Bloomberg Tax

Tax Management
Compensation Planning Journal™

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The Proposed Expansion of Health Reimbursement Arrangements: Is this a Game Changer for Employers?

By Tzvia Feiertag, Esq.[*]

OVERVIEW

In perhaps the most significant guidance resulting from President Trump's 2017 Executive Order Promoting Healthcare Choice and Competition Across the United States, on October 22, 2018, the Departments of Treasury, Labor, and Health and Human Services (the Departments) jointly released proposed regulations on health reimbursement arrangements (HRAs) and other account-based plans that would allow two new types of HRAs.[1] If finalized, the proposed regulations will impact employers of all sizes. The proposed regulations may especially be useful for small and medium-sized companies that want to be able to define the costs that they are willing to pay towards employee health insurance coverage by using HRAs with a fixed annual employer contribution and that have a small enough workforce to satisfy some of the consistency requirements of the proposed regulations.

The proposed regulations provide for two new types of HRAs:

- **HRAs Integrated with Individual Health Insurance Coverage (Individual Coverage HRAs)**

  Employers of any size could offer HRAs to reimburse employees for the cost of their premiums for individual health insurance coverage (whether purchased on or off the Exchanges) so long as several conditions are met.

- **Standalone Excepted-Benefit HRAs Up to $1,800 (as indexed for inflation)**

  Employers offering traditional group health plan coverage could also offer an excepted-benefit HRA that would allow for reimbursement of up to $1,800 per year (indexed for inflation) plus any carryover amounts for medical expenses and premiums/contributions for COBRA, excepted-benefit coverage (e.g., limited dental or vision coverage), or short-term limited duration insurance (STLDI), but not expenses for other group or individual medical coverage.

The proposed regulations expand the use of HRAs (or other account-based plans) by removing the current prohibition against integrating an HRA with individual health insurance coverage. Under current guidance, HRAs must be integrated with **other** qualifying group health plan coverage that satisfies the Affordable Care Act's (ACA's) market reform mandates. Currently, HRAs are not allowed to be integrated with individual health insurance coverages and offering a non-integrated HRA would violate the ACA (triggering a $100/day per employee excise tax).

Applicability Date

If finalized, the provisions of the proposed regulations regarding the two new types of HRAs would ap-

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Tzvia would like to acknowledge the assistance of her colleagues Helaine Fingold, Rina Fujii, Gretchen Harders, Sharon Lippett, and Tim Murphy for their assistance and insights.

[1] Exec. Order No. 13,813, 82 Fed. Reg. 48, 385 (Oct. 12, 2017). "Health Reimbursement Arrangements and Other Account-Based Group Health Plans," Proposed Rules, 83 Fed. Reg. 54,420 (Oct. 29, 2018) (the "proposed regulations").

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ISSN 0747-8607

ply for plan years beginning January 1, 2020. **However, unlike many proposed rules, the guidance states that it may not be relied upon until finalized.**[2] Thus, the Obama-era guidance (summarized below) remains the law at this time, despite the recent decision in *Texas v. United States*,[3] declaring the ACA, in its entirety, unconstitutional. Employers that offer HRAs that do not comply with current law would be subject to significant penalties.

The comment period closed December 28, 2018, and final regulations are expected to be published in 2019.

BACKGROUND

An HRA is a type of account-based group health plan funded solely by employer contributions (with no salary reduction contributions or other contributions by employees) that reimburses an employee solely for medical care expenses (as defined under I.R.C. §213(d)) incurred by the employee, the employee's spouse, children or other tax dependents, up to a fixed dollar amount for a coverage period (generally, a plan year).[4] Reimbursements are excludable from an employee's income and wages for federal income tax and employment tax purposes. Some HRAs are designed to allow a carryover amount of unused account balances while others forfeit unused balances. HRAs are group health plans under the Employee Retirement Income Security Act (ERISA).

Obama-era guidance under the ACA provided that HRAs (and other employer-sponsored arrangements designed to pay for health coverage purchased in the individual market) could not be stand-alone group health plans because they did not satisfy the ACA's market reform mandates.[5] Specifically, current guidance provides that stand-alone HRAs do not meet the requirement to provide certain preventive coverage at no-cost sharing nor do they meet the prohibition on imposing annual or lifetime limits on ''essential health benefits.'' Under current guidance, HRAs must be integrated with **other** qualifying group health plan coverage that satisfies the ACA's market reform mandates. Currently, HRAs are not allowed to be integrated with individual health insurance coverages and offering a non-integrated HRA would violate the ACA (triggering a $100/day per employee excise tax).

Retiree-Only HRAs and QSEHRAs Remain Available

Retiree-only HRAs[6] and HRAs that are integrated with Medicare, Tricare, or other group health plan coverage (integrated HRAs) will continue to be available to employers of all sizes. The guidance does not treat qualified small employer health reimbursement arrangements (QSEHRAs)[7] as HRAs for purposes of the proposed regulations[8], and QSEHRAs will also continue to be available to small employers.

NEW INDIVIDUAL COVERAGE HRAs

The proposed regulations expand the use of HRAs (or other account-based plans) by removing the current prohibition against integrating an HRA with individual health insurance coverage. To be considered integrated with individual health insurance coverage for purposes of satisfies the ACA market reform mandates, individual HRAs must not consist solely of excepted benefits[9] and satisfy the following conditions.[10]

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[2] 83 Fed. Reg. at 54,444.

[3] *Texas v. United States*, No. 4:18-cv-00167-O, 2018 BL 465633 (N.D. Tex, Dec. 14, 2018). This case was brought by the State of Texas and 19 other states. Following the request by the state attorneys general who stepped in as defendants in the action (the ''Intervenor Defendants'') for a second order clarifying the December 14 decision, on Dec. 30, 2018, the district court granted a stay and partial final judgment. On Jan. 3, 2019, the Intervenor Defendants, led by California Attorney General Xavier Becerra, appealed the partial final judgment and underlying order to the U.S. Court of Appeals for the Fifth Circuit. A decision is expected later this year.

[4] *See* Notice 2002-45; Rev. Rul. 2002-41; Notice 2013-54.

[5] For a summary of prior regulations and guidance on integration of HRAs and other account-based group health plans, see the Preamble to the proposed regulations, 83 Fed. Reg. at 54,421 – 54,424.

[6] The ACA's market requirements do not apply to a group health plan that has fewer than two participants who are current employees on the first day of the plan year.

[7] The 21st Century Cures Act (Cures Act), Pub. L. No. 114-255, was enacted on Dec. 13, 2016. Section 18001 of the Cures Act amends the Code, ERISA, and the Public Health Service Act (PHSA) to permit an eligible employer to provide a QSEHRA to its eligible employees. The Cures Act provides that a QSEHRA is not a group health plan for purposes of the market requirements, and, as a result, QSEHRAs are not subject to PHSA §2711 and §2713. *See* I.R.C. §9831(d)(1), ERISA §733(a)(1), and PHSA §2791(a)(1).

[8] *See* 83 Fed. Reg. at 54,426.

[9] Excepted benefits are described in I.R.C. §9832, ERISA §733, and PHSA §2791. There are four statutory categories of excepted benefits. One such category of excepted benefits is limited excepted benefits. Under the statutory provisions, limited excepted benefits may include limited scope vision or dental benefits, benefits for long-term care, nursing home care, home health care, or community-based care, or any combination thereof, and ''such other similar, limited benefits as are specified in regulations'' by the Departments. To be excepted benefits under this category, the benefits must either: (1) be insured and provided under a separate policy, certificate, or contract of insurance; or (2) otherwise not be an integral part of the plan. The Departments previously exercised the authority to specify additional types of limited excepted ben-

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All Individuals Covered by the Individual Coverage HRA Must Be Enrolled in Individual Health Insurance Coverage

An individual covered by the Individual Coverage HRA must actually be enrolled in **any** individual market health insurance coverage (whether purchased on or off the Exchange) other than excepted-benefit coverage for each month that they are covered by the Individual Coverage HRA.[11] To be considered integrated, the individual health insurance coverage does not need to meet the ACA's market reform mandates. STLDI is not individual market health insurance coverage so it cannot be reimbursed under an Individual Coverage HRA.

If the individual covered by the Individual Coverage HRA ceases to be covered by the individual health insurance coverage, that individual must forfeit the HRA in accordance with applicable laws (including COBRA and other continuation of coverage requirements).[12]

Prohibition Against Offering Both an Individual Coverage HRA and a Traditional Group Health Plan to the Same Class of Employees

An employer may not offer an Individual Coverage HRA to a class of employees if it offers a ''traditional group health plan'' to that same class of employees.[13] An employer may divide employees into separate classes eligible for either the Individual Coverage HRA or a traditional group health plan, but cannot offer both to the same class. A ''traditional group health plan'' for this purpose means any group health plan other than either an account-based group health plan or a group health plan that consists solely of excepted benefits.[14] An employer could offer varying Individual Coverage HRAs to different classes so long as the requirements are satisfied within each class.

Permitted classes consists of the following (or a combination of any of these):[15]

- full-time employees;
- part-time employees;
- seasonal employees;
- employees who are included in a unit of employees covered by a collective bargaining agreement;
- employees who have not satisfied a waiting period for coverage (generally, no longer than 90 days);
- employees who have not attained age 25 prior to the beginning of the plan year;
- non-resident aliens with no U.S.-based income (generally, foreign employees who work abroad); or
- employees who work in the same rating area.

Defining full-time, part-time, and seasonal employees—either I.R.C. §105(h) or §4980H definitions may be used. While employers may define those three classes in accordance with either of those Code sections, they must be consistent across all three classes of employees. The HRA plan document must set forth the applicable definitions prior to the beginning of the plan year (but nothing would prevent an employer from changing the definitions for a subsequent plan year so long as the plan document was properly and timely amended).[16]

It is not entirely clear whether classes must apply on a controlled-group basis rather than at the common-law employer level. However, the guidance is clear that former employees (such as retirees) are considered to be in the same class they were in immediately before separation from service.[17] This presumably applies where the Individual Coverage HRA covers both active and former employees (because retiree-only HRAs are not covered by these rules).

The Departments state that the proposed classes are intended to provide the ''flexibility'' that is needed to achieve increased HRA usability ''while establishing parameters sufficient to address the health status discrimination and adverse selection concerns.'' They also stated that the classes proposed are ones that they believed, based on their experience, employers use for employee benefit and other purposes, which would make it unlikely that employers will shift employees between the classes simply for purposes of offering an HRA.[18]

The Departments requested comments on whether other classes, such as ''hourly'' or ''salaried,'' should be provided.[19]

Employee pre-tax contributions under a cafeteria plan permitted to pay for non-exchange individual health insurance coverage. The ACA had added I.R.C. §123(f) prohibiting an employer (except certain small employers) from allowing an

efits with respect to certain health FSAs, certain employee assistance programs, and certain limited wraparound coverage.

[10] *See* Prop. Treas. Reg. §54.9802-4(c)(1) – (6).

[11] *See* Prop. Treas. Reg. §54.9802-4(c)(1).

[12] *Id.*

[13] *See* Prop. Treas. Reg. §54.9802-4(c)(2).

[14] *Id.*

[15] *See* Prop. Treas. Reg. §54.9802-4(d)(1).

[16] *See* Prop. Treas. Reg. §54.9802-4(d)(2).

[17] *See* Preamble to the proposed regulations, 83 Fed. Reg. at 54,431.

[18] *See id.* at 54,432.

[19] *Id.*

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ISSN 0747-8607

employee to make salary reduction contributions to a cafeteria plan to purchase individual health insurance coverage offered through an Exchange. Surprisingly, under the guidance, employers may permit employees to pay the balance of the premium for individual health coverage purchased outside the Exchange through the employer's cafeteria plan.[20]

Same-Terms Requirements

Employers who offer an Individual Coverage HRA to a class of employees must offer that HRA on the same terms, i.e., both in the same amount and otherwise on the same terms or conditions, to all employees within the class, with the following notable **exceptions**:[21]

- **Age.** To account for the increased cost of premiums for older individuals, employers may increase the maximum amount available to a participant based on the participant's age (but the increase must apply to all similarly aged participants within the class).
- **Family Size.** An employer may also increase the maximum dollar amount made available under an Individual Coverage HRA as the number of the participant's dependents who are covered under the HRA increases (so long as the increase applies to all similarly situated participants within that class).
- **Former Employees.** An Individual Coverage HRA is treated as providing the same terms even if the employer offers the HRA to some former employees (for example, to all former employees within a maximum tenure of employment) but failed to offer the HRA to other former employees within a class of employees. If an employer offers the HRA to one or more former employee(s) within a class of employees, the HRA must be offered to those former employee(s) on the same terms as all other employees within the class.
- **Carryovers.** Carryover amounts allowed under an Individual Coverage HRA are disregarded for purposes of determining whether the HRA is offered on the same terms (so long as the method for determining whether participants have access to the carryover amounts, and the methodology and formula for determining the amounts of such carryovers, is the same for all participant within the class).

In addition, employers may not offer a more generous Individual Coverage HRA to individuals based on an adverse health factor (such as diabetes, cancer, heart disease, etc.), which is permitted under other laws such as HIPAA nondiscrimination rules.[22]

IRS Expects to Release I.R.C. §105(h) Safe Harbor Guidance. Varying the terms of benefits under an Individual Coverage HRA based on an individual's age raises nondiscrimination issues under I.R.C. §105(h) nondiscrimination rules. In the proposed regulations, the Departments indicated that they intended to issue guidance in the ''near term'' that describes an anticipated safe harbor that would allow increases in the maximum dollar amount made available under an Individual Coverage HRA based on age if certain conditions are met.

In IRS Notice 2018-88, issued in November 2018, the IRS stated that it expects to release future guidance stating that an Individual Coverage HRA would not violate the I.R.C. §105(h) nondiscrimination rules as long as the maximum reimbursement was consistent within each class of employees. The IRS also expects that the guidance would allow Individual Coverage HRAs to increase reimbursement based on the employee's age.

If issued, this guidance would mean that Individual Coverage HRAs would not be discriminatory as long as employees in the same class, who are the same age, could receive the same maximum reimbursement.

The Notice also reiterates, based on existing regulations, that an Individual Coverage HRA that only reimburses for insurance premiums is not subject to I.R.C. §105(h) nondiscrimination rules. Thus, if an employer wished to avoid any I.R.C. §105(h) nondiscrimination concerns with offering an Individual Coverage HRA, it could limit reimbursement under such HRA only to premiums for the cost of individual coverage.

Opt-Out Required

Individuals who are covered by an Individual Coverage HRA for a month (regardless of the amount of reimbursement available under the HRA) are not eligible for a premium tax credit (PTC) to purchase health insurance coverage on the Exchange for that same month. Because in some circumstances an individual may be better off obtaining the PTC than the reimbursements under the HRA, employers that offer Individual Coverage HRAs must allow participants to

[20] *See id.* at 54,432 – 54,433 (Oct. 29, 2018).

[21] *See* Prop. Treas. Reg. §54.9802-4(c)(3).

[22] *See* Proposed DOL Reg. 29 C.F.R. §2590.702-2(a)(2); 83 Fed. Reg. at 54,433, 54,466.

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opt out of and waive future reimbursements from the HRA at least annually.[23] Similarly, to maintain an individual's eligibility for the PTC, upon termination of employment, the employer must allow a participant to permanently opt out of and waive future reimbursements from the HRA to ensure that the HRA participant may choose whether to claim the PTC, if otherwise eligible, or to continue to participate in the HRA after the participant's separation from service.

Substantiation and Verification of Individual Health Insurance Coverage

Individual Coverage HRAs must have ''reasonable procedures'' to verify that individuals whose medical care expenses are reimbursable by the HRA are, or will be, enrolled in individual health insurance coverage (other than coverage that consists solely of excepted benefits) during the plan year.[24] ''Reasonable procedures'' may include:

- A document (such as insurance card or explanation of benefit) from a third party (such an insurance carrier) showing that the participant and any dependents covered by the HRA are, or will be, enrolled in individual health insurance coverage during the plan year; or
- An attestation by the participant stating that the participant and any dependents are or will be enrolled in individual health insurance coverage, the date coverage began or will begin, and the name of the provider of the coverage. (An attestation may be relied upon absent actual knowledge that an individual is or will not be enrolled in individual health insurance coverage during the plan year.)

Substantiation will also be required prior to each request for reimbursement of a medical care request verifying that the participant or any dependents continue to be enrolled in health insurance coverage for the month during which the medical expenses were incurred.[25] For reimbursements of monthly insurance premiums, arguably, an employer would need to substantiate coverage each month. Such substantiation may be in the form of a written attestation on the reimbursement request form, which, while not addressed in the guidance, may include a statement on the back of a debit card if reimbursement is provided by that method.

Notice Requirement

Because of the concern that individuals may not understand that their coverage under an Individual Coverage HRA in any month will cause them to become ineligible for a PTC, the proposed regulations require employers offering such HRAs to provide notice. Notice must be provided at least 90 days prior to the beginning of a plan year, or for those not yet eligible to participate at that time, no later than the date on which the participant is first eligible to participate in the HRA.[26]

Notice must include a description of the terms of the HRA, including **all** of the following:[27]

- The maximum dollar amount made available;
- A statement of the right of the participant to opt-out of and waive future reimbursement under the HRA;
- A description of the potential availability of the PTC if the participant opts out of and waives the HRA and the HRA is not affordable;
- A description of the PTC eligibility consequences for a participant who accepts the HRA;
- A statement that the participant must inform any Exchange to which they apply for advance payments of the PTC of the availability of the HRA, the amount of the HRA, the number of months the HRA is available to participants during the plan year, whether the HRA is available to their dependents, and whether they are a current or former employee;
- A statement that the participant should retain the written notice because it may be needed to determine whether the participant is allowed the PTC;
- A statement the HRA may not reimburse any medical care expense unless the substantiation requirements are met;
- A statement that it is the responsibility of the participant to inform the HRA if the participant or any dependent whose medical care expenses are reimbursable by the HRA is no longer enrolled in the individual health insurance coverage; and
- If applicable, a statement that advises participants that the individual health insurance coverage integrated with the Individual Coverage HRA is not subject to ERISA.

The notice does not need to include information specific to a participant and may include other information, as long as the additional information does not conflict with the required information.

Student Health Insurance Coverage. Because student health insurance coverage is individual health

[23] *See* Prop. Treas. Reg. §54.9802-4(c)(4).

[24] *See* Prop. Treas. Reg. §54.9802-4(c)(5)(i).

[25] Prop. Treas. Reg. §54.9802-4(c)(5)(ii).

[26] *See* Prop. Treas. Reg. §54.9802-4(c)(6).

[27] *Id.*

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ISSN 0747-8607

insurance coverage (even though it is exempt from certain provision of the ACA and HIPAA), the guidance provides that an HRA may be integrated with student health insurance coverage.[28]

NEW STANDALONE EXCEPTED-BENEFIT HRAs UP TO $1,800

Recognizing that employers may wish to offer a non-Integrated HRA or Individual Coverage HRA (i.e., a pure reimbursement account), the proposed regulations expand the definition of ''limited excepted benefits'' to include a new standalone HRA.[29] Because HIPAA-excepted benefits are not subject to the ACA's market reforms, these new Excepted-Benefit HRAs do not need to comply with the prohibition on annual or lifetime limits on ''essential health benefits'' or provide preventive care services at no cost-sharing. Also, because the HIPAA-excepted benefits are not considered ''minimum essential coverage'' under the ACA, an individual covered under an Excepted-Benefit HRA is still eligible for a premium tax credit to purchase health insurance coverage on an Exchange.

To qualify as an Excepted-Benefit HRA, **all** of the following four conditions must be satisfied:

1. The HRA must not be an integral part of the plan.

This means that an employer must make available to employees who are offered the Excepted-Benefit HRA other group health plan coverage (other than an account-based group health plan or coverage consisting solely of excepted benefits, such as limited-scope dental or vision) for the plan year.[30] Only employees eligible for an employer's traditional group health plan coverage may be eligible for an Excepted-Benefit HRA. That other coverage does not need to be affordable or meet minimum value, and employees do not need to enroll in the other coverage to satisfy this requirement.

2. The HRA must provide benefits that are limited in amount.

The amounts made newly available for a plan year in an Excepted-Benefit HRA cannot exceed $1,800 annually (as indexed for inflation using the C-CPI-U for plan years beginning after December 31, 2020).[31] Carryover amounts do not count against the $1,800 limit.[32] If an employer provides more than one Excepted-Benefits HRA to the participant for the same period, the amounts made available under such plans are aggregated when determining if the $1,800 limit is exceeded.[33]

3. The HRA cannot provide reimbursement for premiums for certain health insurance coverage.

Excepted-Benefit HRAs could be used to reimburse premiums for individual health insurance coverage that consists solely of excepted-benefits (such as limited-scope vision or limited-scope dental), COBRA or other group continuation coverage (the premiums of which are generally paid with after-tax funds), or STLDI.[34] However, Excepted-Benefit HRAs are **not** permitted to reimburse 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.[35]

4. The HRA must be made available under the same terms to all similarly situated individuals.

To prevent an employer from intentionally or intentionally, directly or indirectly, steering any participants or dependents with adverse health factors away from the employer's traditional group health plan, an Excepted-Benefit HRA must be made available under the same terms to all similarly situated individuals (as defined in the HIPAA nondiscrimination regulations) regardless of any health factors.[36] For example, an Excepted-Benefit HRA could not be offered only to (nor could greater amounts be made available to) employees who have cancer or fail a physical exam. Under HIPAA's nondiscrimination rules, similarly situated employees are based on ''bona fide employment-based classifications'' such as full-time, part-time, occupation, collectively-bargained employees, geographic distinctions, length of service, or date of hire, which are different than the employee classifications use above for Individual Coverage HRAs.

Interaction between Individual Coverage HRA and Excepted-Benefit HRAs. An employer is not permitted to offer both an Individual Coverage HRA and an Excepted-Benefit HRA to the same group of employees. The reason for this is that an Individual Coverage HRA may only be provided to

[28] *See* 83 Fed. Reg. at 54,435.
[29] *See* Prop. Treas. Reg. §54.9831-(c)(3)(viii).
[30] *See* Prop. Treas. Reg. §54.9831-(c)(3)(viii)(A).
[31] *See* Prop. Treas. Reg. §54.9831-(c)(3)(viii)(B)(1).
[32] *See* Prop. Treas. Reg. §54.9831-(c)(3)(viii)(B)(2).
[33] *See* Prop. Treas. Reg. §54.9831-(c)(3)(viii)(B)(3).
[34] *See* Prop. Treas. Reg. §54.9831-(c)(3)(viii)(C).
[35] *Id.*
[36] *See* Prop. Treas. Reg. §54.9831-(c)(3)(viii)(D).

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ISSN 0747-8607

a class of employees that is **not** offered a traditional group health plan, and an Excepted-Benefit HRA must be offered to a class of employee that **is** eligible for a traditional group health plan.

IMPACT ON PREMIUM TAX CREDITS AND ACA EMPLOYER MANDATE PENALTIES

Regardless of whether the coverage is ''affordable'' and provides ''minimum value,'' an individual who is **covered** by an Individual Coverage HRA is ineligible for a PTC because such coverage is eligible employer-sponsored plan coverage.

An employee who is **offered**, but opts out of an Individual Coverage HRA, or an individual related to that employee who is offered such an HRA due to his or her relationship to the employee, is ineligible for the PTC for any months the HRA is'' affordable'' and ''minimum value.'' A PTC would be available only if the employee opts out the Individual Coverage HRA and the coverage does not meet ''minimum value'' and is not ''affordable.'' The proposed regulations address when coverage is considered ''minimum value'' and ''affordable'' for purposes of PTC eligibility.

Both the ''A'' and ''B'' penalties under the ACA Employer Mandate, which applies to ''applicable large employers'' (ALEs) (i.e., employers who employ at least 50 full-time employees, including full-time equivalents, on average during the prior year), are triggered when at least one full-time employee purchases coverage on the Exchange with the PTC.

An Individual Coverage HRA qualifies as ''minimum essential coverage'' so ALEs who offer such HRAs to at least 95% of their full-time employees (and their children) will avoid the ''A'' penalty under I.R.C. §4980H(a) ($2,500 in 2019). In addition, an ALE that offers an Individual Coverage HRA that is ''affordable'' and meets ''minimum value'' will also avoid the ''B'' penalty under I.R.C. §4980H(b) ($3,750 in 2019).

Possible Safe Harbors for ALEs Offering Individual Coverage HRAs

The guidance stated that in the ''near term'' the Treasury Department and the IRS intended to issue guidance that describes an anticipated safe harbor for purposes of determining whether an employer that has offered an Individual Health Coverage HRA would be treated as having made an offer of ''affordable'' coverage that provides ''minimum value,'' regardless of whether the employee who received that offer declines the HRA and claims the PTC. In November 2018, several weeks after the initial proposed regulations were issued, the IRS released Notice 2018-88 introducing the following potential safe harbors for identifying the plan to be used to determine ''affordability'' for ALEs who offer Individual Coverage HRAs.

Worksite Location Safe Harbor. An ALE would use the lowest cost silver plan for self-only coverage offered by the exchange in the rating area in which the employee's primary worksite of employment is located (rather than the employee's place of residence) as the affordability plan for each employee.

Calendar-Year Safe Harbor. Because the cost of the affordability plan that will apply for a calendar year will not be available until mid-to-late fall of the prior calendar year, ALEs would be able to determine affordability based on the cost of the applicable affordability plan for the prior calendar year.

Non-Calendar Year Safe Harbor. For plans that span two years, an ALE that offers an Individual Coverage HRA would be able to assume that the cost of the affordability plan for the first month of the plan year would be the cost of the affordability plan for all the months in the plan year.

Current Safe Harbors. The three current affordability safe harbors (Form W–2 wages safe harbor, the rate of pay safe harbor, and the federal poverty line safe harbor) would be available for ALEs offering Individual Health Coverage HRAs.

Notice 2018-88 does not provide, but requests comments, on a proposed safe harbor related to the fact that the affordability plan for an employee is based on the employee's age. Specifically, it is concerned about the potential administrative issues and burdens that may arise due to the need to separately determine the employee's required contribution for each individual employee based on his or her age.

In Notice 2018-88, the IRS proposes that an Individual Health Coverage HRA that is ''affordable'' would be treated as providing ''minimum value,'' which, if finalized, would simplify administration for employers and would be welcomed.

Individual Health Insurance Coverage and ERISA Plan Status

An HRA is a self-insured ''group health plan'' subject to ERISA. However, the proposed regulations clarify that that the underlying individual health insurance coverage itself selected by an individual in the individual market and reimbursed by such an Individual Coverage HRA, would not be treated as part of a ''group health plan'' or as part of any ''employee

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ISSN 0747-8607

welfare benefit plan'' under ERISA, provided that **all** of the following conditions are satisfied:[37]

- The purchase of any individual health insurance coverage is completely voluntary;
- The employer does not select or endorse any particular insurance carrier or insurance coverage (providing general contact information regarding the availability of health insurance in a state or providing general health insurance educational information is permitted);
- Reimbursement for premiums is limited solely to individual health insurance coverage;
- The employer does not receive any consideration in the form of cash or otherwise in connection with the employee's selection or renewal in any individual health insurance coverage; and
- Each plan participant is notified annually that the individual health insurance coverage is not subject to ERISA. There are additional specific requirements depending on the type of HRA.

Supplemental Salary Reduction Arrangements under a Cafeteria Plan to Purchase Off-Exchange Individual Health Insurance Coverage Permitted; Not Subject to ERISA. The proposed regulations provide that individuals may pay on a pre-tax basis through an employer's cafeteria plan the remaining premiums for off-Exchange individual health insurance coverage that is not reimbursed under an Individual Coverage HRA (or QSEHRA).[38] This means that employees' entire premiums for non-Exchange individual health insurance coverage could be paid on a tax-free basis so long as the supplemental salary reduction agreement arrangement is offered along with coverage under an Individual Coverage HRA or QSEHRA.

The guidance also makes clear that such supplemental salary reduction arrangements are not ''group health plans'' subject to ERISA.[39] Prior guidance took the position that such an arrangement would create a ''group health plan'' that would violate ACA's market reform mandates.

Individual Marketplace Special Enrollment Periods

The proposed regulations provide a special enrollment period in the individual market for individuals who gains access to and enroll in an Individual Coverage HRA or are provided a QSEHRA.[40] This would allow such employees and their dependents to enroll in individual health insurance coverage or to change from one individual insurance health insurance plan to another outside of the individual market annual open enrollment period.

EMPLOYER TAKEAWAYS

In the short term, employers should take **no** action in reliance on the proposed regulations and wait until final regulations are issued.

As of the close of the public comment period, the Departments had received hundreds of comments. Several commenters recommended that the government delay implementation until at least 2021 so that HRAs can be administered effectively. Others expressed concerns about the potential impact on the individual insurance market and whether the provisions in the proposed regulations adequately protect employers and employees with Individual Coverage HRAs.

While the ultimate impact of the proposed regulations cannot yet be known, stakeholders with concerns about the continued viability of the ACA marketplaces are viewing these proposed regulations with a skeptical eye as they follow the Trump Administration's release of two prior final regulations stemming from the 2017 Executive Order that expanded access to short-term limited duration insurance and association health plans, both of which are expected to undermine the small group and individual insurance market plans, as such plans are defined under the ACA.

Given the extensive and complex nature of the proposed regulations, the subsequent IRS guidance, and the significant number of comments, there likely will be changes to the rules in any final regulations. It also is not clear whether and when the proposed regulations will be finalized, which may depend, among other things, on the outcome of the recent decision in *Texas v. United States,* declaring the ACA, in its entirety, unconstitutional.

In the long term, many employers are considering their potential options in light of the proposed expansion of HRAs (especially employers considering wholesale replacement of traditional group health plan coverage with Individual Coverage HRAs). Employers, however, may have concerns about the viability and stability of the individual health insurance markets. In addition, nothing in the proposed regulations requires insurers to offer compatible individual

[37] *See* Prop. DOL Reg. 29 C.F.R. §2510.3-1(l); 83 Fed. Reg. at 54,440 – 54,442, 54,466.

[38] *See* 83 Fed. Reg. at 54,432 – 54,433.

[39] *Id.*

[40] *See* Prop. Reg. 45 C.F.R. §155.420(a)(4)(iii); 83 Fed. Reg. at 54,442.

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ISSN 0747-8607

health insurance coverage in the marketplace. It remains to be seen how popular this approach may be with employers and whether the current individual insurance market will adapt in response if employers seek to offer these HRAs.

For now, the proposed regulations are not a game changer, but certainly worth watching in the coming years.

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ISSN 0747-8607