



As a means to modify the Affordable Care Act (ACA), President Trump signed an [Executive Order](#) on October 12, 2017, directing the ACA's governing agencies (Departments of Labor, Treasury and Health and Human Services) to address three methods to expand health coverage: formation of association health plans, expand short-term, limited-duration insurance, and expand the rules to allow individual premium to be reimbursed through health reimbursement arrangements (HRAs). Under current law, an HRA can only reimburse individual health premium if the HRA is a retiree-only HRA, or a qualified small employer HRA (QSEHRA).

In response to the Executive Order calling for expansion of the use of HRA, the tri-governing agencies released a pre-published version of their [proposed regulations](#), together with a [Fact Sheet](#), on October 23, 2018. Importantly, these regulations are being issued as non-reliant proposed regulations, i.e., these regulations cannot be relied upon at this time. The proposed rules are scheduled to be published on October 29, 2018, and will provide for a comment period through December 28, 2018, after which, the agencies will develop final regulations. At the earliest, if these regulations are finalized, they are expected to take effect for plan years beginning on or after January 1, 2020.

In a nutshell, these regulations make two new types of HRAs available to any-sized group. One type of HRA would provide an HRA contingent on obtaining individual health coverage through the public marketplace or private market. The other type of HRA would be established as an excepted benefit HRA, and would only be available to individuals who are offered traditional comprehensive health coverage. Following is a brief summary of these two types of HRAs.

Individual integrated HRA

Under this design, an employer can integrate an HRA with individual health coverage if certain conditions are met:

1. *Enrollment in individual coverage.* To participate in the HRA, the individual must actually enroll in individual coverage for each month covered by the HRA. Individual coverage providing only excepted-benefits would not qualify for this purpose. The HRA must also provide that, subject to applicable COBRA or other continuation of coverage requirements, if the individual health coverage terminates, the individual cannot then seek reimbursement under the HRA for claims incurred once that coverage terminates. Further,

if the HRA-participant or his/her dependent loses individual coverage, then the individual would forfeit the HRA. Individuals participating in this type of HRA would be ineligible for premium assistance that might otherwise be available.

2. *No traditional group coverage allowed.* A plan sponsor who offers an HRA integrated with individual coverage to any class of employees (defined below) cannot also offer traditional group health plan coverage to the same class of employees. Thus, there can be no choice between an HRA integrated with individual coverage and a traditional group plan.
3. *Same terms and conditions.* The HRA integrated with individual coverage must be offered on the same terms with regard to the amount and conditions to all participants within a class (see *Permitted Classes of Employees*, below). Notably, the regulations allow age-based adjustments to the maximum amount of reimbursement, as well as adjustments if the participant adds additional dependents.
4. *Opt-out.* The HRA must allow individuals to opt-out and waive future reimbursements from the HRA at least annually. Upon termination of employment, the remaining amounts in the HRA are forfeited, or the participant is permitted to permanently opt-out of and waive future reimbursements from the HRA.
5. *Procedures for proof of coverage and substantiation of medical expenses.* The HRA must establish procedures for individuals to verify their enrollment in individual health coverage for the plan year. Proof of coverage can be obtained by third party, or written attestation by the individual indicating the insurer and dates of coverage. The HRA must also establish a procedure for participants to substantiate medical expenses when seeking reimbursement.
6. *Notice requirement.* Written notice about the availability of the HRA must be provided to eligible individuals at least 90 days prior to the beginning of each plan year, as well as when an individual becomes eligible mid-year. The regulations set forth the contents that must be included in the notice such as the maximum dollar amount available, conditions for reimbursement, the required proof of individual coverage, a statement that the individual coverage is not subject to ERISA, the right to opt-out, information relating to the premium tax credit, among other content requirements.

IMPACT OF ESR MANDATE. The agencies intend to issue future guidance for employers subject to the ACA's employer shared responsibility (ESR) requirement that would allow a safe harbor arrangement; thus, protecting an applicable large employer adopting this type of HRA from the risk of ESR penalties.

Excepted-Benefit HRA

These regulations permit employers to offer a non-integrated HRA with other group health coverage that qualifies as excepted benefits. As such, the HRA would not be subject to the ACA market reform rules. In this type of arrangement, the HRA must provide up to \$1,800 in benefits per year (subject to inflationary indexing) to reimburse expenses such as dental, vision, etc. The HRA cannot be an integral part of the group plan and must be made available to all employees of a class ((see *Permitted Classes of Employees*, below).

Permitted Classes of Employees

For purposes of both types of HRAs, permissible classes of employees include full-time, part-time and seasonal, those covered by a collective bargaining agreement, as well as employees who have not satisfied a waiting period for coverage, are under age 25, nonresident aliens with no U.S.-based income, employees whose primary site of employment is located within the same rating area, or groups combining any of these classes of employee. The HRA could also be offered to former employees, however, if it is offered to one or more former employees within a class of employees, then the HRA must be offered to the former employees on the same terms as to all other employees within the class.

Use of salary reduction via cafeteria plan

The regulations are considering allowing individual premium to be available through the premium conversion portion of an IRC Section 125 (cafeteria) plan. This would not apply to individual premium for marketplace coverage. Further, if an individual is permitted to pay the coverage by a salary reduction arrangement through the terms of a Section 125 plan, then the option must be made available on the same terms to all employees (except former employees) of a particular class.

No dual HRA coverage

If these rules are finalized in their current form, no employee is eligible for both an excepted HRA and an individual-integrated HRA.

Conclusion

As mentioned at the beginning, these are not reliant regulations, therefore, no action can be taken based on these regulations at this time. The current law prohibiting employers from contributing to individual premium, other than through a QSEHRA or retiree-only HRA, still apply. I suspect there will be many comments submitted on these regulations, and they are likely to evolve in the months to come.

It should also be noted that these types of proposed HRAs could be impacted by on-going ACA related litigation; in particular, the *Texas v. United States* matter, challenging the constitutionality of the individual mandate (see prior memo, [Status of ACA Individual Mandate](#), 6/8/18).

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