Proposed Rules Offer New HRA Options for Employers Beginning in 2020

The U.S. Departments of the Treasury, Labor, and Health and Human Services (collectively the "Departments") have jointly issued proposed regulations ("Proposed Rule") that would broaden the landscape for the use of health reimbursement arrangements ("HRAs") and certain other account-based plans to fund health benefits. The Proposed Rule is the final guidance issued pursuant to President Trump's Executive Order Promoting Healthcare Choice and Competition Across the United States, published on October 12, 2017, in which President Trump directed the Departmets to consider proposing regulations to "increase the usability of HRAs."

Current Law Affordable Care Act ("ACA") Group Market Reform

The ACA requires that a HRA plan must be integrated with a group health plan that covers more than just excepted benefits (*e.g.*, vision and dental). The HRA may be integrated with a plan providing Minnimum Essential Coverage ("MEC") that does not meet Minimum Value ("MV"), or a major medical plan that does meet MV. If a standalone HRA is offered by a large employer without integration with another group health plan, then the employer could be subject to substantial penalties as described below.

Penalties Under Current Law

Because HRAs are group health plans, they must comply with the ACA's group market reform provisions, such as the prohibition on lifetime and annual limits on the dollar value of essential health benefits, 100% first dollar coverage of preventive health services, the adult child coverage mandate, and the prohibition on rescissions, among others.

An HRA may be able to avoid some or all of these requirements if:

- it is considered a grandfathered health plan under the ACA;
- it is a retiree-only plan; or
- it provides only excepted benefits, such as limited-scope dental and vision benefits.

If an HRA does not qualify for one of these exceptions, then it is subject to all of the ACA's group market reform provisions, but generally will not be able to satisfy these requirements. As a result, a general purpose HRA that pays or reimburses expenses incurred by participants who are current employees can no longer be structured as a stand-alone plan.

Instead, employers are now generally required to structure their general purpose HRAs for current employee participants as being part of, or integrated with, other group major medical plan coverage, to rely on the other medical plan's compliance with the ACA's group market reform provisions.

Failing to comply with the ACA's group market reform provisions can result in liability of $100 per day excise tax per violation, per person, as well as Department of Labor ("DOL") enforcement actions and participant lawsuits.

Proposed Law as of January 1, 2020

The Proposed Rule contains sweeping changes to the ACA's group market reform provisions that prohibit offering HRAs to employees with individual health policies, as well as other changes to the current HRA rules.

The Proposed Rule would permit employers of any size to offer a standalone HRA to employees and former employees who have individual health coverage. In order to comply with the Proposed Rule, the "Integrated HRA" must meet the following criteria:

- **All individuals covered by an Integrated HRA must be enrolled in individual health coverage**.

  The Proposed Rule requires that a participant and any dependent covered by the Integrated HRA be enrolled in individual health insurance coverage for *each month* a participant is covered by the Integrated HRA.

  If an individual covered by an Integrated HRA does not have individual health insurance coverage, the HRA would fail to satisfy the ACA's group market reform provisions, and the HRA would be subject to forfeiture.

  Under the Proposed Rule, "individual health insurance coverage" means health insurance coverage offered to individuals in the individual market, but notably does not include coverage that consists solely of excepted benefits or short term limited duration insurance ("STLDI"). The Departments have requested comments on STLDI coverage.

In addition, a "participant" includes an employee or former employee of an employer (and his or her beneficiaries) who is, or may become, eligible for benefits under an employer sponsored plan. An Integrated HRA plan document must contain specific language addressing this requirement.

- **Plan Sponsors may not offer a choice between Integrated HRA and employer sponosored group health plan coverage**.

  In order to address concerns that plan sponsors may direct employees or dependents with high claims into an individual market plan, the Proposed Rule prohibits an employer from offering the *same* class of employees a choice between an Integrated HRA and traditional coverage under the employer's group health plan.

  The Proposed Rule categorizes classes of employees as:

  - full-time;
  - part-time;
  - seasonal;
  - collectively bargained;
  - employees subject to a coverage waiting period;
  - employees under age 25;
  - non-resident aliens with no US-based income; and
  - employees whose primary site of employment is in the same rating area and certain combinations of the various classes.

  The Proposed Rule provides an employer with flexibility regarding how it defines full-time, part-time, and seasonal classes of employees, but specific definitions are ascribed to the remainder of classes.

- **An Integrated HRA be offered on the "same terms" (amount and conditions) to all employees or retirees within a certain class**.

  The Proposed Rule permits employers to provide a higher maximum dollar amount under an Integrated HRA based on a participant's age and number of covered dependents. The increased maximum dollar amounts must be offered to all similarly situated participants in a given employee class.

Former employees (*e.g.*, retirees) are considered to be in the same class they were in immediately prior to separation from service, but the Departments acknowledged the wide variety of employer practices with respect to retiree eligibility for post-employment health coverage. Thus, the "same terms" rules permit a years-of-service requirement with respect to Integrated HRA coverage for retirees within a certain class.

The Departments noted that further guidance is forthcoming to address how such arrangements may be designed to ensure compliance with the nondiscrimination rules under the Internal Revenue Code (the "Code").

- **Integrated HRAs must contain an annual opt-out provision.**

  An individual who is covered by an HRA integrated with individual health insurance coverage would be ineligible to obtain the premium tax credit ("PTC") through the Health Insurance Marketplace, under current law. The Proposed Rule requires an Integrated HRA allow participants the opportunity to opt-out of and waive future reimbursements from an Integrated HRA at least once per year.

  However, it is important to note that an employee may still be ineligible for the PTC even if they opt out of the Integrated HRA. The Proposed Rule states that an employee who is offered, but opts out of, an Integrated HRA is considered eligible for MEC for any month the HRA is affordable and provides minimum value. The Proposed Rule includes detailed rules regarding the calculation of affordability and minimum value as it relates to PTC eligibility for an individual.

- **Integrated HRAs must have a substantiation and verification of individual health insurance process**.

  The Proposed Rule requires that Integrated HRAs implement and comply with reasonable procedures to verify that individuals are enrolled in individual health insurance as part of *each* reimbursement request.

  These procedures can take the form of a document demonstrating that the individual is covered under an individual insurance policy (*e.g.*, an insurance card), or an attestation by the participant. An employer is permitted to rely on this documentation unless it has actual knowledge that the individual is not enrolled in individual health coverage.

- **Notice requirement to participants**.

  In order to ensure that individuals eligible for Integrated HRAs understand how this coverage could impact PTC eligibility, the Proposed Rule includes a detailed notice requirement.

  Upon initial eligibility and at least 90 days prior to the beginning of each plan year, the Integrated HRA's sponsor must provide eligible participants with a written notice describing, among other requirements, the terms of the Integrated HRA (including the individual insurance coverage and substantiation requirements), the dollar value available for reimbursement, the participant's opt-out rights, the PTC eligibility consequences and several other required statements.

  The Departments intend to issue a model notice prior to 2020.

Interaction with Employer Shared Responsibility Rules

The Proposed Rule establishes that any employee who is covered by, or is offered, but opts out of, an Integrated HRA would be ineligible to receive a federal PTC for health insurance coverage purchased on the Marketplace if the Integrated HRA is "affordable" and provides MV.

An Integrated HRA is affordable if the employee's required contribution is no more than 1/12 of the product of the employee's household income and the required contribution percentage.

The required contribution percentage is the excess of:

- the monthly premium for the lowest-cost silver plan for self-only coverage available to the employee through the Marketplace, for the rating area in which the employee resides; over

- the monthly self-only HRA amount provided by the employee's employer (the amount available for the plan year, divided by the number of months in the plan year the HRA is available to the employee), or, if the employer offers an HRA that provides for the same dollar amount regardless of whether the employee elects self-only or other-than-self-only coverage, the monthly maximum amount available to the employee.

The Departments propose to allow employers to use the current safe harbors to test for affordability of an Integrated HRA.

Applicable Large Employers ("ALEs") offering an Integrated HRA to at least 95% of its full-time employees would avoid the employer shared responsibility payment ("ESRP") under Code 4980(h)(A) (In 2018, $2,320 x total FTEs).

ALEs offering an Integrated HRA that is affordable and of MV, to full-time employees, would avoid an ESRP under Code 4980(h)(B). (In 2018, $3,480 x number of employees or dependents receiving a PTC.)

Transitional Relief for Non-Calendar Year Plans

The Departments propose a non-calendar plan year safe harbor for both determination of affordability, to be determined on the first month of the plan year.

The Proposed Rule would create two new special enrollment rights for Marketplace coverage for employees or dependents:

- who gain access to and enroll in an Integrated HRA; and

- who are offered a Qualified Small Employer Health Reimbursement Arrangement ("QSEHRA")

Thus, the Proposed Rule allows employees who are offered non-calendar year plan benefits an opportunity to enroll in these plan options.

Comments Due by December 28, 2018

Comments on the Proposed Rule are due by December 28, 2018. The final rule will take into consideration comments made on the Proposed Rule. If the Final Rule substantially adopts the provisions in the Proposed Rule, the new Integrated HRA option for employers will be effective as of January 1, 2020.

This summary is intended for informational purposes alone, and should not be construed as legal advice. If you have questions regarding a particular client's situation, please contact our office.

Dated: December 20, 2018