

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM) NOTICE OF AMENDMENT
2.21.1931, 2.21.1932, 2.21.1933,)
2.21.1934, 2.21.1937, 2.21.1938,)
2.21.1939, 2.21.1940, and 2.21.1941)
pertaining to the Voluntary Employees')
Beneficiary Association (VEBA))

TO: All Concerned Persons

1. On August 23, 2019, the Department of Administration published MAR Notice No. 2-21-584 regarding a public hearing on the proposed amendment of the above-stated rules at page 1195 of the 2019 Montana Administrative Register, Issue No. 16. The public hearing was held September 12, 2019.

2. The department has amended ARM 2.21.1931, 2.21.1933, 2.21.1934, 2.21.1937, 2.21.1939, 2.21.1940, and 2.21.1941, as proposed.

3. The department has amended ARM 2.21.1932 and 2.21.1938 as proposed, but with the following changes, stricken matter interlined, new matter underlined:

2.21.1932 DEFINITIONS In addition to the definitions found in 2-18-1303, MCA, the following definitions apply to this subchapter:

(1) "Dependent" means the tax-qualified dependent of the participant as determined under section 105(b) of the Internal Revenue Code, 26 USC 105(b), ~~as amended~~. A tax-qualified dependent includes the participant's spouse recognized under the laws of the state in which the marriage was first established, and any child who has not, as of the end of the taxable year, attained age 27.

(2) through (7) remain as proposed.

(8) "Qualified health care expenses" means expenses for a participant or the participant's dependent for medical care, as defined by section 213(d) of the Internal Revenue Code, 26 USC 213(d), ~~as amended~~. Examples of qualified health care expenses are prescription drug costs, hospital and physician charges, and health insurance premiums.

(9) remains as proposed.

AUTH: 2-18-1305, MCA

IMP: 2-18-1303, MCA

2.21.1938 ELECTIONS (1) through (5) remain as proposed.

(6) If at least 25% of the members of the group request an annual election, members of a group may ~~shall~~ hold a vote to:

(a) continue as an active group with the same contribution sources;

(b) continue as an active group with different contribution sources; or

- (c) disband the group.
- (7) through (9) remain as proposed.

(10) If no group members or less than 25% ~~an insufficient number~~ of group members request an annual election by the end of the 30-day notice period immediately prior to the anniversary date of the group, the group's existing structure and contribution sources continue without modification for 12 months.

AUTH: 2-18-1305, MCA
IMP: 2-18-1310, MCA

4. The department has thoroughly considered the comments and testimony received. The department thanks those individuals who provided comments and testimony. A summary of the comments received and the department's responses are as follows:

COMMENT #1: A commenter suggested removing the qualifier, "as amended" that follows each federal citation in ARM 2.21.1932(1) and (8) because the amended federal provision does not currently exist. The cited federal provision is consistent with statutory citations in the corresponding MCA statutes.

RESPONSE #1: The department agrees and amends ARM 2.21.1932(1) and (8) to reflect the removal of the qualifier.

COMMENT #2: A commenter asked for clarification on the 30-day notice requirement in ARM 2.21.1933(2)(g).

RESPONSE #2: Pursuant to ARM 2.21.1933(2)(g), the employer must notify group members 30 days before the group's anniversary date of the group's right to vote. The department believes the employer is the appropriate entity to track group anniversary dates and ensure group members have notice of their right to vote.

COMMENT #3: Pursuant to ARM 2.21.1937(4), a commenter asked for clarification regarding the 25% threshold used to determine the highest paid group of employees.

RESPONSE #3: The rules apply to any public employer within Montana that elects to participate in the Montana VEBA HRA. The pool of employees from which the top 25% highest paid are ranked includes all employees of that employer.

COMMENT #4: Pursuant to ARM 2.21.1938(1), a commenter requested clarification on the number of employees who can request a vote to form a new group. The commenter suggested changing the 25% threshold to a majority of employees.

RESPONSE #4: Section 2-18-1310(1), MCA, provides that an employer may, if requested by least 25% of the employees, facilitate an election to form a new

group. Changing the 25% threshold to a majority would violate this statute. The department therefore cannot make this change.

COMMENT #5: A commenter asked how unions receive notice of an upcoming vote.

RESPONSE #5: If a group includes a mix of union and non-union members, an employer typically gives advance notice of an upcoming group vote to the union. After the voting period concludes and the results are known, the employer will execute a memorandum of understanding with the union if the group includes a mix of union and non-union members.

COMMENT #6: A commenter asked whether a group must vote annually if less than 25% request a vote.

RESPONSE #6: The employer is required pursuant to ARM 2.21.1933(2)(g) to notify group members 30 days before the group's anniversary date so group members can vote. Group members are not required to vote but cannot change group structure or contribution sources or disband a group without a vote. Meeting the 25% threshold is not required. If one or two group members request an election to vote for a change in group structure or contribution sources, neither the statute nor the rule prevents an employer from facilitating an election. The department agrees additional clarification is necessary and amends ARM 2.21.1938(6) to reflect this clarification.

COMMENT #7: A commenter requested the rule specify the date on which employees can request a vote to form a new group after disbanding an existing group.

RESPONSE #7: If the majority votes to disband a group, employees in that work unit can request another election at any time within the following 12 months. The department declines to set a specific election date, so employees retain the rule's current flexibility to request another election at a time within the 12-month period that best accommodates those employees.

COMMENT #8: Concerning ARM 2.21.1938(8), a commenter requested clarification on whether another election should occur 12 months from the date of the election or 12 months from the effective date of the vote.

RESPONSE #8: The department proposed 12 months from the date of the election. The effective date of a vote for an existing group is the day following the group's anniversary date. Waiting to conduct an election until 12 months after the effective date of a prior year's vote is too late. By that time, the group's anniversary date has passed, and the existing group structure and contribution sources must remain in place for another year.

COMMENT #9: Concerning ARM 2.21.1938(10), a commenter requested clarification on the requirement for an annual vote and what constitutes an "insufficient amount" of employees.

RESPONSE #9: The department agrees the term "insufficient amount" is vague and amends ARM 2.21.1938(10) as above. The department refers the reader to the response to comment #6 for a response to the potential of a required annual vote.

COMMENT #10: Concerning ARM 2.21.1940, a commenter requested clarification on the permitted contribution sources for state employers.

RESPONSE #10: ARM 2.21.1940 applies to all public employers in Montana. There is no separate rule or policy for public employers other than the state. Contribution sources for the Montana VEBA HRA must be permitted by state statute and federal law. Section 2-18-1311, MCA, references accrued sick leave and any other contribution source not otherwise prohibited by law. Annual leave, while not specifically referenced in 2-18-1311, MCA, is not prohibited by state or federal law, and may be a contribution source. Contribution sources must be benefits earned equally by all group members. For example, comp time (compensatory time off) is a benefit limited to exempt employees, so comp time cannot be a contribution source. Conversely, sick leave is a benefit for any employee who meets criteria in 2-18-1311, MCA, so accrued sick leave can be a contribution source.

COMMENT #11: Concerning ARM 2.21.1932(8), a commenter requested modifying the definition of a separation from service to only voluntary separations from service.

RESPONSE #11: IRC section 501(c)(9) and related federal guidance governing the Montana VEBA HRA prohibits individual choice. After a Montana VEBA HRA group is established, all employees who meet the eligibility requirements for that group are group members. The department obtained IRS approval to further limit eligible employees within a group to only those eligible to retire, if at least five employees who are eligible to retire would be in the group. The termination of a group member's employment is the triggering event for a group member to become a participant. There is no difference between the voluntary termination of a group member (e.g., retirement) and the involuntary termination of a group member (e.g., member was fired). If the employee was a member of a group before the triggering event of employment termination – whether voluntary or involuntary – that employee is a participant after termination. Permitting a fired group member to cash out accrued leave when that group member is otherwise eligible to participate in the Montana VEBA HRA is impermissible individual choice.

COMMENT #12: A commenter suggested that if the group size became less than five group members after the retirement of one group member, the group should automatically disband.

RESPONSE #12: As stated in the response to Comment #11, IRC section 501(c)(9) and related federal guidance governing the Montana VEBA HRA does not permit individual choice. Allowing a group to automatically disband because group size decreases to four following the retirement of one group member qualifies as impermissible individual choice. Federal regulations require the structure of a group to be established by a group of employees, not by one individual employee.

ARM 2.21.1933 accommodates individual employee need to the extent legally permissible by authorizing as few as five employees to establish a group. A group can be formed from a work unit such as a bureau instead of an entire agency. Group membership can be limited to only those eligible to retire within the work unit. Therefore, the flexibility of ARM 2.21.1933 permits employees to structure a group to meet the needs of as few as five members.

Administrative practice affirms the right to participate in the Montana VEBA HRA if a group member experiences the triggering event of termination of employment within the year following a vote. During that one-year period, group dynamics can change multiple times. A retirement can decrease group size to less than five members. Conversely, group size can remain the same or increase if other employees meet eligibility requirements to become a group member. For example, if the employee hired to replace a retiring employee transfers from another agency or public employer and is eligible at the time of transfer, that employee is a group member. Administrative practice allows a second eligible group member to become a participant if the group member retires during that one-year period when the group has less than five members. If group size is less than five at the time of the next annual election, remaining group members can disband the group, or continue the group with the same structure for another year. Changing group structure requires a vote of five group members.

COMMENT #13: A commenter requested clarification on the difference between a member and a participant.

RESPONSE #13: Participant describes a group member who separated from service and completed the steps to establish an account in the Montana VEBA HRA. Member describes an active employee who votes annually with other employees to establish a group or change the structure and contribution sources of an existing group. The department took this approach because in educational presentations throughout state government and for other public employers in Montana, including the Montana University System, employees have been confused about who belongs to a group and who can access funds to pay for qualified medical expenses. It is hoped this separation between member and participant will help employees understand the difference between active employees and former employees with respect to the Montana VEBA HRA. Current administrative procedures for the Montana VEBA HRA should not change. Those procedural changes were adopted in 2013 to comply with federal Affordable Care Act requirements for health reimbursement arrangements. Proposed rule changes are intended to conform these rules to the existing administrative procedures.

By: /s/ John Lewis
John Lewis, Director
Department of Administration

By: /s/ Michael P. Manion
Michael P. Manion, Rule Reviewer
Department of Administration

Certified to the Secretary of State October 29, 2019.