**From:** Jessica Waltman <jessica@forwardhealthconsulting.com>   
**Sent:** Wednesday, October 24, 2018 12:43 PM  
**To:** Wake, Robert <Robert.A.Wake@maine.gov>; Cook, Jennifer R. <JCook@naic.org>; Marcy Buckner <MBuckner@nahu.org>  
**Subject:** ERISA Guidebook Information -- Potential Language From NAHU

QSEHRAs

The 21st Century Cures Act (Cures Act), P.L. 114-255, 130 Stat. 1033, was

enacted on December 13, 2016. Section 18001 of the Cures Act amends the Internal Revenue Code, ERISA  and the Public Health Service Act (PHS Act), to create Qualified Small Employer Health Reimbursement Arrangements (QSEHRA).  This provision allows businesses with fewer than 50 full-time-equivalent (FTE) employees to reimburse workers up to $4,950 per year for single coverage and up to $10,000 per year for family coverage, adjusted for inflation. Reimbursements may pay the premiums for health insurance purchased on the individual market and pay for qualified medical expenses. Employees must provide proof of their actual medical costs to receive reimbursement.

Qualified individuals can access exchange-based premium tax credits and still have a QSEHRA, but then their tax credit eligibility is reduced to reflect the amount of their QSEHRA.  Individuals need to report their QSEHRA when applying for premium tax credits, and their employer also has to take complicated compliance steps to maintain QSEHRA eligible employer status, all outlined in [the QSEHRA guidance issued to-date](https://www.irs.gov/pub/irs-drop/n-17-67.pdf).

If an employer violates any of the eligible employer requirements or loses eligible employer status for any other reason, it is unclear if ERISA/PHSA group health plan responsibilities, liabilities, and penalty structures then apply to the employer’s plan offering.  It is also unclear if 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. Similarly, it is unclear if 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.

Furthermore, the Trump Administration has recently proposed a new federal regulation that could further expand HRA issues and options for individuals and employers and invoke additional ERISA concerns and questions.

Wellness/EEOC

The EEOC rules have been the subject of federal litigation and [will be vacated by court order on January 1, 2019](https://benefitslink.com/src/ctop/AARP-v-EEOC_DDC_12202017.pdf). However, the EEOC has announced its intention to create new rules for health plans to follow in  June of 2019.  Employers offering wellness programs in the interim no longer have an ADA or GINA safe harbor to rely on when offering a wellness program for 2019.  The lack of federal guidance also makes it challenging for employers when setting the value of any wellness program awards for the year ahead.

Common Law Information -  THIS MAY BE WAY TOO MUCH!

The [common-law employee standard](https://www.law.cornell.edu/cfr/text/26/31.3121%28d%29-1) is a test applied by the IRS to determine if an employer has responsibility for a worker for the ACA's health insurance employer shared responsibility provisions  other federal requirements.The IRS specifies that an individual is a common-law employee based on the individual facts and circumstances of a 20-prong test. The facts and circumstances employers should take into consideration when determining which people to count are:

·      **Level of instruction**

·      **Amount of training**

·      **Business integration**:

·      **Personal Services**.

·      **Control of Assistants**

·      **Continuity of Relationship**

·      **The Flexibility of Schedule**

·      **Demands for Full-Time work**

·      **Need for On-site Services**

·      **The Sequence of Work**

·      **Requirements for Reports**

·      **Method of Payment**

·      **Payment of Business or Travel expenses**

·      **Provision of Tools and Materials**.

·      **Investment in Facilities**

·      **Realization of Profit or Loss**

·      **Work for Multiple Companies**

·      **Availability to the Public**

·      **Control over Discharge**

·      **The right of termination**