# **Pitfalls of Employer Deductible Reimbursement Plans**

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Every employer I've ever met would love to save a few bucks on their company's health insurance premium. Over the past 10 years, I have offered a number of suggestions as to how employers might be able to do just that. One approach I have never suggested (and that is being implemented by an ever-increasing number of employers) occurs when an employer transitions employees to a high deductible policy and then reimburses them a portion of the increased deductible. This article will explore a few of the reasons why this "high deductible reimbursement" approach is not a sound way to control increased health insurance costs and will examine a few of the potential legal pitfalls created by such an approach.

One fundamental reason against utilizing the deductible reimbursement approach to controlling increasing healthcare costs is that it is a very short-term solution to a long-term problem. If employees (*i.e.*, consumers) are continually insulated from increasing healthcare costs, their incentive to carefully manage utilization of the dollars contributed into the system is eroded. Over time, this increases utilization and costs.

Because we live in an employer-based healthcare system, it is imperative that employers do everything reasonably possible to ensure the ultimate consumer of the healthcare has a vested interest in the cost of the care. Otherwise, the consumer develops an "I don't care what it costs because I'm not paying for it" mentality. Obviously, this increases utilization and costs which are ultimately passed along to the employer.

A second reason against the deductible reimbursement method of controlling health insurance costs is because of the many legal traps and pitfalls that can befall the unwary employer who reimburses medical expenses but fails to comply with a litany of complex federal and state legislation and regulation. Even though inexperienced or unscrupulous insurance agents might counsel employers to implement these types of programs to save on their insurance premiums, rest assured it is the employer who is legally responsible to ensure compliance with the law and who will face the consequences of noncompliance.

Most employers don't realize that even simple deductible reimbursement fringe benefit plans constitute Health Reimbursement Arrangements ("HRAs") that must comply with applicable HRA laws. These laws include, but are not limited to, ERISA, COBRA and HIPAA. This article briefly focuses on a couple elements of each of these laws to highlight the importance of compliance, but I caution the reader that the points I address are far from exhaustive and I would encourage any employer offering a deductible reimbursement program to obtain appropriate legal advice from a competent legal professional.

The Employee Retirement Income Security Act ("ERISA") is a federal law that imposes one of the highest fiduciary standards known to law. The fiduciary obligations required by ERISA are extremely complex and onerous and failure to comply with those obligations can result in civil or criminal penalties. ERISA also requires that any employer who offers a welfare benefit plan must create and maintain a formal ERISA plan document, and must comply with other applicable federal reporting and disclosure regulations. ERISA applies to all employer-sponsored plans regardless of the employer's size or number of employees.

The Consolidated Omnibus Budget Reconciliation Act ("COBRA") is a federal law that applies to employers with 20 or more employees. It requires that health coverage be continued for qualified beneficiaries upon certain qualifying events (*e.g.*, death, divorce or termination of employment), and it requires that most deductible reimbursement programs allow COBRA-qualified beneficiaries to individually elect whether they wish to continue their participation. Yes, you read that correctly. For example, if an employer has adopted a program whereby the employer reimburses employees up to $1,000 per year for their out-of-pocket medical expenses, former employees and other qualified beneficiaries have an individual right to continue that benefit simply by paying 102% of the actuarially determined value of the benefit (*e.g.*, $400 per employee per year).

Most deductible reimbursement plans are considered "group health plans" under the Health Insurance Portability and Accountability Act ("HIPAA"). HIPAA is a very comprehensive federal law that applies to employers of all sizes and addresses many aspects of group health plans including the portability of healthcare coverage and non-discrimination amongst employees and plan participants. As a result, most deductible reimbursement plans will be subject to federal restrictions on preexisting condition limitations, special enrollment rights, nondiscrimination requirements and certificate of creditable coverage obligations. In fact, some deductible reimbursement plans might even be governed by HIPAA's administrative simplification rules relating to privacy, security and electronic data interchange.

After closer examination, it becomes more evident that even the most well-intentioned employee benefit programs can be fraught with unintended consequences. While deductible reimbursement programs may seem like a good idea at first blush, there are strong reasons to avoid them. Although they are appealing to employers as a premium saving device designed to minimize employee disruption or dissatisfaction, they are not very effective at controlling healthcare costs in the long run and they often saddle the employer with legal liability and regulatory requirements that far outweigh the minimal premium savings on the front-end.

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