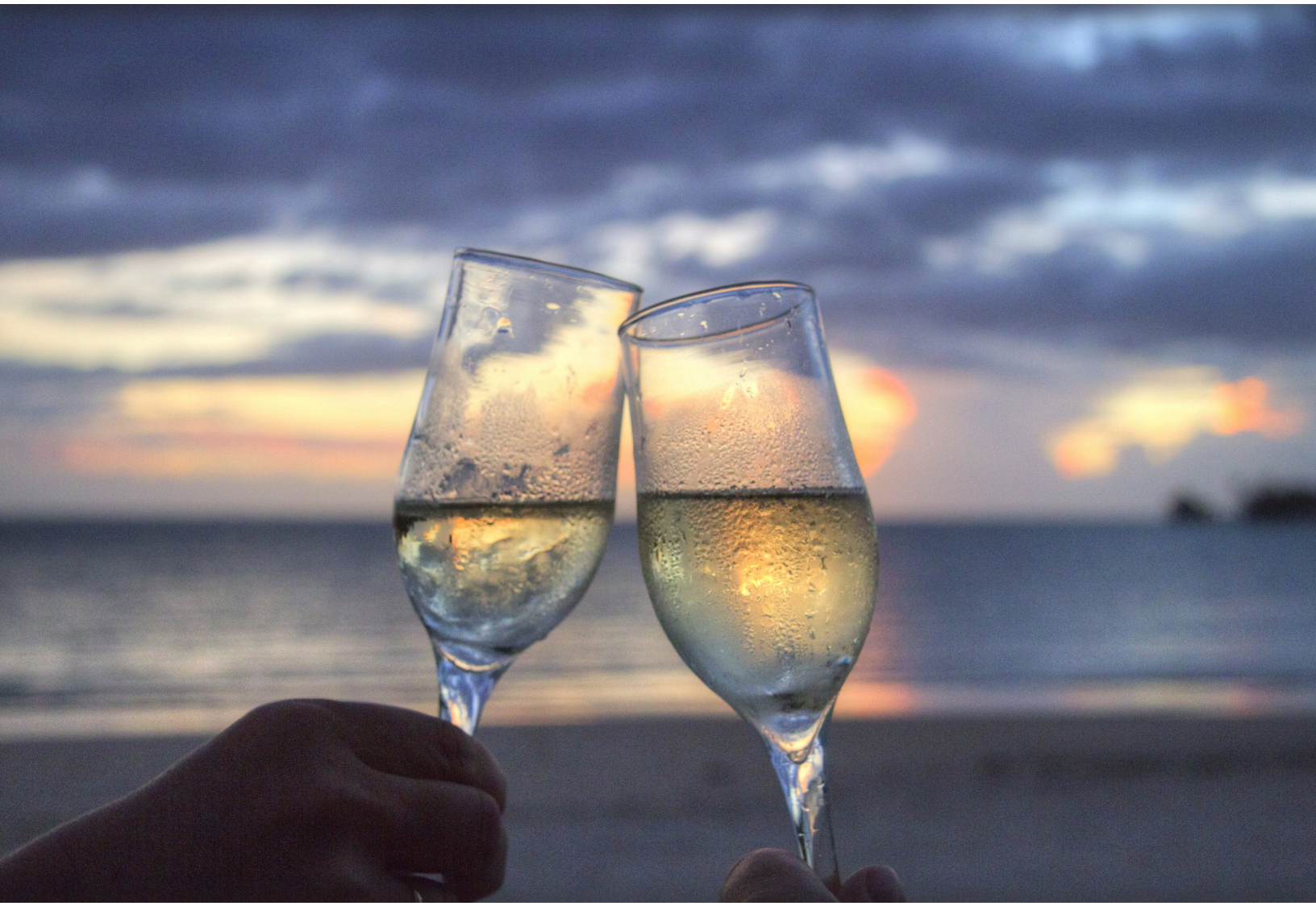
Defined Contribution

...It's BACK!



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HPA
HEALTH PARTNERS AMERICA

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Notice Requirements

By law, employers are required to notify employees of these three options – not just when they lose coverage, but when they start working for the company. There are actually three up-front notice requirements, and the timing is a little different for each.

Notice of Coverage Options: This is the newest of the requirements. Also referred to as the Exchange Notice, this must be provided to all employees when they're hired, whether they're full-time or part-time and whether they're eligible or ineligible for benefits. In fact, employers of all sizes are required to provide this notice even if they don't offer group health coverage. The Notice of Coverage Options tells employees about the Marketplace and lets them know that signing up for individual coverage when group coverage is available will not only mean that they forfeit any employer contribution, but it may make them ineligible for a premium tax credit. The notice must be provided within 14 days of an employee's start date.

HIPAA Notice: The HIPAA Notice must be provided to all employees eligible for the group health plan, whether they actually enroll or not. The reason is because some employees or dependents who waive coverage may be eligible to sign up outside of the open enrollment period if they experience a qualifying event, and the HIPAA Notice informs them of their rights and responsibilities. It must be provided "at or before the time an employee is initially offered the opportunity to enroll in a group health plan."

COBRA General Notice: The COBRA General Notice, sometimes called the Initial Rights Notice, must be provided to employees and dependents who actually sign up for coverage. It lets them know of the continuation rights they might have when they lose the group health coverage and also tells them about their responsibility to notify the employer if certain circumstances should occur, like the couple divorcing or an adult child aging off of the plan. The notice must be provided to qualified beneficiaries within 90 days of joining the plan.

Defined Contribution is Back!

The administration couldn't possibly have been more clear: defined contribution for individual health plans is absolutely, positively not permitted. Period. End of discussion.

The guidance brokers have received over the past two-and-a-half years from the DOL and Treasury, starting with a series of FAQs about Health Reimbursement Arrangements in January of 2013, followed by a technical release that September, and punctuated by an IRS threat about the BIG penalties employers could face if they ignore the regulations, was a huge blow to brokers across the country who hoped a defined contribution strategy could ease their clients' administrative burdens while stretching their limited budgets.

But now this strategy seems to have some new life, thanks to new bipartisan companion language in the House (H.R. 2911) and Senate (S. 1697) known as the Small Business Healthcare Relief Act. This bill was introduced following the Supreme Court's ruling in King v. Burwell that the premium tax credits will continue to be available in all states and has the backing of a number of powerful organizations, including the U.S. Chamber of Commerce and the National Federation of Independent Business (NFIB). And it's giving defined contribution enthusiasts new hope about an issue that many thought was already dead.

What Is Defined Contribution?

Defined contribution is a concept that was originally applied to retirement plans. Several years ago, companies began transitioning away from "defined benefit" pension plans, opting instead to make "defined contributions" into individually owned accounts like 401(k) plans.

Now we're seeing a similar development in group health insurance. Tired of dealing with unpredictable annual premium increases on their group

health plans and the difficulty of selecting a "one-size-fits-all" benefit design for an increasingly diverse workforce, a growing number of large employers are beginning to offer "defined contribution" plans, often through a private exchange site that allows employees to learn about their options and enroll in their core and ancillary benefits online. With this arrangement, an employer decides how much the company will contribute toward the cost of health coverage and other benefits and then allows employees to select the best options for themselves and their families. This helps ease the administrative burden for the HR department, and the expanded choice tends to increase employee satisfaction.

Similarly, large employers that have historically offered health coverage to their retirees are discovering that it's much easier for the company and much better for their former workers if they drop their group retirement plan, put a defined amount of money in an HRA, and allow employees to select a Medicare Advantage or Medicare Supplement plan that works for them.

Unfortunately, small employers have had some trouble adopting a similar defined contribution strategy, which is a shame since small employers have more difficulty fitting the cost of health insurance into their budgets and are less likely to have someone on staff to deal with the administrative headache of offering a group health plan. For these companies, defined contribution is a perfect strategy, but it's often more effective if the employer funds can be used to purchase individually-owned rather employer-based policies. Small employers often have trouble meeting the participation and contribution requirements on a group health plan, and the availability of group coverage blocks many lower-paid employees and their family members from getting a subsidy in the individual market. Allowing employees to use the employer money to purchase individual or family plans instead of forcing them onto an overpriced group plan is a better option for many small employers. This option, though, has been repeatedly shot down by the administration over the past two-and-a-half years.

Guidance

Since early 2013, the DOL, IRS, and HHS (jointly referred to as "the Departments") have issued six pieces of guidance clarifying that defined contribution is not an allowable strategy and warning of severe penalties for employers that choose to contribute to the cost of individual health coverage. Here's a quick summary of that guidance:

January 24, 2013: FAQs about Affordable Care Act Implementation (Part XI)

Following months of speculation about whether defined contribution for individual plans would finally get the green light from federal regulators, the Departments issued a set of FAQs that discussed the applicability of Public Health Service Act section 2711 to Health Reimbursement Arrangements. PHS 2711 is a provision created by the Affordable Care Act that prohibits annual dollar limits on essential benefits. The guidance says that 1) an HRA is a group health plan; 2) group health plans are subject to a number of market reforms, including the PHS 2711 prohibition on annual limits; 3) HRAs place an annual limit on contributions in violation of PHS 2711; 4) HRAs can be integrated with other group health coverage that does not have an annual limit on essential benefits to bring the plan into compliance; and 5) HRAs cannot be integrated with individual market coverage and therefore would violate PHS 2711.

September 13, 2013: DOL Technical Release 2013-03 and IRS Notice 2013-54

Because many people were confused by the HRA FAQs, the DOL and IRS issued simultaneous guidance in September, 2013 to clarify their position not only on HRAs but also on 125 plans and Employer Payment Plans. This guidance says that these arrangements are all group health plans, that using employer funds provided through one of these arrangements for individual policies would be out of compliance not only with the PHS section 2711 prohibition on annual dollar limits but also the PHS section 2713 preventive service requirements. Furthermore, because these arrangements are

group health plans and therefore minimum essential coverage, even if it were possible to use pre-tax employer funds to pay for individual health insurance, participating in one of these payment arrangements would make an employee ineligible for a premium tax credit in the individual market. Below are a few more details on the Friday the 13th defined contribution guidance.

Overview of the September 13, 2013 Guidance
(DOL Technical Release 2013-03 and IRS Notice 2013-54)

- Group health plans are subject to the market reforms detailed in Sections 2711 and 2713 of the Public Health Service Act. They may not impose any annual limit on the dollar amount of essential benefits and must provide certain preventive services without any cost-sharing requirements.
- Coverage provided through Section 125 plans, employer payment plans, health FSAs, and HRAs are eligible employer-sponsored group health plans. This means that they are subject to these market reforms, which is a problem since, by design, they do have an annual limit (the employer contribution amount) and do not provide preventive services without cost-sharing in all instances.
- Furthermore, while these plans can be integrated with other employer-sponsored group health plans that satisfy the market requirements and be considered compliant, they cannot be integrated with individual health plans. Therefore, using employer money for individual premiums would fail to satisfy the market reforms.
- Finally, because these employer contributions to individual coverage are considered employer-sponsored plans, they're also considered minimum essential coverage unless the coverage consists solely of excepted benefits. This means that, even if it did somehow satisfy the market reform requirements, participating in one of these plans would make an employee ineligible for a premium tax credit in the individual marketplace.

May 13, 2014: IRS FAQs on Employer Healthcare Arrangements

Eight months to the day after the joint guidance that put the nail in the coffin for defined contribution plans, the IRS released a two-question FAQ document that basically answered the question "what if an employer ignores the guidance and pays, directly or indirectly, for individual health plans purchased by employees?" The IRS says that this sort of arrangement would fail "to satisfy the market reforms and may be subject to a $100/day excise tax per applicable employee (which is $36,500 per year, per employee) under section 4980D of the Internal Revenue Code."

If the Friday the 13th guidance didn't do the trick, the threat of $100 per day per employee fines was enough to get many brokers to stop recommending a defined contribution strategy.

November 6, 2014: FAQs about Affordable Care Act Implementation (Part XXII)

Despite all of the guidance and warnings by federal regulators, some third party administrators and other vendors continued to promote a defined contribution strategy to both brokers and employers. This prompted the Departments to issue some joint FAQs to clarify, once again, the government's position on these sorts of arrangements. Question 3 doesn't leave much wiggle room for defined contribution proponents:

Q3: A vendor markets a product to employers claiming that employers can cancel their group policies, set up a Code section 105 reimbursement plan that works with health insurance brokers or agents to help employees select individual insurance policies, and allow eligible employees to access the premium tax credits for Marketplace coverage. Is this permissible?

- No. The Departments have been informed that some vendors are marketing such products. However, these arrangements are problematic for several reasons. First, the arrangements described in this Q3 are themselves group health plans and, therefore, employees participating in such arrangements are ineligible for premium tax credits (or cost-sharing reductions) for Marketplace coverage. The mere fact that the employer does not get involved with an employee's individual selection or purchase of an individual health insurance policy does not prevent the arrangement from being a group health plan. DOL guidance indicates that the existence of a group health plan is based on many facts and circumstances, including the employer's involvement in the overall scheme and the absence of an unfettered right by the employee to receive the employer contributions in cash.
- Second, as explained in DOL Technical Release 2013-03, IRS Notice 2013-54, and the two IRS FAQs addressing employer health care arrangements referenced earlier, such arrangements are subject to the market reform provisions of the Affordable Care Act, including the PHS Act section 2711 prohibition on annual limits and the PHS Act 2713 requirement to provide certain preventive services without cost sharing. Such employer health care arrangements cannot be integrated with individual market policies to satisfy the market reforms and, therefore, will violate PHS Act sections 2711 and 2713, among other provisions, which can trigger penalties such as excise taxes under section 4980D of the Code.

February 18, 2015: IRS Notice 2015-17 – Guidance on the Application of Code § 4980D to Certain Types of Health Coverage Reimbursement Arrangements

This notice provides temporary relief from the excise taxes under § 4980D of the tax code for employers that pay or reimburse employees for the cost of individual health insurance coverage through an HRA or other employer payment plan through June 30, 2015.

This relief is limited to employers that are not Applicable Large Employers, and now that the deadline has passed, the IRS intends to enforce its previous guidance. Defined contribution, as of June 30th, is officially dead. Or is it?

Not Dead Yet

Just when it appeared all hope was lost for brokers and employers who support a defined contribution strategy for small employers, a recently introduced bipartisan bill is breathing new life into this strategy.

From the press release:

U.S. Senators Chuck Grassley (R-IA) and Heidi Heitkamp (D-ND) and Congressmen Charles W. Boustany, Jr., MD, (R-LA) and Mike Thompson (D-CA) introduced bipartisan companion language in the House (H.R. 2911) and Senate (S. 1697) known as the Small Business Healthcare Relief Act to roll back existing Treasury Department guidance issued under the authority of the Affordable Care Act prohibiting the use of Health Reimbursement Arrangements (HRAs). Boustany and Thompson introduced the legislation last Congress.

On September 13, 2013, Treasury issued guidance disallowing employers from using stand-alone HRAs to reimburse employees for healthcare-related expenses, stating these arrangements did not satisfy the Affordable Care Act's minimum benefit and annual dollar cap requirements for health insurance plans offered by employers. As a result, employers that continue to offer HRAs would be subject to a $100 per day per employee penalty, totaling up to $36,500 over the course of the year. After Boustany questioned Secretary Jack Lew on this issue in a Ways & Means hearing on February 3, 2015, Treasury announced on February 18 that it would delay enforcement of this guidance and resulting penalties until July 1, 2015.

The Small Business Healthcare Relief Act has three goals:

1. Ensuring that small businesses and local municipalities with fewer than 50 employees are allowed to continue using pre-tax dollars to give employees a defined contribution for healthcare expenses
2. Allowing employees to use HRA funds to purchase health coverage on the individual market, as well as for qualified out-of-pocket medical expenses if the employee has qualified health coverage
3. Protecting employers from being financially penalized for providing this cost-sharing option to employees

Again, the bill would not allow applicable large employers to take advantage of a defined contribution strategy to fund their employees' individual health insurance premiums, and employees would not be able to "double dip" and also claim a premium tax credit while receiving employer funds, but it would allow employers who are unhappy with the administrative hassle and unpredictable annual renewals associated with group health insurance plans.

Comments from the bill's sponsors

Each of the bill's sponsors offers a compelling argument for allowing small employers to continue offering pre-tax dollars to help their employees pay for health insurance in the individual market.

> **Senator Grassley:** "I've heard from farmers, small business owners and accountants who are worried about getting hit with a penalty for something they've done for a long time without any controversy. It doesn't make sense to tell small employers they can't help their employees get health insurance. Why disrupt something that worked? Our bill puts this provision back to what it was so farmers and small businesses can use this option as they see fit."

Senator Heitkamp: "Our bipartisan bill would make a needed fix to restore the ability for small businesses, which sometimes can't afford to provide health benefits for employees, to help their workers purchase coverage using HRAs. That just makes sense. I have long said some parts of the health care reform law work, but we need to improve the pieces that should work better for families and small businesses - and this bill continues those efforts."

Congressman Boustany: "Restoring choice and affordability in the healthcare marketplace is the key to driving down costs and improving accessibility for consumers. Using Healthcare Reimbursement Arrangements is a creative approach that allows employees to select healthcare plans that are best tailored to fit their needs. Our common-sense bipartisan legislation frees employers to provide their employees with options that will put the individual in charge."

Congressman Thompson: "This common-sense, bipartisan bill is about choice and affordability. It will allow small businesses to offer Healthcare Reimbursement Arrangements to their workers so they can choose a quality, affordable health insurance plan that fits their individual budget and healthcare needs."

Lots of support

In addition to the bipartisan support in both the House and the Senate, the Small Business Healthcare Relief Act has a huge amount of support from organizations around the country, including the U.S. Chamber of Commerce, the National Association for Towns and Townships, the American Farm Bureau Federation (AFBF), the National Association of Manufacturers (NAM), the the National Association of Home Builders

(NAHB), the National Federation of Business (NFIB), the Small Business Majority, the National Association for the Self Employed (NASE), the Coalition for Affordable Health Coverage (CAHC), the Retail Industry Leaders Association (RILA), and the National Retail Federation (NRF).
Perhaps Joel White, President of the Council for Affordable Health Coverage (CAHC), says it best:

The IRS has issued a rule that penalizes small employers for doing the right thing - providing help to employees. Employers are struggling with how to maintain employee health benefits in the current costly, burdensome, and uncertain environment. This legislation takes a good first step in addressing the negative consequences of the rule. Employers shouldn't be penalized for helping employees better afford their coverage. Congress needs to pass this bill as quickly as possible.

Gaining momentum

The huge popularity of this bill from both sides of the aisle and among organizations that represent small employers is a good indication that this actually has a chance of passing. We're certainly a lot closer to getting the green light on defined contribution than we have been in quite a while. We've gone from "we don't know" to "definitely not" to "maybe so," so this is definitely a step in the right direction.

It's also important to look at the timing. Opponents of the health reform law just suffered a huge loss in the King v. Burwell case, which sided with the IRS in its position that premium tax credits should be available in all states, whether or not they create their own state exchange. Republicans would like nothing more than to "get even" by overruling a ridiculously strict decision by the IRS. For that reason alone, we may see some legislators throw their support behind the bill. It's also something Democrats could support because it furthers the goal of reducing the uninsured rate and would help grow coverage and reduce adverse selection in the individual market, which could be good for individual premiums.

should get your individual private exchange site set up today if you haven't already. That will ensure that you're prepared for this fall's open enrollment period and for the special enrollment opportunities that will arise if thousands of small employers start dropping their group health insurance.

One of the arguments against the bill is that it could have the effect of killing the small group market, which is already struggling. Nationally, less than half of small employers offer group health insurance to their employees, and we see the number decline on an annual basis. Passing a bill that would allow employers to ditch their group coverage in favor of individual policies would only accelerate that decline, and for that reason the bill may be met with some resistance.

Take Action

For agents who sell individual policies, particularly those who are marketing to groups of individuals in an effort to direct traffic to their individual private exchange site, the passage of this bill could be a huge win, but it's not going to happen unless our elected officials hear what ordinary Americans think. For that reason, if you're in favor of the proposed legislation, you may want to contact your representatives to let them know how you feel. More importantly, you may want to ask your clients to contact their congressmen and senators – it really does make a difference.

As a broker, you also need to take action personally to make sure you don't miss out on the huge opportunity to sell individual policies if this bill passes. That means you should get your individual private exchange site set up today if you haven't already. That will ensure that you're prepared for this fall's open enrollment period and for the special enrollment opportunities that will arise if thousands of small employers start dropping their group health insurance. Contact Health Partners America at 205-949-9736 or visit www.healthpartnersamerica.com to get an affordable, customizable private exchange site today.

About Health Partners America

Since 2007, Health Partners America has been providing game-changing training and solutions to agents and brokers nationwide. HPA is a technology and consulting company that works with and through brokers in order to engage with the marketplace through healthcare reform. HPA Partners with agents and brokers nationally to bring them technology solutions, private exchange sites, marketing tools, training and leverage to help them be more successful.

HPA believes in championing, protecting and nurturing the relationships that exist between brokers, employers, and employees. Using white-labeled technology that extends from us to the broker partnering with us, then to the employer and the end-user employee, Health Partners America's private exchanges facilitate the vast array of options available to employees in a safe, user-friendly environment.

HPA's technology connects the broker to their respective clients (employers), and connects their clients (employers) to their employees as the "employer of choice." In addition to facilitating government subsidies for health insurance, the Health Partners America marketplace technology goes far beyond just health insurance, delivering the complete universe of insurance needs. The recent changes in health insurance law present a huge opportunity for those who are prepared, and HPA has a plan. Team up with Health Partners America and get started right away.

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