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View From Groom: Administration’s Health Reimbursement Arrangement Proposal Is Welcome Step but Leaves Questions Unanswered



By KATIE BJORNSTAD AMIN AND RACHEL LEISER
LEVY

Employers and health insurers have been waiting with the corporate equivalent of bated breath since October 2017 when President Trump issued Executive Order No. 13813, directing regulators to “expand employers’ ability to offer [Health Reimbursement Arrangements (“HRAs”)]” and permit HRAs to be “used in conjunction with nongroup coverage.”

The wait finally came to an end on Oct. 23, 2018, when the Departments of Health and Human Services, Labor, and Treasury (the “Departments”) released proposed regulations effectively reversing Obama-era guidance governing the use of HRAs. The result is that employees will soon be allowed to use HRAs to pay for premiums for individual health insurance purchased either on or off the Exchanges.

While the proposed regulations promise relief from the prior guidance, it may be premature to exhale quite yet. First, despite their length and complexity, many questions remain. Additionally, taxpayers may not rely on the proposed regulations, meaning that any relief they offer are still speculative. Final regulations are not expected until 2019 (with comments on the proposed regulations due by Dec. 28, 2018). The proposed regulations are a very welcome first step, however, and indicate how serious the Departments are about issuing meaningful relief that works well within the existing regulatory framework.

In addition to creating two new types of permissible HRAs, discussed below, the proposed regulations contain important rules regarding eligibility for premium tax credits (“PTCs”) for individuals eligible for one of

the new HRAs, the ERISA status of individual market plans purchased with an HRA, the use of a cafeteria plan in conjunction with the new HRAs, and new special enrollment rights. The proposed regulations, however, do not contain rules for how an employer might satisfy its employer shared responsibility requirements with the new HRAs, but the Departments have promised to issue follow-on guidance on this topic shortly.

I. HRA Integration and Excepted Benefits: ICHRAs and EBHRAs

The proposed regulations remove the current prohibition on using HRA funds to purchase individual health insurance coverage, provided certain conditions are met (thereby creating “Individual Coverage HRAs” or “ICHRAs”). In addition, the proposed regulations create a new version of stand-alone HRAs that employees can use to pay for out-of-pocket medical expenses and certain premiums (“excepted benefit HRAs” or “EBHRAs”). Both HRAs include nondiscrimination rules that limit their use.

According to the Departments, the proposed nondiscrimination rules are designed to “prevent negative consequences”—*i.e.*, discrimination against older and sicker individuals and significant destabilization of the individual insurance market. The Departments are right to pay attention to the stability of the individual insurance market—absent such a foundation, it would appear unlikely that employers will actually take advantage of the options offered by the proposed regulations due to their hesitation to send their employees to an unstable market.

A. ICHRAs The proposed regulations would permit an HRA to be integrated with certain individual health plan coverage (so that the HRA can satisfy the Affordable Care Act's ("ACA") requirements with respect to annual limits and preventive services, the reason why a stand-alone HRA for active employees was not permissible under previous guidance). In order to be "integrated" with individual market coverage, the proposed regulations provide that the ICHRA must meet several conditions:

- **Enrollment and substantiation.** Any individual covered by the ICHRA must be enrolled in health insurance coverage purchased in the individual market and must periodically substantiate and verify that they have such coverage.

- **Prohibition on offering HRA and traditional group coverage.** The employer may not offer the same class of individuals both an ICHRA and a "traditional group health plan" (defined as any group health plan other than either an account-based group health plan or a group health plan that consists solely of excepted benefits).

- **Same terms.** The employer must offer the ICHRA on the same terms to all employees in a "class."

- **Opt-out.** Employees must have the ability to opt-out of receiving the ICHRA so that the employee may receive a PTC if he or she would otherwise qualify; and

- **Notice.** Employers must provide a detailed notice to employees.

B. EBHRAs The proposed regulations would also allow for the use of a new type of stand-alone HRA that can qualify as an "excepted benefit" ("EBHRA").

Using their existing statutory authority, the Departments have created a new HIPAA excepted benefit category. The significance of making an EBHRA an excepted benefit is that the ACA's market reform rules do not apply, so there is no need to worry about how the HRA can satisfy the prohibition on annual dollar limits or the preventive care requirements. Status as an excepted benefit also means that the employee who is covered under the EBHRA is not considered enrolled in "minimum essential coverage" and would, therefore, not be precluded from receiving a PTC for coverage purchased on an Exchange. The following requirements must be satisfied in order for an HRA to qualify as an EBHRA:

- The employer must offer other, non-account based, medical coverage to employees that is not an excepted benefit (but employees are not required to enroll in that coverage).

- The amount of new employer contributions each year cannot exceed \$1,800 (indexed).

- The EBHRA may be used to reimburse medical expenses and premiums or contributions for COBRA, excepted benefit coverage, or STLDI, but may not be used to reimburse premiums or contributions for other medical coverage (individual or group).

- The EBHRA must be made available on a uniform basis to all similarly situated employees, as defined in the HIPAA nondiscrimination regulations.

- An employer is not permitted to offer both an ICHRA and an EBHRA to the same group of employees.

II. Open Questions

The Departments appear to have anticipated the regulatory twists and turns necessitated by the newly permitted HRAs and to provide necessary guidance to employers. Of course, numerous open questions remain, including:

- a. The ability to apply "classes" on an employer-by-employer (versus controlled group) basis.

- b. The ability to use ICHRAs with private exchanges.

- c. How ICHRAs can be used for employer share responsibility compliance.

- d. Whether an ICHRA can be integrated with coverage sold in 1332 waiver states.

- e. Coordination of ICHRA/EBHRA benefits with Medicare Secondary Payer rules.

Hopefully, at least some of the issues will be raised with the Departments in comment letters and will be addressed in final regulations.

Kathryn Bjornstad Amin is a Principal at Groom where she advises employers, governmental entities, self-funded plans, and insurers on the full range of health and welfare matters.

Rachel Leiser Levy is a Principal at Groom where she counsels clients on a wide range of federal tax issues affecting health and welfare plans and retirement plans and specializes in all tax aspects of the Affordable Care Act.