

Proposal for Employer Provided Health Reimbursement Accounts for Individuals to Purchase Health Insurance—A Remedy for High Health Benefit Costs?

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First, the new proposal for Health Reimbursement Accounts/Arrangements (“HRAs”) to be used for the purchase of individual health insurance policies does not alter the annual enrollment in which many employers are currently engaged. **The proposal will not to apply to group health plans or health insurance issuers until January 1, 2020.** This proposal will require new processes, notices, plan documents and careful consideration by employers to implement it effectively. The Proposal is something to consider for 2020, assuming the regulations are finalized and all of the changes, notices and the administrative processes are in place by such date. The purpose of this alert is to provide some quick answers for common questions this proposal may raise as leaders think about long term options.

HRA Historical Context

HRAs were first recognized in 2002. When the Affordable Care Act was enacted, they could not stand alone as a group health plan because they did not satisfy the ACA’s benefit mandates because HRAs had a dollar limit on what they covered as medical expenses. HRAs were subsequently permitted to exist and be compliant with the ACA, but only if they were integrated with (provided in tandem with) a group health plan that satisfied the ACA benefit mandates.

Proposal Goal

The administration’s proposal (the “Proposal”) is intended to permit employers to use HRAs to define the costs the employer is willing to pay toward employees’ health insurance and limit their exposure to increasing health care costs. The Proposal provides an alternative that may work for some employers if their workforce fits well with the parameters and consistency requirements in the Proposal.

Proposal Requirements—Two Types of HRAs Addressed

The Proposal contemplates two different types of HRAs. One which is used to reimburse the cost of individual health insurance policies purchased by individual employees (and their family members) on the insurance marketplaces or otherwise created under the Affordable Care Act (the “ACA”) (the “ACA HRAs”). The ACA HRAs are treated as integrated with the individual health insurance policies and require that for each expense submitted the individual must provide proof of individual health insurance coverage for that month before the medical expense is reimbursed. An individual health insurance policy purchased on the ACA insurance marketplaces is deemed to provide minimum value and so it is integrated with the HRA as one coverage. Individual policies that are purchased outside of the ACA insurance marketplaces

The other type is designed to provide a benefit limited to \$1800 for reimbursing excepted benefits (vision and dental coverage or benefits) outside of the ACA marketplaces (the “Independent HRAs” or “Indy HRAs”). The \$1800 maximum is proposed to apply to limit the value of all benefits treated as “excepted benefits” under the ACA and HIPAA. Indy HRAs are permissible because the benefit is limited and thus it is excepted from complying with the ACA requirements as an excepted benefit which limits the rules applicable to this type of benefit. The Indy HRAs are prohibited from reimbursing the cost of individual health insurance, but may reimburse COBRA continuation coverage premiums and STLDI (short term limited duration insurance) coverage. Indy HRAs have other requirements as well. Indy HRAs can only be offered if the employer also offers a group health plan to the class of employees offered the Indy HRAs.

ACA HRA Requirements in General Terms

The ACA HRA will require the ACA marketplaces to continue to function and provide individual health insurance or that individual health insurance policies be available in all geographic locations where an employer operates.

The ACA HRAs must comply with requirements to prevent discrimination against persons with health statuses and to prevent adverse selection of either pushing less healthy individuals to one type of coverage, among others. Many employers offer employees the option to choose among several types of coverage.

In order to be eligible to use the ACA HRAs, an employer must offer the ACA HRA as the only coverage to the class of employees to which it is offered. The Proposal specified the eight classes of employees (and the classification definitions which must be used consistently within a particular plan year). The eight classes of employees are:

1. Full-time employees (using either the definition for the employer shared responsibility penalty under 4980H or the more mature definition used for self-insured health plan non-discrimination testing under 105(h)- please excuse the reference to the Internal Revenue Code sections);
2. Part-time employees (using the same type of definition as used in 1.);
3. Seasonal employees (using the same type of definition as used in 1.);
4. Employees who are members of a collective bargaining unit and whose employment is governed by a collective bargaining agreement (see caution below regarding implementing for this group);
5. Employees who have not satisfied a waiting period for coverage;
6. Employees who have not attained the age of 25 before the beginning of the plan year;
7. Non-resident aliens with no U.S. source income (foreign employees who work abroad); and
8. Employees whose primary site of work is in the same rating area as defined in the ACA regulations defining rating areas.

Under the ACA HRAs, the purchase of the individual insurance on the ACA marketplace ensures that the coverage provides a certain level of benefits and this is a proxy to assure that the coverage when linked to the HRA provides the minimum value required by the ACA. So an employer could offer its current group health plan to all full-time employees and offer Part-time and Seasonal employees the ACA HRA alternative, but such Part-time and Seasonal employees could not be offered any other type of group health plan (other than excepted benefits (Part-time collectively bargained could be a combined class as could Full-time collectively bargained in a class combination). The same source of the definition (4980H or 105(h)) of full-time, part-time or seasonal employee must be used for all of those classifications at the employer.

If an employer wants to change to an ACA HRA for its collectively bargained workforce, it may do so, provided it is the only coverage offered and such change was either negotiated with the collective bargaining unit, or you have consulted labor counsel regarding whether such change is permitted under the current collective bargaining agreement. Just because it is permitted to be different under the Proposal does not mean other requirements do not also apply.

The ACA HRA can permit amounts to carryover to a subsequent year, but must forfeit the account when an individual terminates employment; however, an HRA is still subject to the COBRA continuation coverage requirements. The ACA HRA must be offered on the same terms and conditions to all members of the class, except that it can be increased for the employee's age or the number of dependents as long as the increase in the ACC HRA amount is uniform across the class. The self-insured group health plan non-discrimination testing rules will still apply to the amounts allocated to an ACA HRA. There is no size limit on the employer that can adopt an ACA HRA. The ACA HRA must restrict reimbursement of medical expenses for an individual until it has proof such individual has health insurance coverage for the month in which the expense was incurred so there will need to be new administrative procedures established.

The Proposal requires notice be provided to the employees in the class to which the ACA HRA is offered. There are other additional requirements which apply to the ACA HRA in order to deal with the other requirements under the ACA and other applicable laws. The

ACA HRA is still a group health plan and as such would still be subject to the other requirements applicable to group health plans in the law, including COBRA continuation coverage. ACA HRAs will need to have a plan document with certain requirements incorporated in such documents, and the required administrative scheme to keep it compliant with the requirements to be an ACA HRA.

The rules for coordination with the Premium Tax Credit must also be considered as employers will need to notify employees offered an ACA HRA with a notice regarding the impact of their participation in the HRA on the availability of the Premium Tax Credit. Such rules are not addressed in this alert.

Health flexible spending accounts still cannot be used to reimburse health insurance premiums under the Proposal. The Proposal also addressed issues that arise when the ACA HRA is considered to be or be part of an ERISA employee welfare benefit plan, but those are not included in this alert.

How the employer shared responsibility tax (a/k/a the pay or play tax on Applicable Large Employers) applies to ACA HRAs is to be addressed in future guidance which may provide safe harbors for what constitutes offering affordable coverage that provides minimum value. More reading to come...

Final Thoughts

The over 200 pages of preamble and regulations provide a good explanation of the thought process navigating through many of the existing legal requirements and requested comments on numerous aspects of the Proposal. This alert is intended to provide the highlights of some of the most significant requirements for the ACA HRAs that can stand as a group health plan providing coverage on an integrated basis with an individual health insurance policy to satisfy a number of legal requirements under the ACA. This is not intended to be a full description of all of the requirements for the ACA HRAs and it is only a brief mention of the Indy HRAs. No action should be taken based on this discussion of the Proposal which has not matured to be a legal requirement yet.

How the Proposal may progress also depends, in part, on the future of the litigation on the ACA's Constitutionality in the suit brought by a number of State Attorneys General because if the ACA falls in the litigation as unconstitutional, and the individual marketplaces created by the ACA and the mandates on coverage under the ACA also fall, some of the rules will not be needed, but the usefulness of HRAs to reimburse individual insurance premiums will depend upon the availability of individual insurance. Litigation can take YEARS to finally resolve, the finalization of the Proposal may happen far sooner.

The agencies issuing the Proposal, the Internal Revenue Service, the U.S. Department of Labor and the Department of Health and Human Services all requested comments on a wide range of aspects of the Proposal and if there are aspects or issues that should be adjusted, now is the time to provide input in the form of comments, using the regulatory procedures. Stay tuned as the Proposal and litigation progress.

Contacts:

[Greta Cowart](#)

214.745.5275

gcowart@winstead.com

[Marsha Clarke](#) (Admitted in MO and IL)

214.745.5877

mclarke@winstead.com

[Nancy Furney](#)

214.745.5228

nfurney@winstead.com

[Lori Oliphant](#)

214.745.5643

loliphant@winstead.com

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