

May 21, 2019

Melissa Smith
Director of the Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue NW
Washington, DC 20210

Submitted via the Federal eRulemaking Portal <http://www.regulations.gov>

Re: Proposed Regulations to Update and Revise the Regulations Issued Under the Fair Labor Standards Act

Dear Ms. Smith:

The Department of Labor has issued proposed rules to update the regulations issued under the Fair Labor Standards Act (FLSA) and has asked for comments on the proposal. The proposed rule would update the salary and compensation levels in determining whether an employee is exempt from the overtime pay rules under the FLSA. The Employers Council on Flexible Compensation (ECFC) has reviewed these proposed rules and requests clarification of the rules regarding the exclusion of certain health insurance benefits from the calculation of the amount of compensation under FLSA. Specifically, ECFC is concerned that amounts allocated by the employer to an employee's account under a health reimbursement arrangement (HRA) may not be exempt from FLSA unlike other health plans arrangements established by an employer and would request clarification under the final regulations that HRAs be treated similar to other employer-provided health benefit plans.

ECFC is a membership organization dedicated to promoting and protecting the availability of benefit choices for working Americans through account-based benefit plans which provide benefits in areas such as health care, child care and commuting. ECFC's members include employers who sponsor employee benefit plans, including flexible spending arrangements, health reimbursement arrangements and health savings accounts, as well as third party administrators, health plan providers, payers, providers, payment networks, processors, financial institutions, and accounting, consulting, and actuarial companies that design or administer employee benefit plans. ECFC member companies assist in the administration of cafeteria plan and health benefits for over 33 million employees.

HRAs Should Be Treated Like Other Employer-Provided Health Plans. The FLSA excludes "contributions irrevocably mandate ... to a trustee or third person pursuant to a bona fide plan providing old-age, retirement, life, accident, or health insurance or similar benefits for

employees from the definition of compensation under the FLSA. Prior regulatory guidance has provided a multi-part test to determine whether a benefit plan may qualify as a bona fide plan.

There has been a recent litigation over what constitutes a bona fide plan under this multi-part test. In recent litigation regarding an employer that provided an HRA to its employees, the court held that a self-funded HRA plan could not be excluded because the company did not make irrevocable payments to the plan. *Gilberston v, City of Sheboygan*, 165 F. Supp. 3d 742 (E.D. Wis. 2016). This result is clearly in error since an HRA is no different than other health plans provided by employers since an HRA only reimburses employees for substantiated qualified medical expenses, similar to how other employer-provided health plans (whether insured or self-funded) operate. The only difference between an HRA and other types of health plans is that the benefit provided under the HRA is defined as an account balance unlike a health plan that provides for full or partial payment based on the services performed. The HRA only reimburses for qualified medical expenses, the account balance in the HRA cannot be used for any other expenses of the employees. The Department should use this regulatory project as a means to settle the rules and provide that amounts that an employer provided to an employee under an HRA should be excluded from compensation under the FLSA just as the benefits provided under other employer-provided health plans are not counted under the FLSA definition of compensation.

ECFC appreciates this opportunity to provide regarding this proposed regulation. If you have any questions or require further information regarding our comments, specifically if you would like more information about how HRA operate, please feel free to contact me by telephone at (202)465-6397 or by e-mail at wsweetnam@ecfc.org.

Sincerely,



William F. Sweetnam, Jr.
Legislative and Technical Director