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Final HRA Regulations Issued – Key Highlights

TIFFANY N. SANTOS

JULY, 2019

On June 13, 2019, the Departments of Labor, Health and Human Services and the Treasury (the "Departments") released final regulations that will permit employers and other plan sponsors to offer employees two new types of health reimbursement arrangements or "HRAs" (see here for "FAQs"): (1) an Individual Coverage HRA ("ICHRA") which can be offered in lieu of a group health plan and which can reimburse individual health insurance plan premiums; or (2) an "Excepted Benefit HRA" which can reimburse the cost of copays, deductibles or other expenses not covered by the primary group health plan (this can refer to the primary group health plan sponsored by the same employer or plan sponsor, or by another plan sponsor, such as a spouse's employer) and is available even if the employee does NOT enroll in the employer's traditional group health plan.

Date of Applicability

Issued in response to Executive Order 13813 which directed the Departments to expand access to HRAs, especially with respect to employees who work at small businesses, the regulations allow plan sponsors to offer these new HRAs as of the first plan year beginning on or after January 1, 2020. (Note: An HRA is a type of account-based health plan that is funded entirely by the employer,

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IN THIS ISSUE...

1 Final HRA Regulations Issued – Key Highlights

7 PBGC's Missing Participants Program for Defined Contribution Plans

9 Limited Expansion of the Determination Letter Program – Is Your Plan Eligible for Review?

11 Firm News

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Trucker ✦ Huss is pleased to announce...

Freeman L. Levinrad

ASSOCIATE

Freeman Levinrad will serve as President of the National Institute of Pension Administration (NIPA) San Francisco Chapter Board of Directors beginning July 1, 2019. Freeman has been an integral member of the Board for several years.

T. Katuri Kaye

DIRECTOR

Katuri Kaye has been appointed to the President's Advisory Committee on Women in the Legal Profession of the Los Angeles County Bar Association (LACBA) for the 2019–2020 term. LACBA's mission is to meet the professional needs of Los Angeles lawyers and advance the administration of justice, and the committee is dedicated to promoting women in the legal profession.

Kevin E. Nolt

DIRECTOR

Kevin E. Nolt has been selected as President-Elect of the Governing Board of Western Pension & Benefits (WP&BC), San Francisco Chapter, effective July 1, 2019.

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usually for the purpose of reimbursing medical expenses incurred by eligible employees and their dependents who are under age 26, from notional accounts established for each eligible participant.)

Individual Coverage HRA (ICHRA)

Until the issuance of the final regulations, an HRA could not be integrated with individual health insurance coverage. Under the new regulations (which go beyond the "QSEHRAs" that were provided for under the 21st Century Cures Act[1] for small employers), an employer, regardless of size, can now help employees pay for individual health insurance coverage that the employee obtains either through an Affordable Care Act–compliant State Exchange or outside the Exchange. To offer an ICHRA, the following requirements must be met:

- The ICHRA may NOT be available to any employee to whom the employer offers coverage under a traditional group health plan (may not offer employees a choice between an ICHRA or traditional group health plan coverage);
- ***No Maximum Annual Contribution:*** Unlike a QSEHRA, an employer may contribute any amount to an Individual Coverage HRA;
- ***Classes of Eligible Participants:*** If the ICHRA is offered to a class of employee, it must be offered on the same terms to all employees within the class (i.e., same amount and generally same terms and conditions).

  PERMISSIBLE CLASSES (classes may be determined at the common law employer level, rather than at the controlled group of employers level; if an employee moves from one class to another, unused amounts from the first ICHRA may be transferred to the second):

  - Full-time employees (use definition that applies for purposes of Section 105(h) of the Internal Revenue Code or Section 4980H of the Internal Revenue Code);
  - Part-time employees (use definition that applies for purposes of Section 105(h) of the Internal Revenue Code or Section 4980H of the Internal Revenue Code);
  - Seasonal employees (use definition that applies for purposes of Section 105(h) of the Internal Revenue Code or Section 4980H of the Internal Revenue Code);
  - Employees who are covered by a collective bargaining agreement in which the employer participates;
  - Employees who have not satisfied a waiting period (i.e., waiting period must comply with 90-day waiting period provision of the Affordable Care Act);
  - Employees who have not yet attained age 25 prior to the beginning of the plan year;
  - Non-resident aliens with no U.S.–based income;
  - Employees working in the same geographic location (generally, the same insurance rating area, state or multi-state region);
  - Salaried employees;
  - Non-salaried employees (e.g., hourly employees);
  - Temporary employees of staffing firms; or
  - Any group of employees that combines two or more of the above classes.

MINIMUM CLASS SIZE: If an employer offers both a traditional group health plan to some employees (e.g., full-time employees) and an ICHRA to other employees (e.g., part-time employees) or, generally, if any of the above classes are combined, the class of employees with the ICHRA must satisfy the following minimum class size:

- If the employer has 100 or more employees, the class must have at least 10 employees;
- If the employer has 100 to 200 employees, the class must comprise at least 10% of the total number of employees;
- If the employer has more than 200 employees, the class must have at least 20 employees.

HRA FOR NEW HIRES: An employer that offers a traditional group health plan to a class of employees may prospectively offer employees in that class who

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Super Lawyers Recognizes 19 Trucker ✦ Huss Attorneys in 2019

Super Lawyers 2019

Trucker Huss, APC is pleased to announce that seventeen Trucker Huss attorneys were included in the 2019 Super Lawyers magazine list for Northern California. Two of the firm's attorneys in Los Angeles were also named to the Southern California Super Lawyers list earlier this year.

Every year Super Lawyers identifies the top five percent of attorneys in each state or region, as chosen by their peers and through independent research, to receive this honor. In addition, each year no more than 2.5 percent of the lawyers in the state are selected by the research team at Super Lawyers to receive the honor of Rising Star. The objective of the Super Lawyers selection process is to create a credible, comprehensive and diverse listing of exceptional attorneys.

2019 Northern California Super Lawyers

- R. Bradford Huss
  Brad was also listed in 2019 "Northern California Top 100 Attorneys"
- Clarissa A. Kang
- Mary E. Powell
- Tiffany N. Santos
- Robert F. Schwartz
- Charles A. Storke
- Nicholas J. White
- J. Marc Fosse
- Angel L. Garrett
- Elizabeth Loh
- Kevin E. Nolt

2019 Northern California Rising Stars

- Robert R. Gower
- Sarah T. Kanter
- Freeman L. Levinrad
- Dylan D. Rudolph
- Adrine Adjemian
- Jahiz Noel Agard

2019 Southern California Super Lawyers

- Joseph C. Faucher (Super Lawyers)
- Brian D. Murray (Rising Stars)

are hired on or after a certain future date an ICHRA instead ("new hire subclass").

- ***Must Be Integrated with Individual Coverage or Medicare:*** All participants must have individual health insurance coverage (can be Exchange-coverage or coverage procured outside an Exchange or Medicare);

- Enrollment in such coverage must be verified on an annual basis (participant must substantiate that he or she will have individual health insurance coverage for the portion of the ICHRA plan year during which he or she is covered by the ICHRA; can be satisfied via a third party — e.g., copy of insurance card or an explanation of benefits, or by the participant's

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written attestation that he or she and any dependents are enrolled in individual health insurance coverage, the date coverage commenced and the name of the coverage — this may be included in a claim form);

NOTE: The open enrollment period for individual insurance coverage is generally the end of the calendar year; for coverage to commence as of January 1, 2020, the open enrollment period is from November 1, 2019 to December 15, 2019.

- May NOT be integrated with short-term limited duration insurance, health care sharing ministry, or group health plan coverage (includes Association Health Plans and MEWAs) or TRICARE.

- ***Opt-out:*** Must allow employees to opt out of the ICHRA on an annual basis so that the employee can claim the "premium tax credit" for Exchange coverage under Section 36B of the Internal Revenue Code if available;

- ***Pre-tax Contributions for Underlying Insurance:*** Note: While individual health insurance premiums for coverage obtained through an Exchange may not be paid with pre-tax dollars under Internal Revenue Code Section 125(f)(3), the regulations note that pre-tax contributions towards individual insurance purchased by an employee OUTSIDE an Exchange can be made through a cafeteria plan;

- ***Contribution Amount May Vary by Age or Family Size:*** An ICHRA may be designed so that the maximum reimbursement amount contributed by the employer increases with the size of employee's family or as the age of the employee increases [note: the maximum amount available to the oldest participant(s) may not be more than three times the maximum dollar amount available to the youngest participant(s)];

- ***Pro-rata Contribution for Employees Hired Mid-Year:*** An ICHRA can be designed to provide for a reasonable proration of the amount contributed for employees who are hired or who add a new dependent mid-year (alternatively, the full contribution for the plan year can be made on the employee's behalf);

- ***Permissible Reimbursements:*** An ICHRA can reimburse any Internal Revenue Code Section 213(d) medical expense that has not been otherwise reimbursed or submitted for reimbursement by another plan [such expense must be incurred while the individual was covered by the ICHRA (written attestation by the individual will be sufficient)];

  - Generally, the ICHRA will be designed to reimburse individual health insurance premiums and/or cost-sharing;

- ***Notice Requirement (model notice is available, see FAQs linked on page 1):*** Prior to the effective date of the ICHRA, an employer or other plan sponsor must provide a notice explaining the ICHRA, how it interacts with eligibility for the premium tax credit for Exchange coverage, the procedure for substantiating individual health insurance or Medicare, the right to opt-out on an annual basis, that the employer or other plan sponsor has no responsibility with respect to the individual health insurance — i.e., not subject to ERISA (assuming the employer does not "endorse" such coverage, the employee voluntarily enrolls in such coverage, and the employer does not receive any compensation with respect to the employee's selection or renewal of such individual coverage), the availability of a special enrollment period to enroll in individual health insurance coverage for those who gain access to an ICHRA mid-year and contact information;

- ***Must Comply with All Other Laws:*** An ICHRA must comply with all other applicable laws including, but not limited to, Medicare Secondary Payer Rules, ERISA, Internal Revenue Code, HIPAA and COBRA.

  NOTE: Guidance is expected with respect to whether ICHRA will permit an "applicable large employer" to comply with the "shared responsibility requirement" of Internal Revenue Code Section 4980H, but see outline of principles for compliance set forth in IRS Notice 2018-88.

Excepted Benefit HRA

Intended to expand the availability and use of HRAs and provide increased healthcare coverage options to

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employers and employees, an “Excepted Benefit HRA” can be offered by an employer or other plan sponsor in addition to a traditional group health plan. It may be an option for an employer that wishes to make a higher contribution than can otherwise be made on behalf of an employee under a health flexible spending account, and it allows for the rollover of unused funds from year to year. Under the new regulations, an Excepted Benefit HRA:

- May reimburse Internal Revenue Code Section 213(d) medical expenses, including
  - Limited excepted benefits, such as limited scope dental or vision expenses, benefits for long-term care, nursing home care, home healthcare, or community-based care; and
  - Medical care expenses, such as cost sharing for individual health insurance coverage or group health plan coverage;

  May NOT reimburse individual health insurance premiums or group health plan premiums, but may reimburse premiums for:
  — COBRA or other continuation coverage;
  — Coverage consisting solely of excepted benefits;
  — Short-term limited duration insurance;

  Note: Employers can continue to offer HRAs that reimburse ONLY excepted benefits. These HRAs are NOT “Excepted Benefit HRAs”.
- Maximum amount that can be contributed by an employer or other plan sponsor for a plan year is $1,800 (indexed for inflation beginning in 2021);
  - Unused amounts may be rolled over (carryover amounts are disregarded for purposes of determining the $1,800 limit);
- Must be offered in conjunction with a traditional group health plan;
  - But, employees are not required to enroll in employer’s traditional group health plan, to be covered by the employer’s Excepted Benefit HRA;
- Must be uniformly available to all similarly situated individuals in accordance with the non-discrimination requirements of HIPAA;

If you have any questions regarding this article, please contact its author.

[1] A “QSEHRA” is a qualified small employer health reimbursement arrangement that is available to employers that are not “applicable large employers” (i.e., generally, fewer than 50 full-time employees) and do not offer any group health plan to employees. It may reimburse health insurance premiums up to a certain maximum per year (for 2019, $5,150 for an employee-only QSEHRA and $10,450 for a QSEHRA that reimburses expenses of family members).

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PBGC's Missing Participants Program for Defined Contribution Plans

BARBARA PLETCHER

JULY, 2019

Did you know that the Pension Benefit Guaranty Corporation (PBGC) administers a missing participants program for defined contribution plans? We ask because PBGC has indicated, informally, that few defined contribution plans have taken advantage of this program.

Missing Participants Program

In the benefits community, it is well known that PBGC administers a termination insurance program applicable to most defined benefit pension plans, and that, upon termination, a defined benefit pension plan may be required to participate in PBGC's Missing Participants Program.

Less well known is that, if a defined contribution plan (DC Plan)[1] terminates on or after January 1, 2018, that plan voluntarily can participate in PBGC's Missing Participants Program. The goal of the program is to connect missing participants with their benefits. Although the program is referred to as the "Missing Participants Program," it applies also to missing beneficiaries and to "unresponsive" individuals whose address is known, but who, upon plan termination, fail to fill out necessary paperwork or to accept a lump sum payment.[2]

A terminating DC Plan can choose to participate in the Missing Participants Program as a "Transferring Plan" or as a "Notifying Plan." A Transferring Plan must transfer to PBGC the account balances of ***all*** Missing Participants. A Notifying Plan participates by sending information to PBGC about the financial institution or unclaimed property fund to which the Missing Participant's DC Plan account balance has been transferred. A Notifying Plan may choose to notify PBGC with respect to ***some or all*** Missing Participants.

Fees

1. ***Transferring Plans***. PBGC charges a one-time $35 administrative fee for each Missing Participant whose payment obligation of more than $250 is transferred to PBGC. PBGC does not charge a fee for transferred payment obligations of $250 or less.
2. ***Notifying Plans.*** Notifying Plans are not charged a fee.

Distributions

1. ***Distributions from DC Plan to PBGC.*** Amounts transferred to PBGC pursuant to the Missing Participants Program will not be treated as taxable distributions subject to withholding or reporting.
2. ***Distributions from PBGC to Missing Participants.*** When a Missing Participant is located, the PBGC will offer that Missing Participant a lump sum payout and, if the benefit is in excess of $5,000, the PBGC also will offer payment in the form of an annuity.[3] Tax-free rollovers (e.g., into a qualified retirement plan or IRA) also are available.

Timing

The latest date for submitting a Missing Participants filing to PBGC (and for payment of any monies owed to PBGC) is 90 days after the later of (i) the date all distributions have been made to individuals who are not Missing Participants, or (ii) one year after the plan termination date.

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Within nine months before submitting a Missing Participants filing to PBGC, a DC Plan must conduct a diligent search for Missing Participants. For this purpose, a diligent search is one that satisfies regulations and other applicable guidance issued by the U.S. Department of Labor.

Flexibility

The Preamble to the Missing Participants regulation explains that, because "it is impossible to anticipate and appropriately provide for every state of events" the PBGC is authorized "to grant waivers, extend deadlines, and in general adapt to unforeseen circumstances, with the proviso that similar treatment be given to similar situations."

Advantages

Fiduciaries of terminating DC Plans may determine that it is in the best interest of DC Plan participants for the DC Plan to participate in PBGC's Missing Participants Program. Advantages of participation include the following:

1. ***Notifying Plan.*** Without paying a fee, a terminating DC Plan can add a Missing Participant's name to the PBGC database, making it more likely that the Missing Participant will be reunited with his or her DC Plan benefits.
2. ***Transferring Plan***. DC Plan benefits transferred to PBGC are not subject to ongoing administrative fees.[4]
3. ***Search.*** PBGC will conduct periodic searches for Missing Participants.

For more information about PBGC's Missing Participants Program for terminating DC Plans, you can contact PBGC by phone at (800) 453-9584 or by email at: MissingParticipants@pbgc.gov. You can also contact one of our benefits attorneys.

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[1] In this article, the term "DC Plan" refers to 401(k) plans, profit sharing plans, money purchase plans, target benefit plans, employee stock ownership plans, stock bonus plans, and 403(b)(7) plans subject to Title 1 of ERISA. Examples of plans not included in this definition because they are not covered by PBGC's Missing Participants Program are governmental plans, church plans, and plans that cannot pay benefits to PBGC in cash. See, 29 CFR 4050.201 of PBGC's Missing Participants regulation for more information.

[2] In this article, we use the term "Missing Participant" to refer to missing participants, to missing beneficiaries and to "unresponsive" individuals as described above.

[3] Annuities are offered regardless of whether the terminated DC Plan contained an annuity distribution option.

[4] If the Missing Participant's benefit is paid as a lump sum, it will be credited with interest at the Federal mid-term rate. If the Missing Participant's benefit is paid as an annuity, it will be converted using assumptions under Internal Revenue Code Section 417(e)(3).

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Limited Expansion of the Determination Letter Program – Is Your Plan Eligible for Review?

ADRINE ADJEMIAN

JULY, 2019

On May 1, 2019, the Internal Revenue Service (IRS) issued good news in the form of Revenue Procedure 2019-20, which announced a limited expansion of the determination letter program for individually designed hybrid and merged plans. The IRS will begin accepting determination letter applications for these plans effective September 1, 2019, subject to the conditions described below.

Background

Effective as of January 1, 2017, the IRS scaled back its determination letter program and permitted plan sponsors of individually designed plans to submit a determination letter application only for a ruling on initial plan qualification and for qualification upon plan termination. However, the IRS reserved the right to open limited review periods in other specified circumstances, at its discretion. In 2018, the Treasury Department and the IRS requested comments on whether the determination letter program should be expanded. In response to receiving numerous comments, the determination letter program is being expanded, as summarized below.

Statutory Hybrid Plans — One-Year Review Period

Plan sponsors may submit determination letter applications for individually designed statutory hybrid plans, such as cash balance pension plans and pension equity plans, for the 12-month period beginning September 1, 2019, and ending August 31, 2020. The IRS will review individually designed statutory hybrid plans for compliance with the 2017 Required Amendments List and all Required Amendments and Cumulative lists issued prior to 2016.

Merged Plans

In addition, beginning on September 1, 2019, the IRS will accept determination letter applications for certain individually designed "merged plans" on an ongoing basis. In this regard, the IRS defines a merged plan as a plan that results from the merger or consolidation of two or more plans maintained by previously unrelated entities into a single individually designed plan in connection with a corporate merger, acquisition, or other similar business transaction among unrelated entities.

The IRS will accept a determination letter application for merged plans, provided the following two requirements are satisfied:

1) The date on which the plan merger occurs must not be later than the last day of the first plan year that begins after the plan year which includes the effective date of the transaction that resulted in the merger; and

2) The application for the determination letter must be submitted within a period beginning on the date of the plan merger and ending on the last day of the first plan year of the merged plan that begins after the date of the plan merger.

By way of example: Company A and Company B enter into a merger agreement with a merger effective date of July 1, 2018. Company A maintains the Company A 401(k) Plan, and Company B maintains the Company B 401(k) Plan. Company A and Company B decide to merge the

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Company A 401(k) Plan into the Company B 401(k) Plan effective September 1, 2019. The Company B 401(k) Plan is an individually designed plan and uses a calendar year plan year. The last day of the Company B 401(k) Plan's first plan year after the corporate merger is December 31, 2019. Because the plan merger occurs before December 31, 2019, Company B may submit a determination letter application on behalf of the merged plan by December 31, 2020.

Limited Extension of Remedial Amendment Period

The IRS is also extending any remedial amendment period still open on the date a plan sponsor becomes eligible to submit a determination letter application until the last day the sponsor may submit a determination letter application under the new guidance. Treasury Regulation § 1.401(b)-1(e)(3), which provides that the submission for a determination letter application extends the remedial amendment period until 91 days after the IRS issues a determination letter, will continue to be applicable.

Sanction Relief

Finally, the IRS is offering sanction relief to certain plan document failures discovered during the review of a plan submitted for a determination letter pursuant to the new revenue procedure.

For statutory hybrid plans, the IRS will not impose a sanction for plan provisions that fail to comply with the final hybrid plan regulations in Treas. Reg. §§ 1.411(a)(13)-1 and 1.411(b)(5)-1. For merged plans, the IRS will not impose a sanction for any plan document failure with respect to a plan provision included to effectuate the plan merger.

Plan document failures which are unrelated to the final hybrid plan regulations, or to a plan provision included to effectuate a plan merger, may be eligible for a reduced sanction equal to the applicable Employee Plans Compliance Resolution System (EPCRS) Voluntary Correction Program (VCP) user fee the sponsor would pay to correct such failure, provided that:

- The plan sponsor timely and in good faith adopted the amendment that creates the failure and had the intent of maintaining the qualified status of the plan; or
- Where an amendment was required because of a change in qualification requirements, the plan sponsor reasonably and in good faith determined that the amendment was not required because the change did not impact provisions of the plan document.

If the conditions for the special sanction structure are not satisfied, then the general sanction structure under EPCRS will apply for plan document failures discovered by the IRS during the determination letter process equal to 150% to 250% of the applicable VCP user fee, depending on the duration of the failure.

Conclusion

Obtaining a new determination letter provides important protection in the event of an IRS examination of the plan. For this reason, we recommend that plan sponsors of statutory hybrid plans consider submitting a determination letter application during the limited window beginning September 1, 2019 and ending August 31, 2020. In addition, plan sponsors involved in a corporate transaction should consult with their benefits counsel to determine whether they have the opportunity to request a determination letter on behalf of a merged plan.

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FIRM NEWS

On June 4, **Craig P. Hoffman** presented a Washington Update session to the ASPPA Benefits Council of New England.

On June 12, **Clarissa A. Kang** was quoted in a Law360 article entitled, "High Court May Deal A Blow To ERISA Class Actions." Clarissa provided her insights on a case regarding ERISA's statute of limitations for breach of fiduciary duty claims — *Sulyma v. Intel Corporation Investment Policy Committee* — which is now on appeal to the U.S. Supreme Court.

On June 20, **Craig Hoffman** was quoted in an article appearing in Law360 entitled "Stretch IRA Limits May Put Damper on Small Biz Plans," saying that small companies with less robust accounting departments might be disproportionately affected by late filing penalties than bigger firms.

On June 20, **Tiffany N. Santos** was a panelist on a Strafford webinar entitled, *ERISA Retirement Plans: Mitigating Liability Risks for Hedge and Private Equity Fund Alternative Investments.*

On June 21, **Brad Huss** was quoted in an article appearing in Law360 entitled "5 ERISA Cases to Watch in the Second Half of 2019," addressing the statute of limitations for workers to sue over retirement plan mismanagement. Brad also commented on a class-action burden-of-proof question which could potentially discourage companies from establishing benefit plans.

On July 9, **Tiffany N. Santos** was a panelist on a webinar hosted by the American Bar Association (ABA) Joint Committee on Employee Benefits (JCEB) entitled, *A First Look at the New (Final!) HRA Regulations*.

On July 9, **T. Katuri Kaye** was a panelist on a Strafford webinar entitled, *Self-Correcting Qualified Retirement and 403(b) Plan Mistakes*.

On August 27, **J. Marc Fosse** will be presenting a Lorman Education Services webinar entitled, *Share-Based Compensation — Impact of Recent Events on the Use of Equity Compensation*.

On October 16 at 6 p.m., **Mary E. Powell** will be a speaker at the Commonwealth Club in San Francisco in a program entitled, *The Secret Behind High Drug Costs.* Find out how pharmacy benefit managers (PBMs) control the amount paid for prescription drugs, why discounts don't get to the patient and what actions we can take to reduce prescription drug costs. Tickets can be purchased here.

On July 14, Members of **Team Trucker ✦ Huss** participated in AIDS Walk San Francisco 2019 and helped raise funds to fight the spread of AIDS in the Bay Area.

The Trucker ✦ Huss *Benefits Report* is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (www.truckerhuss.com).

Editor: Shannon Oliver, soliver@truckerhuss.com

In response to new IRS rules of practice, we inform you that any federal tax information contained in this writing cannot be used for the purpose of avoiding tax-related penalties or promoting, marketing or recommending to another party any tax-related matters in this *Benefits Report*.

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