

Expanding the Role of HRAs - the Employer Mandate and Nondiscrimination Implications

In October, the Trump administration issued proposed rules that would allow all employers the ability to offer a stand-alone Health Reimbursement Arrangement beginning January 1, 2020. These “individual coverage HRAs” would need to coordinate with health coverage purchased by employees in the individual market. [Notice 2018-88](#) begins the conversation on how the **employer mandate** (IRC 4980H) and **nondiscrimination requirements** (IRC 105(h)) for self-funded plans may be applied to individual coverage HRAs. Treasury and IRS are seeking input from the public on their initial considerations with comments due by December 28, 2018.

It will be interesting to see whether large employers will be anxious to adopt individual coverage HRAs to help control escalating healthcare plan costs. If the proposed rules to make compliance with the ACA employer mandate and IRC nondiscrimination rules are finalized and administratively feasible, employers may begin to consider this arrangement in their benefit package. However, the economic and employment climate as well as the political landscape now and in the future may certainly influence the adoption of individual coverage HRAs.

Please see our [UPDATE](#) for details about the proposed rules for individual coverage HRAs including the requirement that a traditional group health plan may not be offered to employees eligible for an individual coverage HRA.

Background: The Employer Mandate

Under the ACA, employers with 50 or more full-time employees must offer coverage to at least 95% of full-time employees or be subject to the ACA “a” penalty. Employers that satisfy this 95% threshold could still face the ACA “b” penalty if the coverage being offered is not considered minimum value or is not affordable to a full-time employee who seeks coverage from the ACA individual marketplace and qualifies for a premium

tax credit (“PTC”). In general, an employer-sponsored plan is affordable if the cost an employee must pay for self-only coverage is less than the **required contribution percentage** (9.86% for 2019) times the employee’s household income. The ACA provides employers that offer traditional medical coverage with three affordability safe harbors (using an employee’s base pay, W-2 earnings or the Federal Poverty Line) to enable employers the ability to avoid the ACA “b” penalty without knowledge of an employee’s household income.

Earlier proposed premium subsidy regulations suggest that individual coverage HRAs would be affordable (which excludes an employee from claiming a premium subsidy) if the **required HRA contribution** does not exceed an (a) *employee’s household income, times (b) the required contribution percentage*. The **required HRA contribution** under the proposed regulations would be (a) *the premium for the lowest cost silver plan for the employee for self-only coverage offered by the Exchange for the rating area in which the employee resides, minus (b) (in general) the self-only employer contribution under the individual coverage HRA*.

Example:

- Employer contributes \$3,000 to an individual coverage HRA for all employees (self-only and family coverage)
- Required contribution percentage: 9.86%
- Cost for lowest cost silver plan for self-only coverage in the employee’s rating area (residence): \$6,000
- Employee’s **required HRA contribution** is \$6,000 - \$3,000 = \$3,000
- Employee’s household income = \$40,000

Affordability to determine eligibility for a premium subsidy: \$40,000 times 9.86% = \$3,860. The employee’s share of the cost (\$3,000) is less than the affordability threshold (\$3,860) and therefore this employee would not qualify for a premium subsidy when purchasing individual coverage.

The Employer Mandate and Individual Coverage HRAs

For an individual coverage HRA to satisfy the ACA employer mandate, the IRS is considering the following:

- Employers that offer an ACA eligible employer-sponsored group health plan (which may include an HRA integrated with individual market coverage) to 95% of full-time employees will not be subject to the ACA “a” penalty. Determining affordability to avoid the “b” penalty is more complex.

- The IRS anticipates allowing employers the ability to use the existing employer affordability safe harbors (base pay, W-2 earnings or Federal Poverty Line) in lieu of household income to help design an individual coverage HRA to avoid the ACA “b” penalty. In our example above, the employer could use the employee’s base pay, W-2 earnings or the Federal Poverty Line at the start of the plan year to determine affordability for ACA employer mandate purposes.
- To determine HRA affordability, use the lowest cost silver plan in an employee’s primary site of employment (rather than an employee’s residence) relieving the employer from separately calculating HRA affordability on an employee-by-employee basis.
- Employers with calendar year plans would be able to use the lowest cost silver plan for the *prior calendar year* to help design an affordable individual coverage HRA for the following plan year. Employers with plans *spanning two separate calendar years* could use the lowest cost silver plan at the start of the plan year, even though premiums are adjusted by the Exchange for the following calendar year.
- The IRS is seeking comment on how age-rated increasing costs for individual coverage may burden an employer in the determination of affordability and what alternative solutions may be more tenable.

Self-Funded Plan Nondiscrimination Rules

HRAs are self-funded employer plans and may be subject to nondiscrimination requirements under IRC 105(h). ***HRAs that only reimburse premiums (i.e. individual coverage) and do not cover other allowable healthcare expenses are not subject to the nondiscrimination rules.*** An employer that designs an individual coverage HRA to only reimburse premiums for coverage purchased in the individual marketplace would be exempt from 105(h) nondiscrimination testing.

Highly compensated individuals (“HCIs”) in HRAs that reimburse medical expenses in addition to premiums for individually purchased coverage would be subject to additional taxation if the plan provides better benefits or more favorable eligibility requirements to the HCIs. Varying the maximum HRA amount for different classes of employees (allowable under the proposed HRA rules) would conflict with the existing nondiscrimination requirement that any maximum limit attributable to employer contributions must be uniform for all participants.

Under the proposed rules, if the maximum HRA reimbursement within an allowable class of employees either: (a) is the same dollar amount, (b) increases with age, or (c) increases with the number of family members covered, the IRS may consider the HRA to satisfy the nondiscrimination requirements and HCIs will not succumb to additional taxation.

Employer mandate “a” penalty for 2019 for failure to offer coverage to 95% of full-time employees in the month:

$1/12 \times \$2,500 \times (\# \text{ of full-time employees in excess of } 30)$ if one full-time employee has subsidized coverage from the individual marketplace for the month.

Employer mandate “b” penalty for 2019 for failure to offer coverage that does not satisfy (i) minimum value standards (plan covers at least 60% of health costs), or (ii) is not affordable to a full-time employee for a month:

$1/12 \times \$3,750$ for each full-time employee with subsidized marketplace coverage for the month.

ADDITIONAL INFORMATION

For specific questions concerning information contained in this UPDATE, please contact your CohnReznick Benefits consultant. Information contained in this UPDATE is not intended to render tax or legal advice. Employers should consult with qualified legal and/or tax counsel for guidance with respect to matters of law, tax and related regulation. CohnReznick Benefits Consultants provides comprehensive consulting and administrative services with respect to all forms of employee benefits, risk management, qualified and non-qualified retirement plans, and compensation and human resources. For additional information about our services, please contact us at 516.683.6100 or mail@CohnReznickBenefits.com