Proposed HRA Regulations

ABA Section of Taxation
2019 Midyear Tax Meeting
January 18, 2019
Proposed Regulations

► Integration with individual health insurance coverage
  ► Status of integrated HRA under the employer mandate rules
  ► Impact of integrated HRA on eligibility for premium tax credit
  ► Creation of individual market special enrollment right

► Treatment of account-based plans as excepted benefits

► Application of ERISA to individual insurance purchased through an account-based plan
Proposed Effective Dates

► Rules on integrated HRAs and excepted benefit HRAs
  ► Plan years beginning on or after January 1, 2020

► Rules on eligibility for the premium tax credit
  ► Taxable years beginning on and after January 1, 2020

► Individual special enrollment rules
  ► January 1, 2020

Taxpayers may not rely on these proposed rules
Integration with Individual Insurance

► HRA must require participants and any dependents covered by the HRA to be enrolled in individual health insurance that complies with the ACA rules on lifetime/annual dollar limits and coverage of preventive services
► This requirement will not be met if the participant is enrolled in
  ► Excepted benefits or
  ► Short-term limited duration insurance
► All other coverage in the individual insurance market is presumed to be compliant with the ACA rules
► If any covered individual ceases to be enrolled in individual insurance coverage, expenses incurred by that individual after such coverage ceases may not be reimbursed
► If all covered individuals cease to be enrolled in individual insurance coverage, the participant must forfeit the HRA
Integration with Individual Insurance

► HRA must require participants and any dependents covered by the HRA to be enrolled in individual health insurance

► The HRA must implement reasonable procedures to substantiate the required coverage

► The procedures may require the participant to provide either

► A document from a third party confirming enrollment of the participant and applicable dependents, such as

► Explanation of benefits or

► Insurance card or

► Attestation by the participant, including the date coverage began and name of provider

► The procedures must require substantiation initially and with every reimbursement request
Integration with Individual Insurance

- Employer may not offer the same class of employees a choice between the employer’s traditional group health plan and the HRA

- “Traditional group health plan” does not include
  - A plan that offers only excepted benefits
  - Another account-based plan
Integration with Individual Insurance

- The HRA must be offered on the same terms to all employees within the same class
  - The maximum reimbursement amount may increase based on age
    - The same maximum reimbursement amount must apply to all employees of the same age in the same class
  - The maximum reimbursement amount may increase based on number of dependents covered
    - The same maximum reimbursement amount must apply to all employees with the same number of dependents in the same class
  - The “maximum reimbursement amount” will not include any amounts carried over from a prior year if the method for determining carry-over amounts is applied in the same way to all employees in the same class
Integration with Individual Insurance

► The HRA must be offered on the same terms to all employees within the same class

► The HRA may be offered only to a subset of former employees within a class

► The HRA must be offered on the same terms to all former employees within a class who are offered the HRA

► Retiree-only HRAs are exempt from these rules

KNOW THE RULES!
Integration with Individual Insurance

- The HRA must be offered on the same terms to all employees within the same class

- The ability to use salary reductions under a cafeteria plan to pay for the portion of premiums not covered by the HRA is a term of the HRA that must be applied in the same way to all employees within a class

- Cafeteria plans may not provide for the purchase of Marketplace policies

- Cafeteria plans may provide for the purchase of individual policies outside the Marketplace
Integration with Individual Insurance

► Permitted classes:
  ► Full-time employees*
  ► Part-time employees*
  ► Seasonal employees*
  ► Employees covered by a collective bargaining agreement
  ► Employees who have not satisfied a waiting period
  ► Employees who are under age 25 as of the first day of the plan year
  ► Non-resident aliens with no U.S.-based income
  ► Employees whose primary site of employment is in the same rating area

► Retirees are considered to be in the class they were in immediately before separation from service

*As defined by Code Section 105(h) or 4980H – employer must choose and include definition in plan document
Integration with Individual Insurance

Examples:

- Traditional health plan offered to full-time employees and HRA offered to part-time employees

- No traditional health plan offered, and HRA excludes non-resident aliens with no U.S.-based income

- No traditional health plan offered, and HRA offers:
  - $5,000 maximum reimbursement to non-union full-time employees
  - $3,000 maximum reimbursement to non-union part-time employees
  - $3,500 maximum reimbursement to union full-time employees covered by CBA #1
  - $2,500 maximum reimbursement to union part-time employees covered by CBA #1
  - $4,000 maximum reimbursement to union employees covered by CBA #2
Integration with Individual Insurance

Examples:

► No traditional health plan offered, HRA available only to full-time employees, and HRA offers:
  ► $5,000 maximum reimbursement to employees with no dependents
  ► $7,500 maximum reimbursement to employees with one or more dependents

► No traditional health plan offered and HRA offers:
  ► $5,000 maximum reimbursement to full-time employees under age 50
  ► $6,000 maximum reimbursement to full-time employees who are at least age 50
  ► $3,000 maximum reimbursement to part-time employees under age 50
  ► $4,000 maximum reimbursement to part-time employees who are at least age 50
Integration with Individual Insurance

► Participants must receive a notice explaining how the HRA impacts eligibility for the premium tax credit

► By the date the participant is first eligible to participate and

► At least 90 days before the beginning of each plan year
Integration with Individual Insurance

► Content of notice

► Description of the terms of the HRA, including:
  ► The maximum reimbursement amount for each participant
  ► Rules regarding the proration of the maximum reimbursement amount for participants who are not eligible for the entire plan year
  ► Whether a participant’s family members are eligible for the HRA
  ► The fact that the plan is not a QSEHRA
  ► A statement that the plan requires the participant and all dependents to be enrolled in individual insurance coverage
  ► A statement that the participant is required to substantiate enrollment in individual insurance coverage
  ► A statement that the individual insurance coverage may not be STLDI or excepted benefits
  ► If applicable, a statement that the HRA is not subject to ERISA
Integration with Individual Insurance

► Content of notice

► A statement of the right to opt-out and wave future reimbursements

► Description of the potential availability of the premium tax credit and the impact of the offer of the HRA on eligibility for the premium tax credit

► A description of the premium tax credit eligibility consequences for a participant who is covered under the HRA

► A statement that, if the participant applies for the premium tax credit through a Marketplace, the participant must inform the Marketplace of the availability of the HRA, the self-only amount of the HRA, the number of months the HRA is available, whether the HRA is available to dependents, and whether the participant is a current or former employee

► A statement that the participant should retain the written notice because it may be needed to determine whether the participant is allowed the premium tax credit

► A statement that the HRA may not reimburse any medical care expense unless the substantiation requirements are met

► A statement that it is the responsibility of the participant to inform the HRA if the participant or any applicable dependent is no longer enrolled in individual health insurance coverage
Integration with Individual Insurance

► Participants must be allowed to opt out of the HRA and waive future reimbursements at least annually

► Upon termination of employment, either
  ► Any remaining amounts are forfeited or
  ► The participant can elect to permanently opt out and waive future reimbursements
Integration with Individual Insurance

Comments requested on:

- The methods by which an HRA can confirm that an individual insurance policy meets the ACA rules on lifetime/annual dollar limits and coverage of preventive care, including:
  - Identification of the benefits that consist of essential health benefits and
  - Confirmation that all recommended preventive services are covered without cost sharing
Integration with Individual Insurance

Comments requested on:

- The requirement that an employer may not offer the same class of employees a choice between the employer’s health plan and the HRA/individual insurance
- The proposed classes of employees
- Definitions used for the classes
- Whether additional classes should be provided
- Whether additional classifications within the proposed classes should be allowed
- Whether employer size or employee class size should be considered in determining permissible classes
- Whether the proposed classes are sufficient to mitigate adverse selection and health status discrimination concerns
Integration with Individual Insurance

Comments requested on:

- Whether a HRA that is integrated with individual insurance could also be integrated with a group health plan
- Whether integration with short-term limited duration insurance should be permitted
- Whether integration with other coverage that satisfies the market reform rules should be permitted
- How any of the above integration should be structured
- What potential benefits and problems might arise from allowing any of the above integration
- Whether any such integration would raise concerns about health status discrimination or adverse selection in the individual market
Integration with Individual Insurance

Comments requested on:

- Whether the ability to integrate an HRA with individual health insurance has the potential to increase participation in and strengthen the viability of individual market risk pools

- Whether the proposed integration safeguards are appropriate and narrowly tailored to mitigate adverse selection and the potential for discrimination based on health status or whether less restrictive safeguards would suffice

- Whether employers may seek to provide cafeteria plan premium arrangements and, if so, whether additional guidance is needed
Impact on Employer Mandate

► An employer that offers an HRA integrated with individual health insurance coverage will have made an offer of coverage under 4980H(a)

► Treasury/IRS plan to issue guidance to describe a safe harbor for determining whether an HRA integrated with individual health insurance coverage is affordable minimum value coverage

► Notice 2018-88 provided potential safe harbors and requested comments
Impact on Premium Tax Credit Eligibility

- Individual who is covered by an HRA integrated with individual health insurance is ineligible for the premium tax credit.

- Individual who is eligible for, but opts out of, an HRA integrated with individual health insurance is ineligible for the premium tax credit for any month in which the HRA is affordable and provides minimum value coverage.

  - HRA coverage is affordable if the employee’s “required HRA contribution” does not exceed 
    
    \[
    \frac{1}{12} \times \text{(employee’s household income)} \times (\text{required contribution percentage})
    \]

  - If the HRA coverage is affordable, it is deemed to provide minimum value.

- Does not apply to former employees who opt out of the HRA and waive future reimbursements.
Impact on Premium Tax Credit Eligibility

► The required HRA contribution is equal to:

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

\[ \text{minus} \]

The amount newly made available to the employee for self-only coverage for the plan year ÷ the number of months in the plan year that the HRA is available to the employee

► The required contribution percentage is 9.56%, adjusted for inflation (9.86% for 2019)
Impact on Premium Tax Credit Eligibility

► The affordability calculation would not take into account any amounts carried over from a prior year, so long as the amount newly made available is determinable within a reasonable time before the beginning of the plan year.

► Affordability is determined separately for each employment period that is less than a full calendar year.

► Affordability is determined separately for portions of the plan year that fall within different taxable years of the employee.

► If a Marketplace determines that an HRA is unaffordable at the time an employee applies for advance payment of the premium tax credit, the employee generally remains eligible for a premium tax credit even if the HRA is ultimately determined to be affordable.

► Certain exceptions apply.
## Impact on Premium Tax Credit Eligibility - Example

- Employer’s self-only contribution for a plan year is $2,400
- Employee’s household income is $28,000
- Employee is enrolled in the integrated HRA for the full calendar year
- Monthly premium for lowest cost silver plan is $500
- Required contribution percentage is 9.86%

<table>
<thead>
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<th>The employee’s required HRA contribution</th>
<th>May Not Exceed</th>
<th>(1/12) x (employee’s household income) x (required contribution percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>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 minus The amount newly made available to the employee for self-only coverage for the plan year ÷ the number of months in the plan year that the HRA is available to the employee</td>
<td>May Not Exceed</td>
<td>(1/12) x ($28,000) x (9.86%)</td>
</tr>
<tr>
<td>$500 – ($2,400 ÷ 12)</td>
<td>May Not Exceed</td>
<td>(1/12) x $2,760.80</td>
</tr>
<tr>
<td>$300</td>
<td>May Not Exceed</td>
<td>$230.07</td>
</tr>
</tbody>
</table>

The integrated HRA is unaffordable for premium tax credit purposes
Impact on Premium Tax Credit Eligibility

- Comments requested on
  - Whether the silver-level plan used to determine affordability should be the lowest-cost plan or the second lowest cost plan
  - Whether a different plan should be used to determine affordability
  - Any operational or other issues that use of the proposed method of determining affordability (or any alternative) would entail
Individual Market Special Enrollment

► An individual will have a special enrollment right to enroll in individual health insurance coverage (through or outside the Marketplace) if
  ► The employer newly begins to offer an integrated HRA or QSEHRA after the start of the calendar year
    ► Applies when employer first begins to offer the plan
    ► Applies when employee first becomes eligible
  ► Individuals may request enrollment up to 60 days in advance of the special enrollment event
  ► Individual health insurance coverage must become effective as of the later of
    ► The first day of the first month following the individual’s plan selection
    ► The first day of the first month coincident with or next following the date of the special enrollment event
Individual Market Special Enrollment

► Comments requested on
  ► All aspects of the proposal
  ► Whether special enrollment should also be available annually at the beginning of a plan year that is not the calendar year
Treatment as an Excepted Benefit

► Applies to all account-based plans other than health flexible spending accounts (“HRAs”)

► HRA must not be an integral part of the plan
  ► Other group health plan coverage (other than excepted benefits or another HRA) must be made available by the same plan sponsor to participants offered the HRA
    ► The participant need not enroll in the other group health coverage

► HRA must provide benefits that are limited in amount
  ► Amounts made newly available for reimbursement for a plan year may not exceed $1,800 (to be adjusted for years beginning after 2020 using C-CPI-U)
    ► Aggregate maximums in all HRAs offered by the plan sponsor to the participant for the same period
    ► Funds carried over are disregarded
Treatment as an Excepted Benefit

▶ HRA cannot provide reimbursement for premiums for certain health insurance coverage
  ▶ Cannot provide reimbursement for
    ▶ Individual health insurance (except as noted below)
    ▶ Group health plans (except as noted below)
    ▶ Medicare Parts B or D
  ▶ May provide reimbursement for
    ▶ Individual health insurance or group health plan coverage that consists solely of excepted benefits
    ▶ Short term limited duration insurance
    ▶ COBRA or other group continuation coverage
    ▶ Other coverage not explicitly excluded
Treatment as an Excepted Benefit

► HRA must be made available under the same terms to all similarly situated individuals, regardless of any health factor

► “Similarly situated individuals” has the same meaning given under the HIPAA nondiscrimination rules

► Benign discrimination not permitted
  ► Example: Employer may not make greater amounts available under an HRA to persons with cancer
  ► Example: Employer may not offer the HRA only to employees who fail a physical examination
Treatment as an Excepted Benefit

- Comments requested on:
  - The amount of the proposed maximum dollar limit
  - Whether an alternate amount or formula would be more appropriate and why
  - Whether the $1,800 maximum should be higher if the HRA covers dependents (or lower if it covers only the employee)
  - The measure of inflation to be used
  - Whether publication of the adjusted limit by early fall will provide employers with sufficient time to prepare for the following year
  - Whether additional clarity is required regarding the types of premiums that may be reimbursed from an excepted benefit HRA
Application of ERISA

Rule applies to

- HRAs integrated with individual health insurance
- QSEHRAs
- Retiree-only HRAs
- Other HRAs that are offered to fewer than two current employees on the first day of the plan year
- Cafeteria plans that allow employees to pay for the portion of individual insurance premiums not covered by the integrated HRA or QSEHRA
Application of ERISA

- Individual insurance purchased through an applicable plan will not be subject to ERISA or treated as a group health insurance if:
  - The purchase of individual insurance is completely voluntary
  - The employer does not select or endorse any particular issuer or individual health insurance coverage
    - Employer may provide general contact information for insurance available in a state and may provide general health insurance educational information
  - Reimbursement is limited to individual health insurance coverage
  - Employer does not receive consideration in connection with the employee’s selection or renewal of individual insurance coverage
    - This requirement is not intended to affect the plan’s ability to reimburse the employer for certain administrative expenses
  - Each plan participant receives an annual notice that the individual insurance coverage is not subject to ERISA
Application of ERISA

- Comments requested on
  - Whether all conditions are necessary or whether other conditions should be used instead of or in addition to the proposed conditions
  - Whether guidance would be helpful regarding the communications that would not constitute endorsement
  - Which forms of payment are treated as “reimbursement” (e.g., include individual or aggregate direct payments to insurance company?)
  - Whether a better approach (rather than carving out policies from Title I of ERISA) would be better to provide relief from otherwise-applicable ERISA obligations
  - Whether guidance should be issued on ERISA reporting and disclosure requirements applicable to HRAs integrated with non-ERISA individual health insurance coverage
  - Whether guidance would be useful regarding an HRA’s ability to reimburse the plan sponsor for certain administrative expenses
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