Paving the Way for More HRAs

Tuesday, October 30, 2018

Summary

President Trump signed an executive order last year directing the Secretaries of Labor, Treasury and Health and Human Services to consider proposing regulations to “increase the usability of HRAs.” This month, the collective departments issued proposed regulations containing changes to the prohibition on pairing HRAs with individual health policies, as well as other changes to the current HRA rules.

Proposed effective date January 1, 2020; comments due December 28, 2018.

In Depth

A year ago, President Trump signed an executive order that, among other things, directed the Secretaries of Labor, Treasury and Health and Human Services (HHS) (collectively, the Departments) to consider proposing regulations to “increase the usability of HRAs.” In response, the Departments issued proposed regulations (the Proposed Rule) this month, which contain sweeping changes to the prohibition on pairing health reimbursement arrangements (HRAs) with individual health policies, as well as other changes to the current HRA rules.

Comments on the Proposed Rule are due December 28, 2018. If finalized, the Proposed Rule generally would be effective January 1, 2020.

Integrated HRAs

The proposed “Integrated HRA” rules would permit employers of any size to offer a standalone HRA to employees and former employees who have individual health coverage. In order to comply with the Proposed Rule, an Integrated HRA must meet the following criteria:

- **All individuals covered by the Integrated HRA must be enrolled in individual health coverage.** The Proposed Rule requires that a participant and any dependent covered by the Integrated HRA be enrolled in individual health insurance coverage for each month a participant is covered by the Integrated HRA. If an individual covered by an Integrated HRA does not have individual health insurance coverage, the HRA would fail to satisfy the Affordable Care Act’s prohibition on life-time/annual limits and preventive care mandates, and therefore, HRA distributions would be subject to forfeiture in accordance with applicable laws. Under the Proposed Rule, “individual health insurance coverage” means health insurance coverage offered to individuals in the individual market (including grandfathered coverage), but notably does not include coverage that consists solely of excepted benefits or short term limited duration insurance (STLDI) (although the Departments requested comments on the latter). In addition, a “participant” includes an employee or former employee of an employer (and his or her beneficiaries) who is, or may become, eligible for benefits under an employer sponsored plan. An Integrated HRA plan document must contain specific language addressing this requirement. Prior Internal Revenue Service (IRS) guidance allowed for integration with a spousal plan.

- **No choice between Integrated HRA and traditional group health plan coverage.** In order to address concerns that plan sponsors might direct participants or dependents with adverse health factors away from the plan sponsor’s traditional group health plan and into the individual market (potentially
destabilizing the marketplace), the Proposed Rule prohibits an employer from offering a class of employees a choice between an Integrated HRA and traditional coverage under the employer’s group health plan. The employee classes include (1) full-time, (2) part-time, (3) seasonal, (4) collectively bargained, (5) employees subject to a coverage waiting period, (6) employees under age 25, (7) non-resident aliens with no US-based income, (8) employees whose primary site of employment is in the same rating area and certain combinations of the various classes. The Proposed Rule gives an employer some flexibility with respect to how it defines certain classes of employees (full-time, part-time and seasonal), but a specific definition is prescribed for the remainder of the classes.

- **Same-terms.** The Proposed Rule requires that an Integrated HRA be offered on the “same terms” (amount and conditions) to all employees or retirees within a certain class. However, recognizing that premiums for individual coverage may vary, the Proposed Rule permits employers to provide a higher maximum dollar amount under an Integrated HRA based on a participant’s age and number of covered dependents. Such increased maximum dollar amounts must be offered to all similarly situated participants in a given employee class. Former employees (e.g., retirees) are considered to be in the same class they were in immediately prior to separation from service, but the Departments acknowledged the wide variety of employer practices with respect to retiree eligibility for post-employment health coverage. Thus, the “same terms” rules permit a years-of-service requirement with respect to Integrated HRA coverage for retirees within a certain class. The Departments noted that further guidance is forthcoming to address how such arrangements may be designed to ensure compliance with the nondiscrimination rules under the Internal Revenue Code (the Code).

- **Opt-out provisions.** Under the existing legal framework, an individual who is covered by an HRA integrated with individual health insurance coverage would be ineligible to obtain the premium tax credit (PTC) through the Health Insurance Marketplace (the Exchange). Therefore, the Proposed Rule requires an Integrated HRA to allow participants to opt-out of and waive future reimbursements from an Integrated HRA at least once per year.

**Important Note:** An employee may still be ineligible for the PTC even if they opt out of the Integrated HRA. The Proposed Rule states that an employee who is offered, but opts out of, an Integrated HRA is considered eligible for minimum essential coverage for any month the HRA is affordable and provides minimum value. The Proposed Rule includes detailed rules regarding the calculation of affordability and minimum value as it relates to PTC eligibility for an individual.

- **Substantiation and verification.** The Proposed Rule requires that Integrated HRAs implement and comply with reasonable procedures to verify that individuals are enrolled in individual health insurance as part of each reimbursement request. These procedures can take the form of a document demonstrating that the individual is covered under an individual insurance policy (e.g., an insurance card), or an attestation by the participant. The Proposed Rule would permit an employer to rely on this documentation unless it has actual knowledge that the individual is not enrolled in individual health coverage.

- **Notice requirement.** In order to ensure that individuals eligible for Integrated HRAs understand how such coverage could potentially impact PTC eligibility, the Proposed Rule includes a detailed notice requirement. Upon initial eligibility and at least 90 days prior to the beginning of each plan year, the Integrated HRA must provide eligible participants with a written notice describing, among other requirements, the terms of the Integrated HRA (including the individual insurance coverage and substantiation requirements), the dollar value available for reimbursement, the participant’s opt-out rights, the PTC eligibility consequences and several other required statements. The agencies will likely issue a model notice prior to 2020.

**Interaction with Employer Shared Responsibility**

The Affordable Care Act’s employer shared responsibility provisions require that employers with 50 or more full-time employees (and/or full-time equivalents) (Applicable Large Employers or ALEs) offer minimum essential health coverage to 95 percent of their full-time employees (and their dependents) that is affordable and provides a minimum value of benefits. Employers who do not satisfy these requirements for a particular month may owe employer shared responsibility payments to the IRS. The Proposed Rule states that the Treasury Department and IRS intend to issue guidance including a potential safe harbor that employers may use to determine whether an offer of coverage under an Integrated HRA will be treated as an offer that satisfies the minimum value requirements under the employer shared responsibility rules.

**Excepted Benefit HRAs**

As an alternative to the Integrated HRA option, the Proposed Rule would recognize certain HRAs as limited excepted benefits (Excepted Benefit HRA). An Excepted Benefit HRA would allow participants to obtain
In order to qualify as an Excepted Benefit HRA, the Proposed Rule requires the following:

- **Not an integral part of the plan.** In order to satisfy existing statutory requirements for excepted benefits, the HRA must not be an “integral part” of the employer’s group health plan. This means that a plan sponsor must offer other group health plan coverage to the employees who are also offered the Excepted Benefit HRA for a particular plan year. The “other” coverage must not be another account-based group health plan or coverage consisting solely of excepted benefits. However, only the offer of other group health coverage is required; Excepted Benefit HRA participants would not be required to enroll in the other coverage to be eligible for an Excepted Benefit HRA.

- **Benefit limit.** An Excepted Benefit HRA would be limited to annual contributions of $1,800 per year (indexed for inflation after 2020). If the Excepted Benefit HRA permits unused amounts to be available in later years, carried over amounts would not count toward the annual contribution limit in later years. If a plan sponsor offers more than one Excepted Benefit HRA to a participant for the same time period, the amounts under all of the HRAs would be aggregated for purposes of determining the limit.

- **No reimbursement of premiums for certain health insurance coverage.** Under the Proposed Rule, an Excepted Benefit HRA could not provide reimbursement of premiums for individual health insurance coverage, coverage under a group health plan (other than COBRA or other group continuation coverage), or Medicare parts B or D. The Proposed Rule would permit reimbursement of premiums for individual coverage that consists solely of excepted benefits or coverage under a group health plan that consists solely of excepted benefits, as well reimbursement of STLDI premiums and COBRA premiums.

- **Uniform availability.** In order to address concerns regarding discrimination against individuals with adverse health factors, the Proposed Rule includes a uniform availability requirement. Benefits provided under an Excepted Benefit HRA would be required to be made available under the same terms and conditions to all similarly situated individuals (as defined in the regulations under the Health Insurance Portability and Accountability Act (HIPAA)), regardless of any health factor. For example, this requirement would prevent a plan from requiring that all employees who have a certain disease enroll in the Excepted Benefit HRA.

Since an employer must offer traditional group health plan coverage to those individuals who are eligible to participate in the Excepted Benefit HRA, the employer could not offer both an Excepted Benefit HRA and an Integrated HRA to the same individual (see No choice between Integrated HRA and traditional group health plan coverage above).

**ERISA Application**

Embedded in the Proposed Rule, the US Department of Labor (DOL) includes a separate proposed regulation to clarify the definition of “employee welfare benefit plan” and “welfare plan” under the Employee Retirement Income Security Act (ERISA) to exclude individual health insurance coverage, the premiums of which are reimbursed by an HRA, provided certain requirements are met; the exclusions include an Integrated HRA, an HRA covering less than two current employees (e.g., a retiree HRA), and a qualified small employer health reimbursement arrangement (QSEHRA). In order to be exempt from the ERISA, the coverage would need to meet the following requirements:

- The purchase of any individual health insurance coverage is completely voluntary for employees. *Important Note:* Coverage that must be purchased as a condition for participation in an HRA would not make the purchase involuntary.

- The employer or plan sponsor must not elect or endorse any particular issuer or insurance coverage. Providing general contact information regarding availability of coverage or general health insurance educational information would be permitted. The DOL invited comments on whether additional regulatory guidance would be helpful to further define what types of employee communications would be considered “endorsements.”

- Reimbursement for non-group health insurance premiums is limited solely to individual health insurance coverage.

- The employer or plan sponsor receives no consideration in connection with the employee’s selection or renewal of any individual health insurance coverage.
Each plan participant is notified annually that the individual coverage is not subject to ERISA. This clarification is particularly helpful to employers who are looking to transition certain groups of employees to an account-based group health plan model, and further guidance regarding what constitutes “endorsement” will likely be sought after by employers and administrators of existing “private exchanges.”

**Individual Market Special Enrollment Periods**

HHS also has an individual addition to the Proposed Rule, which would allow employees and their dependents to enroll in individual health insurance coverage or to change individual health plans outside of the individual market annual open enrollment period if and when such individuals gain access to an Integrated HRA or a QSEHRA. Under the proposal, an employee’s access to, and enrollment in, an Integrated HRA or QSEHRA would be a triggering event for a special enrollment period. The proposed coverage effective date for such enrollment would then be the first day of the month following the triggering event. HHS also proposed to offer the option for advance availability for the special enrollment period. This would allow qualified individuals and dependents to select coverage during a special enrollment period up to 60 days in advance of the triggering event.

**Next Steps**

*Consider the opportunities for 2020.* These proposed regulations present plan design opportunities for employers of all sizes. Once the regulations are finalized, employers will want to understand how these new rules may save costs, create efficiencies and ease administration.

*Watch for regulations and guidance.* The Departments noted that new guidance and additional proposed regulations are forthcoming. For example, we are likely to see guidance in the near future from the Treasury Department and the IRS regarding the Integrated HRA and compliance with the nondiscrimination requirements of Code Section 105(h) and the employer shared responsibility requirements of Code Section 4980H.

*Document changes.* If an employer decides to establish an Integrated HRA or Excepted Benefit HRA, communications to employees will need to be prepared specifically addressing PTC eligibility, special enrollment periods and health savings account interaction. Further, plan documents and summary plan descriptions will also need to be prepared, as well as any notices if an employer is terminating a group health plan.

*Charnae Supplee, McDermott law clerk, also contributed to this article.*

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