

Associated General Contractors of ND Employees'
Health Reimbursement Arrangement
PO Box 1951
Fargo ND 58107

Via Email (healthinsurance@hhs.gov)

November 29, 2010

Department of Health and Human Services
Office of Consumer Information and Insurance Oversight
Office of Oversight
Room 737-F-04
200 Independence Avenue S.W.
Washington, DC 20201

Attn: James Mayhew

Re: Waiver Request for the Associated General Contractors of ND Employees'
Health Reimbursement Arrangement

Dear Mr. Mayhew:

The Board of Trustees of the Associated General Contractors of North Dakota Welfare Benefits Trust¹, on behalf of the of the above-named group health plan (the "Plan"), hereby applies for a waiver from the restricted annual limits set forth in the interim final regulations issued at 26 CFR § 54.9815-2719T; 29 CFR § 2590.715-2719; and 45 CFR § 147.126 (the "Regulations"). In accordance with OCIO Sub-Regulatory Guidance 2010-1, the following information is submitted in support of this waiver request.

¹ The Plan is a multiple employer plan and is funded through this trust. The Board of Trustees of the trust is the Plan Administrator of the Plan.

Terms of Plan

The Associated General Contractors of ND Employees' Health Reimbursement Arrangement consists to two benefit components. One component of the Plan provides major medical coverage. The other component of the Plan constitutes a health reimbursement arrangement established pursuant to IRS Notice 2002-45 and IRS Revenue Ruling 2002-24 (the "HRA"). For purposes of ERISA, both benefits constitute a single group health plan. This request for a waiver applies only with respect to the HRA.

As with all health reimbursement arrangements, the HRA is an account-based, defined contribution group health plan, pursuant to which a participant's benefit is determined based upon the amount of contributions made to the Plan on his or her behalf. In accordance with Notice 2002-45, the HRA is funded solely through employer contributions and the carryover of account balances from plan year to plan year.

For some participants, the HRA reimburses only the premiums payable by the participants under the Plan's major medical coverage. For other participants, the HRA reimburses expenses for medical care, as defined in Section 213(d) of the Internal Revenue Code (the "Code"), for which the participant has not received reimbursement from any other source. The HRA provides "essential health benefits" because reimbursement is available for expenses falling within the categories identified in the statute.

Employees of a participating employer whose employment is subject to the fringe benefit requirements of the Davis Bacon Act are eligible to participate in the HRA. After they cease to be eligible for contributions to the HRA (e.g., upon termination of employment), participants have the ability to spend down the balance of their HRA accounts.

The HRA is not an excepted benefit pursuant to Section 2791 of the PHSA, Section 732 of ERISA, or Section 9831 of the Code. In addition, the HRA does not appear to qualify as a health flexible spending account under Section 106 of the Code. Because of the HRA design (e.g., carryover of unused annual

contributions), the maximum reimbursement available under the HRA (measured by account balances) can exceed (b)(4) of the value of the coverage.

The HRA also does not appear to be an "integrated" HRA, as described in the preamble to the Regulations. Although the HRA is "part of" a group health plan that includes a benefit that is subject to the restricted annual limits, it does not appear to be "integrated" with that other coverage. The HRA covers employees who are not covered by the medical coverage (e.g., employees who have waived the medical coverage). In addition, the HRA reimburses expenses that are not covered by the medical coverage (e.g., any 213(d) expense for participants not enrolled in the medical coverage).

Number of Individuals Covered by Plan

The HRA covers [redacted] employees currently employed by the employers participating in the HRA and (b)(4) former employees.

Annual Limits and Rates Applicable to Plan

Under the terms of the HRA, the maximum benefit a participant may receive at any time is limited to the balance of the participant's account. Accordingly, the maximum benefit a participant may receive during a particular plan year is equal to (1) the participant's account balance as of the first day of the plan year, plus (2) the additional contributions made to the account during the plan year. This maximum benefit amount, which varies from participant to participant, may be considered to be an annual limit.

As described above, the HRA is a health reimbursement arrangement. It is funded solely by the employers sponsoring the HRA. Consequently, there are no "rates" applicable to the HRA.

Reason Compliance with Restricted Annual Limits Would Cause Significant Decrease in Access to Benefits

The application of the restricted annual limits to the HRA is inherently at odds with the fundamental nature of a health reimbursement arrangement. A health

reimbursement arrangement is a defined contribution plan, pursuant to which the amount of benefits to which a participant is entitled is always limited to the amount of contributions that have been made to the plan on the participant's behalf. As a result, the HRA cannot remain a health reimbursement arrangement and comply with the restricted annual limits imposed by the Regulations.

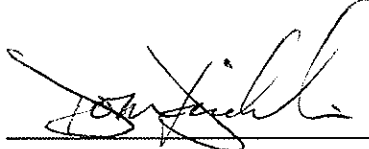
If this request for a waiver is not granted, the choices facing the Board of Trustees will result in decreased access to benefits. Because it cannot comply with the annual limit restrictions, the HRA will either: (1) need to be terminated, (2) need to be amended to make it an integrated HRA.²

In either case, a significant decrease in access to benefits will occur. For participants enrolled in the major medical coverage, in many cases the contributions made to the HRA for these employees exceed the cost of medical coverage. Upon termination of employment, these participants are able to use their HRA balance to pay for post-employment expenses. If the HRA is terminated, these participants will lose the funds they could have otherwise used to pay for post-employment expenses, such as COBRA premiums. If the HRA is amended, former employees who do not elect COBRA coverage under the medical plan will lose the ability to use their HRA balance for other post-employment medical expenses. In either case, the benefits available to these individuals will decrease significantly.

Participants who waive major medical coverage will assume full responsibility for expenses previously reimbursable under the HRA, whether the HRA is terminated or amended. Such participants will be required to pay out-of-pocket medical expenses that currently are reimbursed by the HRA with their own funds. The loss of the HRA funds will be a significant decrease in benefits for these participants.

² The preamble to the regulations do not define an integrated HRA, so it is not clear what amendments would be needed to the HRA to make it integrated with the major medical coverage. We assume the HRA would at least need to be amended to cover only individuals enrolled in the major medical coverage and might also need to be amended to reimburse only expenses that are covered under the major medical plan.

I hereby certify that (1) the HRA was in force prior to September 23, 2010; and (2) the application of the restricted annual limits to the HRA would result in a significant decrease in the access to benefits for those currently covered by the HRA.

By: 

Trustee, Associated General Contractors
of North Dakota Welfare Benefits Trust
DONN DIEDERICH
CHAIRMAN

From: Andrews, Jane (HHS/OCIO)

Sent: Thursday, December 09, 2010 9:30 AM

To: 'scott@hitesmanlaw.com'

Cc: Habit, Sandra (HHS/OCIO)

Subject: Your application for an annual limits waiver for your HRA

Mr. Wold – Can you please provide me with the amount of the HRA that is provided to enrollees? Also, are the total number who receive the HRA (b)(4)? What is your effective date?

Thanks.

From: Scott Wold [scott@hitesmanlaw.com]

Sent: Monday, November 29, 2010 11:31 AM

To: HHS HealthInsurance (HHS)

Cc: Donn Diederich; Angel Vedder

Subject: Waiver

Attachments: HRA waiver application signed.pdf

Mr. James Mayhew:

We represent the Associated General Contractors of ND Employees' Health Reimbursement Arrangement (the "Plan"). On behalf of the Plan, we are submitting the attached request for a waiver from the annual limit restrictions. The application has been executed by the Plan Administrator of the Plan.

In responding to this request, you may communicate directly with the Plan at the address provided in the request or you may communicate with me using this email address or the mailing address provided below.

Thank you for your attention to this matter.

Scott A. Wold, Esq.

Hitesman & Associates, P.A.

12900 – 63rd Avenue North

Maple Grove, MN 55369

P: 763-503-6620 | F: 763-503-6619

W: www.HitesmanLaw.com

Jane W. Andrews

OCIO

7501 Wisconsin Ave

Bethesda, MD 20814

301-492-4122 (desk)

202-536-6779 (Blackberry)

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Unauthorized disclosure may result in prosecution to the full extent of the law.

From: Andrews, Jane (HHS/OCIIO)
Sent: Friday, December 10, 2010 4:48 PM
To: 'Scott Wold'
Cc: Habit, Sandra (HHS/OCIIO)

Subject: RE: Your application for an annual limits waiver for your HRA

The original effective date is May, 2003, but is May, 2011 the effective date for the HRA for which you are seeking a waiver?

Thanks again.

Jane W. Andrews
OCIIO
7501 Wisconsin Ave
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301-492-4122 (desk)
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From: Scott Wold [mailto:scott@hitesmanlaw.com]
Sent: Friday, December 10, 2010 2:09 PM
To: Andrews, Jane (HHS/OCIIO)
Cc: Habit, Sandra (HHS/OCIIO)
Subject: RE: Your application for an annual limits waiver for your HRA

Ms. Andrews:

I have the following responses to your questions:

- 1) The amount of the HRA benefit for a participant is based upon the amount of contributions made to the HRA; the HRA is a defined contribution health plan. The amount of contributions varies on a participant by participant basis. The employees who are eligible to participate in the plan work in positions that are subject to the Davis Bacon Act. The Davis Bacon Act requires employers to provide certain levels of fringe benefits. The amount of required fringe benefits is expressed in terms of an hourly rate. In this case, the employers participating in the plan (this is a multiple employer plan) satisfy their obligations to provide Davis Bacon fringe benefits in part by making contributions to the HRA. Other fringe benefits provided by the employers (outside of the HRA) include pension contributions and group term life insurance coverage.

Depending on the employer, the contribution rate to the HRA is either (b)(4) per hour. Accordingly, the monthly contribution for any one participant will depend on the contribution rate established by his/her employer and the number of hours worked during the month. In addition, there are other rules regarding the funding of the cost of the life insurance coverage and the maximum HRA balance that may be accumulated before the Davis Bacon fringe benefit payments are allocated to pension benefits that impact the amount of the contribution made on behalf of a particular participant.

To give you an idea of the amount of contributions made to the HRA, from January, 2010, through November, 2010, the average contribution to the HRA has been (b)(4) per employee per month. Note, the HRA participants work in the construction industry, mostly in North Dakota, and often are laid off or have reduced hours during the winter. Therefore, the amount of monthly contributions often varies based upon the time of the year.

AGC ND:000007

- 2) The total number of current participants in the HRA is [REDACTED]. This number includes active employees who are receiving contributions to their HRA accounts (as well as benefit reimbursements) and former employees who are not receiving additional contributions, but are continuing to receive benefit reimbursements. The number **does not** include spouses and dependents who are “covered” under the HRA (medical expenses incurred by a participant’s spouse and dependents can be reimbursed under the HRA). Because spouses and dependents are not required to enroll, the plan administrator does not track the number of spouses and dependents covered.
- 3) The original effective date of the HRA was May 1, 2003.

Please let me know if you any additional questions.

Scott A. Wold, Esq.
Hitesman & Associates, P.A.
12900 – 63rd Avenue North
Maple Grove, MN 55369
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Thank you in advance for your cooperation.

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<http://www.HitesmanLaw.com>

From: Andrews, Jane (HHS/OCIIO) [mailto:Jane.Andrews@hhs.gov]
Sent: Thursday, December 09, 2010 8:30 AM
To: Scott Wold
Cc: Habit, Sandra (HHS/OCIIO)
Subject: Your application for an annual limits waiver for your HRA

Mr. Wold – Can [REDACTED] please provide me with the amount of the HRA that is provided to enrollees? Also, are the total number who receive the HRA [REDACTED]? What is your effective date?

Thanks.

From: Scott Wold [scott@hitesmanlaw.com]
Sent: Monday, November 29, 2010 11:31 AM
To: HHS HealthInsurance (HHS)
Cc: Donn Diederich; Angel Vedder
Subject: Waiver

Attachments: HRA waiver application signed.pdf
Mr. James Mayhew:

AGC ND:000008

We represent the Associated General Contractors of ND Employees' Health Reimbursement Arrangement (the "Plan"). On behalf of the Plan, we are submitting the attached request for a waiver from the annual limit restrictions. The application has been executed by the Plan Administrator of the Plan.

In responding to this request, you may communicate directly with the Plan at the address provided in the request or you may communicate with me using this email address or the mailing address provided below.

Thank you for your attention to this matter.

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From: Scott Wold [scott@hitesmanlaw.com]
Sent: Friday, December 10, 2010 5:23 PM
To: Andrews, Jane (HHS/OCIIO)
Cc: Habit, Sandra (HHS/OCIIO)
Subject: RE: Your application for an annual limits waiver for your HRA
Ms. Andrews:

The HRA has a plan year running from January 1 through December 31. We are seeking a waiver for the plan year beginning January 1, 2011.

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Sent: Friday, December 10, 2010 2:09 PM
To: Andrews, Jane (HHS/OCIIO)
Cc: Habit, Sandra (HHS/OCIIO)
Subject: RE: Your application for an annual limits waiver for your HRA

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Please let me know if you any additional questions.

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Subject: Your application for an annual limits waiver for your HRA

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Cc: Donn Diederich; Angel Vedder
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AGC ND:000012

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AGC ND:000015

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From: Botwinick, Alexandra (HHS/OCIIO)

Sent: Wednesday, December 29, 2010 4:18 PM

To: scott@hitesmanlaw.com

Subject: Associated General Contractors of ND Employees Waiver of the Annual Limits Requirements 12-29-2010

Importance: High

Follow Up Flag: Follow up

Flag Status: Green

Attachments: Updated Jan 1 Approval Letter .pdf

Good Afternoon,

Thank you for submitting an application for a Waiver of the Annual Limits Requirements of the PHS Act Section 2711 for Associated General Contractors of ND Employees. HHS has reviewed your application and made its determination. Please see the attached letter.

Please confirm receipt of this letter by replying to this e-mail.

Please let me know if I can be of further assistance.

Sincerely,

Alexandra Botwinick

Office of Oversight

HHS/OCIIO

alexandra.botwinick@hhs.gov

From: Scott Wold [scott@hitesmanlaw.com]
Sent: Wednesday, December 29, 2010 4:16 PM
To: Botwinick, Alexandra (HHS/OCIIO)
Subject: RE: Associated General Contractors of ND Employees Waiver of the Annual Limits Requirements 12-29-2010

Follow Up Flag: Follow up
Flag Status: Red

Receipt of the letter is confirmed. Thank you for your consideration of the application.

Scott A. Wold, Esq.
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Thank you in advance for your cooperation.

Hitesman & Associates, PA
<http://www.HitesmanLaw.com>

From: Botwinick, Alexandra (HHS/OCIIO) [mailto:Alexandra.Botwinick@hhs.gov]
Sent: Wednesday, December 29, 2010 3:18 PM
To: Scott Wold
Subject: Associated General Contractors of ND Employees Waiver of the Annual Limits Requirements 12-29-2010
Importance: High

Good Afternoon,

Thank you for submitting an application for a Waiver of the Annual Limits Requirements of the PHS Act Section 2711 for Associated General Contractors of ND Employees. HHS has reviewed your application and made its determination. Please see the attached letter.

Please confirm receipt of this letter by replying to this e-mail.

Please let me know if I can be of further assistance.

Sincerely,

AGC ND:000018

Alexandra Botwinick

Office of Oversight

HHS/OCIO

alexandra.botwinick@hhs.gov

From: Scott Wold [scott@hitesmanlaw.com]
Sent: Monday, November 29, 2010 11:31 AM
To: HHS HealthInsurance (HHS)
Cc: Donn Diederich; Angel Vedder
Subject: Waiver

Attachments: HRA waiver application signed.pdf
Mr. James Mayhew:

We represent the Associated General Contractors of ND Employees' Health Reimbursement Arrangement (the "Plan"). On behalf of the Plan, we are submitting the attached request for a waiver from the annual limit restrictions. The application has been executed by the Plan Administrator of the Plan.

In responding to this request, you may communicate directly with the Plan at the address provided in the request or you may communicate with me using this email address or the mailing address provided below.

Thank you for your attention to this matter.

Scott A. Wold, Esq.
Hitesman & Associates, P.A.
12900 – 63rd Avenue North
Maple Grove, MN 55369
P: 763-503-6620 | F: 763-503-6619
W: www.HitesmanLaw.com

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DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Consumer Information and
Insurance Oversight
Washington, DC 20201

Date: October 2010

From: Steve Larsen, Director, Office of Oversight 

Subject: Application for Waiver of the Annual Limits Requirements of PHS Act Section 2711

Dear Waiver Applicant:

Section 2711(a)(2) of the Public Health Service Act (PHS Act), as added by the Patient Protection and Affordable Care Act (Affordable Care Act), requires the Secretary to impose restrictions on the imposition of annual limits on the dollar value of essential health benefits (as defined in section 1302(b) of the Affordable Care Act) for any participant or beneficiary in a new or existing group health plan or a new policy in the individual market for plan or policy years beginning on or after September 23, 2010 and prior to January 1, 2014. Specifically, the Secretary is granted the authority to determine what constitutes a "restricted annual limit" that can still be imposed under such plans or policies prior to January 1, 2014.

The interim final regulations published on June 28, 2010 (codified at 26 CFR § 54.9815-2719T; 29 CFR § 2590.715-2719; and 45 CFR § 147.126) established such restricted annual limits. The regulations also provided that these restricted annual limits may be waived by the Secretary of Health and Human Services (HHS) if compliance with the interim final regulations would result in a significant decrease in access to benefits or a significant increase in premiums. Pursuant to the regulation, HHS issued guidance on September 3 regarding the scope and process for applying for a waiver.

The Office of Consumer Information and Insurance Oversight, Office of Insurance Oversight received and processed your application for the plan(s) or policy(ies) year beginning January 1, 2011. We have determined that your application has met the criteria to obtain a waiver of the restricted annual limits requirements because compliance with the interim final regulations would result in a significant decrease in access to benefits for those currently covered by such plans or policies, or a significant increase in premiums paid by those covered by such plans or policies. To the extent you make any change to your benefit package after March 23, 2010, you must determine whether the change(s) will trigger loss of grandfathering status pursuant to 45 CFR § 147.140(g)(1).

An approval of your request for waiver of the restricted annual limits requirements granted under this process applies only to the annual limit(s) provided in your application for the plan or policy year beginning between September 23, 2010 and September 23, 2011. This waiver only applies to the annual limits requirements in Section 2711 of the ACA and does not apply to any other requirement of the Affordable Care Act, ERISA, the IRS Code or the PHS Act. Further, a group

health plan or health insurance issuer must reapply for any subsequent plan or policy year prior to January 1, 2014 when this waiver expires in accordance with future guidance from HHS. HHS may modify this waiver approval process memorandum and other relevant information.

If you have any questions regarding this letter, please email OCIIOOversight@hhs.gov.