

November 29, 2018

NEW PROPOSED REGULATIONS TO EXPAND HRAS

The Departments of Health and Human Service, Labor and Treasury (the Departments) recently proposed rules to expand the use of Health Reimbursement Arrangements (HRAs). These rules are in response to President Trump's executive order last year directing the Departments to expand access to HRAs. In addition, the Departments released Notice 2018-88 to request specific comments on issues related to HRAs integrated with individual health insurance policies.

This *Reform Update* reviews the following:

- Background on HRAs
- HRA Integration with Individual Health Insurance
- New Special Enrollment Rights
- Excepted Benefit HRAs

These proposed rules offer employers more health coverage options for plan years beginning on or after January 1, 2020. The Departments are seeking comments and may change some provisions.

BACKGROUND ON HRAS

HRAs are employer-sponsored self-funded medical plans. Historically, they combined with consumer driven health plans to reimburse out-of-pocket expenses on a tax-favored basis. Employers could be much more flexible if they used HRAs tied to their health plans rather than Health Savings Accounts (HSAs) since very specific requirements apply to health plans paired with HSAs.

Only employers can contribute funds to an HRA, and employers typically cap funding at a specific level. The Affordable Care Act (ACA), however, prohibits annual and lifetime dollar caps on health plans and requires plans to cover specific preventive care services. Standalone HRAs would, therefore, run afoul of the ACA requirements. The ACA does allow HRAs if they are integrated with a more comprehensive employer-sponsored health plan that meets ACA requirements.

Also, separate guidance initially prohibited premium-only HRAs. These HRAs primarily allow reimbursement for individual health plan premiums. Early this year, guidance was passed to allow premium-only HRAs for specific small employers so long as the HRA meets specific requirements.

The ACA originally limited how employees could use their HRAs. These proposed regulations would broaden the scope in which HRAs could be used.

HRA INTEGRATION WITH INDIVIDUAL HEALTH INSURANCE

These proposed rules will allow employers to offer HRAs that integrate with individual health insurance coverage. Any employer (not just small employers) can offer an HRA that integrates with an employee's or family member's individual insurance coverage. The insurance coverage could be purchased on or off the Marketplace. To receive a reimbursement from the HRA for health expenses or premiums, employees must verify they and any eligible family members have individual coverage.

The rules do limit how employers can offer these integrated HRAs. The Departments are concerned employers would encourage sick and high claim employees to select these integrated HRAs to shift risk from their plans to individual insurance carriers. Employers, therefore, must meet two conditions when they offer integrated HRAs:

1. An employer **cannot** offer the same class of employees a choice between a traditional employer-sponsored group health plan or an HRA integrated with individual coverage.
2. If an employer does offer an individual insurance integrated HRA, it must be offered on the same terms to all employees within the same class with limited exceptions (that is, different levels of funding can be provided for single coverage and family coverage or based on age – older people will be charged more for coverage).

Under the proposed rules, employers can offer eight specific classes of employees either traditional health coverage or an HRA integrated with individual coverage. The eight potential classes are as follows:

- Full-time employees
- Part-time employees
- Seasonal employees
- Employees covered by a Collective Bargaining Agreement (CBA)
- Employees who have not satisfied the waiting period for coverage
- Employees under age 25 before the beginning of the plan year
- Employees who work abroad
- Employees in different work locations

For these proposed rules, the employer can choose either the definition allowed under Section 105(h) or the definition under the Affordable Care Act (ACA). For example, under the ACA, full-time means 30 or more hours a week. Under Section 105(h), full-time customarily means 35 or more hours a week. The plan document must refer to the specific law the employer is using in making these determinations.

These HRAs integrated with individual health insurance must generally be offered under the same terms to a given class of employees. HRA funding could be increased, however, for older employees or employees who cover families under these individual policies. It makes sense. Individual policies are age-rated and premiums are higher if a family is covered.

The proposed rules verify that allowing yearend balances to rollover will not affect the requirement to offer HRAs under the same terms.

These set classes will make it difficult for employers to drive their high cost claimants into the individual market. All members of the above classes could only be offered an HRA integrated with individual coverage.

Employers must establish reasonable procedures to verify employees (and any family members) are, in fact, covered by an individual insurance policy. Verification may include:

1. Documents from a third party such as an insurance card or explanation of benefits letter
2. A document verifying that the employee and any applicable family members are covered by an individual insurance policy. This document should include the effective date of coverage and the name of the insurance carrier.

The employer must verify the initial coverage and verify the coverage is still valid every time an employee or applicable dependent submits an expense. This can be a simple statement included with a reimbursement request form.

The proposed rules cover the impact that HRAs integrated with individual policies will have on premium tax credits or subsidies in the Marketplace. Employees with a non-excepted benefit HRA (that integrates with individual coverage) cannot receive premium tax credits in the Marketplace if the HRA offers affordable coverage. In some cases, employees may be better off obtaining the premium tax credits rather than using employer HRA funds to pay for coverage. The proposed rules require employer plans to allow an employee to waive coverage under the HRA and waive future reimbursements under the HRA.

To determine whether the employer funds in the HRA allow affordable coverage, the employer will use the lowest cost silver plan the Marketplace offers. The proposed rules included an example. It takes the cost of the lowest cost silver plan in the Marketplace and nets out one-twelfth of the annual HRA allotment. The remaining amount is the employee contribution. That amount is tested for affordability against the employee’s household income.

Example – Single Employee with Household Income of \$28,000

Monthly Premium – Lowest Cost Silver Plan (self-only and in geographic region of employee)	\$400
Employer Funding for HRA – \$3,600 or \$300/month	\$300
Net EE cost for single coverage for lowest cost silver plan	\$100
Employer would test \$100 for affordability at \$28,000 annual income (\$2,333.33 a month). Using 9.86 percent as an assumed affordability percentage for 2020, this situation would pass the affordability test. The proposed rules state the Departments intend to include a safe harbor for testing in the final rules.	

It is not clear whether this testing must be performed on the premium of the lowest silver plan in the employees’ age bracket.

For employer mandate purposes, this HRA integrated with individual health insurance will be considered minimum essential coverage and employers can avoid the potential A penalty (\$2,320 in 2018). The Departments have requested comments on whether an affordable minimum value HRA integrated with individual coverage would avoid the B penalty (\$3,480 in 2018) under the ACA.

If the employer's coverage offer is not affordable:

- Employers must offer the right to waive coverage under the HRA for the entire year so that the employee is eligible for premium tax credits when buying individual coverage in the Marketplace.
- Employers will likely have to pay the B Penalty under the ACA because they did not offer a full-time employee minimum value, affordable coverage in the Marketplace and the employee had to purchase subsidized coverage (in 2018, the annual B penalty is **\$3,480**).

To make sure employees understand HRAs integrated with individual insurance coverage, employers will need to notify them at least 90 days before the beginning of each plan year. The notice will need to include at a minimum:

- The annual maximum HRA amount available
- The effect HRA coverage has on their eligibility for premium tax credits in the Marketplace
- A statement informing employees that they can opt out of the HRA and waive the right to future reimbursements from the HRA
- The requirement that the employee must verify individual insurance coverage initially and with each claim for benefits under the HRA

It was not noted if the Departments intend to provide a sample notice.

The Departments did release a notice that requests additional comments and provides clarifications on some practical issues that arise when offering HRAs that integrate with individual health insurance coverage:

- An employee covered by an HRA (unless it is an excepted benefit HRA) is ineligible for premium tax credits in the Marketplace. If an employee is eligible for an HRA that is affordable and offers minimum value coverage, the individual is ineligible for premium tax credits in the Marketplace.
- If an applicable large employer (ALE) offers an HRA integrated with individual policies to at least 95% of all full-time employees and dependents, they would not be subject to the "A" penalty under the employer mandate.
- To determine if an HRA integrated with an individual policy is affordable, first the contribution amount must be determined. To determine the contribution, the proposed regulations state it will take the lowest cost silver plan for-self-only coverage in the rating area less the self-only amount the employer makes available in the HRA. The Departments recognizes that this approach will require employers to determine affordability on an employee-to-employee basis because premiums are determined by geographic regions and age. The Departments plan to propose a location safe harbor that will allow affordability to be tested at the employee's worksite location. The Departments have requested comments on possible safe harbors or administrative simplifications for testing on age.
- The Notice also contemplates that the premiums in the individual Marketplace and the point when employers budget for health plan expenses will not always align. For example, many employers will set budgets in September and Marketplace premiums are often not available until late October. The Departments anticipate issuing a safe harbor to address this issue and request comments.
- The Departments also propose a non-calendar plan year safe harbor. This applies when an employer plan year is not aligned with the calendar year. Affordability would be determined

based on the first month of the plan year and apply for the entire plan year. A change in premiums on January 1st will not affect affordability for a non-calendar year plan.

- The Departments will propose to allow employers to use the current safe harbors to test for affordability of an HRA integrated with an individual insurance policy. Those safe harbors allow employers to test on the W-2, the rate of pay or the Federal Poverty Level (FPL).

The Notice also addressed potential issues under Section 105(h) nondiscrimination rules. These rules apply to self-funded employer-sponsored group health plans. The Departments indicate that future guidance will establish that a covered HRA will not be a 105(h) issue if the same maximum dollar amount is provided to all employees of a particular class. The Departments will allow HRA amounts to be increased based on an employee's age, as long as the employee offers the same amount to all employees in that class that are the same age.

This Notice requests comments by the end of the year.

NEW SPECIAL ENROLLMENT RIGHTS

The proposed rules also recognize that not all employers operate on a calendar plan year. To benefit from an HRA integrated with an individual health plan, the employee would need to be able to enroll in individual coverage mid-year in some cases. Just like employer plans, the Marketplace limits when people can enroll for coverage outside open enrollment.

The proposed rules would create two new special enrollment rights for Marketplace coverage for employees or dependents:

1. Who gain access to and enroll in an HRA that is integrated with individual coverage
2. Who are offered a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA)

These new special enrollments rights in the Marketplace will allow employees to take advantage of these new expanded HRAs throughout the year.

EXCEPTED BENEFIT HRAs

The proposed rules would also allow employers to offer an *excepted benefits* HRA. An excepted benefits HRA offers limited reimbursement amounts and coverage for certain excepted benefits (like dental and vision expenses). As a practical matter, this HRA may allow employees to pay premiums for short-term, limited duration insurance, for certain excepted benefits, and for COBRA.

To qualify as an excepted benefit HRA, the HRA:

1. Must not be an integral part of the plan
2. Provide benefits that are limited in amount
3. Not provide reimbursement for other non-excepted benefit health insurance premiums
4. Be made available on the same terms to similarly-situated employees

To offer an excepted benefits HRA, the employer must make other comprehensive or traditional group health plan coverage available to employees. This would **not** include an offer of coverage under an HRA integrated with an individual health insurance policy.

The proposed provisions set a cap on the limited amount referenced in the second point. The excepted benefits HRA must be limited to a maximum benefit amount of \$1,800 a year. This amount would be annually indexed.

CONCLUDING THOUGHTS

These regulations, if finalized, would change the tax preference for individual insurance policies in a limited circumstance. Employers and employees could use tax-favored dollars from an HRA that integrates with an employee's or family member's individual insurance coverage to pay for that individual coverage. Depending on the details of the final regulations, these HRAs may appeal to certain employers.

However, it would be a very big change in how employers offer health benefits. Employees would be responsible for purchasing their own insurance coverage. In many cases, Marketplace silver plans may have higher out-of-pocket costs for services or may have a more limited network of providers. In addition, if employees have problems with their insurance coverage, they would have to resolve them directly with their insurance carrier.

The individual health plan funded through an integrated HRA would not be considered an ERISA plan if it meets these requirements:

- The purchase of individual insurance is completely voluntary.
- The employer or other plan sponsor does not select or endorse any particular insurer or coverage.
- Participants are notified annually that the individual coverage is not subject to ERISA.

The preamble to the proposed rules indicates the Departments may allow premiums for individual insurance plans that exceed the HRA funds to be paid for with pre-tax contributions through a Section 125 plan. The preamble requests comments on this point. This potential allowance for additional tax preferred means for paying for individual insurance coverage was not actually included in the proposed rules themselves.

At this point, these are simply proposed rules. The Departments must issue final rules before these integrated HRA plans can become an option. It will be critical for employers to split benefit classes only as the law allows. MMA MI will keep you posted when final rules are issued.

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