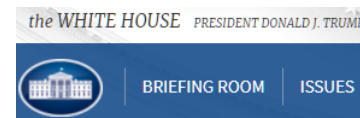


# Affordable Care Act - Businesses

## EO Promoting Health Care Choice

- EO 13813 (10/12/17)
  - Includes call for promotion of
    - Health Reimbursement Arrangements (HRAs)
    - “Within 120 days of the date of this order, Secretaries of Treasury, Labor, and Health and Human Services shall consider proposing regulations or revising guidance, to extent permitted by law and supported by sound policy, to increase usability of HRAs, to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage.”



# Qualified Small Employer Health Reimbursement Arrangement (QSEHRA)

**P.L. 114-255  
(12/13/16)**

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## Small Employer HRA Refresher

- Notice 2013-54 – If employer provides reimbursements for employee health plans, then it is considered a plan and must meet “market reforms.”
  - These plans will fail.
  - Employer at risk of \$100/day/employee penalty.
    - IRC §4980D.

<https://www.irs.gov/pub/irs-drop/n-13-54.pdf>

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## IRS Provided Limited Relief

- Notice 2015-17
  - No penalty assessed through June 30, 2015
  - And relief for 2-percent shareholder-employee of S corp until IRS issues guidance.
    - IRS has not issued such guidance.

[https://www.irs.gov/irb/2015-14\\_IRB/ar07.html](https://www.irs.gov/irb/2015-14_IRB/ar07.html)

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## HRA Change - New §9831 (d)!

- Employers who are not an “applicable large employer” and do not offer group health plan.
  - Ok to let employees know about marketplace/exchange and PTC.
- No employee contributions to the funding (no salary reduction; funded solely by employer).
- Amount of payments and medical reimbursements for any year do not exceed
  - \$4,950 for single (\$5,050 for 2018)
  - \$10,000 for family members of the employee (\$10,250 for 2018)
  - Adjust for inflation

## New §9831(d) – key terms include ...

**(2) QUALIFIED SMALL EMPLOYER HEALTH REIMBURSEMENT ARRANGEMENT** For purposes of this subsection—

- **(A) In general** The term “qualified small employer health reimbursement arrangement” means an arrangement which—
  - (i) is described in subparagraph (B), and
  - (ii) is provided **on the same terms** to all eligible employees of the eligible employer.
- **(B) Arrangement described** An arrangement is described in this subparagraph if—
  - (i) such arrangement is funded solely by an eligible employer and no salary reduction contributions may be made under such arrangement,
  - (ii) such arrangement provides, **after the employee provides proof of coverage**, for the payment of, or reimbursement of, an eligible employee for expenses for medical care (as defined in section 213(d)) incurred by the eligible employee or the eligible employee’s family members (as determined under the terms of the arrangement), and
  - (iii) the amount of payments and reimbursements described in clause (ii) for any year do not exceed \$4,950 (\$10,000 in the case of an arrangement that also provides for payments or reimbursements for family members of the employee).

**Suggestion** – Read all of §9831(d) - <https://www.law.cornell.edu/uscode/text/26/9831>

## HRA Change - New §9831(d)!

- Employee provides proof of coverage to employer
- Notice to employees (more later).
- **Benefit** – no \$100/day/EE penalty + EE exclusion per Rev Rul 61-146.

# May only exclude employees who ...

- (i) have not completed 90 days of service;
- (ii) under age 25;
- (iii) part-time [Reg. 1.105-11(c)(2)(iii)(C)] or seasonal employees;
  - Generally, part-time is under 35 hours/week OR usually < 25 hours/week or < 7 months/year
- (iv) are not included in the plan who are included in a unit of employees covered by an agreement between employee representatives and one or more employers which the Secretary finds to be a collective bargaining agreement, if accident and health benefits were the subject of good faith bargaining between such employee representatives and such employer or employers; and
- (v) nonresident aliens and who receive no earned income (within the meaning of section 911(d)(2)) from employer which constitutes income from sources within the US (within meaning of section 861(a)(3)).
- [§105(h)(3)(B)]

See Q&A 8 of Notice 2017-67 - <https://www.irs.gov/pub/irs-drop/n-17-67.pdf>

## Employer notice to employees

- “§9831(d)(4)(A) IN GENERAL.—An employer funding a **qualified small employer health reimbursement arrangement** for any year shall, **not later than 90 days before the beginning of such year (or, in the case of an employee who is not eligible to participate in the arrangement as of the beginning of such year, the date on which such employee is first so eligible)**, provide a written notice to each eligible employee which includes the information described in subparagraph (B).
- “(B) CONTENTS OF NOTICE.—
  - “(i) A statement of amount which would be such eligible employee’s permitted benefit under the arrangement for the year.
  - “(ii) A statement that eligible employee should provide information described in clause (i) to any health insurance exchange to which employee applies for advance payment of the PTC.
  - “(iii) A statement that if employee is not covered under minimum essential coverage for any month the employee may be subject to tax under §5000A [individual mandate] for such month and reimbursements under the arrangement may be includible in gross income.”.

## Employer notice requirement

- §6652(o)
- “(o) FAILURE TO PROVIDE NOTICES WITH RESPECT TO QUALIFIED SMALL EMPLOYER HEALTH REIMBURSEMENT ARRANGEMENTS.—In the case of each failure to provide a written notice as required by §9831(d)(4), unless it is shown that such failure is due to reasonable cause and not willful neglect, there shall be paid, on notice and demand of the Secretary and in the same manner as tax, by person failing to provide such written notice, an amount equal to **\$50 per employee** per incident of failure to provide such notice, but the total amount imposed on such person for all such failures during any calendar year shall not exceed \$2,500.”.

## Addition to §106 exclusion:

“(g) QUALIFIED SMALL EMPLOYER HEALTH REIMBURSEMENT ARRANGEMENT.—For purposes of this section and section 105, payments or reimbursements from a *qualified small employer health reimbursement arrangement* (§9831(d)) of an individual for medical care (§213(d)) shall **not** be treated as paid or reimbursed under employer-provided coverage for medical expenses under an accident or health plan **if** for the month in which such medical care is provided the individual does not have minimum essential coverage (within the meaning of §5000A(f)).”

**SO, if employee doesn't have MEC –  
employer reimbursement is taxable!**

# Coordination with PTC

Employee **not** eligible for any month where employee is provided a *qualified small employer health reimbursement arrangement* which constitutes affordable coverage.


+ explains how to know if affordable (the standard for measuring for these purposes)

# W-2 Reporting

New §6051(a)(15) “the total amount of permitted benefit (as defined in §9831(d)(3)(C)) for the year under QSBHRA (as defined in §9831(d)(2)) with respect to the employee.”

# Reporting QSEHRA on Form W-2

- Qualified Small Employer Health Reimbursement Arrangement (QSEHRA) – New HRA Starting 1/1/17 per 21st Century Cares Act. P.L. 114-255 (12/13/16). See IRC sections 9831(d), 106(g), 36B(c)(4) and 6652(o).
  - Reimbursement only taxable if employee did not obtain minimum essential coverage.

e Employee's first name and initial		Last name		Suff.	11 Nonqualified plans		12a See instructions for box 12 <b>FF \$xxxx</b>	
13 Statutory employee		Retirement plan		Third-party sick pay		12b		
14 Other		12c			12d			
f Employee's address and ZIP code								
15 State	Employer's state ID number		16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name	
Form <b>W-2 Wage and Tax Statement</b> <span style="float: right;">2017</span> Department of the Treasury—Internal Revenue Service Safe, accurate, 								

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## Effective Dates

- Generally – tyba 12/31/16
- “TRANSITION RELIEF—relief under Treasury Notice 2015–17 shall be treated as applying to any plan year beginning on or before December 31, 2016.”
- Employer who wishes to create a QSEHRA in 2017, has 90 days from 12/13/16 to comply with notice requirement (to avoid the penalty) .



# S corps

DOL FAQs Implementation Part 35 (12/20/16):

“The Cures Act’s extension of relief under Notice 2015-17 to plan years beginning on or before December 31, 2016 **does not modify Q&A 2 of Notice 2015- 17, which continues to apply to such arrangements until additional guidance provides otherwise.**”

<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-35.pdf>

## QSEHRA – More Time to Get Notice to Employees for 2017

- Notice 2017-20 (2/27/17)
  - Extends time to get initial written notice to eligible employees from 3/13/17 to “at least 90 days after additional guidance regarding the contents of the QSEHRA notice is issued.”

# QSEHRA Guidance

- Notice 2017-67 (10/31/17)
  - 59 pages with 79 Q&As
  - Addresses required notice to employees, eligibility, which employees can be excluded, and more.
  - Per IRS, is in line with EO 13813 (10/17/17).

<https://www.irs.gov/pub/irs-drop/n-17-67.pdf>

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## Notice 2017-67 covers these topics [Q&A #]:

- |                                       |   |
|---------------------------------------|---|
| A. Eligible employer [1-7]            |   |
| B. Eligible employee [8-11]           |   |
| C. Same terms requirement [12-26]     |   |
| D. Statutory dollar limits [27-34]    |   |
| E. Written notice requirement [35-39] |   |
| F. MEC requirement [40]               |   |
| G. Proof of MEC requirement [41-43]   |   |
| H. Substantiation requirement [44-45] |   |
|                                       | I. Reimbursement of medical expenses [46-56]                  |
|                                       | J. Reporting requirement [57-64]                              |
|                                       | K. Coordination with PTC [65-71]                              |
|                                       | L. Failure to satisfy the requirements to be a QSEHRA [72-74] |
|                                       | M. Interaction with HSA requirements [75-78]                  |
|                                       | N. Effective date [79]  |

## A. Eligible employer

**Question 1:** Does an employer fail to be an eligible employer if it offers a group health plan to former employees (for example, retirees)?

**Answer 1:** No. For purposes of the QSEHRA requirements, former employees are not treated as employees. As a result, offering a group health plan to former employees does not cause the employer to fail to be an eligible employer.

## A. Eligible employer and B. Eligible employee

**Question 3:** Does an S corporation fail to be an eligible employer if, separate from a QSEHRA, it reimburses the health insurance policy premiums of a 2-percent shareholder (as defined in section 1372(b)) who is an employee?

**Answer 3:** No. But see Q&A-9 regarding the status of an owner as an eligible employee.

**Question 9:** May an eligible employer provide a QSEHRA to retirees, other former employees, or non-employee owners?

**Answer 9:** No. A QSEHRA may only be provided to employees. A 2% shareholder who is otherwise an employee is not an employee for purposes of a QSEHRA. See section 1372. An arrangement provided to former employees is a group health plan within the meaning of section 5000(b).<sup>6</sup>

<sup>6</sup> Provided the arrangement meets the general exception set forth in section 9831(a)(2) that on the first day of the plan year the plan has less than two participants who are current employees, the arrangement would not be subject to the market reforms and other requirements of chapter 100.

## B. Eligible employee

**Question 10:** When must an eligible employer provide a QSEHRA to an eligible employee who previously was excluded under one or more categories of excludable employees referenced in section 9831(d)(3)(A)?

**Answer 10:** If the employee is otherwise an eligible employee, the eligible employer must provide a QSEHRA to the employee no later than the day immediately following the date the employee is no longer in any category of excludable employees under the terms of the plan.

**Question 11:** May an eligible employee waive participation in a QSEHRA?

**Answer 11:** No. Section 9831(d)(2)(A)(ii) requires that the eligible employer provide, rather than offer, a QSEHRA on the same terms to all eligible employees.

## C. Same terms requirement

**Question 12:** Does an arrangement fail to satisfy the same terms requirement if it is not operated on a uniform and consistent basis with respect to all eligible employees?

**Answer 12:** Yes. To satisfy the same terms requirement, the arrangement must be operated on a uniform and consistent basis with respect to all eligible employees. However, an arrangement does not fail to be operated on a uniform and consistent basis merely because different eligible employees who are provided the same permitted benefit are reimbursed different amounts because they submitted different expenses for reimbursement.

**“same terms” requirement – several Q&As on this, including where employees are related, and more!**

## E. Written notice requirement

**Question 35:** When is eligible employer required to furnish initial written notice to eligible employees with respect to QSEHRA provided during 2017 or 2018?

**Answer 35:** An eligible employer that provides a QSEHRA during 2017 or 2018 must furnish initial written notice to its eligible employees by the later of

(a) February 19, 2018, or

(b) 90 days before the first day of the plan year of the QSEHRA.

The penalties under §6652(o) apply to any employer that does not furnish initial written notice by that date. Thus, employer that provided a QSEHRA before release of this notice and has not previously furnished the written notice must furnish the written notice by February 19, 2018. For some employees, the information in the notice will be necessary to complete their individual tax returns even if the information is not available when they are making decisions about health coverage, and the information will alert them to potential tax consequences. In addition, employers are encouraged to provide employees with information regarding the QSEHRA as soon as possible to allow employees to make informed decisions about health coverage, even if that information is less than the full notice required to satisfy the written notice requirement that will be provided at a later date.

## E. Written notice requirement

**Question 36:** May an eligible employer use an electronic medium (for example, email) to furnish the written notice to its eligible employees?

**Answer 36:** Yes. An eligible employer may furnish the written notice electronically to its eligible employees if the employer follows the rules for the use of electronic media in § 1.401(a)-21. <https://www.law.cornell.edu/cfr/text/26/1.401%28a%29-21>

**Question 37:** When must the initial written notice be furnished to a newly eligible employee?

**Answer 37:** Except as provided in Q&A-35, in the case of a newly eligible employee, the initial written notice must be furnished on or before the first day the employee becomes eligible to participate in the QSEHRA.

## E. Written notice requirement

**Question 38:** What information must be included in the written notice?

**Answer 38:** The written notice must include information described below, and may include other information, as long as additional information does not conflict with the following required information:

- (a) A statement of the amount of each permitted benefit for which the employee might be eligible. ...
- (b) A statement that eligible employee must inform any Marketplace to which employee applies for advance payments of the PTC (APTC) of amount of the permitted benefit. ...
- (c) A statement that if eligible employee does not have MEC for any month, employee may be liable for individual shared responsibility payment under section 5000A for that month, and reimbursements under QSEHRA for expenses incurred in the month will be includible in gross income.

## I. Reimbursement of medical expenses

**Question 46:** May a QSEHRA reimburse eligible employees with a taxable payment of unused permitted benefits at the end of the year (sometimes referred to as a cash-out)?

**Answer 46:** No. A cash-out of unused permitted benefits would result in all payments to all eligible employees under the QSEHRA for the year being includible in income and wages because the exclusion under section 105(b) does not apply to amounts the taxpayer would be entitled to receive irrespective of whether the taxpayer incurs medical expenses.

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**Question 52:** May a QSEHRA reimburse medical expenses incurred before eligible employee is provided the QSEHRA?

**Answer 52:** No. ...

## J. Reporting requirement

Generally, must report with Code FF on W-2 box 12 if reimbursed employee but it wasn't MEC (minimum essential coverage) or employee doesn't have MEC.

**Question 64:** Is an eligible employer that provides a QSEHRA to its eligible employees required to provide Forms 1095-B, Health Coverage, regarding the QSEHRA?

**Answer 64:** No.

## L. Failure to satisfy the requirements to be a QSEHRA

[thus, potentially subject to §4980D penalty of \$100/employee/day; potentially taxable to all employees (Q&A 73 and 45)]

**Question 74:** Is a QSEHRA an applicable self-insured health plan subject to the Patient-Centered Outcomes Research Trust Fund (PCORTF) fee under section 4376 for years ending before September 30, 2019?

**Answer 74:** Yes. Plan sponsors of applicable self-insured health plans must file Form 720, Quarterly Federal Excise Tax Return, annually to report and pay the PCORTF fee; a QSEHRA is an applicable self-insured health plan for this purpose. The Form 720 is due on July 31 of the year following the last day of the policy year or plan year. The fee is applicable with respect to plan years ending before October 1, 2019.

# Employer Mandate Still In Effect

- Information Letter 2017-0013 (6/30/17)

- No exceptions or waiver exists (§4980H).
- EO (1/20/17) relevance

“Executive Order does not change the law; legislative provisions of the ACA are still in force until changed by Congress, and taxpayers remain required to follow the law and pay what they may owe. For additional information on the ACA Executive Order and the current tax filing season, please visit

<https://www.irs.gov/tax-professionals/aca-information-center-for-tax-professionals.>”

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## §4980H Amounts

	2015	2016	2017
§4980H(a) penalty – did not offer coverage and at least one FT employee claimed PTC	\$2,080 per FT employee	\$2,160 per FT employee	\$2,260 per FT employee
§4980H(b) penalty – did offer coverage, but either was not minimum value or affordable	\$3,120 per FT employee who claimed PTC	\$3,240 per FT employee who claimed PTC	\$3,390 per FT employee who claimed PTC



**Above amounts are annual.  
Penalty is prorated for months of violation.**

<https://www.irs.gov/affordable-care-act/employers/employer-shared-responsibility-provisions>

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# W-2 Reporting of Health Coverage

- Transition relief still in effect per IRS website
- No need to report info on W-2 if issued less than 250 Forms W-2 in prior calendar year.
- Website explains what to report if required.
- W-2 Box 12 Code DD

<https://www.irs.gov/affordable-care-act/form-w-2-reporting-of-employer-sponsored-health-coverage>

<https://www.irs.gov/newsroom/employer-provided-health-coverage-informational-reporting-requirements-questions-and-answers>

9 Verification code			10 Dependent care benefits
ff. 11 Nonqualified plans			12a <b>DD</b>   <b>\$xxxxxx</b>
13 Statutory employee <input type="checkbox"/>	Retirement plan <input type="checkbox"/>	Third-party sick pay <input type="checkbox"/>	12b
14 Other			12c