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Departments Publish Final Regulations Expanding the Availability of HRAs

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On June 13, 2019, the Department of Labor, together with the Department of Health and Human Services and the Department of the Treasury (collectively, the "Departments"), published final regulations designed to expand the use of health reimbursement arrangements ("HRAs"). The final regulations provide, in general, that HRAs may be used to (1) reimburse premiums for individual insurance market coverage, and (2) reimburse non-premium (other than COBRA premium) medical expenses even if the participant is not enrolled in health coverage. These new HRAs are likely to be a welcome development for employers who seek to expand health coverage opportunities for employees while controlling benefit program costs.

Background

Before the passage of the Patient Protection and Affordable Care Act ("PPACA"), many employers offered HRAs that paid or reimbursed employees for the cost of individual insurance premiums and other eligible health expenses. However, as described in our November 2014 blog entry, guidance released under PPACA made clear that HRAs were considered "group health plans" and subject to PPACA's market reforms, including first dollar coverage of preventive services and the prohibition of annual and lifetime dollar limits. The nature of HRAs (e.g., that they have an annual dollar limit) meant they could not comply with PPACA, except where the HRA was provided in conjunction with (or was "integrated") with a group health plan that satisfied PPACA requirements. As discussed in our 2015 blog entries here and here, subsequent guidance further clarified that HRAs could not integrate with individual market insurance, and therefore could not be used to reimburse employees for the cost of individual insurance coverage (whether on a pre-tax or post-tax basis).

On October 12, 2017, the President signed The Executive Order Promoting Healthcare Choice and Competition, which directed federal agencies to create or modify the treatment of certain alternatives to traditional group medical insurance under PPACA, including HRAs. Proposed regulations regarding the expansion of HRAs were released in October 2018. The final regulations issued last week create two types of HRAs—Individual Coverage HRAs and Excepted Benefit HRAs.

New HRAs

The final regulations contain significantly more detail than we can summarize in a single blog entry, so the summary that follows presents a high-level overview of the changes. Over the next week or so, we will post subsequent blog entries digging into the new HRAs and the legal and administrative implications of each.

- Individual Coverage HRAs. The most significant aspect of the final regulations is the creation of the "Individual Coverage HRA," which allows employers to create HRAs through which employee can purchase health coverage on the individual market. These HRAs are subject to numerous requirements, including uniform access among employment classifications (subject to minimum class sizes), employee notification requirements, and employee attestations. These requirements and the implications on ERISA and PPACA's employer mandate and premium tax credit will be described in detail in the forthcoming blogs.
- Excepted Benefit HRAs. The final regulations also create "Excepted Benefit HRAs," which permit employers

to credit up to $1,800 per year (indexed for inflation after 2020) to HRAs from which employees can get reimbursed for certain medical expenses. Unlike Individual Coverage HRAs, Excepted Benefit HRAs must be offered in connection with a traditional group health plan, though employees need not participate in the group health plan to take advantage of the Excepted Benefit HRA. Excepted Benefit HRAs are considered "excepted benefits" that are exempt from many requirements under ERISA and the PPACA.

The final regulations are effective for plan years beginning after December 31, 2019, and, with respect to the premium tax credit, tax years beginning after December 31, 2019. Employers that might be interested in offering either of the new HRAs should consider planning now so that appropriate adjustments are made for the upcoming open enrollment period.