



This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

New Law Opens Door for Employer Premium Reimbursements

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Small employers were presented with a holiday gift – the opportunity to reimburse their employees for premiums paid for insurance purchased in the individual market. This practice had been prohibited under the Affordable Care Act ("ACA"). The new law, passed as part of the 21st Century Cures Act, allows small employers to adopt qualifying reimbursement programs effective as early as January 1, 2017. Read below to determine whether this new opportunity is right for your company.

Background. Generally effective January 1, 2015, the IRS, DOL and HHS put an end to a common practice among employers of reimbursing employees for, or directly paying, their premiums for individual health insurance policies, Medicare or Medicare supplemental insurance, or TRICARE. For more information, see our previous brief [here](#). Noncompliant arrangements could become subject to severe penalties of up to \$100 per employee per day. IRS transition rules delayed the effective date until June 30, 2015 for small employers and for certain Medicare arrangements.

New Reimbursement Opportunity. The 21st Century Cures Act permits small employers to establish Qualified Small Employer Health Reimbursement Arrangements ("QSEHRAs") to reimburse employees for premiums paid for insurance purchased in the individual market. To qualify as a QSEHRA, your arrangement must satisfy all of the following requirements:

- **Small Employer.** You must not qualify as an applicable large employer (ALE) for purposes of the ACA. An ALE is an employer with 50 or more full-time employees, including full-time equivalent employees, on average during the prior year. Because this calculation can be complicated, if you need assistance in determining if your organization is an ALE, please seek legal advice.
- **No Employer-Provided Group Health Plan.** You cannot offer a group health plan to any employees.
- **Same Terms for All Employees.** The QSEHRA must be offered on the same terms to all employees, other than those who are employed fewer than 90 days, under age 25, part-time, seasonal, covered by a collective bargaining agreement under which health benefits were the subject of good faith bargaining, or non-resident aliens with no US-source income. Variations in premium reimbursements that result from differences in age or family size may be permissible.
- **Employer-Funded.** The only funding must come from the employer (no employee salary reduction contributions are allowed). If you are a government contractor with Service Contract Act employees, you should use caution and consult legal counsel before applying any SCA fringe benefit allowances toward a QSEHRA benefit for the employee.
- **Maximum Cap.** Amounts made available under the QSEHRA must not exceed \$4,950 for individuals and \$10,000 for family (subject to future adjustments for inflation). These caps are prorated for employees eligible for only part of the year.
- **Medical Care Only.** Only expenses that qualify as "medical care" (including premiums for individual coverage) incurred by the eligible employee or his or her eligible family members may be covered by the QSEHRA. Note,

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however, that you can limit eligible expenses to a narrower definition of eligible expenses, such as medical insurance premiums.

- **Substantiation.** The employee must be required to provide you with proof of coverage or expenditure before any reimbursement or payment is made under the QSEHRA.
- **Taxation.** If the employee is not covered under minimum essential coverage (MEC) for any month, the reimbursements made through the QSEHRA may be taxable to the employee.

You must include the QSEHRA in your reporting of applicable employer-sponsored coverage on Forms W-2. In addition, you will be required to include the QSEHRA in Cadillac Tax calculations, if and when that tax takes effect (currently delayed until 2020).

Note that the QSEHRA benefit will reduce the amount of, or disqualify the employee from receiving, any subsidy for which an employee is otherwise eligible through a state exchange. Also note that QSEHRAs are not treated as "group health plans" for most purposes under the Internal Revenue Code, ERISA and the PHSA, and are not subject to COBRA or HIPAA portability requirements.

Notice to Employees. Written notice must be provided to (a) each employee eligible as of the first day of the year, at least 90 days before the beginning of such year, and (b) each employee who becomes eligible mid-year, on or before such eligibility date; *provided, however*, for the 2017 year you have until March 13, 2017 to provide the notice. Penalties for failure to provide this notice are \$50 per employee, up to a maximum per year of \$2,500.

Issues to Consider. Before establishing a QSEHRA, you should weigh the advantages and disadvantages of offering a QSEHRA, including the following:

- **Effect on Employees.** Are most employees covered through individual policies and do they qualify for Affordable Care Act subsidies? How will this affect them?
- **Consider Medicare Secondary Payer Rules.** If you are subject to the Medicare Secondary Payer Rules (generally, an employer with more than 20 employees), you should consult legal counsel before covering Medicare or Medicare supplement policies under your QSEHRA.
- **Additional Tax Liability.** Since QSEHRAs must be employer-funded, employees will no longer be able to contribute on a pre-tax basis toward the cost of their medical coverage, increasing their income and employment taxes owed and also increasing employer employment tax liability.
- **Merger & Acquisition Activity.** Employers involved in a merger or acquisition should consider terminating any QSEHRA prior to the closing of the transaction.
- **Open Issues.** Unanswered questions apply to QSEHRAs. For example, will state continuation coverage requirements apply? Will participation in a QSEHRA disqualify an individual from contributing to an HSA in conjunction with a high-deductible health plan (HDHP)?
- **Make Sure QSEHRA Status is Clear.** If an arrangement does not qualify as a QSEHRA, it will constitute an impermissible employer payment plan under the prior guidance and trigger penalties of up to \$100 per employee per day. Given the size of the potential penalties, you should work with legal counsel and take a conservative approach in adopting any QSEHRA.

Additional Relief for Noncompliant Programs. If you failed to terminate a prior noncompliant reimbursement arrangement, note that the new law also extends the transition relief previously granted under IRS Notice 2015-17 through the end of the plan year beginning on or before December 31, 2016. Please consult that guidance for more details.

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