

January 17, 2018

The Honorable D. Michael Haddox
Muskingum County Prosecuting Attorney
P.O. Box 189
27 North Fifth Street, Suite 201
Zanesville, Ohio 43702-0189

SYLLABUS:

2018-001

1. A township's reimbursement pursuant to R.C. 505.60(D) of out-of-pocket premiums attributable to health care insurance that a township officer obtains from the officer's private employer after electing not to participate in the township's group health care insurance plan does not constitute a "qualified small employer health reimbursement arrangement" under 26 U.S.C.A. § 9831(d) (West Supp. 2017).
2. Insofar as a township's reimbursement pursuant to R.C. 505.60(D) of out-of-pocket premiums attributable to health care insurance that a township officer obtains from the officer's private employer is a "group health plan," and is not a "qualified small employer health reimbursement arrangement," it shall comply with the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a) (West 2011).
3. A township may not reimburse an officer under R.C. 505.60(D) for out-of-pocket premiums attributable to health care insurance benefits that a township officer obtains from the officer's private employer after electing not to participate in the township's group health care insurance plan unless the reimbursement is integrated with another group health plan in accordance with federal law.



MIKE DEWINE

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OPINION NO. 2018-001

The Honorable D. Michael Haddox
Muskingum County Prosecuting Attorney
P.O. Box 189
27 North Fifth Street, Suite 201
Zanesville, Ohio 43702-0189

Dear Prosecutor Haddox:

You have requested an opinion about a board of township trustees' authority pursuant to R.C. 505.60(D) to reimburse a township officer for out-of-pocket premiums attributable to health care insurance benefits the officer obtains from an entity other than the township. You have explained that prior to 2010 a township in Muskingum County provided group health care insurance coverage to officers and employees of the township pursuant to R.C. 505.60. Pursuant to R.C. 505.60(D), township officers who elected not to participate in the township's group health care insurance plan were reimbursed by the township for out-of-pocket premiums attributable to insurance benefits the officers obtained from their private employers. Effective July 1, 2015, the board of township trustees discontinued paying those reimbursements because providing the reimbursements would violate the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) ("ACA"). The board of township trustees continued to provide a group health care insurance plan pursuant to R.C. 505.60.¹

¹ You have indicated that the township discontinued the premium reimbursements because the reimbursements were not integrated with another group health plan. Whether a township's premium reimbursements under R.C. 505.60(D) are integrated with another group health plan in accordance with federal law is dependent upon the characteristics of that group health plan and factors related to the form and requirements of the township's reimbursement arrangement. *See* note 5, *infra* (explaining when an employer's reimbursement arrangement is integrated with a group health plan under federal law). Those conditions are fact-specific and are beyond the scope of an Attorney General opinion. Accordingly, this opinion does not determine whether the township referenced in your letter was or was not able to integrate its premium reimbursements under R.C. 505.60(D) with another group health plan in accordance with federal law.

If a township was unable to integrate its premium reimbursements under R.C. 505.60(D) with another group health plan in accordance with federal law, the township was required to

In 2016, the United States Congress enacted 26 U.S.C.A. § 9831(d) (West Supp. 2017) as part of the 21st Century Cures Act, Pub. L. No. 114-255, 130 Stat. 1033 (2016). Pursuant to 26 U.S.C.A. § 9831(d)(1), a “group health plan” does not include a “qualified small employer health reimbursement arrangement.” The effect of that federal enactment upon a township’s premium reimbursements under R.C. 505.60(D), R.C. 505.601, and R.C. 505.603 was addressed in 2017 Op. Att’y Gen. No. 2017-026. In that opinion, the Attorney General advised that “[t]he conclusions reached in 2015 Op. Att’y Gen. No. 2015-021 with respect to reimbursements a board of township trustees provides to township officers and employees under R.C. 505.60(D) are not altered” by the enactment of 26 U.S.C.A. § 9831(d). 2017 Op. Att’y Gen. No. 2017-026 (syllabus, paragraph 1). The Attorney General further advised that:

Cash payments and reimbursements that a board of township trustees provides under R.C. 505.601 or R.C. 505.603 in circumstances that satisfy the requirements of 26 U.S.C.A. § 9831(d)(2) (West 2017) constitute “qualified small employer health reimbursement arrangements” and do not constitute “group health plans” that are subject to the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a) (West 2011).

2017 Op. Att’y Gen. No. 2017-026 (syllabus, paragraph 2). In the third syllabus paragraph of 2017 Op. Att’y Gen. No. 2017-026, the Attorney General advised:

cease the reimbursements in order to comply with the requirements of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (“ACA”). In that situation, because the township stopped paying those reimbursements in order to comply with federal law, stopping the reimbursements during a township officer’s term of office did not violate Article II, § 20 of the Ohio Constitution. *See* 2017 Op. Att’y Gen. No. 2017-026, at 2-273 (“an in-term cessation of cash payments or reimbursements to township officers by a board of township trustees to ensure compliance with the conditions of the ACA does not work an in-term change in the officers’ compensation that is prohibited by Ohio Const. art. II, § 20”). However, a township would violate Ohio Const. art. II, § 20, if, during a township officer’s term of office, the township stopped paying a reimbursement under R.C. 505.60(D) for health care insurance premiums that could have been integrated with another group health plan in accordance with federal law.

We address your questions with the presumption that, at the time that the township referenced in your letter discontinued reimbursements under R.C. 505.60(D), the township was not able to integrate the reimbursements with another group health plan in accordance with federal law. We further presume that the factors that prevented the township from being able to integrate the reimbursements under R.C. 505.60(D) with another group health plan in accordance with federal law have not changed and the township remains unable to integrate the reimbursements with a group health plan in a way that complies with the requirements of the ACA.

If a resolution of a board of township trustees authorizing cash payments or reimbursements to a township officer under R.C. 505.601 or R.C. 505.603 was effective prior to the commencement of the township officer's term of office, and if the cash payments or reimbursements were discontinued to ensure compliance with the requirements of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), resumption of the cash payments or reimbursements during the township officer's term of office does not violate the prohibition against in-term changes in a public officer's compensation in Article II, § 20 of the Ohio Constitution.

As a result of the enactment of 26 U.S.C.A. § 9831(d), and in light of the conclusions of 2017 Op. Att'y Gen. No 2017-026, you inquire whether the township in question may resume the reimbursements under R.C. 505.60(D) that were previously stopped. You also ask, if the enactment of 26 U.S.C.A. § 9831(d) permits a township to resume reimbursements that were previously stopped, whether the township may make the reimbursements retroactive to July 1, 2015.

A board of township trustees may provide group health care insurance coverage to township officers and employees. R.C. 505.60. Pursuant to R.C. 505.60(D), when a township officer or employee is denied coverage under the township's group health care insurance plan or elects not to participate in the township's health care insurance plan, the board of township trustees may reimburse the officer or employee for the out-of-pocket premiums attributable to health care insurance benefits the officer or employee obtains from an entity other than the township. A reimbursement provided to a township officer or employee under R.C. 505.60(D) shall not exceed "an amount equal to the average premium paid by the township for its officers and employees under any health care plan it procures under [R.C. 505.60]." R.C. 505.60(D). From your description of the circumstances, your questions concern reimbursements under R.C. 505.60(D) for out-of-pocket premiums attributable to health care insurance benefits that a township officer obtains from his private employer. Our analysis of your questions is, therefore, limited to that circumstance.²

You first ask whether a township that discontinued the reimbursements under R.C. 505.60(D) in order to comply with the ACA may resume those reimbursements upon the enactment of 26 U.S.C.A. § 9831(d). That question is answered in 2015 Op. Att'y Gen. No. 2015-021 and 2017 Op. Att'y Gen. No. 2017-026. In his 2015 opinion, the Attorney General advised that township officers and employees may be reimbursed under R.C. 505.60(D) for out-

² This opinion does not address a township's payment of a reimbursement under R.C. 505.60(D) for Medicare Parts A, B, or D premiums, or for the cost of coverage obtained through an individual health care insurance policy purchased by a township officer or employee. Reimbursements under R.C. 505.60(D) in those situations are addressed in 2015 Op. Att'y Gen. No. 2015-021, at 2-226 and 2017 Op. Att'y Gen. No. 2017-026, at 2-262.

of-pocket premiums attributable to health care insurance benefits that they obtain from an entity other than the township, so long as the reimbursements are integrated with another group health plan in accordance with the requirements set forth in IRS Notice 2013-54 and Department of Labor Technical Release 2013-03. 2015 Op. Att’y Gen. No. 2015-021, at 2-224 and 2-226.³ Generally, an employer’s reimbursement is “integrated” with another group health plan when, among other requirements, eligibility for the reimbursement is conditioned upon the employee’s actual enrollment in another group health plan that is not a health reimbursement arrangement (“HRA”)⁴ and that satisfies the requirements of the ACA.⁵ 26 C.F.R. § 54.9815-2711(d)(2)(i)(B)

³ 2015 Op. Att’y Gen. No. 2015-021, at 2-226 states, “a township may reimburse employees for premiums for health care insurance coverage if the *coverage* is integrated with another group health plan and if that group health plan satisfies the requirements set forth in IRS Notice 2013-54 and Department of Labor Technical Release 2013-03[.]” (Emphasis added.) That sentence contains a typographical error. The sentence should state “a township may reimburse employees for premiums for health care insurance coverage if the *township’s reimbursement* is integrated with another group health plan and if that group health plan satisfies the requirements set forth in IRS Notice 2013-54 and Department of Labor Technical Release 2013-03[.]”

⁴ A health reimbursement arrangement (“HRA”) is defined as

[A]n arrangement that: (1) is paid for solely by the employer and not provided pursuant to salary reduction election or otherwise under a § 125 cafeteria plan; (2) reimburses the employee for medical care expenses (as defined by § 213(d) of the Internal Revenue Code) incurred by the employee and the employee’s spouse and dependents (as defined in § 152); and (3) provides reimbursements up to a maximum dollar amount for a coverage period and any unused portion of the maximum dollar amount at the end of a coverage period is carried forward to increase the maximum reimbursement amount in subsequent coverage periods.

IRS Notice 2002-45 (July 15, 2002).

⁵ The integration requirements explained in IRS Notice 2013-54 and Department of Labor Technical Release 2013-03 now appear in the Code of Federal Regulations. *See* 26 C.F.R. § 54.9815-2711(d) (2017) (regulations relating to the Internal Revenue Service); 29 C.F.R. § 2590.715-2711(d) (2017) (regulations relating to the Department of Labor); 45 C.F.R. § 147.126(d) (2017) (regulations relating to the Department of Health and Human Services). Pursuant to the pertinent regulations, there are two ways in which an HRA may be integrated with a group health plan for purposes of the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (“ACA”).

The first method, set forth in 26 C.F.R. § 54.9815-2711(d)(2)(i), describes integration for an HRA or other account-based plan when minimum value is not required. *See* note 7, *infra* (defining minimum value). 26 C.F.R. § 54.9815-2711(d)(2)(i) provides:

Integration Method: Minimum value not required. An HRA or other account-based plan is integrated with another group health plan for purposes of this paragraph if:

(A) The plan sponsor offers a group health plan (other than the HRA or other account-based plan) to the employee that does not consist solely of excepted benefits;

(B) The employee receiving the HRA or other account-based plan is actually enrolled in a group health plan (other than the HRA or other account-based plan) that does not consist solely of excepted benefits, regardless of whether the plan is offered by the same plan sponsor (referred to as non-HRA group coverage);

(C) The HRA or other account-based plan is available only to employees who are enrolled in non-HRA group coverage, regardless of whether the non-HRA group coverage is offered by the plan sponsor of the HRA or other account-based plan (for example, the HRA may be offered only to employees who do not enroll in an employer's group health plan but are enrolled in other non-HRA group coverage, such as a group health plan maintained by the employer of the employee's spouse);

(D) The benefits under the HRA or other account-based plan are limited to reimbursement of one or more of the following – co-payments, co-insurance, deductibles, and premiums under the non-HRA group coverage, as well as medical care (as defined under section 213(d) of the Code) that does not constitute essential health benefits as defined in paragraph (c) of this section; and

(E) Under the terms of the HRA or other account-based plan, an employee (or former employee) is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based plan at least annually and, upon termination of employment, either the remaining amounts in the HRA or other account-based plan are forfeited or the employee is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based plan.

The second method, set forth in 26 C.F.R. § 54.9815-2711(d)(2)(ii), describes integration for an HRA or other account-based plan when minimum value is required. 26 C.F.R. § 54.9815-2711(d)(2)(ii) provides:

Integration Method: Minimum value required. An HRA or other account-based plan is integrated with another group health plan for purposes of this paragraph if:

(2017) (“[t]he employee receiving the HRA or other account-based plan⁶ is actually enrolled in a group health plan (other than the HRA or other account-based plan) that does not consist solely of excepted benefits, regardless of whether the plan is offered by the same plan sponsor (referred to as non-HRA group coverage)” (footnote added)); 26 C.F.R. § 54.9815-2711(d)(2)(ii)(B) (“[t]he employee receiving the HRA or other account-based plan is actually enrolled in a group health plan that provides minimum value pursuant to [26 U.S.C.A. § 36B(c)(2)(C)(ii)]⁷” (and

(A) The plan sponsor offers a group health plan (other than the HRA or other account-based plan) to the employee that provides minimum value pursuant to Code section 36B(c)(2)(C)(ii) (and its implementing regulations and applicable guidance);

(B) The employee receiving the HRA or other account-based plan is actually enrolled in a group health plan that provides minimum value pursuant to section 36B(c)(2)(C)(ii) of the Code (and applicable guidance), regardless of whether the plan is offered by the plan sponsor of the HRA or other account-based plan (referred to as non-HRA MV group coverage);

(C) The HRA or other account-based plan is available only to employees who are actually enrolled in non-HRA MV group coverage, regardless of whether the non-HRA MV group coverage is offered by the plan sponsor of the HRA or other account-based plan (for example, the HRA may be offered only to employees who do not enroll in an employer’s group health plan but are enrolled in other non-HRA MV group coverage, such as a group health plan maintained by an employer of the employee’s spouse); and

(D) Under the terms of the HRA or other account-based plan, an employee (or former employee) is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based plan at least annually, and, upon termination of employment, either the remaining amounts in the HRA or other account-based plan are forfeited or the employee is permitted to permanently opt out of and waive future reimbursements from the HRA or other account-based plan.

⁶ As used in 26 C.F.R. § 54.9815-2711, an “account-based plan” is “an employer-provided group health plan that provides reimbursements of medical expenses other than individual market policy premiums with the reimbursement subject to a maximum fixed dollar amount for a period.” 26 C.F.R. § 54.9815-2711(d)(6).

⁷ 26 U.S.C.A. § 36B(c)(2)(C)(ii) states:

Coverage must provide minimum value. Except as provided in clause (iii), an employee shall not be treated as eligible for minimum essential coverage if such coverage consists of an eligible employer-sponsored plan (as defined in section 5000A(f)(2) [26 USCS § 5000A(f)(2)]) and the plan’s share of the total

applicable guidance), regardless of whether the plan is offered by the plan sponsor of the HRA or other account-based plan (referred to as non-HRA MV group coverage”). The township’s premium reimbursements may be integrated with another group health plan even if that group health plan is provided by an employer other than the township. 2015 Op. Att’y Gen. No. 2015-021, at 2-224; *see also* 26 C.F.R. § 54.9815-2711(d)(2) (“[i]ntegration does not require the HRA (or other account-based plan) and the group health plan with which it is integrated share the same plan sponsor, the same plan document, or governing instruments, or file a single Form 5500, if applicable”). Thus, as advised in 2015 Op. Att’y Gen. No. 2015-021, at 2-226, a township violates the ACA if it reimburses a township officer under R.C. 505.60(D) for out-of-pocket premiums attributable to health care insurance benefits that a township officer obtains from the officer’s private employer when the reimbursement is not integrated with another group health plan in accordance with the requirements of federal law.

The effect of the enactment of 26 U.S.C.A. § 9831(d) upon the advice in 2015 Op. Att’y Gen. No. 2015-021 was addressed in 2017 Op. Att’y Gen. No. 2017-026. Section 9831(d)(1) states that, as used in Title 26 of the United States Code, the term “group health plan” does not include a “qualified small employer health reimbursement arrangement.” This means that a “qualified small employer health reimbursement arrangement” is not subject to the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a) (West 2011). 2017 Op. Att’y Gen. No. 2017-026, at 2-264; *see generally* 26 U.S.C.A. § 9815(a)(1) (West Supp. 2017) (“the provisions of ... [42 U.S.C.A. §§ 300gg, *et seq.*] ... shall apply to group health plans ... as if included in this subchapter [26 U.S.C.A. §§ 9811, *et seq.*]”).

To constitute a “qualified small employer health reimbursement arrangement” premium reimbursements to a township officer or employee shall “satisf[y] the conditions set forth in 26 U.S.C.A. § 9831(d)(2)(B) and [be] provided on the same terms to all ‘eligible employees’ of an ‘eligible employer.’” 2017 Op. Att’y Gen. No. 2017-026, at 2-262 to 2-263. As used in 26 U.S.C.A. § 9831(d), an “eligible employer” is an employer that is not an “applicable large employer” and does not offer a group health plan to any of its employees. 26 U.S.C.A. § 9831(d)(3)(B). A township that offers reimbursements under R.C. 505.60(D) offers group health care insurance coverage to its employees. R.C. 505.60(A), (B). The health care insurance coverage offered by the township constitutes a “group health plan” for the purpose of 26 U.S.C.A. § 9831(d). 2017 Op. Att’y Gen. No. 2017-026, at 2-265. Accordingly, a township’s reimbursements under R.C. 505.60(D) for out-of-pocket premiums attributable to health care insurance benefits that a township officer obtains from the officer’s private employer after electing not to participate in the township’s group health care insurance plan does not constitute a “qualified small employer health reimbursement arrangement” under 26 U.S.C.A. § 9831(d). 2017 Op. Att’y Gen. No. 2017-026, at 2-265.

allowed costs of benefits provided under the plan is less than 60 percent of such costs.

Insofar as a township's reimbursement under R.C. 505.60(D) for out-of-pocket premiums attributable to health care insurance benefits that a township officer obtains from the officer's private employer is a "group health plan," and is not a "qualified small employer health reimbursement arrangement," it shall comply with the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a). 2017 Op. Att'y Gen. No. 2017-026, at 2-265. A reimbursement arrangement that is integrated with another group health plan in accordance with federal law complies with the annual dollar limit prohibition, even though the reimbursement is set at an annual dollar limit, so long as the reimbursement arrangement and the other group health plan, in combination, comply with the annual dollar limit prohibition. Treas. Dec. 9744, 2015-2 C.B. 700, 2015-49 I.R.B. 700 (2015), at 51 ("if an HRA is 'integrated' with other group health plan coverage, and the other group health plan coverage complies with the requirements of PHS Act section 2711 [, 42 U.S.C.A. § 300gg-11], the combined arrangement satisfies the requirements even though the HRA imposes a dollar limit" (footnote omitted)). A reimbursement arrangement that is not integrated with another group health plan in accordance with federal law violates the annual dollar limit prohibition. Therefore, a township may not reimburse a township officer under R.C. 505.60(D) for out-of-pocket premiums attributable to health care insurance benefits that the township officer obtains from the officer's private employer after electing not to participate in the township's group health care insurance plan, unless the reimbursement is integrated with another group health plan in accordance with the requirements of federal law.

The enactment of 26 U.S.C.A. § 9831(d) does not relieve a township of its obligation to comply with the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a) when the township reimburses a township officer under R.C. 505.60(D) for out-of-pocket premiums attributable to health care insurance benefits that a township officer obtains from the officer's private employer. Thus, the enactment of 26 U.S.C.A. § 9831(d) does not permit a township to pay reimbursements under R.C. 505.60(D) that are not integrated with a group health plan in accordance with federal law. Because 26 U.S.C.A. § 9831(d) does not apply to the reimbursements described in your letter, whether the township may resume the reimbursements under R.C. 505.60(D) is not affected by the enactment of 26 U.S.C.A. § 9831(d).

In your second question, you ask, if the enactment of 26 U.S.C.A. § 9831(d) permits a township to resume reimbursements that were previously stopped, may the township pay the reimbursements retroactively to July 1, 2015. Having concluded that the enactment of 26 U.S.C.A. § 9831(d) does not permit a township to reimburse under R.C. 505.60(D) when those reimbursements are not integrated with a group health plan in accordance with federal law, it is unnecessary for us to address your second question.

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. A township's reimbursement pursuant to R.C. 505.60(D) of out-of-pocket premiums attributable to health care insurance that a township officer obtains from the officer's private employer after electing not to participate in the township's group health care insurance plan does not constitute a

“qualified small employer health reimbursement arrangement” under 26 U.S.C.A. § 9831(d) (West Supp. 2017).

2. Insofar as a township’s reimbursement pursuant to R.C. 505.60(D) of out-of-pocket premiums attributable to health care insurance that a township officer obtains from the officer’s private employer is a “group health plan,” and is not a “qualified small employer health reimbursement arrangement,” it shall comply with the annual dollar limit prohibition of 42 U.S.C.A. § 300gg-11(a) (West 2011).
3. A township may not reimburse an officer under R.C. 505.60(D) for out-of-pocket premiums attributable to health care insurance benefits that a township officer obtains from the officer’s private employer after electing not to participate in the township’s group health care insurance plan unless the reimbursement is integrated with another group health plan in accordance with federal law.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General