



Legal Alert: IRS Clarifies Reimbursements for Breastfeeding Supplies

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Without detailed explanation, the Internal Revenue Service issued Announcement 2011-14, holding that breast pumps and other equipment and supplies that assist lactation constitute medical care under § 213(d) of the Internal Revenue Code. This means that the cost of such supplies can qualify as a medical expense deduction (subject to the other conditions of deductibility), and can be reimbursed under Flexible Spending Accounts, as well as under Health Reimbursement Arrangements, Health Savings Accounts, and Archer Medical Savings Accounts. In 2009, the IRS, in a general information letter, had expressed the opinion that breast pumps and related equipment may be beneficial to general health, but do not mitigate or treat a disease and so do not qualify as "medical care," and are not reimbursable under a flexible spending arrangement. (The letter responded to an inquiry regarding FSA reimbursements.) The letter concluded that "[i]t is not within the power of the Internal Revenue Service to classify breastfeeding equipment as medical care in contravention of current law." There are two additional factors, however, that were not mentioned in the letter. First, breast pumps and similar items can be, and sometimes are, used to treat specific medical conditions (such as an abscess), which would constitute medical care, even under the standard referenced in the information letter. Such "dual purpose" items have long been treated as reimbursable if and to the extent that they are used for the purpose that constitutes medical care, as supported by a practitioner's diagnosis or prescription. Second, and more significantly, however, there is a further definition of "medical care," which was not addressed in the letter. That is, medical care expenses include amounts paid "for the purpose of affecting any structure or function of the body." This is the basis on which the Announcement treats lactation-assisting devices as constituting "medical care," stating that "breast pumps and supplies that assist lactation are medical care under § 213(d) of the Internal Revenue Code because, like obstetric care, they are for the purpose of affecting a structure or function of the body of the lactating woman." This was equally true in 2009, but for some reason was not even addressed in the information letter.

The Announcement also notes that the IRS is going to revise its Publication 502, *Medical and Dental Expenses*, to reflect this conclusion, perhaps by adding the items to the Publication's list of allowable medical expenses.

Bottom Line for Employers: The IRS Announcement does not set forth a new conclusion on whether the cost of breastfeeding devices qualifies for deduction or reimbursement through health reimbursement accounts. At

best, it clears up some confusion created by the 2009 general information letter. Nonetheless, the Announcement is consistent with a growing sensitivity in the social and regulatory climate on family responsibility issues. For example, the Patient Protection and Affordable Care Act (health care reform), requires employers to provide break time for nursing mothers to express breast milk as of March 23, 2010. See "DOL Publishes Fact Sheet on Requirement of Break Time to Express Breast Milk," in the September 2010 issue of *Management Update*, <http://www.fordharrison.com/shownewsletter.aspx?Show=6655>. While the break is not required to be a paid break, if the employer provides paid breaks, it must similarly provide the nursing mother break as a paid break.

Additionally, the EEOC has issued guidance in recent years on family responsibility discrimination and although family responsibility is not a specific protected category under federal law, we have seen growing claims based on family responsibility discrimination or stereotyping under gender and disability discrimination theories. In light of the IRS Announcement, employers should review (and discuss with their administrator) the treatment of breastfeeding devices under their employer-sponsored health reimbursement accounts. Employers may also wish to more broadly review all policies and procedures with a consideration of family responsibility issues and incorporate the topic in supervisory discrimination and harassment training programs.

If you have any questions about the Announcement or any other matter discussed above, please contact one of the members of the Employee Benefits Group or the authors of this Legal Alert, Jeffrey Ashendorf, jashendorf@fordharrison.com or Penny Wofford, pwofford@fordharrison.com.