

HEALTH & WELFARE PLAN LUNCH GROUP

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Employee Benefits & Executive Compensation ADVISORY ■

OCTOBER 29, 2018

Summary of New HRA Proposed Regulation

Earlier this month, the tri agencies (Department of Labor (DOL), Treasury, and Health and Human Services (HHS)) published much-anticipated proposed regulations regarding health reimbursement arrangements (HRAs). The HRA proposed regulation is a product of an Executive Order issued by President Trump to the agencies to issue guidance making HRAs more flexible.

This proposed regulation, which will be effective for plan years beginning on or after January 1, 2020 (and cannot be relied on before the effective date), makes drastic changes to the rules currently applicable to HRAs offered to active employees. Under the proposed regulations, employers will be able to establish HRAs for active employees that reimburse the employee's premiums for major medical insurance purchased in the individual market, subject to certain conditions. In addition, employers will be able to set up non-integrated excepted benefit HRAs that reimburse an employee's medical expenses subject to certain conditions (including that the employee be eligible for other group health coverage sponsored by the employer). These new excepted benefit HRAs cannot be used to purchase health insurance in either the individual or group market, other than excepted benefit coverage (e.g., dental or vision). The following is a brief summary of the proposed rules. More details will follow after we have digested the rules.

NOTE: The proposed regulations address the impact of certain health insurance reforms of the Affordable Care Act (ACA) on HRAs. The ACA reforms do not apply to HRAs that only provide excepted benefits (dental, vision) or HRAs covering only former employees (e.g., "retiree" HRA). Consequently, such dental/vision and standalone retiree HRAs are not affected by the proposed regulations.

Premium Reimbursement HRA

If the regulations are finalized as proposed, an employer of any size may establish an HRA that reimburses the employee's premiums for non-excepted major medical insurance purchased in the individual market provided that certain requirements are satisfied. Note that short-term, limited-duration insurance (STLDI) is not individual market insurance and thus cannot be reimbursed under a premium reimbursement HRA; however, comments are requested on this issue.

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The following are the requirements applicable to premium reimbursement HRAs:

- The employer does not offer traditional coverage (i.e., major medical coverage) to the employee or others in the same class of employees. The employer can, however, offer coverage consisting only of excepted benefits.
- The employee and all HRA-covered dependents are actually enrolled in major medical coverage purchased in the individual market and the plan requires substantiation of that fact both initially and when expenses are submitted for reimbursement (employee attestation appears to be sufficient).
- The HRA must be offered to all employees within a designated class and the HRA must be offered on the same terms. Benefits may vary among a class only by age and family size. The classes identified in the regulations are:
 - Full-time (as defined in accordance with Code Section 105 or 4980H).
 - Part-time (as defined in accordance with Code Section 105 or 4980H).
 - Seasonal (as defined in accordance with Code Section 105 or 4980H).
 - Employees subject to a collective bargaining agreement.
 - Employees subject to a waiting period.
 - Nonresident aliens with no U.S. source income.
 - Employees under age 25 before the beginning of the plan year.
 - Employees whose principal place of employment is in the same rating area.
- A “QSEHRA”-like notice must be provided 90 days before the start of the plan year or before the effective date of coverage if the employee becomes eligible after the start of the plan year.
- Employees must be allowed to opt out and waive benefits at least annually.

Employers may offer traditional health coverage to one class of employees and a premium reimbursement HRA to another class without running afoul of the new guidance. Also, premium reimbursement HRAs offered to different classes may vary as long as the requirements are satisfied within each class.

In a rather surprising twist, the employer may also allow participants in the premium reimbursement HRA to pay any excess premium not covered by the HRA with pre-tax salary reductions but only for off-Exchange coverage. Under Section 125(f)(3), Exchange coverage could not be reimbursed by the cafeteria plan. Any such “supplemental” cafeteria plan must be offered to all employees in the class on the same terms. NOTE: The guidance does not appear to go so far as to allow cafeteria plans to pay premiums for individual major medical insurance in other circumstances, but the agencies do request comments on whether this should be permitted.

The premium reimbursement HRA qualifies as minimum essential coverage (MEC) and thus will allow applicable large employers to avoid the 4980H(a) tax (aka the “sledgehammer”) and will also be treated as minimum value (MV) for purposes of the 4980H(b) tax (aka the “tack hammer”) if the coverage is affordable under Code Section 36B. The coverage is affordable if the difference between the premium for the lowest cost silver plan and 1/12 of the annual HRA contribution is less than the applicable percentage (e.g., 9.66%) of the employee’s household income.

The DOL has also proposed regulations that would clarify that the individual market policies paid for by the HRA are not subject to ERISA, even though the HRA is, so long as requirements similar to the voluntary plan safe harbor are satisfied. For example, the employer cannot endorse a specific coverage or participate in the selection of the policies offered through the plan.

Also, as is the case with HRAs generally, the HRA itself will be subject to the other group health plan mandates, including ERISA and COBRA. In this regard, qualified small employer health reimbursement arrangements (QSEHRAs) may actually have a simpler compliance path since COBRA does not apply. However, some of the other QSEHRA requirements are more restrictive. For example, an employer cannot offer a QSEHRA and have any group health plan, even an excepted benefit plan. An employer offering a premium reimbursement HRA, however, can offer excepted benefits as well.

The current guidance regarding reimbursement of Medicare B and D premiums appears to be largely unaffected by these proposed regulations; however, it is worth noting that the agencies did not take the opportunity to add the Medicare premium reimbursement guidance in Notice 2015-17 to the proposed regulations—leaving open the possibility that the 2015-17 guidance will go away.

Excepted Benefit HRA

An employer may also offer a non-integrated HRA that reimburses general medical expenses, including COBRA, STLDI, and excepted benefit premiums, but not other group or any individual market health premiums. Such an HRA is permissible, and will qualify as an excepted benefit, subject to the following conditions:

- The maximum annual contribution is \$1,800, adjusted for inflation (does not include carryover amounts, which may be unlimited).
- The employee must also be offered traditional health coverage from the same employer, but the employee does not have to enroll in that coverage.
- The employee cannot also be offered a premium reimbursement HRA.
- The terms and conditions must be the same for all “similarly situated” classes of employees.

So, if this guidance is finalized, we will have four different types of HRAs:

1. HRAs that are integrated with other group health plan coverage.
2. Premium reimbursement HRAs.
3. Excepted benefit (vision or dental) HRAs.
4. QSEHRAs (although it remains to be seen what value QSEHRAs would offer in light of the flexibility provided by the proposed regulations).

In addition, retiree-only HRAs will continue to be allowed as well.

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New Day for HRAs: The Ins and Outs of the New Proposed Regulation

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New Proposed HRA Regulation in a Nutshell

- Effective 1/1/2020 (taxpayers cannot rely on proposed regulation)
- Allows for two additional types of HRAs
 - Premium Reimbursement HRA
 - Available when no other GHP offered
 - Excepted Benefit HRA (up to \$1800)
 - Available to those for whom other GHP offered

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How We Got Here

- ACA Requirements
 - PHSA 2711 prohibition on annual or lifetime caps
 - PHSA 2713 required preventive care
- Agency Guidance (2013-54 and its progeny) affects HRAs for active employees
 - Prohibits reimbursement of individual medical policies
 - Prohibits stand-alone general purpose HRAs



Current HRA Structures

- Retiree only HRAs
- Limited purpose (vision/dental) HRAs
- “Integrated” HRAs for individuals actually covered under another GHP
 - Limited reimbursement
 - Copayments, coinsurance, deductibles, and premiums under the non-HRA GHP and excepted benefits
 - Minimum value
 - Can reimburse any 213(d) expense other than individual medical insurance
- QSEHRAs



QSEHRA Complexities

- Eligible employer
 - Non-ALE and No other GHP coverage
- Funding Rules
 - Employer only funded HRA
 - Up to \$5050 single, \$10,250 family (2018 numbers as pro-rated and COLA adjusted)
- On a non-discriminatory basis
 - Uniform reimbursement (variations based on “relevant” Marketplace coverage)
 - Can exclude employees with less than 90 days of service, under 25, part time or seasonal, covered by a CBA, non-resident aliens with no US income
 - If they participate benefits must be equal
- To reimburse eligible 213(d) medical expenses of employee and “family members”
 - Cost of individual policy and/or other unreimbursed medical expenses
 - Employer substantiation is required
- Provided they show proof of “MEC coverage”
 - Employer substantiation required
 - Each person for whom reimbursement provided must have MEC



October 2017 HRA Executive Order

- ***Sec. 4. Expanded Availability and Permitted Use of Health Reimbursement Arrangements.*** Within 120 days (February) of the date of this order, the Secretaries of the Treasury, Labor, and Health and Human Services shall consider proposing regulations or revising guidance, to the extent permitted by law and supported by sound policy, to increase the usability of HRAs, to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage.



October 2017 HRA Executive Order

- Issues:
 - Timing of HRA guidance
 - Too little too late?
 - Will guidance expand HRAs generally
 - Will guidance be broader than 21st Century CUREs Act QSEHRA Guidance (IRS Notice 2017-67) ?
 - QSEHRAs have significant limitations
 - No other coverage
 - Nondiscrimination requirements
 - Complicated w/r/t coordination with PTC



New: Premium Reimbursement HRAs

Requirements

- The employer does not offer traditional coverage (i.e. major medical coverage) to the employee or others in the same class of employees.;
- The employee and all HRA covered dependents are actually enrolled in major medical coverage purchased in the individual market and the plan requires substantiation of that fact both initially and when expenses are submitted for reimbursement (employee attestation sufficient);
- The HRA must be offered to all employees within a designated class. Benefits may vary among a class only by age and family size. The classes identified in the regulations are:
 - Full-time (as defined in accordance with Code Section 105 or 4980H)
 - Part-time (as defined in accordance with Code Section 105 or 4980H)
 - Seasonal (as defined in accordance with Code Section 105 or 4980H)
 - Employees subject to a collective bargaining agreement
 - Employees subject to a waiting period
 - Non-resident aliens with no US source income
 - Employees under age 25 prior to the beginning of the plan year
 - Employees whose principal place of employment is in the same rating area
- A "QSEHRA"-like notice must be provided 90 days prior to the start of the plan year or prior to the effective date of coverage if the employee becomes eligible after the start of the plan year.
- Employees must be allowed to opt out and waive benefits at least annually.



New: Premium Reimbursement HRAs

- New PRA will constitute minimum essential coverage (MEC) and may qualify as affordable minimum value coverage under 4980H
- Excess contributions may be pre-taxed through a cafeteria plan (other than individual market coverage)
- Individual policy coverage is not necessarily GHP coverage for ACA and ERISA purposes



New: Excepted Benefit HRA

May reimburse general medical expenses, including COBRA, STLDI and excepted benefit premiums but not other group or any individual market health premiums. Requirements:

- Maximum annual contribution is \$1,800 adjusted for inflation (does not include carry over amounts which may be unlimited),
- Employee must also be offered traditional health coverage from the same employer but the employee does not have to enroll in that coverage,
- Employee cannot also be offered a Premium Reimbursement HRA, and
- The terms and conditions must be the same for all “similarly situated” classes of employees.



Question & Answer

