

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

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On October 22, 2018, in perhaps the most significant guidance resulting from President Trump's 2017 [Executive Order 13813, "Promoting Healthcare Choice and Competition Across the United States"](#) ("2017 Executive Order"), which we reported on [here](#), the U.S. Departments of Labor, Health and Human Services, and the Treasury jointly released [proposed regulations](#) on health reimbursement arrangements ("HRAs") and other account-based plans that would allow two new types of HRAs. If finalized, the proposed regulations will impact employers of all sizes.

The proposed regulations may be especially 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, as follows:

- ***HRAs Integrated with Individual Health Insurance Coverage ("Individual Coverage HRAs")***. Employers of any size may offer HRAs to reimburse employees for the cost of their premiums for individual health insurance coverage (whether purchased on or off Affordable Care Act ("ACA") marketplaces) so long as several conditions are met, including that employers may not offer both group health coverage and Individual Coverage HRAs to the same class of employees.
- ***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. The excepted-benefit HRA could reimburse for premiums/contributions for COBRA,

excepted-benefit coverage (e.g., limited dental or vision coverage), or short-term limited duration insurance.

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 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). The proposed regulations would instead permit an HRA to be integrated with individual health insurance coverage if the proposed integration rules are met.

Retiree-Only HRAs; QSEHRAs Remain Available

Retiree-only HRAs and HRAs that are integrated with Medicare, Tricare, or other group health plan coverage will continue to be available to employers of all sizes. Qualified small employer health reimbursement arrangements ("QSEHRAs") are not treated as HRAs for purposes of the proposed regulations, and QSEHRAs will also continue to be available to small employers.

In addition, the Department of Labor is proposing a clarification to provide HRA and QSEHRA plan sponsors with assurance that the individual health insurance coverage for which the premiums are reimbursed by the HRA or QSEHRA does not become part of an ERISA plan when certain conditions are met.

IRS Notice 2018-88

In support of the proposed regulations, in November 2018, the Internal Revenue Service ("IRS") issued [Notice 2018-88](#), stating that the IRS expects to release future guidance making clear that Individual Coverage HRAs satisfying the requirements under the proposed regulations should not run afoul of the existing nondiscrimination requirements under Section 105(h) of the Internal Revenue Code applicable to self-insured group health plan coverage. In that Notice, the IRS also addressed when HRA coverage will meet "minimum value" and "affordability" requirements so that an "applicable large employer" that offers such coverage may avoid potential employer mandate penalties, which are triggered by full-time employees who receive a premium tax credit.

Applicability Date

If finalized, the provisions of the proposed regulations allowing for the two new types of HRAs would apply for plan years beginning January 1, 2020. ***However, unlike many proposed rules, these proposed regulations state that they may not be relied upon until finalized.*** The comment period closed December 28, 2018, and we would expect final regulations to be published in 2019.

Employer Takeaways

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

- As of the close of the public comment period, the Departments of Labor, Health and Human Services, and the Treasury had received hundreds of comments. Several commenters recommended that the government delay implementation to 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 health plans 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*, which we reported on [here](#), declaring the ACA, in its entirety, unconstitutional.

In the long term, many employers should consider their potential options in light of the proposed expansion of HRAs (especially employers that are 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 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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