

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

In the matter of the amendment of ARM)
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))

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT

TO: All Concerned Persons

1. On September 12, 2019, at 1:00 p.m., the Health Care and Benefits Division of the Department of Administration will hold a public hearing in the State Procurement Bureau Conference room, Room 165, Mitchell Building, at 125 N. Roberts, Helena, Montana, to consider the proposed amendment of the above-stated rules. Attendees may participate by telephone by contacting Melanie Denning at the phone number or email in paragraph 2 by 5:00 p.m., September 6, 2019.

2. The Department of Administration will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Administration no later than 5:00 p.m. on September 4, 2019, to advise us of the nature of the accommodation that you need. Please contact Melanie Denning, Department of Administration, Health Care and Benefits Division, 100 North Park Avenue, Suite 320, Helena, Montana 59620; telephone (406) 444-3745; fax (406) 444-0080; TDD (406) 444-1421; or e-mail m-denning@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: The Montana Voluntary Employees' Beneficiary Association Act was enacted in 2001 as a means for public employers in Montana to help their employees and retirees pay for their qualified health care expenses (i.e., prescription drugs, dental expenses, and health insurance premiums). Participation by state employees in the Montana Voluntary Employees' Beneficiary Association Health Reimbursement Account (Montana VEBA HRA) was initially governed by a Montana Operations Manual policy. In 2005, the policy was replaced by these rules to extend the application to other public employers like cities and counties that signed an adoption agreement to participate in the program. These rules were amended in June 2013 to: (1) address the transfer of a state employee to another public employer; (2) allow public employers other than the state to make contributions for active employees; and (3) increase the minimum group size to five.

The federal Patient Protection and Affordable Care Act (PPACA) was enacted in March 2010. The PPACA added new requirements for health plans, including among other requirements, offering all federally recommended preventive services at no cost to a plan participant and unlimited reimbursement of qualified healthcare

expenses. Then in September 2013, the U.S. Treasury and Labor departments published Notice 2013-54 and Technical Release 2013-03, respectively, to explain how the PPACA applies to an HRA.

The PPACA essentially created two options: (1) to continue participation by former employees only or (2) to allow active employees to participate and discourage any participation by former employees. Evaluating the PPACA guidance in light of who was eligible at that time (active employees, pre-65 retirees, and post-65 retirees), the department believed it was not administratively feasible to continue allowing participation by active employees.

To keep active employees as Montana VEBA HRA participants and comply with the PPACA requirements, a participating employer must offer other major medical coverage (e.g., the State of Montana Employee Benefit Plan) and require that employees and retirees enroll in that coverage if they want to participate in the Montana VEBA HRA.

Keeping active employees as participants also means that pre-65 retirees can no longer obtain subsidized coverage on the Exchange, an online marketplace for consumers to purchase individual insurance policies (a state can run its own exchange or use the federal exchange portal, HealthCare.gov). Exchange coverage is typically less expensive than retiree coverage on any public entity health plan. A pre-65 retiree who wants to participate in the Montana VEBA HRA would be required to enroll in the employer's health plan at a potentially greater cost to that retiree. Additionally, pre-65 retirees would be limited to the use of Montana VEBA HRA funds for deductible, copayments, premiums for the employer's health plan, and certain limited medical expenses that a health plan is not required to cover, such as massage therapy.

Post-65 retirees would face similar limitations to participate in the Montana VEBA HRA with active employees. Post-65 retirees could not use Montana VEBA HRA funds to pay for Medicare or Medicare supplemental premiums. Post-65 retirees could only use the funds to pay for dental and vision expenses.

Currently, all retirees (pre-65 and post-65) may use Montana VEBA HRA funds for any medical expense eligible under IRC section 213(d), including premiums for Medicare and Medicare supplemental coverage. Allowing participation by active employees would discourage any participation by public entity retirees in the Montana VEBA HRA because retirees could not obtain reimbursement for Medicare premiums and Medicare supplemental coverage or enroll in the most affordable retiree health coverage.

Therefore, the department believed the solution most reflective of the legislature's intent to help retirees with their medical expenses and administratively feasible was adoption of the Montana VEBA HRA as a separation-only plan for former employees (e.g., retirees) and establishment of a limited scope option for dental and vision expenses. The PPACA creates an exception for retiree-only plans such that these plans, if covering less than two active employees, are not required to offer the required PPACA benefits (e.g., federally recommended preventive services). The PPACA also creates an exception for limited scope health plans for dental and vision expenses from the same requirements. The department believed a limited scope dental and vision plan was necessary for retirees who might return to

work for the same public entity or a different public entity that is also a participating employer.

The department believes limiting participation to retirees and others who separate from service would have minimal, if any, impact on public entity employees, since no active employees of Montana public employers have ever participated in the Montana VEBA HRA. The department further notes that active employees benefit financially if the employer contribution of accrued sick leave is converted when the employee separates from service because the employee's hourly rate at retirement is generally higher than the hourly rate throughout the prior years of employment.

Therefore, the department proposes to formally recognize the Montana VEBA HRA as a separation-only plan — meaning only those employees who have terminated their employment may, if all other requirements have been met, have a tax-free account in the Montana VEBA HRA to help pay their qualified medical expenses. The department also created a limited scope health plan to reimburse dental and vision expenses for retirees returning to work for the same public entity or another public entity that is a participating employer. Enrollment forms and other plan materials were updated to explain these changes.

Consistent with these changes, the department proposes adopting the term "participant" to describe an employee who separates from service and completes the steps to establish an account in the Montana VEBA HRA. The department also revised the term "member" to describe an active employee who votes annually with other employees to establish a group or change the structure of an existing group. The department took this approach because in educational presentations throughout state government and for cities, counties, K-12 schools, and 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 in an employee's status.

The department intends to propose similar changes to the Montana Voluntary Employees' Beneficiary Association Act in the 2021 legislative session. Adoption of the proposed changes in this notice will make the rule consistent with changes made in 2013 to the Montana VEBA HRA to comply with federal PPACA rules. Regardless of the outcome of this rule amendment process and proposed legislation for the 2021 session, the department must continue to administer the Montana VEBA HRA in a manner that complies with federal PPACA requirements.

4. The rules proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

2.21.1931 OBJECTIVES (1) ~~The state of Montana~~ Department of Administration administers a Voluntary Employees' Beneficiary Association (VEBA) that allows Montana public employees to access health reimbursement accounts for themselves, their spouses, and ~~their~~ other tax-qualified dependents to pay qualified health care expenses. The VEBA is funded by employer contributions and earnings from investment of the contributions. This program is called the Montana VEBA

Health Reimbursement Account (Montana VEBA HRA), and is the plan established under Title 2, chapter 18, part 13, MCA.

~~(2) The Department of Administration shall approve groups across the state, provide access to the Montana VEBA HRA by eligible contracting employers, and determine the investment vehicles available to members.~~

~~(3)(2) The objective of these rules is to establish consistent uniform and cost-effective procedures for establishing and maintaining groups and account contributions plan administration.~~

AUTH: 2-18-1305, MCA

IMP: 2-18-1302, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to amend (1) to clarify that use of VEBA funds is limited to qualified health care expenses of a participant's tax-qualified dependents. Without this change, the rule may appear to permit use of VEBA funds for the expenses of a dependent who is not a tax-qualified dependent. For example, a participant's child is a tax-qualified dependent for the entire taxable year in which the child turns 26. After that, the child is no longer a tax-qualified dependent. In addition, the proposed change to (1) adds clarification regarding expenses eligible for reimbursement from VEBA funds.

The department proposes deletion of (2) because it provides a general reference to a portion of the department's duties in ARM 2.21.1933 and 2.21.1939 instead of stating an objective of the program. The department is responsible for all aspects of plan administration and believes the reference to a subset of the department's duties is misleading. The department believes (1) sufficiently describes the program, the legislature's goal for the program, and the department's role to administer this program. The department's duty to decide investment options for the participant funds in the Montana VEBA HRA was added to ARM 2.21.1933 as new (1)(j).

The department proposes a change to (3) to provide an accurate statement of the department's duties described in ARM 2.21.1933. Without amending the language of (3), it could appear the department's duties are limited to establishing and maintaining groups and account contributions.

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

~~(1) "Contracting employer" means an employer who, as provided in 2-18-1310, MCA, has contracted with the department to participate in the plan.~~

(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) remains the same.

~~(3) "Employee" means a person employed by an employer who is in a pay status of at least 1040 hours each year, but does. An employee is not include an independent contractor or person hired by the employer under a personal services~~

contract, a student intern, an employee employed in a seasonal position, or certain nonresident aliens.

(4) "Group" means a minimum of five employees employed by the same agency and identified as having common characteristics for the purposes of conducting a VEBA election vote employer and formed pursuant to ARM 2.21.1937.

(5) "HRA" means a health reimbursement account. This is a tax exempt account established for the payment of to pay qualified health care expenses through employer contributions and investment earnings. The funds may must be accessed only used for the payment of qualified health care expenses, defined to include medical plan premiums, qualified health care expenses until the funds have been are exhausted.

(6) "Member" means an employee whose work unit voted to establish a group.

(7) "Participant" means a member who separates from service, and for whom an account is established in the Montana VEBA HRA.

(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.

(6)(9) "Separation from service" or "Separate from service" means the employee retires or otherwise has a termination of terminates employment and includes a voluntary or involuntary separation from service. The separation from service must be a separation from the employer. If the separation is a transfer to another agency or within the same public entity, VEBA, plan eligibility is based on the employee's position in the new group and its VEBA the group criteria. If the separation is a transfer to another agency or public entity without a Montana VEBA plan HRA group, the employee would receive receives any remaining leave as provided by the employer's leave policy.

(7) "VEBA participant" means a former employee for whom employer deposits have been received by the Montana VEBA HRA and whose account has a positive balance.

AUTH: 2-18-1305, MCA

IMP: ~~2-18-1302~~, 2-18-1303, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes to amend this rule to update definitions for consistency with Title 2, chapter 18, part 13, MCA, and federal laws that apply to health reimbursement accounts.

The department proposes eliminating (1) because it duplicates the definition in 2-18-1303, MCA.

The department proposes adding a definition of "dependent" to explain the dependents of the participant who would be eligible for reimbursement of their qualified medical expenses and to address the revised definition of dependent in the PPACA. A qualifying dependent under the PPACA includes a dependent who has not, as of the end of the participant's taxable year, attained age 27. A participant may request reimbursement for the qualified health care expenses of a dependent

child for the entire calendar year in which the child turns 26 years of age. Before the PPACA, a qualifying dependent included children up to age 19 or age 24 if enrolled in college. In 2015, the United States Supreme Court legalized same-sex marriage in Obergefell v. Hodges. The department proposes including a description of a spouse to eliminate confusion regarding the eligibility of a same-sex spouse because the spouse of a legal same-sex marriage is a dependent eligible for tax-favored treatment of health care benefits.

New (6) and (7) add definitions for member and participant. The department proposes these changes to differentiate between the rights of an active employee who votes annually with other group members to make changes to a group from the rights of a former employee who completes the enrollment process to become a participant. The department took this approach because in educational presentations throughout state government and for cities, counties, K-12 schools, and 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. This separation between member and participant will help employees understand the difference in an employee's status.

New (8) supplements the definition in 2-18-1303, MCA, with examples of qualifying medical expenses to help the reader understand the general types of expenses eligible for payment from Montana VEBA HRA funds. New (8) also adopts the definition of dependent to reduce confusion regarding which of the participant's dependents may be eligible.

The department proposes changes to existing (6) to describe a termination of employment. Because "termination" is not defined, the department receives questions from employers inquiring whether a termination includes both voluntary and involuntary terminations. U.S. Treasury guidance for IRC section 501(c)(9) VEBA trusts prohibits individual choice (further explained in the following paragraph), so the department believes a termination should not distinguish between voluntary and involuntary terminations of employment.

Individual choice can occur when an employee tries to change the outcome of a vote to fit the employee's personal situation. Individual choice occurs when an employee votes against the formation of a group and then attempts to disclaim status as a member of the group if the majority vote is to form the group. Individual choice also occurs when an employee wants to join an existing group from a department other than the department in which the employee works. An employee does not have the right to opt into or out of a group to satisfy individual need.

The remaining proposed changes are to improve readability and follow drafting convention.

The department proposes changing the implementing statute to 2-18-1303, MCA, because ARM 2.21.1932 references this statute for definitional terms and creates new definitions to supplement those found in 2-18-1303, MCA.

2.21.1933 MONTANA VEBA HRA ADMINISTRATION (1) The department shall:

(a) remains the same.

~~(b) review and approve employer proposals for participation in the Montana VEBA HRA and determine whether the proposed group meets the definition of a group and whether the employer may requests to become a contracting employer;~~

~~(c) evaluate, modify as necessary, and approve a contracting employer's proposal for group structure;~~

~~(c) remains the same but is renumbered (d).~~

~~(d)(e) enforce the group participation requirements in ARM 2.21.1937 and applicable nondiscrimination requirements in section 105(h) of the Internal Revenue Code, 26 USC 105(h) by not allowing discriminatory groups to form or to continue to exist by refusing to administer funds from groups that do not continue to comply with the department's requirements; and~~

~~(e) determine and process contributions as provided by the department in accordance with IRS tax law restrictions.~~

~~(f) establish a procedure to receive and deposit employer contributions consistent with this subchapter and applicable federal laws;~~

~~(g) establish claims adjudication procedures consistent with applicable laws;~~

~~(h) provide accounting and recordkeeping of all participant accounts;~~

~~(i) ensure the Montana VEBA HRA operates to preserve its tax-exempt status and that no part of the net earnings or trust assets inure to the benefit of any one participant, other than by payment of qualified health care expenses and reasonable administrative expenses; and~~

~~(j) determine investment vehicles available for participant account funds in the Montana VEBA HRA.~~

~~(2) Contracting employers must shall:~~

~~(a) remains the same.~~

~~(b) define groups and enroll eligible members as provided in these rules;~~

~~(c) determine the types sources of employer contributions to the HRA available to a group. Allowable employer contributions sources may include sick leave cash-outs, periodic employer contributions, group salary contributions, percent of raise contributions, unused employee benefit funds, annual vacation leave cash-outs as to the extent permitted by state statute, group merit pay, and longevity payments or other contributions sources not prohibited by state statute;~~

~~(d) determine whether current employees can become are members or whether an employee must terminate employment to become a member; and of an existing group and notify employees of any change in status;~~

~~(e) notify the Montana VEBA HRA when an employee becomes an employee hired into a plan-eligible position of the employee's change in status to a member;~~

~~(f) notify the department when an employee becomes a member; and~~

~~(g) notify existing members 30 days before the group's anniversary date to vote.~~

~~(3) The department shall ensure that no part of the net earnings of the Montana HRA inures to the benefit of any private individual or shareholder, other than by payment of the allowable health care reimbursement expenses.~~

~~(4) A group shall operate in a manner prescribed by the department unless the association is disbanded in a manner prescribed by the department.~~

~~(5)(3) A contracting An employer shall provide to the department, or the appropriate administering entity, the information necessary for the plan's operation to~~

operate the plan and establish the employer as a contracting employer. The department, in partnership with a contracting employer, shall provide to ~~plan members~~ the employees the information necessary to actively participate in ~~the plan~~ a Montana VEBA HRA group.

~~(6)~~(4) The department may delegate all or a portion of its administrative duties in this rule to an administrator.

~~(7)~~(5) The ~~administrator~~ department shall exercise ~~all of its discretion~~ its administrative duties in a uniform, nondiscriminatory manner, ~~and shall have~~ having all necessary power and discretion to accomplish those purposes.

AUTH: 2-18-1305, MCA

IMP: ~~2-18-1302~~, 2-18-1309, MCA

STATEMENT OF REASONABLE NECESSITY: The amendment to (1)(b) and addition of new (1)(c) clarify the department's role in the process to add new contracting employers and approve the proposed group structure once an employer is a contracting employer. An employer must become a contracting employer before proposing group structures to meet the needs of its employees. Current (1)(b) combines the two steps and does not distinguish the sequential process of these two steps. The department believes current (1)(b) misleads the reader and that the proposed change will add clarity.

The department receives numerous questions regarding the references to nondiscrimination requirements in the rules (i.e., ARM 2.21.1933(1)(d) and 2.21.1937(4) and (5)). Federal law contains different nondiscrimination requirements for the different types of benefits. For example, a pension plan is subject to a nondiscrimination requirement different from that applicable to a self-funded medical plan. Because ARM 2.21.1933(1)(d) does not identify which requirement applies, ARM 2.21.1937(4) and (5) are being amended to reference the components of the correct requirement, including a reference to the correct nondiscrimination requirement will reduce confusion and ensure proper administration. The appropriate requirement is the rule for the underlying benefit itself – which is section 105(h) of the Internal Revenue Code, 26 USC 105(h), for self-funded medical plans like a health reimbursement arrangement.

The department proposes deleting (1)(e) and replacing with new (1)(f), (1)(g), and (1)(h) to clarify and expand upon the department's role in processing contributions. Processing contributions includes multiple steps beginning with receipt and deposit of the employer contribution, followed by the processing of participant reimbursement claims and ending with account recordkeeping for individual participants or auditing purposes. Without the proposed rule change, the department believes the department's role is unclear and subject to misinterpretation.

The department proposes new (1)(g) to explain the department's responsibility, in conjunction with its claim administrator, to provide a claim adjudication and appeal review procedure for participant claims. When these rules were initially adopted, claims review regulations had just been published. Since then, the PPACA added new claims requirements. After the PPACA became law,

the department and its claims administrator changed the administrative procedure for claims adjudication and response to appeals.

New (1)(h) adds the recordkeeping requirement in 26 CFR 1.501(c)(9)-5 for a voluntary employees' beneficiary association. The department believes current (1)(e) includes the recordkeeping requirement in the general statement of processing contributions, but without a specific mention of recordkeeping, the department believes the recordkeeping requirement could be overlooked.

The department proposes new (1)(i) to replace existing (3) and to consolidate administrative duties of the department under (1). Existing (3) states the prohibition against inurement to benefit any one individual or shareholder. The department proposes replacing the terms "shareholder" and "individual" with "participant" for consistency with other proposed rule changes. Additionally, public employers do not have shareholders nor is the term "individual" defined.

The department proposes new (1)(j) for the department's responsibility to determine investment options for participant account funds and to consolidate the department's administrative duties under (1). Current ARM 2.21.1931(2) contains the department's responsibility to determine investment vehicles, and is proposed to be removed.

The department proposes changes to current (2)(c) to eliminate contribution sources for active employees, including periodic employer contributions, group salary contributions, percent of raise contributions, unused employee benefit funds, group merit pay, and longevity pay. The PPACA created an exception for health plans covering retirees and other former employees from several new requirements (e.g., prohibition against a dollar cap on all benefit payments). As a result of the PPACA requirements, the department made the decision to formally remove active employees as an eligible class of participants in the Montana VEBA HRA.

The department proposes changes to current (2)(d), (2)(e), and (2)(f) to improve clarity and to add a requirement to notify employees of a change to their status as a member. The department receives inquiries from employees hired into Montana VEBA HRA eligible positions who seem unaware of their status as a group member until they terminate employment or retire from their new job position. The department believes the employer is in the best position to ensure these employees are notified of their status at time of hire and their right as an ongoing group member to vote on an annual basis.

The department proposes new (2)(g) to require the employer to notify group members 30 days in advance of the group anniversary date of their right to vote for a change in contribution sources and/or group structure, or to disband an existing group. Without this change, the rule does not appear to have a requirement to notify group members of the annual right to vote. The department receives questions from members who inquire when they can vote and if they will receive notice of that annual right to vote before the group's anniversary date. It is the department's belief that the employer is the appropriate entity to track this annual right to vote and notify the members of each group when they can vote.

The department proposes deleting (4) because it duplicates 2-18-1310(3), MCA, and potentially implies a different process from the process outlined in ARM 2.21.1937. The department believes ARM 2.21.1937 meets the department

obligations under 2-18-1304, MCA, to outline the steps necessary to form groups, change group structure, and disband groups.

A change is proposed to (6) to clarify that duties the department may delegate to an administrator are set forth in ARM 2.21.1933. This change is proposed in conjunction with the proposed changes to (7) to establish the department as the fiduciary and grant the power to the department to carry out the department's duties in ARM 2.21.1933. Previously, (7) granted those powers to the administrator. The administrator is not the fiduciary.

Additional amendments are to improve readability and follow drafting convention.

The department proposes changing the implementing statute to 2-18-1309, MCA, because ARM 2.21.1933 explains the department's duties relative to operating a health plan established as a tax-exempt trust. The current implementing statute, 2-18-1302, MCA, simply cites the legislature's purpose for establishing the program. ARM 2.21.1933 explains the duties undertaken by the department to ensure the Montana VEBA HRA operates in a manner that complies with federal 26 USC 501(c)(9) requirements.

2.21.1934 FEES (1) Contracting employers ~~shall~~ may not be charged a fee by the department to establish one or more groups.

(2) ~~VEBA p~~Participants may be required to pay monthly administration fees and shall pay a percentage of the monthly Montana VEBA HRA administration expenses as determined by the department. The fee begins when the contracting employer contribution is deposited into the participant account, ~~their accounts are established~~ and continues until the account has a zero balance.

AUTH: 2-18-1305, MCA

IMP: ~~2-18-1302~~, 2-18-1304, MCA

STATEMENT OF REASONABLE NECESSITY: It is necessary to amend this rule to clarify the participant's responsibility for account fees and when fees will be assessed.

The change proposed to (1) is necessary to conform to drafting convention.

The department proposes changes to (2) to clarify when account fees are assessed. Current (2) starts fee assessment when the account is established. Instead, fees are assessed when the contribution from the contracting employer for a participant is deposited with the custodial bank trustee for the Montana VEBA HRA. The department proposes the change to (2) to reflect the current process.

The department proposes changing the implementing statute to 2-18-1304, MCA. Section 2-18-1304, MCA, grants authority to the department to determine how the administrative fees to operate the Montana VEBA HRA will be assessed and who will pay those fees, whereas 2-18-1302, MCA, simply cites the legislature's purpose for establishing the program. ARM 2.21.1934 describes administrative fees to operate the program and does not address the legislature's purpose in 2-18-1302, MCA.

2.21.1937 ELIGIBILITY (1) A group may be formed by:

(a) employees in an office, department, board, commission, attached to agency, county, incorporated city or town, school district, unit of the university system, and the judicial and legislative branches of state government;

(b) through (3) remain the same.

(4) No group may ~~discriminate in favor of highly compensated employees~~ and be formed ~~only for the~~ to benefit of a select group of the highest paid employees, ~~which "Highest paid" means an annual compensation in excess of \$80,000 and in the top 20%~~ 25% of employees ranked on the basis of total compensation paid during the year.

~~(5) Employees who may be excluded from participation without violating the nondiscrimination provisions described in (4) include:~~

~~(a) employees who are not:~~

~~(5) Members in a group must be:~~

~~(i) through (iii) remain the same but are renumbered (a) through (c).~~

~~(iv)(d) active in the employer's retirement system (retirement-eligible-only groups);~~

~~(b) seasonal and less than half-time employees;~~

~~(c) employees covered by a collective bargaining agreement; and~~

~~(d) certain nonresident aliens.~~

~~(6) When a group has been is formed:~~

~~(a) members and VEBA participants may not opt out of the group;~~

~~(b) current employees or retirees of the same employer not already in the group may not opt into the group; and~~

~~(c) a participant may return to work but does not become a new member of a group unless hired into a job position eligible for the Montana VEBA HRA and meets all requirements in (5); and~~

~~(c) remains the same but is renumbered (d).~~

AUTH: 2-18-1305, MCA

IMP: ~~2-18-1302~~, 2-18-1310, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes the change to (4) to update the nondiscrimination rule for a health reimbursement arrangement. Existing (4) states the incorrect nondiscrimination requirement. A self-funded health reimbursement arrangement is subject to the nondiscrimination rule under section 105(h) in the Internal Revenue Code. That rule defines a highly compensated employee as an employee in the top 25% of employees ranked by total compensation paid during the year. Compensation is wages only (includes bonuses and leave pay).

The department proposes changes to (5) to improve clarity for eligibility requirements. To become a member of a group, an employee must be eligible for sick leave and benefits from the employer, receive an employer contribution for group benefits (including those defined under 2-18-703, MCA), and be active in the employer's retirement system. Existing (5) lists categories of employees who can be excluded without violating the nondiscrimination rule. A health plan is generally considered non-discriminatory if benefits do not vary on the basis of an employee's years of service, compensation, or employee category (e.g., benefits only available

to management employees). Because the Montana VEBA HRA benefits and eligibility rules are the same for all employees, the department believes the Montana VEBA HRA is non-discriminatory in terms of its plan design and operation. Therefore, the department proposes removing existing (5)(b) through (d) and focusing the reader on the eligibility requirements under new (5)(a) through (d) to reduce confusion and misunderstanding.

The proposed change in (6)(a) excludes a VEBA participant from participating as a group member. As a result of the PPACA requirements, the Montana VEBA HRA was formally adopted as a separation-only (including retirement) plan and active employees were eliminated as an eligible class of participants. Consequently, a member of a group may only be an active employee.

The department proposes the change to (6)(b) for the same reason. A retiree's status is determined by the employee's position relative to the group at the time of retirement. If the retiree was not a member of a group at the time of retirement, the retiree cannot opt into a group.

New (6)(c) addresses the case of a participant who returns to work for the same or a different public employer. This participant becomes a member of a group again if hired into a position eligible for the Montana VEBA HRA and all eligibility criteria in (5) are satisfied. For example, consider a state retiree who returns to work in a Montana VEBA HRA eligible position for more than 960 hours per year. The retiree is again eligible for benefits, must contribute to the state retirement system, and is, therefore, a member of the group and eligible to vote.

Additional amendments are to improve readability and follow drafting convention.

The department proposes changing the implementing statute to 2-18-1310, MCA. Section 2-18-1310, MCA, grants authority to the department to determine a process for the formation and disbanding of groups of employees, whereas 2-18-1302, MCA, simply cites the legislature's purpose for establishing the program. ARM 2.21.1937 explains the different options for employees to consider when forming a group, after the employer becomes a contracting employer. ARM 2.21.1937 does not provide additional clarification of the legislature's purpose in 2-18-1302, MCA.

2.21.1938 ELECTIONS ~~(1) For the purposes of election and administration of the Montana VEBA HRA, an employer may form subunits.~~

~~(2)(1) An employer may either initiate or facilitate an election to determine whether for employees will to vote to form a new group to participate in the Montana VEBA HRA. When However, if at least 25% of the employees request an election, an employer must shall facilitate the election within 60 calendar days from the date of the request. Employers shall notify employees of an impending a vote at least 15 days prior to the date first day of the vote commences voting period.~~

~~(3) The election may include all the employer's employees or a specified group of employees to determine whether those employees will form a group.~~

~~(4)(2) The contribution source(s) must be agreed upon before a vote is conducted. The group may be polled in a manner acceptable to the group~~
Employees shall determine the contribution sources before a vote is conducted. If the employees cannot decide on the contribution sources, the employer may

conduct a straw poll to determine contribution sources. The employer shall allow all employees eligible to vote a reasonable amount of time to submit their choice for contribution sources. Once a majority agrees upon the contribution source(s), the contribution source(s) must be listed on the ballot. If a majority cannot agree on contribution sources for an existing group, the existing group structure and contribution sources remain in place. If a majority cannot agree on proposed contribution sources for a new group, the group does not form.

~~(5)~~(3) Employees who are members of a collective bargaining unit may decide to either participate with other employees in the formation of a group or to initiate the election through the bargaining unit. If the employees of a collective bargaining unit decide to participate with other noncollectively bargained employees, a the employer shall obtain ~~written memorandum of understanding agreement~~ from the union representing the bargaining unit employees ~~must be obtained by the employer.~~

~~(6)~~(4) Employers ~~must shall~~ make a reasonable effort when ~~conducting an election~~ to maintain the privacy of each individual ballot. Employers ~~also must~~ include provisions for shall permit absentee voting for those employees not present during an election.

~~(7)~~(5) If a the majority of the employees vote to become members establish a group or change an existing group, then all employees eligible to vote, any employees who later become eligible, and any eligible employees subsequently hired into positions eligible for the Montana VEBA HRA ~~the positions covered under the terms and conditions of the election~~, must be formed as a group and the employees must become members of the group. If the majority of the employees vote to become members, employees who voted not to participate in the group are ~~still included in~~ establish a group or change an existing group, and any eligible employees who did not return a ballot, become members of the group and may not opt out of the group.

(6) If at least 25% of the members of the group request an annual election, members of a group 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.

~~(8) Members of a group may hold an annual election to determine whether or not they will continue their participation in the Montana VEBA HRA if at least 25% of the members of the group requests an election.~~

~~(a) If a majority of members elect to discontinue their participation, their group is disbanded until another election is conducted; however, the members are not required to wait 12 months from the date of the election to form another group.~~

~~(b) Once a group disbands, an employer shall not make further contributions to VEBA participants' accounts. However, distributions from existing VEBA participants' accounts will continue until the funds in the accounts are exhausted.~~

~~(c) Once an election is conducted, and a positive vote is cast by a majority, an employer may not conduct another election for that group for 12 months from the date of the election.~~

(7) If members vote to disband the group, employees are not required to wait 12 months to form another group.

(8) If members vote to continue as an active group with the same or different contribution sources, an employer may not conduct another election for that group until 12 months from the date of the election.

(9) The effective date of the vote group must be no later than 30 days following is the first day of the pay period/cycle immediately following the closing day of the voting period. The voting period for an existing group must conclude no later than the day before the anniversary date of the group. The employer shall announce the results of the vote to the employees or members of the group, as applicable, at the completion of the vote and announcement of the election outcome which creates the group.

(10) If no group members or 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

STATEMENT OF REASONABLE NECESSITY: The department proposes deletion of (1) because it is replaced by a description of the employer's role in group formation in ARM 2.21.1933.

The department proposes elimination of (3) because it is misleading and an incomplete statement of the composition of a group. The reader is referred to ARM 2.21.1937 for an explanation of group composition.

Proposed changes to existing (4) are necessary to clarify who does the polling and what method can be used to poll employees to determine contribution sources. Existing (4) does not identify either who does the polling or what method can be used. The current practice for employers is to conduct a straw poll of members or potential members of contribution source options if those members or potential members cannot come to an agreement on the contribution source. If the straw poll does not yield a majority vote, contribution sources continue without change for an existing group – or the group does not form if employees are voting to form a new group. Proposed changes to existing (4) explains the consequences if the straw poll does not yield a majority vote. Existing (4) does not state which employees can choose contribution sources, so the department proposes change to clarify that employees eligible to choose contribution sources are the same employees who can vote in the annual election. Existing (4) does not state how much time employees have to vote on contribution sources, so the department proposes the standard of a reasonable amount of time to allow the employer flexibility to accommodate varying sizes and geographic distribution of groups.

Proposed changes to existing (7) clarify the consequences of a vote. The department receives numerous questions from eligible employees who either did not vote or voted against establishing a group and, as a result, they believe they opted out of the group. Converting accrued leave into a tax-favored contribution to the Montana VEBA HRA for payment of future medical expenses requires that an employee have no control or choice over when income is included in gross income. If the employee has the right to assign future income – which is individual choice –

all accrued leave is 100% taxable to the employee. Because this prohibition against individual choice is not easily understood, the department proposes changes to existing (7) to add clarity.

The department proposes replacing (8) with new (6), (7), and (8) to simplify the voting options of a group and the relevant time frames for the next vote. The department receives enough questions from group members and employers on the annual voting process that the department believes additional clarification in the rule for the voting process would help employers manage this process and minimize employee questions.

The department proposes eliminating (8)(b) because active employees are no longer an eligible class of participants in the Montana VEBA HRA. Employer contributions are made at the time of a separation from service, including retirement, and not when a member is an active employee. Once a member becomes a participant, the participant is no longer a group member and is unaffected by the future election choices of a group.

Proposed changes to (9) add an effective date for a new group or a change to an existing group. Existing (9) contains a general rule that the effective date is a day occurring during a 30-day period following the end of a voting period. Employers typically schedule a voting period to end the day before the group's annual anniversary date to give members an opportunity to change group structure or contribution sources, to continue the existing group structure and contribution sources, or to disband the group. The 30-day period in existing (9) is not connected to the employer's pay period/cycle and could potentially extend through two pay periods of a biweekly pay period employer. Therefore, the department proposes replacing the 30-day period with a specific date of the first day of the employer's pay period following the end of the voting period. Additionally, existing (9) does not define when the voting period for an existing group ends, so the department proposes the day immediately before the group's anniversary date. Employers have questioned when a vote is effective and what the outcome is when voting concludes after a group's anniversary date. The department believes establishing a specific effective date and the ending date for the voting period of an existing group will ensure consistent treatment of voting results and reduce confusion over when the adopted change becomes effective.

In addition, the department believes it is necessary to clarify the entity responsible to notify employees or members, as applicable, of the outcome of the vote. The current rule references an announcement of the vote outcome but does not assign the responsibility for that announcement to any entity. The department believes the employer is in the best position to announce the outcome because the employer has regular communication with its employees on other employment-related matters and can notify employees of the vote outcome through email or other methods used to notify employees of other employment matters.

The department proposes new (10) to state the outcome if no members or an insufficient number of members in a group (fewer than 25%) request an annual election, even though the employer gave these members a 30-day notice of their right to hold an annual election. The existing rule assumes an annual vote will occur but does not state a preference for an annual vote or explain the outcome when members of a group fail to request an annual vote. The department believes new

(10) will reduce confusion on the outcome when employees do not request an annual vote.

Additional amendments are to improve readability and follow drafting convention.

2.21.1939 PARTICIPATION (1) ~~Subject to the limitations of this rule and the eligibility provisions of employer policies and applicable collective bargaining unit agreements, an employee becomes a~~ A member is a participant of the Montana VEBA HRA at the time of ~~proper completion of an~~ the member separates from service, submits a signed and completed enrollment form and the first employer deposit to the member's to the department or administrator, as applicable, and the contracting employer makes a contribution to the participant's account.

(2) If a member dies as an active employee, all accrued leave benefits must be paid as taxable income. The member is not a participant.

~~(2)(3)~~ Each member is entitled to participant may direct the investment of funds in the ~~member's~~ participant's account among the investment vehicles offered. The department shall ~~provide for~~ identify a default investment vehicle if a ~~member fails to direct how funds are to be invested for a participant who fails to select an investment vehicle.~~

~~(3)(4)~~ Members Participants may make investment changes on a monthly basis.

(5) A participant account closes when the balance of the account is zero.

AUTH: 2-18-1305, MCA

IMP: ~~2-18-1302~~, 2-18-1304, MCA

STATEMENT OF REASONABLE NECESSITY: It is necessary to amend this rule to remove reference to active employees as an eligible class to participate in the Montana VEBA HRA to comply with the PPACA requirements. The department proposes change to the term "member" and the term "participant" to distinguish between a member (an active employee in an existing group) and a participant (a former employee with an established account) to address confusion over the difference in employee status and who has authority over an established account.

The department proposes removing the reference in (1) to the employee eligibility requirement in employer policies and collective bargaining agreements because these documents are only relevant to active employees and do not apply to retirees or other former employees. The department proposes changing the term "employee" to "member" and adding a reference to separation from service as a procedural step in the process to set up an account. During educational calls and presentations with retiring employees, retiring employees seem confused as to when a member becomes a participant. Listing the procedural steps to become a participant makes that process less confusing to retiring employees.

The department receives questions from employers on how the Montana Voluntary Employees' Beneficiary Association Act applies to an employee's death, so new (2) is proposed to explain the treatment of accrued leave balances when a member dies as an active employee. For employment terminations other than death (e.g., retirement), a member's completion of an enrollment form is the first step for a

member to become a participant. If a member dies before completing an enrollment form, that member does not become a participant. Under 26 CFR Section 1.101-2(a)(2), employee death benefits, whether from unused annual vacation leave or unused sick leave, are 100% taxable income. Unused leave benefits paid as a death benefit cannot be held tax-exempt in the Montana VEBA HRA.

The proposed changes to current (2) and (3) are necessary to identify the participant, not the member, as the individual directing investment of the funds in a participant account.

The department proposes (5) to clarify when a participant account closes. Accounts are closed when the account balance is zero. Adding a reference to the point when an account closes formalizes the date used in the reconciliation process for the annual audit of the Montana VEBA HRA under IRC section 501(c)(9). The audit process randomly selects accounts and reconciles funds held by the custodial trustee for those accounts to the accounting summary prepared by the administrator.

The department proposes changing the implementing statute to 2-18-1304, MCA. Section 2-18-1304, MCA, grants authority to the department to establish a process for a member to become a participant in the Montana VEBA HRA and choose the investment funds a participant may select for his or her account funds, whereas 2-18-1302, MCA, simply cites the legislature's purpose for establishing the program. ARM 2.21.1939 adds clarification to the enrollment process to become a participant and describes a participant's options for investing his or her account funds. ARM 2.21.1939 does not address the legislature's purpose in 2-18-1302, MCA.

2.21.1940 CONTRIBUTIONS (1) Employer contributions into an account, the accumulation of interest or other earnings in an account, and payments from an account for qualified health care expenses are tax-exempt, as provided in 15-30-2110, MCA, and under applicable federal laws and regulations to the extent that the plan ~~is qualified~~ meets requirements under applicable sections of the Internal Revenue Code.

~~(2) Each employer shall make deposits to the VEBA health benefit plan on behalf of its eligible members pursuant to the terms of collective bargaining agreements or employer policies. Employer deposits shall be specifically allocated to each participating member's account.~~

~~(3) Each participating employer shall provide for a member to annually designate how many hours (if any) of the member's annual vacation leave balance in excess of 240 hours and/or sick leave will be automatically converted to an employer contribution to the member's account each pay period, as provided in 2-18-1311, MCA. The state's VEBA plan does not allow contributions of leave prior to separation from service.~~

(2) Each contracting employer shall make contributions to the Montana VEBA HRA for participants. The department or its administrator, as applicable, shall establish an account for each participant.

~~(4)(3) Sick leave is considered a contribution source, as if approved by a vote of the voting entity group, and may be converted convert tax-free for the purposes of as a contribution. The sick leave contribution rate of sick leave is 25% of the employee's member's balance at the time of separation from service. As agreed~~

upon by the ~~voting entity group~~, the sick leave balance of 25% may be divided as defined listed by the department between a Montana VEBA HRA contribution and taxable cash.

~~(5) Each participating employer may establish a maximum amount of sick leave hours that may be automatically converted to an annual contribution. An employer may establish the maximum annual hours at "0" until an employee separates from service.~~

~~(6)~~(4) Annual vacation leave is ~~considered~~ a contribution source, as if approved by a vote of the voting entity group, and may ~~be converted~~ convert tax-free for the purposes of as a contribution. The annual vacation leave rate of ~~annual~~ vacation leave is 100% of the ~~employee's~~ member's balance at the time of separation from service.

~~(7)~~(5) Other contributions ~~shall~~ may be allowed as ~~outlined in~~ permitted by statute and federal law, but may not be discriminatory in favoring highly compensated employees. The All members of a group must ~~all~~ participate in any form of approved contributions.

AUTH: 2-18-1305, MCA

IMP: 2-18-1311, MCA

STATEMENT OF REASONABLE NECESSITY: It is necessary to amend this rule to eliminate the reference to contribution sources for active employees. Active employees as an eligible class of participants in the Montana VEBA HRA were eliminated in 2013 when the PPACA requirements necessitated the change. The reader is referred to the General Statement of Reasonable Necessity for an explanation of the PPACA requirements and their application to the Montana VEBA HRA. Retirees over 65 are enrolled in Medicare and potentially a Medicare supplement plan instead of employer-sponsored medical coverage and typically use Montana VEBA HRA funds to cover the costs of Medicare premiums and supplement policies. Limiting reimbursement to dental and vision claims is necessary for participants who terminated employment for a reason other than retirement and either want subsidized Exchange coverage or who may return to work for the employer.

The department proposes deleting (2) and (3) because these sections outline the employer's obligation to active employees. When the PPACA requirements necessitated adopting the Montana VEBA HRA as a separation-only plan in 2013, active employees were eliminated as an eligible class of participants in the Montana VEBA HRA and contributions for active employees ceased. Current (2) and (3) describe contribution options that are impermissible under the PPACA. The department proposes deleting current (2) and (3) to avoid an employer making the erroneous assumption these contributions are permissible.

New proposed (2) replaces old (2) and (3) and adds the employer obligation to make contributions to the Montana VEBA HRA for participants.

The department proposes deleting (5) because the automatic conversion of sick leave applies to active employees. Active employees are not eligible to participate in the Montana VEBA HRA.

Additional amendments are to improve readability and follow drafting convention.

2.21.1941 BENEFITS IN THE EVENT OF DEATH ~~(1)~~ A member may designate a spouse and/or qualified dependent(s) in a manner prescribed by the department.

~~(2)(1)~~ Upon a VEBA participant's death, if the deceased VEBA participant's account has a positive account balance, the VEBA-participant's surviving spouse, if any, may file claims for qualified health care expenses incurred by the participant up until death, the surviving spouse, and other tax-qualified dependents and/or qualified dependent(s) are eligible to use the account for qualified health care expenses.

~~(3)(2)~~ If a deceased VEBA participant's account has a positive account balance, the VEBA participant's and the participant dies without a surviving spouse, if any, but with other tax-qualified dependents, the dependents (or guardian) may file claims for eligible qualified medical benefits incurred by the VEBA participant, the surviving spouse, and any other qualified health care expenses of those dependents.

~~(4)~~ If a deceased VEBA participant's account has a positive account balance and dies without a surviving spouse but with qualified dependent(s), the guardian(s) of the dependent(s) may file claims for eligible medical benefits on the dependent(s)' behalf.

(3) If the participant dies with no surviving spouse or other tax-qualified dependents, or if the last surviving tax-qualified dependent of the deceased participant dies, or when all surviving dependents of the deceased participant lose tax-qualified status, then the executor or administrator of the deceased participant's estate may file claims for qualified health care expenses incurred by the deceased participant or tax-qualified dependent up to date of death or loss of tax-qualified status. If there are no qualified health care expenses to reimburse, the remaining account balance must be allocated on a per capita basis to all participant accounts (e.g., remaining account balance of \$2,500 for 1,000 participants equals \$2.50 per participant on a per capita basis).

~~(5)~~ At the death of the VEBA participant who has no surviving spouse or qualified dependents, or when the last to die of the VEBA participant and their qualified dependents eligible for medical benefits under the plan dies or is no longer described in IRC 152(a), then the executor or administrator of that person's estate may file claims for any eligible expenses incurred by that person, after which the remaining account balance shall be reallocated on a per capita basis to all Montana VEBA HRA member accounts.

~~(6)(4)~~ If any VEBA-participant's account has been is unclaimed for a period of at least 35 months since the whereabouts or continued existence of the person entitled to the account was were last known to the administrator, the VEBA participant's account shall becomes the property of the Montana VEBA HRA. Unclaimed account funds must be allocated on a per capita basis to all participant accounts (e.g., remaining account balance of \$2,500 for 1,000 participants equals \$2.50 per participant on a per capita basis).

AUTH: 2-18-1305, MCA

IMP: 2-18-1313, MCA

STATEMENT OF REASONABLE NECESSITY: The department proposes deleting (1) to remove the reference to a member's right to designate individuals to receive account funds. In the initial application for tax-exempt status of the Montana VEBA HRA, the department requested the right of a member to designate a beneficiary. The IRS declined to grant the department's request. Therefore, using account funds for qualifying health care expenses is limited to the expenses incurred by the deceased participant up until time of death and any tax-qualified dependents, including a spouse. The department believes that current (1) appears to create a right of a member or participant to designate beneficiaries, even if those individuals are not tax-qualified dependents, such as a child over the age of 26 or a non-tax dependent relative. The department proposes deleting (1) to avoid misleading the reader.

As currently numbered, (3) duplicates the intent of (2), so the department proposes the change to describe how account funds may be used if a participant dies without a surviving spouse but with other tax-qualified dependents.

The department proposes deletion of (4) since the intent is now part of the department's proposed change to current (3).

Additional amendments are to improve readability and follow drafting convention.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Terri Hogan, JD, MBA, Department of Administration, P.O. Box 200130, Helena, Montana 59620-0130; telephone (406) 444-3447; fax (406) 444-0080; or e-mail terri.hogan@mt.gov, and must be received no later than 5:00 p.m., September 20, 2019.

6. Terri Hogan, Department of Administration, has been designated to preside over and conduct this hearing.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the mailing list shall make a written request which includes the name and mailing address or e-mail address of the person to receive notices and specifies that the person wishes to receive notices regarding Voluntary Employees' Beneficiary Association rulemaking actions. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the department's website at <http://doa.mt.gov/administrativerules>. The department strives to make its online version of the notice conform to the official published version, but advises all concerned persons that if a discrepancy exists between the

official version and the department's online version, only the official text will be considered. In addition, although the department works to keep its website accessible at all times, concerned persons should be aware that the website may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. The department has determined that under 2-4-111, MCA, the proposed amendment will not significantly and directly affect small businesses.

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 August 13, 2019.