



Montana Legislative Services Division
Legal Services Office

TO: State Administration and Veterans' Affairs Interim Committee

FROM: K. Virginia Aldrich

DATE: September 6, 2019

RE: Legislative Administrative Rule Review Report

Pursuant to 5-5-228, MCA, the State Administration and Veterans' Affairs Interim Committee is responsible for reviewing administrative rules within its jurisdiction. Staff for the State Administration and Veterans' Affairs Interim Committee has prepared this report for informational purposes only. This report does not represent any action or opinion of the State Administration and Veterans' Affairs Interim Committee and does not preclude additional action that may be taken by the State Administration and Veterans' Affairs Interim Committee pursuant to its authority under the Montana Administrative Procedure Act (Title 2, chapter 4, MCA).

MAR NOTICE NUMBER: 2-21-584

AGENCY/BOARD: Department of Administration

RULE CLASSIFICATION: (e.g. substantive/interpretive/emergency/temporary): Substantive

SUBJECT: Voluntary Employees' Beneficiary Association (VEBA)

NOTICE DESCRIPTION: (e.g. proposal notice/adoption notice): Notice of Public Hearing on Proposed Amendment

SUMMARY OF RULE(S):

The Department of Administration (Department) proposes to amend eight rules concerning the Voluntary Employees' Beneficiary Association (VEBA).

The Department proposes to amend one rule concerning VEBA objectives to clarify that dependents eligible for the program are limited to tax-qualified dependents and that VEBA pays for qualified health care expenses. The changes also clarify that VEBA eligible employees do not include student interns, seasonal employees, or certain nonresident aliens. The amendments specify that separation from service for the purposes of VEBA include voluntary or involuntary separations.

The amendments clarify the difference between a VEBA "member" (an active employee) whose work unit voted to establish a VEBA group and a VEBA "participant" who is a member who has separated from service and who has a VEBA HRA account. Because a participant is limited to an individual who has separated from service, the Department's rules conflict with the enabling statutory language which envisions that both employees and retirees can use a VEBA HRA for

qualified expenses. The Legislature stated that it found that "escalating health care expenses, particularly the increasing cost of medical treatment and health insurance, constitute a substantial financial burden *during* and *after* an employee's working career." Section 2-18-1302, MCA (emphasis added). *See also* e.g. section 2-18-1311(1), MCA. However, the enabling statutes also envisioned complying with future federal tax law changes, providing that "[t]he department shall provide for the administration of the plan in the manner required to satisfy applicable tax qualification requirements of the Internal Revenue Code. If a statutory provision of this part conflicts with a qualification requirement of the Internal Revenue Code and any consequent federal regulations, the provision is either ineffective or must be interpreted to conform with the federal qualification requirements." Section 2-18-1309, MCA.

The Department explains its rationale for limiting a VEBA HRA to separated employees in the notice:

The federal Patient Protection and Affordable Care Act (PPACA) was enacted in March 2010. The PPACA added new requirements for health plans, including among other requirements, offering all federally recommended preventive services at no cost to a plan participant and unlimited reimbursement of qualified healthcare expenses

The PPACA essentially created two options: (1) to continue participation by former employees only or (2) to allow active employees to participate and discourage any participation by former employees. Evaluating the PPACA guidance in light of who was eligible at that time (active employees, pre-65 retirees, and post-65 retirees), the department believed it was not administratively feasible to continue allowing participation by active employees.

To keep active employees as Montana VEBA HRA participants and comply with the PPACA requirements, a participating employer must offer other major medical coverage (e.g., the State of Montana Employee Benefit Plan) and require that employees and retirees enroll in that coverage if they want to participate in the Montana VEBA HRA.

Keeping active employees as participants also means that pre-65 retirees can no longer obtain subsidized coverage on the Exchange, an online marketplace for consumers to purchase individual insurance policies (a state can run its own exchange or use the federal exchange portal, HealthCare.gov). Exchange coverage is typically less expensive than retiree coverage on any public entity health plan. A pre-65 retiree who wants to participate in the Montana VEBA HRA would be required to enroll in the employer's health plan at a potentially greater cost to that retiree. Additionally, pre-65 retirees would be limited to the use of Montana VEBA HRA funds for deductible, copayments, premiums for the employer's health plan, and certain limited medical expenses that a health plan is

not required to cover, such as massage therapy.

Post-65 retirees would face similar limitations to participate in the Montana VEBA HRA with active employees. Post-65 retirees could not use Montana VEBA HRA funds to pay for Medicare or Medicare supplemental premiums. Post-65 retirees could only use the funds to pay for dental and vision expenses.

Currently, all retirees (pre-65 and post-65) may use Montana VEBA HRA funds for any medical expense eligible under IRC section 213(d), including premiums for Medicare and Medicare supplemental coverage. Allowing participation by active employees would discourage any participation by public entity retirees in the Montana VEBA HRA because retirees could not obtain reimbursement for Medicare premiums and Medicare supplemental coverage or enroll in the most affordable retiree health coverage.

Therefore, the department believed the solution most reflective of the legislature's intent to help retirees with their medical expenses and administratively feasible was adoption of the Montana VEBA HRA as a separation-only plan for former employees (e.g., retirees) and establishment of a limited scope option for dental and vision expenses. The PPACA creates an exception for retiree-only plans such that these plans, if covering less than two active employees, are not required to offer the required PPACA benefits (e.g., federally recommended preventive services). The PPACA also creates an exception for limited scope health plans for dental and vision expenses from the same requirements. The department believed a limited scope dental and vision plan was necessary for retirees who might return to work for the same public entity or a different public entity that is also a participating employer.

The department believes limiting participation to retirees and others who separate from service would have minimal, if any, impact on public entity employees, since no active employees of Montana public employers have ever participated in the Montana VEBA HRA. The department further notes that active employees benefit financially if the employer contribution of accrued sick leave is converted when the employee separates from service because the employee's hourly rate at retirement is generally higher than the hourly rate throughout the prior years of employment.

Therefore, the department proposes to formally recognize the Montana VEBA HRA as a separation-only plan — meaning only those employees who have terminated their employment may, if all other requirements have been met, have a tax-free account in the Montana VEBA HRA to help pay their qualified medical expenses. The department also created a limited scope health plan to reimburse dental and vision expenses for retirees returning to work for the same public entity

or another public entity that is a participating employer. Enrollment forms and other plan materials were updated to explain these changes

The department intends to propose similar changes to the Montana Voluntary Employees' Beneficiary Association Act in the 2021 legislative session. Adoption of the proposed changes in this notice will make the rule consistent with changes made in 2013 to the Montana VEBA HRA to comply with federal PPACA rules. Regardless of the outcome of this rule amendment process and proposed legislation for the 2021 session, the department must continue to administer the Montana VEBA HRA in a manner that complies with federal PPACA requirements.

The Department proposes to amend one rule concerning administration of the VEBA HRA. The proposal amends the current rules to specify the Department's duties, including providing that the Department approves requests to become a contracting employer, evaluates, modifies as necessary, and approves a contracting employer's proposal for group structure, does not allow a discriminatory group to continue to exist, establishes procedures to receive and deposit employer contributions, establishes claims adjudication processes, provides accounting and record-keeping of participant accounts, preserves the Montana VEBA HRA tax-exempt status, ensures that no part of the net earning or trust assets inure to the benefit of participant except by payment of qualified health care expenses and reasonable administrative expenses, and determines investment vehicles available for participant account funds in the Montana VEBA HRA. The rule proposal also requires contracting employers to notify employees hired into a plan-eligible position of the employee's change in status, notify the Department when an employee becomes a member, and notify existing members 30 days before the group's anniversary date for voting purposes.

The Department proposes to amend one rule concerning fees to clarify that monthly administration fees begin when a contracting employer contribution is deposited into a participation account rather than when an account is "established."

The Department proposes to amend one rule concerning eligibility. The proposal corrects the nondiscrimination rule that a group cannot be formed to benefit a select group of the highest paid employees from taking into account the individuals in the top 20% to individuals with an annual total compensation in the top 25% of employees. The proposal also addresses what happens when a participant returns to work and specifies that the participant does not become a new member of a group unless hired into an eligible job position and meeting the other VEBA requirements.

The Department proposes to amend one rule concerning elections. The proposal specifies that employees must specify contribution sources before a vote is conducted, and if a majority cannot agree on contribution sources, the group cannot form, or, if it involves an existing group, the existing group structure remains in place. The proposal clarifies who becomes a member of a

group after a vote is conducted and specifies when and how often elections must be held. The proposal specifies that the effective date of the vote is the first day of the pay period following the closing of the voting and voting must conclude no later than the day before the anniversary date of the group.

The Department proposes to amend one rule concerning participation, and it clarifies that a member becomes a "participant" when the member separates from service, submits an enrollment form, and the contracting employer makes a contribution to the participant's account. The proposal specifies that if a member dies as an active employee, the accrued leave benefits are paid as taxable income and the deceased member does not become a participant. The proposal specifies that an account closes when the balance is zero.

The Department proposes to amend one rule concerning contributions. The proposal strikes provisions relating to non-separation plan participants, provides that contributions may be allowed if permitted by statute and federal law, and clarifies that all members of a group must participate in any form of approved contributions.

The Department proposes to amend one rule concerning benefits in the event of death. The proposal specifies that if a VEBA participant dies, the participant's surviving spouse may file for qualified health care expenses incurred by the participant up until death, by the surviving spouse, and by other tax-qualified dependents. If there is no surviving spouse but there are tax-qualified dependents, then the dependents may file for their qualified health care expenses. If the last surviving tax-qualified dependent dies or loses tax-qualified status, the executor of the deceased participant's estate may file for qualified health care expenses incurred by the deceased participant or tax-qualified dependent up until the date of death or loss of tax-qualified status. If there are no qualified health care expenses to reimburse, the remaining account balance "must be allocated on a per capita basis to all participant accounts". If the participant's account is unclaimed for at least 35 months since the whereabouts of the person entitled to the account were last known to the administrator, then the participant's account becomes the property of the Montana VERA HRA and is allocated on a per capita basis to all participant accounts.

The proposal updates the rules throughout for consistency and clarity, including moving some provisions between rules for organizational reasons. The proposed changes delete superfluous provisions, update terminology, and correct implementing statute citations. Throughout, the proposal also reflects the change (discussed above) that the plan would be separation-only.

NOTES: A public hearing will be held on September 12, 2019, at 1:00 p.m. in Room 165, State Procurement Bureau Conference Room, Mitchell Building, 125 N. Roberts, Helena, Montana. The public comment period ends on September 20, 2019.

FULL TEXT OF NOTICE: The full text of the notice proposal and the amended proposal may be found online at http://www.mtrules.org/gateway/Cycle_Home.asp?CID=2945.

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