

November 8, 2010

**Via Electronic Delivery: [healthinsurance@hhs.gov](mailto:healthinsurance@hhs.gov)**

Mr. James Mayhew  
Office of Oversight—Office of Consumer Information and Insurance Oversight  
U.S. Department of Health and Human Services  
Room 737-F-04  
200 Independence Avenue, SW  
Washington, DC 20201

**RE: Waiver Request — Self-funded Defined Contribution Health Reimbursement Arrangement Products Administered by WageWorks, Inc.**

Dear Mr. Mayhew:

WageWorks, Inc., and its wholly-owned subsidiaries, Planned Benefits Systems, Inc. and MHM Resources, LLC (collectively, "WageWorks"), administers certain products on behalf of its clients that are self-funded, defined contribution Health Reimbursement Arrangements (HRA) plans (each a "Plan," and collectively, the "Plans"), which are intended to provide affordable healthcare coverage to employees and their families. We respectfully submit this application for a group waiver for the Plans that are administered by WageWorks, as described in greater detail below, of the restricted annual limits set forth in the Department of Health and Human Services' Interim Final Rule (the "IFR") issued on June 28, 2010 (75 Fed. Reg. 37188), promulgated pursuant to the Patient Protection and Affordable Care Act ("ACA").<sup>1</sup> Many of the Plans that we administer have Plan Years that begin January 1, 2011, and we therefore request that the Department review and approve this waiver application as soon as possible in accordance with the Sub-Regulatory Guidance (OCIIO 2010-1) issued by the Office of Consumer Information and Insurance Oversight ("OCIIO") on September 3, 2010.

Pursuant to OCIIO's Sub-Regulatory Guidance, WageWorks submits the following information:

1. **The Terms of the Plans for Which the Waiver Is Sought**

This waiver application is submitted on behalf of the 416 Plans that WageWorks currently administers on behalf of its clients, which are generally comprised of small to mid-sized employers, as well as larger employers that have adopted an HRA plan design as part of

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<sup>1</sup> In filing this application, WageWorks is not waiving future arguments that (a) these Plans are an excepted benefit under the Health Insurance Portability and Accountability Act ("HIPAA") and therefore exempt from the insurance market reform mandates under the ACA (including the restrictions on annual limits) under 29 CFR Sec. 2590.732(c)(3)(v), (b) the restrictions on annual limits are not applicable to defined contribution health plans such as an HRA, or (c) these HRAs are integrated with an employer's major medical plan that is compliant with the restrictions on annual limits as required by the ACA.

their overall health benefits strategy. These Plans are self-funded plans that provide supplemental benefits to over 50,000 employees.

The following are representative designs of the Plans administered by WageWorks, and for which a waiver is sought:

a. Very High Deductible: The employer has established a Plan that permits an employee to seek reimbursement of an amount up to 50% of the employee's deductible through the HRA, plus any other qualified medical expense permitted under Section 213(d) of the Internal Revenue Code. Unused amounts held in the HRA may roll over from year-to-year.

b. High Deductibles and Co-insurance: The employer has established a Plan that permits employees to seek reimbursement from the HRA of out-of-pocket expenses covered by the medical plan up to a specified annual dollar limit, typically from \$1,000 to \$3,500, plus any other qualified medical expense permitted under Section 213(d) of the Internal Revenue Code. Unused amounts in the HRA may roll over from year-to-year.

WageWorks seeks this waiver for its existing customer plans (and any new members that may be added to such plans) as well as any new customers in 2011 that wish to offer supplemental self-funded defined contribution HRA benefits to their employees under a plan that has a similar design to those set forth above.

2. Number of Individuals Covered

The 416 Plans administered by WageWorks provide supplemental benefits to more than 50,000 employees and their dependents.

3. The Annual Limits and Rates Applicable to the Plan

Each Plan generally has an annual limit that ranges from \$1,000 to \$3,500 per covered family for additional coverage for all health care expenses eligible under IRS §213(d).

Each employer contributes between \$1,000 and \$3,500 per employee/per annum to its respective Plan, which is applied to cover the cost of all benefits. In addition, the employer pays all administrative costs associated with the Plan. The contribution rate is established by the employer based on its underlying health benefits strategy. Plan participants and their eligible dependents do not pay a premium or otherwise contribute directly to the Plan for access to coverage.

4. Description of Why Compliance With the IFR Would Result In a Decrease in Access to Benefits or a Significant Premium Increase

By their very nature, these Plans provide much needed financial assistance to employees and their dependents in meeting their out-of-pocket health care costs. All of these Plans are supported by underlying health plans that comply with the provisions of the ACA. These Plans are not, however, explicitly tied to or administered by the medical carrier.

If these Plans are required to raise annual limits to \$750,000, none of these employers would be able to continue offering these Plans.<sup>2</sup> An increase from an annual limit of \$1,000 to \$750,000 is an increase of 75000%. Because many employers' resources for benefits are limited, such an increase in annual limits will force employers to discontinue or drastically diminish the various benefits that they are able to offer, which also includes reduction of the underlying medical benefits coverage.

Further, the implementation of a \$750,000 annual limit would, on a conservative basis, increase the various employers' costs by at least 10%, and would likely result in financial insolvency for most of these Plans absent additional funding. It is highly probable that removal of the annual defined contribution maximums will cause costs to increase such that it would be extremely difficult, if not impossible, for employers to fund a contribution level that would sustain benefits with a \$750,000 annual limit. And to prevent insolvency, the Plans would be forced to either eliminate the Plan or reduce other critical benefits offered by the employers, such as dental and vision, in order to offset the additional costs that the employer will incur as a result of maintaining a Plan with a \$750,000 annual limit during the 2011 plan year. Under either scenario, employees and their families who are covered by these Plans would experience a "significant decrease in access to benefits for those currently covered by the Plan," which is what OCIO's guidance requires for issuance of a waiver. See September 3, 2010 guidance, §III(4)-(5). The very idea that the \$750,000 annual limit applies to such plans will cause employers to cease offering the plans, shifting additional out-of-pocket burdens to plan participants.

Based on the above information, WageWorks respectfully requests a waiver of the \$750,000 restricted annual limit for each of these Plans, as well as a waiver for all future Plans administered by WageWorks, for the Plan Year commencing January 1, 2011.

5. Attestation

By my signature below, I certify that the coverage provided by the Plans were in force prior to September 23, 2010, and that application of the restricted annual limits for these Plans for the January 1, 2011-December 31, 2011 Plan Year would result in the Plans' insolvency, and thus result in a significant decrease in access to, if not the total elimination of benefits for those currently covered by the Plans.

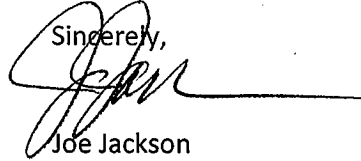
We very much appreciate the Department's consideration of this waiver application, and we look forward to hearing from you. In the meantime, please do not hesitate to contact

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<sup>2</sup> For example, one of our clients is a church that established a Plan approximately 3 years ago, which covers approximately 75 lives. The Plan provides for an annual contribution of \$3,000 per employee that a participant may use to offset out-of-pocket health care expenses that are eligible under IRS §213(d). The underlying medical plans have a fairly high deductible of \$1,500, and comply with the ACA. The employer offers no vision or dental coverage. As a result of the implementation of this Plan, the employer has saved an average of \$22,000 annually, when compared to the option of providing a lower medical deductible and/or dental and vision coverage. In addition, this Plan encourages cost containment because unused amounts accrue from year-to-year, and can be used to offset health care expenses even after an employee's separation from service, provided that the employee meets service and age requirements. If a waiver is not granted for this Plan, the employer would eliminate the Plan and would not be able to afford to add separate dental and vision coverage.

WageWorks' legal counsel, Mark C. Nielsen or Cheryl Risley Hughes, should you have any questions or require any additional information. Mr. Nielsen may be reached at 202.861.5429 or by email at [mcn@groom.com](mailto:mcn@groom.com), and Ms. Hughes may be reached at 202-861-0167, or by email at [chughes@groom.com](mailto:chughes@groom.com).

Sincerely,

A handwritten signature in black ink, appearing to read 'Joe Jackson', with a long horizontal line extending to the right.

Joe Jackson  
Chief Executive Officer  
WageWorks, Inc.