how to choose the health benefit plan and arrangement that is best for the particular situation at your agency, please contact the authors, Jeffrey Ashendorf or Stephen Zweig, members of the firm's Homecare Industry Group in its New York City office at *jashendorf@fordharrison.com* and *szweig@fordharrison.com*, or at (212) 453-5900, or the FordHarrison attorney with whom you usually work. Please also visit our website at *homecareemploymentlaw.com.*