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Proposed Rules Expand the Use of HRAs

The Departments of Treasury, Labor and Health & Human Services (the "Departments") issued proposed rules to expand the use of Health Reimbursement Arrangements ("HRAs") and have introduced two new types of HRAs. The proposed rules would allow employers, who otherwise do not provide traditional **group** health insurance, to offer an HRA that could be used by employees to pay for **individual** health insurance coverage, except short-term-limited duration insurance ("STLDI"). In addition, the proposed rules would allow employers that do offer traditional health insurance to establish "excepted benefit" HRAs of up to $1,800 per year to cover certain expenses including dental, vision and STLDI. Each of these HRAs is subject to certain conditions which are explained in more detail below.

The proposed rules would not take effect until January 1, 2020 and employers are cautioned to not rely on the proposed rules until finalized. Public comments may be submitted through December 28, 2018.

HRAs Integrated with Individual Health Insurance

HRAs are a tax-favored account-based medical expense reimbursement group health plan, funded solely by an employer and subject to an annual fixed dollar maximum reimbursement level. A "stand-alone" HRA (not offered in conjunction with a traditional group health plan) would violate the ACA rules prohibiting annual limits on Essential Health Benefits as well as the requirement to provide preventive services with no cost sharing (i.e. preventive services would not be payable by the HRA once the annual limit has been reached). Under complex ACA rules, HRAs must be **integrated** with traditional **group** health insurance plans to not violate these ACA provisions; HRAs cannot be integrated with individual insurance policies. These ACA provisions restrict an employer's ability to offer an HRA on a stand-alone basis for employees to purchase individual health insurance policies, a benefit that prior to the ACA had generally been used by smaller employers to help employees purchase their own coverage on a tax-favored basis.

As part of the 2016 21st Century Cures Act, small employers (not subject to the ACA employer mandate) were given the ability to offer a stand-alone Qualified Small Employer Health Reimbursement Arrangement ("QSEHRA") beginning January 1, 2017 that employees could use to purchase individual health policies.

These proposed rules do not change the QSEHRA provisions but instead allow employers of *any size* to establish HRAs considered *integrated with individual insurance*, provided the following conditions are satisfied:

- Employees and covered dependents would be required to enroll in individual coverage (other than coverage that consists of excepted benefits) and substantiate the coverage to the employer by either: (i) providing a document from a third party such as an enrollment ID card, or (ii) signing an attestation.
- The HRA must be offered on the *same terms* to all employees within a *class* subject to certain exceptions.
- The employer is prohibited from offering the same class of employees a traditional group health insurance plan and an HRA integrated with individual health insurance.
- Employees must be allowed to opt-out of the HRA coverage and to waive future reimbursements. Eligibility for the HRA may impact an individual's ability to claim an ACA premium tax credit for individual insurance purchased from an ACA Marketplace.
- A written notice must be given to eligible participants at least 90 days before the beginning of each plan year or no later than the date the employee first becomes eligible for coverage.

Allowable Classes of Employees: Employers would have the ability to vary the terms of the HRA based on the following employee classifications: full-time, part-time, seasonal, employees covered by a collective bargaining agreement, as well as for employees whose primary worksite is in the same rating area. Latitude is also given for employees still in an ACA acceptable waiting period, employees under age 25 and non-resident aliens with no US income. Treasury and the IRS intend to issue guidance on the interaction of the Code Section 105(h) [self-funded] nondiscrimination rules and HRAs integrated with individual health insurance coverage.

Employers that offer traditional group health insurance to full-time employees, for example could establish an HRA for part-time employees to purchase individual health insurance policies.

Same Terms Requirement: The proposed rules state that the HRA must offer the same coverage level as well as the same terms and conditions for coverage (i.e. waiting period) within the same class of employees. The Departments recognize that individual health insurance becomes more expensive for older employees and for those employees who cover family members and therefore, employers would be allowed to

increase the maximum dollar amount for a class of employees based on age and family size. Any unused amounts that an employer would allow to rollover to the next coverage period would not be considered in the determination of the "same terms" requirement.

Notice Requirement: The notice would be required to include: (i) terms of the HRA including the maximum dollar amount made available, (ii) right to opt-out of coverage, (iii) information about the ACA premium tax credit and how HRA eligibility and/or enrollment might impact the ability to claim an ACA premium tax credit, (iv) obligations to inform the ACA Marketplace about the employer-sponsored HRA, (v) expense substantiation is required for reimbursement from the HRA, and (vi) a requirement to inform the employer when individual coverage ceases.

The proposed rules also note the following about an HRA integrated with individual coverage:

- The arrangement may be considered eligible employer coverage for the ACA employer mandate and can shield an Applicable Large Employer from the penalty for failing to offer coverage to 95% full-time employees (assuming the HRA is actually offered to this percentage of the full-time population). Treasury and the IRS intend to issue guidance that would provide a safe harbor for determining whether the HRA integrated with individual insurance would be considered minimum value and affordable to also avoid the second prong ACA employer mandate penalty.
- The arrangement will not cause the individual health insurance to become part of an employer's ERISA plan if the following conditions are satisfied: (i) the purchase of individual insurance must be completely voluntary for the employee, (ii) the employer may not select or endorse an insurance carrier or coverage, (iii) reimbursement for nongroup coverage is limited to individual health insurance, (iv) the employer cannot receive any consideration in connection with the employee's selection of the individual health insurance, and (v) plan participants must annually be notified that the individual coverage is not subject to ERISA.
- Section 125 salary reduction amounts may be made available for employees to pay for the portion of their individual health insurance not covered by HRA reimbursement, **only if**: (i) the individual insurance policy is purchased **outside** an ACA marketplace, and (ii) this feature is made available on the same terms to all participants in the same class of employees.

It will be interesting to see what the final rules may hold in store and whether larger employers would abandon offering employees traditional group insurance plans for a Health Reimbursement Arrangement integrated with individual insurance, particularly if ACA employer mandate penalties can be avoided.

Excepted Benefit HRAs

Excepted benefits are not subject to the requirements of the ACA that apply to group health plans, such as the restrictions on annual/lifetime limits, requirement to cover preventive services without cost sharing, dependents to age 26, etc. There are several types of excepted benefits such as specified disease and accident plans, hospital indemnity plans and limited-scope excepted benefits (i.e. dental and vision).[1]

The proposed rules state that "…some employers may wish to offer an HRA without regard to whether its employees have other coverage at all or without regard to whether its employees have coverage that is subject to and satisfies the [ACA] market requirements." To be considered an *excepted benefit HRA*, the HRA:

- Must not be an *integral part of the plan*. This requires the plan sponsor must make available other group health coverage (other than an account-based group health plan or coverage consisting solely of excepted benefits) to the participants offered the HRA. Only employees **eligible** for the traditional group health plan would be eligible to participate in the excepted benefit HRA, although **enrollment** in the traditional group health plan is not required to participate in the excepted benefit HRA.
- Must provide benefits that are *limited in amount to $1,800 per year* indexed for inflation. Benefits may include for example, any or all the following: limited-scope vision or dental benefits, long-term care, nursing home and home health care, or community-based care as well as general medical expenses, and premiums for COBRA, STLDI, and excepted benefits.
- Cannot provide reimbursement for premiums for (i) individual health insurance, (ii) group health plan coverage, and (iii) Medicare Part B and D.
- Must be made available under the same terms to all similarly situated individuals.

The proposed rules make clear that "an employer could only offer an excepted benefit HRA if traditional group health plan coverage is also made available to the employees who are eligible to participate in the excepted benefit HRA." Thus, an employer would not be permitted to offer employees a **choice** of an HRA integrated with individual health insurance coverage or an excepted benefit HRA due to the differing requirements of these HRAs.

[1]Health flexible spending accounts are not impacted by these proposed rules as they have their own unique requirements to be considered an excepted benefit.

ADDITIONAL INFORMATIONADDITIONAL 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