MARATHAS BARROW WEATHERHEAD LENT LLP

Introduction to Consumer Directed Healthcare and Account-Based Plans (HSAs, FSAs and HRAs)

Benefit Advisors Network

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Agenda

- Health Savings Accounts
  - Background
  - Eligibility Rules
  - Contributions
  - Employer Contributions
  - Distributions
  - Coordination with FSAs & HRAs
- Health Reimbursement Arrangements under the ACA
  - ICHRAs and EBHRAs
  - QSEHRAs (Qualified Small Employer HRAs)
- Health Flexible Spending Accounts under the ACA

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Definitions

- FSA – Health Care Flexible Spending Account
- HDHP – Qualified High Deductible Health Plan
- HSA – Health Savings Account
- HRA – Health Reimbursement Arrangement
- QSEHRA – Qualified Small Employer HRA
- ICHRA – Individual Coverage HRA
- EBHRA – Excepted Benefits HRA

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Health Savings Accounts (HSAs)

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HSA Background

- HSAs became available in 2004 as part of Congress' attempt to expand coverage and control costs through consumer-directed programs
- HSAs are tax-favored investment accounts that may be used to pay for an individual's current or future medical, dental and vision expenses
- To set up an HSA, an individual must be covered by an HDHP and satisfy certain other eligibility rules
- Within the statutory limits, employer contributions to an HSA are not taxable and individuals may make tax-deductible HSA contributions

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HSA Eligibility

- There are four basic HSA eligibility rules
- Individuals must be:
  1. Covered by a qualified High Deductible Health Plan;
  2. Not covered by any non-HDHP plan;
  3. Not entitled to (*i.e.*, enrolled in) Medicare; and
  4. Not eligible to be claimed as a dependent on another individual's federal tax return

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HSA Eligibility

1. In order to qualify, the HDHP must have an annual deductible at or above the statutory minimum, and contributions and out-of-pocket limits at or below the statutory maximum

	2021 (single/family)	2020 (single/family)
Minimum Annual HDHP Deductible	$1,400 / $2,800	$1,400 / $2,800
Annual HSA Contribution Limit	$3,600 / $7,200	$3,550 / $7,100
Maximum Out-of-Pocket for HDHP (applies to all in-network benefits)	$7,000 / $14,000	$6,900 / $13,800

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HSA Eligibility

1. (cont'd.) An HDHP may provide preventive care before the minimum annual deductible is satisfied, which includes:
   - Periodic health evaluations, including diagnostic procedures ordered in connection with routine examinations, such as annual physicals
   - Routine prenatal and well-child care
   - Child and adult immunizations
   - Tobacco cessation programs
   - Obesity weight-loss programs
   - Screening services for: cancer; heart disease; mental health/substance abuse; metabolic, nutritional, and endocrine conditions; musculoskeletal disorders; obstetric and gynecological conditions; pediatric conditions; and vision and hearing disorders
   - ACA-recommended preventive care services
   - New expanded list of *specific* preventive care services for *certain* chronic conditions

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Expanded List of Preventive Care Services

For Individuals Diagnosed with	Preventive Care for Specified Condition
Asthma	Inhaled corticosteroids, peak flow meter
Congestive heart failure and/or coronary artery disease	Beta-blockers
Congestive heart failure, diabetes, and/or coronary artery disease	Angiotensin Converting Enzyme (ACE) inhibitors
Depression	Selective Serotonin Reuptake Inhibitors (SSRIs)
Diabetes	Insulin and other glucose lowering agents
Diabetes	Retinopathy screening
Diabetes	Glucometer, Hemoglobin A1c testing
Heart disease	Low-density Lipoprotein (LDL) testing
Heart disease and/or diabetes	Statins
Hypertension	Blood pressure monitor
Liver disease and/or bleeding disorders	International Normalized Ratio (INR) testing
Osteoporosis and/or osteopenia	Anti-resorptive therapy

Preventive care generally does not include any service or benefit intended to treat an existing illness, injury, or condition

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HSA Eligibility

2. In order to be eligible to contribute to an HSA, an individual must not be covered under any non-qualified health care plan, with two exceptions: permitted insurance and permitted coverage
   - Permitted insurance: Worker's compensation, tort liability, ownership liability, specified disease coverage, per-diem indemnity insurance
   - Permitted coverage: Accident coverage, disability, dental, vision, long-term care

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HSA Eligibility

- **Temporary Safe Harbor for No-Cost Telehealth**
- CARES Act included a safe harbor for HDHPs that include telehealth and other remote care benefits before participants meet their deductibles (i.e., without cost-sharing)
- This safe harbor applies for plan years beginning on or before December 31, 2021, unless extended
- Finally, clear guidance—albeit temporary– that no-cost telehealth may be provided without disrupting HSA eligibility

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HSA Eligibility

3. Individuals who are entitled to Medicare are not eligible to establish or contribute towards an HSA
   - Entitled means actually covered under any part of Medicare: Part A, Part B, a Medicare Advantage Plan, or Part D
   - Individuals who are eligible for Medicare, but have not enrolled, may establish and contribute to an HSA
   - Medicare entitlement is not automatic at age 65!
     - Employees can maintain HSA eligibility by delaying enrollment in Medicare
     - *Caution*: Medicare entitlement can be retroactive when an individual waits to enroll
     - Generally, enrollment in Part A is retroactive by up to 6 months when an individual enrolls in Medicare after their initial enrollment date (but no earlier than the first month they are eligible for Medicare)

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HSA Eligibility

4. Any individual who is eligible to be claimed as a dependent on another person's federal tax return is not eligible to establish or contribute to an HSA

Example: A student who is eligible for an HDHP, but whose parents claim her as a dependent because she meets the IRS definition of "qualifying relative," is not HSA eligible

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Veteran Eligibility for HSAs

- Surface Transportation Act of 2015 removed the “3-month” rule for care received through the VA for a “service-connected disability”
  - In the past, an individual was not HSA-eligible for a month if he or she had received VA medical benefits during the previous three months
- This rule only applies to VA coverage
  - For these purposes, any hospital care or medical services received from the VA by a veteran who has a disability rating is considered service-connected
- TRICARE coverage still disrupts HSA eligibility

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HSA Eligibility

- 2 ½ month FSA grace period may not prevent HSA eligibility
- Generally, an individual may not participate in both an HSA and an FSA because FSA coverage is not an HDHP
- According to the IRS, this restriction includes any FSA "grace period," even if there is no money left in the FSA
- However, individuals with a zero balance in their FSA at year end may contribute to an HSA at the start of the new year

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HSA Contributions

- Full-year contribution allowed for mid-year enrollees (“last month rule”)
- Under this rule, individuals who first enroll in a high deductible plan after the start of the year may make a full HSA contribution for the year
- However, the individual must remain HSA-eligible for the next full calendar year, otherwise the ineligible amount is included in income, plus a 10% penalty applies
  - Ineligible amount is based on the amount contributed in excess of the applicable limit based on tier (single/family) and months of HDHP coverage

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Employer Contributions to HSAs

- Employers may, but are not required to, contribute to their employees' HSAs
- If an employer contributes to an employee's HSA, the contributions are excludable from federal taxable income and are not taxable to the individual
- Employers can structure their contributions under one of two rule sets:
  - Comparable Contributions
  - Contributions through a Cafeteria Plan

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Employer Contributions Through a Cafeteria Plan

- An employer's HSA contribution is "through" a cafeteria plan as long as employees can make their own pre-tax HSA contributions
- Employer HSA contributions will usually be in the form of:
    1. Employer flex credits (cashable or non-cashable); or
    2. Employer non-flex credit contributions such as:
        - Flat dollar amount
        - Specified percentage of deductible(s)
        - Matching contributions

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Employer Contributions Through a Cafeteria Plan

- What must an employer confirm before making HSA contributions?
- An employer is responsible for knowing the employee's age (for catch-up contribution purposes), whether the employee has HDHP coverage, and whether the employee has any non-HDHP coverage *sponsored by that employer*
  - IRS Notice 2004-50, Q/A-81

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HSA Distributions

- Distributions from an HSA are tax-free if used to pay or reimburse "qualified medical expenses" incurred after establishment of the HSA
- Distributions for non-qualified expenses are subject to income tax and an additional 20% tax
  - The additional 20% tax does not apply if the HSA holder is age 65 or older

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HSA Distributions

- "Qualified medical expenses" are those expenses that would generally qualify for a tax deduction as medical and dental expenses (see IRS Pub. 502) AND which are incurred by:
  - You or your spouse (as determined under federal law)
  - All dependents you claim on your tax return
  - Anyone you could have claimed as a dependent except that:
    - The person filed a joint return; or
    - The person had gross income of $4,300 or more (2020)

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HSA Distributions

- "Qualified medical expenses" do not include insurance premiums, unless they are for:
  - Long-term care insurance (amounts are limited)
  - COBRA continuation coverage
  - Health care coverage while receiving unemployment compensation under federal or state law
  - Medicare and other health care coverage if the HSA holder is age 65 or older (other than premiums for a Medicare supplemental policy, such as Medigap)

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HDHPs and Embedded Deductibles

- How do embedded individual deductibles work?
  - A family HDHP cannot pay claims (other than preventive care) until the minimum annual deductible is satisfied ($2,800 in 2020)
  - Many HDHPs have deductibles for family coverage that exceed $2,800 in aggregate; however, they allow individuals to satisfy a lower deductible
  - As long as the embedded individual deductible is not lower than the minimum deductible for family coverage, HSA eligibility is not disrupted
    - For example, a $3,000 / $6,000 plan with an embedded individual deductible would not jeopardize HSA eligibility, as the embedded $3,000 deductible equals or exceeds $2,800
    - A $2,500 / $5,000 plan could not have an embedded deductible & be HSA qualified

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2021 HSA and ACA OOP Limits

	2021 (single/family)	2020 (single/family)
Annual HSA Contribution Limit	$3,600 / $7,200	$3,550 / $7,100
Minimum Annual HDHP Deductible	$1,400 / $2,800	$1,400 / $2,800
Maximum Out-of-Pocket for HDHP (applies to all in-network benefits)	$7,000 / $14,000	$6,900 / $13,800
ACA Maximum Out-of-Pocket Limits	$8,550 / $17,100	$8,150 / $16,300

- ACA requires family plans to have an embedded individual OOP limit
- Embedded OOP limit rule applies to all non-grandfathered group health plans, including HDHPs

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Coordination of HSAs with FSAs and HRAs

- Certain plan designs negatively impact HRA eligibility
  - General Purpose HRA or FSA: Disrupts HSA eligibility
  - Limited Purpose HRA or FSA: Maintains HSA eligibility
  - Suspended HRA: Maintains HSA eligibility
  - Post-deductible HRA: Maintains HSA eligibility
  - Retiree HRA: Maintains HSA eligibility

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HRAs under the ACA

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HRAs under the ACA

- HRAs and FSAs must comply with the ACA's annual limit and preventive care requirements, unless they are ***integrated*** with a compliant group health plan
- Exceptions apply for ICHRAs and "excepted benefits" under HIPAA
  - Most FSAs are excepted benefits
  - Most HRAs are not excepted benefits, unless they reimburse only dental or vision benefit or are offered only to retirees

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HRAs under the ACA

- HRAs must be "*integrated*" with a group health plan, which occurs if:
  1. The employer offers a minimum value plan to the employee;
  2. The employee is enrolled in a group plan that provides minimum value;
  3. The HRA is available only to employees with group coverage; and
  4. The employee must be able to opt out of the HRA at least annually
- These HRAs may reimburse any qualified medical expense
- If the plan is not minimum value, the HRA can only reimburse copays, co-insurance, deductibles or premiums under the GHP, or non-essential benefits

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HRAs & Individual Market Coverage

- IRS guidance provides that a group health plan, including an HRA, will not be considered "integrated" with an individual market policy for purposes of satisfying the ACA's annual limit or preventive care rules
  - This means that employers cannot reimburse employees for the cost of individual insurance premiums on a non-taxable basis
  - Exceptions exist for Qualified Small Employer HRAs and ICHRAs

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HRAs & Individual Market Coverage

- Employer Payment Plans
  - Employers may offer employees the choice of taxable compensation (cash) or an after-tax payment to be applied to health coverage
  - IRS guidance also permits employers to establish a payroll practice of forwarding employee contributions to an insurance carrier without the arrangement being considered a group health plan; however, the arrangement generally must comply with the rules for "voluntary" plans under ERISA, with one such requirement being that the employees pay 100% of the cost of the coverage

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HRAs & Individual Market Coverage

- Premium Reimbursement Arrangements
  - IRS generally considers premium reimbursement arrangements to be group health plans (i.e., HRAs)
  - HRAs that reimburse only health insurance premiums are not subject to Section 105(h)
    - Treas. Reg. 1.105-11(b)(2): “a plan which reimburses employees for premiums paid under an insured plan is not subject to this section”

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Qualified Small Employer HRAs (QSEHRAs)

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Qualified Small Employer HRAs

- 21st Century CURES Act – allows establishment of QSEHRAs
- Enables small employers (non-Applicable Large Employers) to use an HRA to reimburse medical expenses and individual market health insurance premiums, up to a specified annual limit
- Limit for 2020 is $5,250 (individual) / $10,600 (family)
  - Must be prorated for partial years of coverage
  - Employer contribution generally must be the same for all eligible employees; however, certain variations are permitted based on age and number of covered family members

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Qualified Small Employer HRAs

Conditions of offering a QSEHRA

- Employer cannot be an Applicable Large Employer (ALE)
- Employer cannot offer a group health plan to any employee
  - Cannot offer dental/vision coverage either
  - Employers may allow pre-tax HSA contributions for eligible employees (if the QSEHRA only reimburses premiums)
- QSEHRA must be funded solely by employer contributions
- Must be offered to all "eligible employees"
  - Generally, all full-time, non-union employees who have worked at least 90 days

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Qualified Small Employer HRAs

Notice Requirements

- Employers must notify employees at least 90 days prior to the beginning of the plan year (or upon eligibility for employees who become eligible during the year)
- Notice must state:
  - The amount available under the HRA for the year;
  - That employees receiving federally subsidized coverage must disclose the HRA contribution to the Marketplace; and
  - That if the employee does not have MEC, an individual mandate penalty may apply and any reimbursement from the HRA may be included in gross income that month
- Notice failures may result in penalty of $50 per employee, not to exceed $2,500 per year

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Qualified Small Employer HRAs

Effect on Other Laws

- QSEHRAs are not group health plans under ERISA and, with the exception of the PCORI fee, are not subject to the ACA's mandates, including Section 6055 reporting for self-insured plans
  - No plan document, SPD or Form 5500 requirement
  - QSEHRAs are also exempt from COBRA continuation requirements

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Qualified Small Employer HRAs

- **Notice 2017-67 –** Includes guidance on the following topics:
  - Eligible employer and eligible employee
  - Same terms requirement
  - Statutory dollar limits
  - Written notice requirement
  - MEC requirement
  - Substantiation requirement
  - Reimbursement of medical expenses
  - Reporting requirement
  - Coordination with PTC
  - Failure to satisfy the requirements to be a QSEHRA
  - Interaction with HSA requirements

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Final Regulations Expanding HRAs

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Individual Coverage HRAs

- Effective January 1, 2020, employers of all sizes may offer an HRA that is integrated with individual health insurance coverage or Medicare
  - May be used for Marketplace or non-Marketplace coverage
  - Remainder of non-Marketplace premiums may be paid under cafeteria plan
- Employers cannot offer employees a *choice* between group coverage and an ICHRA, although ICHRAs may be offered on a class basis or to employees hired after a certain date
- ICHRAs are eligible employer-sponsored plans for purposes of the ACA's employer mandate

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Individual Coverage HRAs

- ICHRAs must be offered on same terms for all employees in a class ("same terms" requirement)
  - ICHRA contributions are unlimited, unlike QSEHRAs
  - ICHRA amounts may be increased for older workers and based on number of dependents
  - Employers can maintain their traditional group health plan for existing enrollees, with new hires offered only an ICHRA
- *ICHRAs and Excepted Benefit HRAs are subject to ERISA, COBRA and HIPAA to the same extent as traditional HRAs*

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Permitted Classes for Individual Coverage HRAs

- Employers may offer an ICHRA on a class basis to:
  - Full-time vs. Part-time employees
  - Employees in the same geographic area (e.g., same rating area, state, or multi-state region)
  - Seasonal employees
  - Collectively bargained (union) employees
  - Employees who have not satisfied a waiting period
  - Non-resident aliens with no U.S.-based income
  - Salaried workers vs hourly
  - Temporary employees of staffing firms, or
  - A combination of two or more classes
    - FT, PT and Seasonal can be defined under Section 105(h) or 4980H

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Minimum Class Size (MCS) Requirement

- MCS requirement applies if an employer offers a group health plan to one or more classes of employees and offers an ICHRA to one or more other classes
- MCS requirement applies only to the class offered an ICHRA
  - It does not apply to a class of employees offered a traditional group health plan or a class of employees offered no coverage
  - MCS only applies to a class comprised of full-time employees, part-time employees, salaried employees, non-salaried employees, or employees whose primary site of employment is in the same rating area
  - Exception from MCS requirement available if the class includes employees who have not satisfied a waiting period

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Minimum Class Size (MCS) Requirement

- Minimum number of employees in a class subject to the MCS requirement is determined before the start of the plan year and is:
  - **10**, for an employer with fewer than 100 employees;
  - **10%** of the total number of employees, for employers with 100 to 200 employees;
  - **20**, for an employer with more than 200 employees
- Employer size is determined in advance of the plan year based on the number of employees that the employer reasonably expects to employ on the first day of the plan year
- MCS requirement is satisfied based on the number of employees in the class offered the ICHRA as of the first day of the plan year
- MCS requirement does not apply to the "new hire" subclass

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Excepted Benefits HRAs

- Effective January 1, 2020, certain types of HRAs are "excepted benefits" that are not subject to ACA requirements
- Employees offered an Excepted HRA must also be offered non-excepted (i.e., major medical) group health plan coverage by the employer
- Employer may offer up to $1,800 per year to reimburse employees for out-of-pocket medical expenses, including premiums for:
  - Limited scope dental or vision benefits;
  - Short-term, limited-duration insurance plans; and
  - COBRA coverage

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FSAs under the ACA

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FSAs under the ACA

- Under the ACA, health FSAs must be "excepted benefits"
- FSAs will be "excepted" if the employer also offers non-excepted group health plan coverage and the FSA is structured so that the maximum benefit payable cannot exceed the **greater** of:
  a. 2x the participant's salary reduction election to the FSA for the year; or
  b. $500 plus the participant's salary reduction election
- If an employer provides a non-excepted FSA, it is subject to the market reforms, including the preventive services requirements
  – Because a non-excepted FSA is not integrated with a group health plan, it will fail to meet the preventive services requirements

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FSA Carryovers

- Modification to the Use-It-Or-Lose-It Rule for FSAs
  - Can carryover up to $500 to following plan year (as indexed)
  - Plan cannot have both a grace period and a carryover feature
  - Employers may design FSAs to automatically carry over funds from a general-purpose FSA to a limited purpose FSA for employees enrolling in HDHP coverage
- Employee contribution limit is $2,500 per year (as indexed)
  - 2020 limit is $2,750; for plan years beginning in 2020, the $500 carryover limit is indexed to 20% of the maximum salary reduction amount for the year (i.e., $550 for 2020)
- What is more valuable—Grace Period or Rollover?

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FSA Carryovers and COBRA

- Application of COBRA to FSAs with $500 Carryover Feature
- General rule: Employers that allow carryovers must also allow them for COBRA participants
  - This could extend COBRA past the end of the plan year
- **However**, an employer may limit the carryover to employees who elect to contribute to the FSA in the following year, in which case COBRA ends at the end of the plan year
- Employers may limit carryovers to a maximum period (e.g., one or more years)

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CARES Act

- **Over-The-Counter Medication Reimbursement under FSA/HRA/HSA**
- The CARES Act allows FSAs, HRAs and HSAs to reimburse over-the-counter medication and menstrual products without a prescription
- This is a *permanent* repeal of the ACA's prohibition on reimbursements under such plans for over-the-counter medication obtained without a prescription
- This change is effective January 1, 2020

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Questions?

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