



The Honorable David J. Kautter
Acting Commissioner,
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20044

RE: Notice 2017-67

Sent Electronically Via Notice.comments@irscounsel.treas.gov

Dear Mr. Kautter:

I am writing on behalf of the National Association of Health Underwriters (NAHU), a professional association representing more than 100,000 licensed health insurance agents, brokers, general agents, consultants and employee benefits specialists. We are pleased to have the opportunity to respond to the Internal Revenue Service's request for comments on IRS Notice 2017-67, published on October 31, 2017, that provides guidance on the requirements for qualified small employer health reimbursement arrangements (QSEHRA) under section 9831(d) of the Internal Revenue Code.

The members of NAHU work on a daily basis to help millions of individuals and employers purchase, administer and utilize health insurance coverage. Our expertise lies in the technicalities of health-plan administration and the real-world challenges employers face therein. For many health insurance agents and brokers, employers that are eligible to provide a QSEHRA to employees represent a significant portion of their client base. NAHU members appreciate the development of the Notice 2017-67 guidance since it will help them more accurately answer client questions about this new health insurance coverage option in the years ahead. It also provides much needed tax information for qualified employers and employees and will help direct QSEHRA implementation for employers that ultimately choose this option.

However, in reviewing this guidance, NAHU members have identified some practical concerns that Notice 2017-67 either does not address or does not cover thoroughly enough to answer questions that employers and employees have already posed to our membership concerning QSEHRAs. As such, our comments focus on the resources health insurance agents and brokers need to be able to answer client questions regarding QSEHRAs. We also address the additional information qualified small employers and individual employees need to make informed choices and implementation decisions concerning QSEHRAs.

Permissible Actions by Eligible Employers and Health Insurance Agents and Brokers

NAHU appreciates that Part A of the new guidance specifies that if "an employer endorses a particular policy, form or issuer of individual health insurance, the coverage may constitute a group health plan."



We also support the clarification that employers may provide employees with information about the federal and state-based health insurance exchanges without fear of triggering group health plan requirements. However, our membership sees a real need for the IRS to provide additional information to employers and their licensed health insurance agents and brokers as to what actions would make QSEHRA-related coverage a group plan offering. The guidance prohibits specific carrier and product endorsements, but the term endorsement is undefined and NAHU members and their clients need additional examples in order to establish appropriate client compliance standards. For instance, would referring an employee to the employer's independent health insurance agent constitute a group coverage offering? What about providing all eligible employees with worksite access to the employer's licensed health insurance agent? How does an employer answer questions and about what types of coverage qualify as minimum essential coverage (MEC) so that QSEHRA requirements are met without triggering endorsement rules? If changes are made to short-term-policy availability, employees may present that type of coverage for reimbursement, so how should that issue be handled? Similarly, how do employers address the issue of healthcare-sharing ministries, fixed indemnity coverage or other excepted benefits?

Responsibilities of an Eligible Employer

Part A, Questions 1 through 7, of this guidance sets out criteria for employers eligible to provide a QSEHRA to employees. NAHU members and their clients request clarification about this scenario: If an employer violates any of the eligible employer requirements or loses eligible employer status for any other reason, will then all ERISA/PHSA group health plan responsibilities, liabilities and penalty structures apply to the employer's plan offering? If this is indeed the case, as NAHU members assume, then we urge the IRS to explicitly outline in the guidance what the consequences of the loss of eligible employer status will be so that employers fully understand their potential liability.

Eligible Employees

Part B of this guidance, which establishes who an employer may consider QSEHRA-eligible employees, makes it clear that eligible employers MAY exclude those employees who have less than 90 days of service, who are under age 25, part-time employees, seasonal, covered by a collective bargaining agreement, and non-resident aliens. NAHU requests clarification about if these employers need to articulate to the IRS and others when they have an employee eligible who falls outside those minimum thresholds (e.g., employees under 25) and if so, how should they report this information to the IRS? How should these permissible exclusions, which employers would normally document in group health plan documents required by the Employee Retirement Income Security Act (ERISA) and Public Health Services Act (PHSA), be documented for employee protection and employer liability and compliance purposes?

In Part B, Question 11, Notice 2017-67 specifies qualified employers that provide reimbursement for individual health insurance premiums must specify a baseline individual market policy for the purposes of meeting the "same terms" requirement. However, do employers select this policy and inform



employees about the baseline policy, including its premium costs, without violating the “no endorsement” requirement?

QSEHRAs and Health Savings Accounts

Part C of this guidance, including Questions 12 through 26, addresses how a QSEHRA must be an arrangement provided on the “same terms” to all eligible employees of an eligible employer. NAHU members request clarification and guidance about how an employer offering eligible employees a QSEHRA may also contribute to employee Health Savings Accounts (HSAs) and meet the “same terms” requirements outlined in Part C. Since HSAs are by definition an employee-owned and controlled account, an employer cannot ensure that all employees will establish one, and therefore seemingly cannot combine a QSEHRA offering with an HSA contribution and also guarantee that their plan offering meets the same terms test. Even if the employer intends that all employees purchase qualified high-deductible health plan coverage and makes an offer of a related HSA contribution that is level across all employees, and is therefore deemed to have met the “same terms” requirement, how is said employer not violating the rule that prohibits eligible employers from recommending or endorsing a specific health insurance product to employees? Examples of how an eligible employer can structure these contributions, which seem to be permissible as per Guidance Question 6, as well as all of Part M, and still meet the “same terms” and “no endorsements” requirements would be appreciated.

Statutory Dollar Limits

Part D of this guidance concerns limits to QSEHRA reimbursements due to statutory dollar limits. In Question 33 in this section, it is specified that no medical expense may be reimbursed under a QSEHRA more than once. NAHU members request clarification as to how an employer can ensure that no medical expense is reimbursed more than once when there are two employers involved, either because spouses both have access to a QSEHRA through their respective employers or because the person was employed by two different companies in a calendar year, both of which offered QSEHRA access to employees

Written Notice to Employees

Part E of Notice 2017-67, via Questions 35-38, addresses the written notification that eligible employers who provide QSEHRAs to eligible employees must annually deliver to eligible employees. This annual notification is significant because QSEHRA eligibility has tax consequences for employees and directly affects an individual’s eligibility for advance premium tax credits offered through the federal and state-based health insurance exchanges. Guidance Question 38 gives employers some suggestions as to language that should be included in employee notices, but NAHU suggests that the IRS instead develop a model disclosure template for employers to use. A template is both simpler for employers to implement and more accurate and efficient for employee use. In an addendum to this comment letter, NAHU has prepared a sample model disclosure template for the IRS’s consideration.



Helping People with QSEHRAs Enroll in Individual Coverage

Individuals with QSEHRA eligibility who seek coverage through the federal or state-based health insurance exchanges will need to inform these marketplaces and anyone who helps them enroll in exchange-based coverage of their QSEHRA benefits. QSEHRA-eligible individuals must do so to ensure that the amount of any advance premium tax credit they may qualify for is calculated correctly. Otherwise, the result could be significant tax consequences.

While NAHU recognizes individual responsibility to correctly report coverage status and offers to the health insurance exchanges, we also note that health insurance enrollment is generally a confusing process for most individuals, and QSEHRA eligibility adds a layer of nuance. Many individual enrollees will not fully understand how their QSEHRA impacts their tax status, even if they have been provided with sufficient notice from their employer. Accordingly, NAHU suggests that the IRS take steps to educate state-based exchange and federally facilitated marketplace call center operators about QSEHRAs, their potential impact on premium tax credit benefits and questions call center operators should ask consumers to determine their QSEHRA status. Similarly, we feel that training courses for marketplace navigators, assisters, application counselors and certified agents and brokers should be thoroughly updated to include information about QSEHRAs and their potential impact on individual health insurance exchange consumers. Finally, we urge the IRS and HHS to create a calculator for employers, employees, licensed agents and brokers, and marketplace navigators, assisters, application counselors and call center staff to use to figure out the impact a QSEHRA benefit will have on advance premium tax credit eligibility and values.

Substantiation and Reimbursement of Medical Expenses

Part H of Notice 2017-67 addresses how to qualify for an exclusion from an employee's taxable income. QSEHRA reimbursements must be for substantiated reimbursements for medical care expenses, not for payments that the taxpayer would be entitled to receive irrespective of whether such an expense was incurred. In reviewing the guidance relative to substantiated expenses, NAHU members have detected several consequences for taxpayers and eligible employers that our membership believes may be unintended and detrimental, and we seek IRS guidance on these issues.

The example delineated in Question 45 yields a result where an employer that has a single substantiation or reimbursement error that is not corrected before March 15 of the prior year via a process that requires employee cooperation ends up having to tax every single transaction to every employee made after the erroneous transaction. The process would call for issuance of corrected Form W-2s, which would be burdensome for employers, and it could be very detrimental to employees who could face increased personal income taxes and the potential requirement to refile their personal returns. The guidance as drafted does not appear to allow for another opportunity for corrective action, regardless of when the error is discovered. NAHU members are concerned that the error-correction process as currently envisioned will encourage employer noncompliance if and when a reimbursement error is



detected, given the substantial liability and regulatory burden those who attempt to correct errors will face.

Question 52 establishes that a QSEHRA is permitted to treat a premium expense for a period of coverage as incurred on (a) the first day of each month of coverage on a pro rata basis, (b) the first day of the period of coverage or (c) the date the premium is paid. NAHU members believe that allowing the date a premium is paid to be the eligibility date is problematic. First of all, it invites confusion. Is the "paid" date the date that the individual attempted to pay (i.e., date on a check) or the date the premium payment is actually debited or processed by the health plan? Second, could the use of this date be a means for employees to game the system? NAHU members suggest that QSEHRAs simply be permitted to use the first day of each month of coverage on a pro rata basis or the first day of the period of coverage instead.

Question 56 yields a result where a self-employed business owner who currently may deduct as much as \$30,000 per year on their family's health insurance premiums (Section 162(I) deduction) could have their right to that deduction voided by a spouse's employer who offers a QSEHRA which the spouse has no right to opt out of and is reported on the spouse's W2. Merely offering the benefit could cost such an employee's family \$13,000 per year in increased income taxes. NAHU seeks clarification on the interface of Section 162(I) and QSEHRA requirements for eligible employees filing taxes jointly with a self-employed spouse.

Finally, if for some reason a QSEHRA loses its protected tax status, what are the ramifications for an employee who might have otherwise been eligible for a subsidy or a larger subsidy without the QSEHRA? Can the individual get credit on their tax return even if it requires an amended return? What are the implications for the employer? How will employers notify employees in this situation about the change in the status of the QSEHRA and their potential tax implications? If the loss of status relates to an improper medical reimbursement, how do employers notify plan participants without revealing protected health information?

Other Compliance Responsibilities for QSEHRA-Eligible Employers

In order for our members to properly advise eligible employer clients, NAHU members request clarification from the IRS as to whether employers offering QSEHRAs need to maintain plan documents generally required of group health plans by ERISA and PHSA and follow related rules and compliance responsibilities, as they would with a traditional health reimbursement arrangement. If an employer offering a QSEHRA does not need to plan documents generally required of group health plans by ERISA and PHSA, then how does the IRS suggest that qualified employers document QSEHRA rules and policies specific to the employer for both employee and beneficiary informative purposes, and as a liability protection for the employer without delving into group health plan territory?



Similarly, do eligible employers need to provide eligible employees with a Summary of Benefits and Coverage regarding the QSEHRA offering, as they would with a traditional health reimbursement arrangement? Also, are qualified employers offering QSEHRAs subject to HIPAA/HITECH privacy and data security requirements as covered entities or business associates? It is clear that these employers will have access to protected health information that needs to be safeguarded. NAHU seeks guidance on these questions as well.

NAHU is grateful for the opportunity to provide information to the IRS on QSEHRA implementation, and appreciate your willingness to consider the point of view of brokers, employers and individual health insurance consumers. If you have any questions or need additional information about our suggestions, please do not hesitate to contact me at either (202) 595-0787 or jtrautwein@nahu.org.

Sincerely,

A handwritten signature in black ink, reading "Janet Stokes Trautwein". The signature is fluid and cursive, with the first name "Janet" being particularly prominent.

Janet Stokes Trautwein
Executive Vice President and CEO
National Association of Health Underwriters



Addendum A: Sample Draft General Notice Template For Employers Who Provide QSEHRAs to Eligible Employees

Important Information about Your QSEHRA Coverage

Effective [insert date], EMPLOYER sponsors a type of medical reimbursement plan—called a qualified small employer health reimbursement arrangement (QSEHRA)—for eligible employees. The QSEHRA is an important benefit because it can be used to pay (or reimburse you) for the following types of expenses if you have minimum essential coverage for yourself (and if applicable for your family members):

[include a brief description of the expenses that are covered under the QSEHRA, such as premiums for individual health insurance policies and/or other out-of-pocket medical expenses which are considered 213(d) medical expenses].

In general, payment or reimbursements from the QSEHRA are not included in your income for federal tax purposes. However, some benefits (such as reimbursement for the cost of coverage paid by your spouse to be covered on their employer's group health plan or over-the-counter medications) may be subject to be included in your taxable income. Also, if you do not have health insurance coverage that qualifies as "minimum essential coverage" for any month, you will be subject to a penalty under the ACA for that month and any reimbursements you receive from the QSEHRA may be taxable to you.

Please read below for key information regarding your QSEHRA coverage:

Maximum Annual Benefit: Your maximum benefit under the QSEHRA for this year is [insert amount] [which varies based on your age (as reflected below) and on whether you are covered or you and members of your household are covered]. You are not entitled to receive cash for any unreimbursed benefits remaining at the end of the plan year.

Exchange or Marketplace Coverage: If you purchase health insurance through the Health Insurance Marketplace or a state-based exchange and you apply for advance payment of the premium tax credit, you are solely responsible to provide notice about your maximum QSEHRA benefit.

There are special rules for coordinating your QSEHRA coverage with your eligibility for a premium tax credit. If your QSEHRA benefit makes your health insurance coverage "affordable" under a federal definition, you will not be eligible for a premium tax credit. If your coverage is not affordable, you may still be eligible for a premium tax credit, but the amount of the credit will be reduced by your QSEHRA benefit.

W-2 Reporting: The maximum benefit for which you are eligible will be reported to you on your annual statement of earnings from your employer (Form W-2) in Box 12, Code FF.

HSA Eligibility Impacted by QSEHRA: Eligibility for benefits under the QSEHRA could impact whether or not you are entitled to tax-favored contributions to a Health Savings Account. You should consult your tax advisor to determine whether or not your eligibility.

Automatic Enrollment: You are automatically enrolled in the QSEHRA and cannot waive participation in the plan under any circumstances.

No Continuation Rights: You are not entitled to continue to receive QSEHRA benefits once you are no longer an eligible employee.

For more information on your QSEHRA coverage, contact [insert contact information].