

ALERTS

Reminder: Cafeteria Plans May Need to be Amended for Health Care Reform Over-the-Counter Drug Requirements

June 6, 2011

If you sponsor a cafeteria plan and have not yet amended your plan to comply with the new requirements for over-the-counter drugs, you have until June 30, 2011 to adopt the necessary changes.

As discussed in our Summer 2010 Employment & Employee Benefits Developments Newsletter, *Special Health Care Reform Issue*, under the Patient Protection and Affordable Care Act (“PPACA”), effective Jan. 1, 2011, employer-sponsored plans, including health flexible spending accounts (“health FSAs”) and health reimbursement arrangements (“HRAs”), may no longer reimburse participants for expenses incurred for over-the-counter drugs and medicines unless the drug or medicine is obtained by prescription. As described in IRS Notice 2010-59, Health FSA and HRA debit cards may not be used to purchase over-the-counter drugs and medicines after Jan. 15, 2011, though participants can continue to use debit cards to purchase medical items other than over-the-counter drugs and medicines.

Employer-provided plans, including health FSAs and HRAs, can therefore pay or reimburse participants for expenses incurred for drugs and medicines only if the drug or medicine:

- Requires a prescription;
- Is available without a prescription but the participant has obtained a prescription nonetheless; or

- Is insulin.

The same is true for health savings accounts (“HSAs”) and Archer medical savings accounts (“Archer MSAs”): for amounts paid on or after Jan. 1, 2011, a distribution from an HSA or Archer MSA for a drug or medicine will constitute a tax-free qualified expense only if the drug or medicine is a prescribed drug, regardless of whether the drug or medicine is available without a prescription, or is insulin. If a distribution is made from an HSA or Archer MSA for a drug or medicine that does not satisfy these requirements, the distribution will be for a nonqualified medical expense and will be included in the participants’ gross income and generally be subject to a 20 percent additional tax.

Call to Action

Sponsors of cafeteria plans need to adopt a plan amendment to comply with the over-the-counter drug and medicine requirements of PPACA and Notice 2010-59. Though cafeteria plan amendments are generally effective only prospectively, Notice 2010-59 provides a transition rule which permits a retroactive amendment that is effective for expenses incurred after Dec. 31, 2010, or after Jan. 15, 2011, for health FSA and HRA debit card purchases, provided the amendment is adopted by June 30, 2011. If you have not yet amended your cafeteria plan, your attorney at Schulte Roth & Zabel, or one of the attorneys who have authored this *Alert*, can advise you in drafting the amendment.

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