

A New Direction for Health Reimbursement Arrangements

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In an about-face from prior Obama-era guidance, the Departments of Treasury, Labor, and Health and Human Services (the Departments) have issued proposed regulations governing health reimbursement arrangements (HRAs). The proposed regulations were released in response to a Trump Executive Order issued last fall, which directed the Departments to increase the use of HRAs, to expand employers' ability to offer HRAs to employees, and to allow HRAs to be used in conjunction with non-group health coverage. The new proposed regulations liberalize and expand upon the use of HRAs in connection with individual insurance policies and create an additional new category of benefits called an "Excepted Benefit HRA." While the proposed regulations are intended to primarily benefit small employers, they are available to employers of all sizes who would like to offer additional limited benefits to certain categories of employees. Employers of all sizes will be interested in these new proposed regulations.

Current HRA Rules

HRAs are treated as group health plans for purposes of ERISA, the Internal Revenue Code (Code) and the Public Health Security Act (PHSA). Under current Affordable Care Act (ACA) guidance, stand-alone HRAs offered by employers to active employees fail to satisfy requirements under the ACA that prohibit the imposition of lifetime or annual limits on essential health benefits (EHBs) and mandate first dollar coverage of preventive care benefits (ACA Coverage Rules). In order to satisfy these requirements under current law, HRAs must be integrated with other group health plan coverage or meet some other exception from the ACA Coverage Rules, such as a retiree-only HRA. Rules issued by the Departments under the Obama Administration specifically prohibited the integration of HRAs with individual insurance coverage purchased on an individual marketplace exchange (Exchange) out of fear that employers would steer bad risk to the Exchange by abandoning more robust traditional health plans in favor of reimbursing employees for premiums for individual coverage obtained on the Exchange. The preamble to the proposed rules makes it clear that the current group health plan and Medicare integration rules remain in effect, but employers now also have the ability to integrate HRAs with individual insurance coverage.

HRA Integration with Individual Insurance Coverage

Proof of Individual Insurance Coverage

The proposed rules are intended to increase the use of HRAs by reversing the current prohibition against integrating an HRA with individual health insurance coverage. Specifically, under the proposed rules, HRAs can be integrated with individual health coverage, including fully-insured student health insurance coverage, if participants and any dependents covered by the HRA are enrolled in individual health insurance coverage (other than coverage consisting solely of excepted benefits) that satisfies the ACA Coverage Rules. An employer who wishes to offer an HRA integrated with individual health insurance coverage cannot offer a traditional group health plan to the same individual.

An HRA sponsor must implement reasonable procedures to verify whether an individual is enrolled in individual health insurance coverage in order to be eligible for integrated HRA coverage. The proposed rules provide that substantiation may be in the form of a document from a third party, such as a health insurance issuer ID card, or an attestation by the participant stating that the participant and any dependents are enrolled in individual health coverage, the dates of coverage, and the name of the provider of coverage. The HRA sponsor can rely on such documentation unless it has actual knowledge that the individual covered by the HRA is not enrolled in individual health coverage. Continued enrollment in individual insurance coverage must be substantiated as part of each reimbursement request.

To the extent an individual is not covered under individual health insurance coverage for a particular month, the HRA would not be permitted to reimburse any medical care expenses for such individual, and the individual would forfeit coverage under the HRA. It is not clear how the COBRA continuation requirements would be applied to a monthly eligibility determination and corresponding loss of coverage, therefore further guidance on this topic would be welcomed.

The rules further propose to treat all individual health insurance coverage (other than coverage that consists solely of excepted benefits) as meeting the requirements of the ACA Coverage Rules by proxy—whether or not the coverage is grandfathered (which may not technically meet such requirements). The Departments have specifically requested comments as to methods by which an HRA could substantiate whether someone’s individual insurance coverage complies with the ACA Coverage Rules and how an HRA would determine whether the arrangement covers EHBs.

Winston Takeaway: *The Departments have requested comments on whether it is appropriate to permit integration of HRAs with short-term limited duration insurance or other types of non-group coverage and whether the ability to integrate HRAs with individual health insurance coverage has the potential to increase participation in and strengthen the viability of states’ individual market risk pools. The Trump Administration recently made it easier for states to apply for waivers for the ACA requirements for insurance products sold in their states, which some have speculated will increase litigation against the Trump Administration. Thus, it remains to be seen how these rules acting in tandem will affect individual insurance markets in the states and whether such markets are an attractive option for employers.*

Prohibition on Offering Choice Between Traditional Health Coverage and Integrated HRA

Citing the risk of market segmentation and health status discrimination, the proposed rule also prohibits an employer from directly or indirectly steering participants or dependents with adverse health factors away from the plan sponsor’s traditional health plan and into the individual market. The proposed rules accomplish this by prohibiting a plan sponsor from offering both a traditional group health plan (group health plans other than account-based plans or excepted benefits) and an HRA integrated with individual health coverage to the same class of employees on the same terms. It does not appear, however, that an employer is prohibited from only offering an HRA/integrated arrangement to *all* of its employees—although this may trigger penalties under the ACA Employer Shared Responsibility (ESR) rules as discussed below.

HRA Contribution Amount

To further prevent employers from steering individuals to an HRA with integrated individual insurance coverage in lieu of traditional group coverage, the proposed regulations require that an employer offer the integrated HRA on

the same terms and conditions to all employees within a class. An employer may differentiate HRA offerings based on the following permissible classes (or combination thereof): (i) full-time employees; (ii) part-time employees; (iii) seasonal employees; (iv) collectively bargained employees; (v) employees who have not satisfied a waiting period for coverage; (vi) employees who have not attained age 25 prior to the beginning of the plan year; (vii) non-resident aliens with no U.S. source income; and (viii) employees whose primary site of employment is the same rating area as defined in ACA regulations. Such employee classifications may be determined using existing definitions under either Code Section 105(h) or Code Section 4980H. Retirees and other former employees must be offered the same integrated HRA as active employees in the same class.

Further, the amount of HRA coverage may increase based on the age or family size of the participant as long as the same maximum dollar amount is available to all similarly situated employees. The preamble to the proposed rule acknowledges that varying the amount of the HRA contribution based on age could create nondiscrimination issues under Code Section 105(h), but indicates that the Treasury Department and the IRS intend to issue further guidance that would provide safe harbor age-based HRA contribution differences if certain conditions are met.

Winston Takeaway: *Under the proposed rules, differences in the amount of HRA contributions can be based on an employee's work location. However, availability of individual Exchange coverage is based on an individual's place of residence. Employees at the same work location could live in multiple rating areas. Therefore, the employer's HRA contribution would buy varying amounts of coverage for its employees, even if the employer makes adjustments for age and family size, because of differences in individual insurance coverage options and costs.*

Notice Requirement

Employers wanting to take advantage of offering integrated HRAs to their employees are required to provide a notice to participants prior to the beginning of each plan year, or when first eligible, describing the terms of the HRA, the dollar amount available for reimbursement, the right of the participant to opt-out and waive future reimbursement and the effect of the HRA or opt-out on the employee's ability to obtain a PTC on an Exchange. The notice is also required to contain a statement that the HRA may not reimburse any medical care expenses unless the substantiation requirements are met, and that it is the responsibility of the participant to inform the employer if the participant or any dependent whose medical expenses are reimbursable by the HRA is no longer enrolled in individual insurance coverage.

Excepted Benefit HRAs

The proposed rules also expand the definition of limited excepted benefits under the ACA to treat certain HRAs of limited amount and coverage as excepted benefits. In order to qualify as an Excepted Benefit HRA:

- The HRA must not be an integral part of the plan; that is, group health plan coverage, other than account-based group health plan coverage or excepted benefits must be offered to participants in the Excepted Benefit HRA. HRA participants, however, would not be required to enroll in the other group health plan coverage in order to be eligible for the Excepted Benefit HRA. An employer would not be permitted to offer both an HRA integrated with individual health insurance coverage and an Excepted Benefit HRA to the same employee.
- The HRA must provide benefits that are limited in amount—not to exceed \$1,800 per year, indexed for inflation after 2020. The Departments have requested comments on whether this amount is appropriate and whether it should be higher for families.
- The HRA cannot provide reimbursement for premiums for individual health insurance coverage, coverage under a group health plan, or Medicare Parts B or D. Excepted Benefit HRAs can be used to reimburse premiums for individual health insurance coverage consisting solely of excepted benefits, STLDI premiums, or COBRA premiums.
- The HRA must be made available on the same terms and conditions to similarly situated employees regardless of any health factor.

Winston Takeaway: *Since the ACA's individual mandate has effectively been repealed starting in 2019, the proposed rules would allow employers to give employees who opt out of traditional group coverage the opportunity to still receive health care benefits from the employer in the form of the Excepted Benefit HRA. The Excepted Benefit HRA contributions could be used to purchase short-term limited duration insurance or excepted benefits, such as dental or vision insurance coverage.*

Premium Tax Credits, Exchanges, and Employer Shared Responsibility

An applicable large employer (ALE) that is subject to the ESR requirements of the ACA may owe a penalty for not offering sufficient coverage to substantially all of its full-time employees, or for offering coverage that is not affordable or of minimum value (MV). In general, an ALE will owe a payment under Code Section 4980H(a) if it fails to offer an eligible employer-sponsored plan to at least 95 percent of its full-time employees and their dependents and at least one full-time employee is allowed a PTC for the month. An ALE that offers an eligible employer-sponsored plan to at least 95 percent of its full-time employees and their dependents may still be liable for a penalty under Code Section 4980H(b) if at least one full-time employee is allowed a PTC for coverage purchased on an Exchange, which may occur if the plan offered was not affordable or did not provide MV, or if the employee was not offered coverage.

The proposed rules treat an HRA integrated with individual insurance coverage as an eligible employer-sponsored plan for purposes of the ESR rules. The proposed rules indicate that the Treasury Department and the IRS intend to issue guidance that provides a safe harbor for purposes of determining whether an employer that has offered an HRA integrated with individual health insurance coverage would be treated as having made an offer of affordable coverage that provides MV for purposes of section 4980H of the Code, regardless of whether the employee who received that offer declines the HRA and claims the PTC.

The proposed rules also contain rules issued by the Treasury Department and IRS regarding PTC eligibility for individuals offered coverage under an HRA integrated with Exchange-based coverage. An individual who is not claimed as another person's dependent is eligible for a PTC for a month if: (1) the individual is enrolled in individual coverage through the Exchange, (2) the individual was not eligible for affordable coverage through an employer plan that provides MV or is eligible to enroll in government health coverage, such as Medicare or Medicaid, and (3) the individual's household income is below certain limits. The proposed rules describe the manner in which affordability is determined for purposes of the PTC for HRAs integrated with individual health insurance coverage. This affordability test compares the employee's household income against the employee's premium share of the lowest cost silver Exchange plan offered in the employee's rating area.

Finally, HHS is proposing changes to regulations regarding special enrollment periods on the Exchange for individuals who gain access to HRAs integrated with individual health insurance coverage or who are newly offered a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA).

Winston Takeaway: *Offering an HRA integrated with individual insurance (instead of traditional group insurance coverage) may not be an option for large employers that are subject to the ESR Requirements of the ACA if the employer seeks to avoid penalties. While an integrated HRA counts as an offer of coverage for avoiding the penalty under Code Section 4980H(a), failure to offer affordable or MV coverage may still trigger a potential penalty under Code Section 4980H(b). Further guidance regarding affordability of an HRA integrated with individual health insurance coverage under the employer mandate is forthcoming. Integrated HRAs may, however, be a useful way to offer coverage to certain classes of employees, such as part-time employees, or those who are in a limited non-assessment period and would otherwise not trigger an ESR penalty.*

Treatment under ERISA of HRAs Integrated with Individual Insurance Coverage

The proposed rules also clarify that reimbursement of individual health insurance premiums from an integrated HRA will not cause the individual insurance coverage to become part of the employer's ERISA plan if certain requirements are met. Specifically, the Department of Labor has proposed a rule that would clarify that the terms "employee welfare benefit plan," "welfare plan," and "group health plan" would not include individual health insurance coverage if premiums are used by an HRA to purchase such coverage and certain conditions are met. In order to take advantage of this treatment, the purchase of individual insurance must be completely voluntary and the employer must not select or endorse a particular issuer or insurance coverage. In addition, reimbursement for non-group health insurance premiums must be solely limited to individual health insurance coverage, the employer can receive no consideration in connection with the employee's selection or renewal of the individual coverage, and plan participants must be notified annually that the individual coverage is not subject to ERISA. This is in line with the ERISA Regulation Section 2510.3-1(j).

Winston Takeaway: *This is helpful clarification to the application of ERISA to benefit designs that pair an HRA with individual insurance policies, such as retiree medical exchanges and integrated HRAs. ERISA exemption rules similar to those applicable to voluntary employee-pay-all plans appear to apply.*

Next Steps

Employers of all sizes will benefit from careful review and analysis of the proposed rules. Small employers who may not have previously offered health insurance to their employees will welcome the ability to offer HRAs integrated with individual insurance coverage. Larger employers may want to explore adding integrated HRAs as a benefit for certain classes of employees who may not have previously been offered coverage, or may want to adopt Excepted Benefit HRAs as another way to assist employees covered under traditional health coverage with out-of-pocket expenses. Plan sponsors will need to carefully evaluate the addition of such new benefits to their existing line-up to make sure that such arrangements do not trigger penalties under the ESR rules or make employees ineligible for other benefit offerings, such as health savings accounts.

The proposed regulations are targeted to apply for plan years beginning on and after January 1, 2020, and the special enrollment period provisions are set to take effect January 1, 2020. Taxpayers and others may not rely on the proposed rules. Comments on the proposed regulations are due 60 days from the date of publication in the Federal Register. Please contact a member of the Winston EBEC Team for more information or if you would like to submit comments on the proposed rules.

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