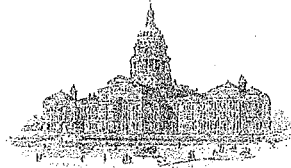


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OPINION COMMITTEE



CHARLES PERRY  
TEXAS STATE SENATOR  
DISTRICT 28

FILE # ML-4818817  
L.D. # 48188

RQ-0172-KP

August 8, 2017

Office of the Attorney General  
Attention Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

Re: Request for an Attorney General's opinion concerning whether the Texas Department of Insurance regulations on Health Reimbursement Arrangement from 2006 are preempted by recent federal law enacted in 2016.

Dear General Paxton:

Please accept this letter as a request for an Attorney General's opinion pursuant to Government Code, Section 402.042(b)(7), requesting clarification on whether the Texas Department of Insurance (TDI) regulations from 2006 on Health Reimbursement Arrangement (HRA) are preempted by recent federal law enacted in 2016.

Historically, TDI prohibited the practice of employers paying premiums for employees' individually-owned health insurance policies when the funding mechanism was a HRA funded by employer contributions.

Federal law, under The Internal Revenue Code, defines a HRA as a flexible spending arrangement, and defines a flexible spending arrangement as, "a benefit program which provides employees with coverage under which specified incurred expenses may be reimbursed (subject to reimbursement maximums and other reasonable conditions), and 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." 26 U.S. Code § 106(c)(2).

Texas state law defines the use of employer health benefit plans to adopt the flexible spending arrangement or HRA as defined in 26 U.S.C. Section 106 or 162 of the Internal Revenue Code. See Texas Insurance Code §1501.003(2); Texas Insurance Code §1501.004(2).

In accordance with this definition, The TDI Commissioner issued a bulletin on Aug. 1, 2006, entitled Commissioner's Bulletin #B-0028-6 which stated in relevant part:

"An HRA is a flexible spending account as defined in IRC §106(c)(2), and is, therefore, part of a plan or program for purposes of §106 of the IRC. Under TIC §§1501.003(2) and 1501.004(2), if an employer or a covered individual treats a health benefit plan as part of a plan or program for purposes of Section 106 or 162 of the IRC, the plan is subject to the group health provisions of TIC Chapter 1501. Accordingly, if a health benefit plan

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issuer offers coverage in conjunction with an employer HRA or for which the premium is paid or reimbursed through an HRA, the coverage, even if provided through an individual health benefit plan, is subject to those same provisions, including any requirements regarding guaranteed issuance of coverage.”

Although Bulletin #B-0028-6 does not expressly prohibit employers from reimbursing the premiums of individually owned health benefit plans of their employees, the Bulletin requires the insurer to include certain benefits, usually only required in group health plans. For example, one such criteria is the requirement for guaranteed issue. The Bulletin requires insurers to determine whether an individual is being reimbursed by an employer, and then apply the TDI specific required criteria. The practical effect of requiring these individual plans to resemble group plans is to essentially invalidate the practical effect of an HRA. Bulletin #B-0028-6 remains the State’s authority on this practice today.

Anticipating a change to sections 106 and 162 of the Federal Internal Revenue Code, the Texas State Legislature amended state law to provide for such a change. In 2011, the Texas Legislature added Sec. 1221 to the Texas Insurance Code. TIC Sec. 1221 reads:

“The commissioner, by rule, *unless it would violate state or federal law*, may develop procedures to allow an employer to make financial contributions to or premium payments for an employee or retiree’s individual consumer directed health insurance policy in a manner that eliminates or minimizes the state or federal tax consequences, or provides positive state or federal tax consequences to the employer.”

This change allows for employers to utilize HRA funds to pay for individual premiums, if the change is permitted by federal law.

In 2016, federal law changed sections 106 and 162 of the Internal Revenue Code. In the 114th Congress (2015-2016), H.R. 34, the 21st Century Cures Act, amended the Internal Revenue Code, the Patient Protection and Affordable Care Act (PPACA), and other laws to exempt qualified small employer HRAs from certain requirements that apply to group health plans. On Dec. 7, 2016, the U.S. Congress gave final approval to the 21<sup>st</sup> Century Cures Act, PL 114-255; and it was signed into law by the President on Dec. 13, 2016.

Under the 2016 federal law, IRC sections 106 and 162 allow employers to establish flexible spending accounts, such as HRA, which are solely funded by employer contributions. The 21<sup>st</sup> Century Cures Act contains §18001, which allows the employer to reimburse individual plan premiums of their employees. The exemption is described as a “Qualified Small Employer Health Reimbursement Arrangement.” IRC §9831(d)(2).

HRAs that meet these requirements are not considered group health plans and are exempt from various requirements that apply to group health plans, including coverage and cost-sharing requirements.

Coverage and payments under a qualified HRA are excluded from gross income, unless the employee does not have minimum essential coverage for the month in which the medical care was provided.

However, in Texas, TDI Bulletin #B-0028-06 remains the State’s authority on HRA practices. By requiring individual plans to resemble group plans, TDI regulations seem to be preempted by this new federal law. The TDI Commissioner’s Bulletin #B-0028-6 prohibits the use of an HRA

The Honorable Ken Paxton  
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by employers who wish to reimburse the premiums of individually owned health benefit plans of their employees. However, H.R. 34 seems to permit the use of an HRA by employers to reimburse the premiums of individually owned health benefit plans of their employees.

Question Presented: Are the regulations laid out in the 2006 TDI Bulletin #B-0028-06 preempted by the Federal changes to Section 106 and 162 of the Federal Internal Revenue Code enacted by H.R. 34 in 2016?

Thank you for your time and attention to this request. Please feel free to contact me or my staff if you have any questions or need any further information.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles Perry", with a long horizontal flourish extending to the right.

Charles Perry  
Texas State Senator - Senate District 28  
Chairman, Senate Committee on Agriculture, Water & Rural Affairs