Final HRA Regulations Issued – Key Highlights

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On June 13, 2019, the Departments of Labor, Health and Human Services and the Treasury (the "Departments") released final regulations that will permit employers and other plan sponsors to offer employees two new types of health reimbursement arrangements or "HRAs" (see here for "FAQs"): (1) an Individual Coverage HRA ("ICHRA") which can be offered in lieu of a group health plan and which can reimburse individual health insurance plan premiums; or (2) an "Excepted Benefit HRA" which can reimburse the cost of copays, deductibles or other expenses not covered by the primary group health plan (this can refer to the primary group health plan sponsored by the same employer or plan sponsor, or by another plan sponsor, such as a spouse's employer) and is available even if the employee does NOT enroll in the employer's traditional group health plan.

Date of Applicability

Issued in response to Executive Order 13813 which directed the Departments to expand access to HRAs, especially with respect to employees who work at small businesses, the regulations allow plan sponsors to offer these new HRAs as of the first plan year beginning on or after January 1, 2020. (Note: An HRA is a type of account-based health plan that is funded entirely by the employer, usually for the purpose of reimbursing medical expenses incurred by eligible employees and their dependents who are under age 26, from notional accounts established for each eligible participant.)

Individual Coverage HRA (ICHRA)

Until the issuance of the final regulations, an HRA could not be integrated with individual health insurance coverage. Under the new regulations (which go beyond the "QSEHRAs" that were provided for under the 21st Century Cures Act[1] for small employers), an employer, regardless of size, can now help employees pay for individual health insurance coverage that the employee obtains either through an Affordable Care Act–compliant State Exchange or outside the Exchange. To offer an ICHRA, the following requirements must be met:

- The ICHRA may NOT be available to any employee to whom the employer offers coverage under a traditional group health plan (may not offer employees a choice between an ICHRA or traditional group health plan coverage);
- ***No Maximum Annual Contribution:*** Unlike a QSEHRA, an employer may contribute any amount to an Individual Coverage HRA;
- ***Classes of Eligible Participants:*** If the ICHRA is offered to a class of employee, it must be offered on the same terms to all employees within the class (i.e., same amount and generally same terms and conditions).

  PERMISSIBLE CLASSES (classes may be determined at the common law employer level, rather than at the controlled group of employers level; if an employee moves from one class to another, unused amounts from the first ICHRA may be transferred to the second):

  - Full-time employees (use definition that applies for purposes of Section 105(h) of the Internal Revenue Code or Section 4980H of the Internal Revenue Code);
  - Part-time employees (use definition that applies for purposes of Section 105(h) of the Internal Revenue Code or Section 4980H of the Internal Revenue Code);
  - Seasonal employees (use definition that applies for purposes of Section 105(h) of the Internal Revenue Code or Section 4980H of the Internal Revenue Code);
  - Employees who are covered by a collective bargaining agreement in which the employer participates;
  - Employees who have not satisfied a waiting period (i.e., waiting period must comply with 90-day waiting period provision of the Affordable Care Act);
  - Employees who have not yet attained age 25 prior to the beginning of the plan year;
  - Non-resident aliens with no U.S.–based income;
  - Employees working in the same geographic location (generally, the same insurance rating area, state or multi-state region);
  - Salaried employees;
  - Non-salaried employees (e.g., hourly employees);
  - Temporary employees of staffing firms; or
  - Any group of employees that combines two or more of the above classes.

  MINIMUM CLASS SIZE: If an employer offers both a traditional group health plan to some employees (e.g., full-time employees) and an ICHRA to other employees (e.g., part-time employees) or, generally, if any of the above classes are combined, the class of employees with the ICHRA must satisfy the following minimum class size:

  - If the employer has 100 or more employees, the class must have at least 10 employees;
  - If the employer has 100 to 200 employees, the class must comprise at least 10% of the total number of employees;

  - If the employer has more than 200 employees, the class must have at least 20 employees.

  HRA FOR NEW HIRES: An employer that offers a traditional group health plan to a class of employees may prospectively offer employees in that class who are hired on or after a certain future date an ICHRA instead ("new hire subclass").

- ***Must Be Integrated with Individual Coverage or Medicare:*** All participants must have individual health insurance coverage (can be Exchange-coverage or coverage procured outside an Exchange or Medicare);
  - Enrollment in such coverage must be verified on an annual basis (participant must substantiate that he or she will have individual health insurance coverage for the portion of the ICHRA plan year during which he or she is covered by the ICHRA; can be satisfied via a third party — e.g., copy of insurance card or an explanation of benefits, or by the participant's written attestation that he or she and any dependents are enrolled in individual health insurance coverage, the date coverage commenced and the name of the coverage — this may be included in a claim form);

    NOTE: The open enrollment period for individual insurance coverage is generally the end of the calendar year; for coverage to commence as of January 1, 2020, the open enrollment period is from November 1, 2019 to December 15, 2019.
  - May NOT be integrated with short-term limited duration insurance, health care sharing ministry, or group health plan coverage (includes Association Health Plans and MEWAs) or TRICARE.
- ***Opt-out:*** Must allow employees to opt out of the ICHRA on an annual basis so that the employee can claim the "premium tax credit" for Exchange coverage under Section 36B of the Internal Revenue Code if available;
- ***Pre-tax Contributions for Underlying Insurance:*** Note: While individual health insurance premiums for coverage obtained through an Exchange may not be paid with pre-tax dollars under Internal Revenue Code Section 125(f)(3), the regulations note that pre-tax contributions towards individual insurance purchased by an employee OUTSIDE an Exchange can be made through a cafeteria plan;
- ***Contribution Amount May Vary by Age or Family Size:*** An ICHRA may be designed so that the maximum reimbursement amount contributed by the employer increases with the size of employee's family or as the age of the employee increases [note: the maximum amount available to the oldest participant(s) may not be more than three times the maximum dollar amount available to the youngest participant(s)];
- ***Pro-rata Contribution for Employees Hired Mid-Year:*** An ICHRA can be designed to provide for a reasonable proration of the amount contributed for employees who are hired or who add a new dependent mid-year (alternatively, the full contribution for the plan year can be made on the employee's behalf);

- ***Permissible Reimbursements:*** An ICHRA can reimburse any Internal Revenue Code Section 213(d) medical expense that has not been otherwise reimbursed or submitted for reimbursement by another plan [such expense must be incurred while the individual was covered by the ICHRA (written attestation by the individual will be sufficient)];
  - Generally, the ICHRA will be designed to reimburse individual health insurance premiums and/or cost-sharing;
- ***Notice Requirement (model notice is available, see FAQs linked on page 1):*** Prior to the effective date of the ICHRA, an employer or other plan sponsor must provide a notice explaining the ICHRA, how it interacts with eligibility for the premium tax credit for Exchange coverage, the procedure for substantiating individual health insurance or Medicare, the right to opt-out on an annual basis, that the employer or other plan sponsor has no responsibility with respect to the individual health insurance — i.e., not subject to ERISA (assuming the employer does not "endorse" such coverage, the employee voluntarily enrolls in such coverage, and the employer does not receive any compensation with respect to the employee's selection or renewal of such individual coverage), the availability of a special enrollment period to enroll in individual health insurance coverage for those who gain access to an ICHRA mid-year and contact information;
- ***Must Comply with All Other Laws:*** An ICHRA must comply with all other applicable laws including, but not limited to, Medicare Secondary Payer Rules, ERISA, Internal Revenue Code, HIPAA and COBRA.

  NOTE: Guidance is expected with respect to whether ICHRA will permit an "applicable large employer" to comply with the "shared responsibility requirement" of Internal Revenue Code Section 4980H, but see outline of principles for compliance set forth in IRS Notice 2018-88.

Excepted Benefit HRA

Intended to expand the availability and use of HRAs and provide increased healthcare coverage options to employers and employees, an "Excepted Benefit HRA" can be offered by an employer or other plan sponsor in addition to a traditional group health plan. It may be an option for an employer that wishes to make a higher contribution than can otherwise be made on behalf of an employee under a health flexible spending account, and it allows for the rollover of unused funds from year to year. Under the new regulations, an Excepted Benefit HRA:

- May reimburse Internal Revenue Code Section 213(d) medical expenses, including
  - Limited excepted benefits, such as limited scope dental or vision expenses, benefits for long-term care, nursing home care, home healthcare, or community-based care; and
  - Medical care expenses, such as cost sharing for individual health insurance coverage or group health plan coverage;

    May NOT reimburse individual health insurance premiums or group health plan premiums, but may reimburse premiums for:
    — COBRA or other continuation coverage;
    — Coverage consisting solely of excepted benefits;

— Short-term limited duration insurance;

Note: Employers can continue to offer HRAs that reimburse ONLY excepted benefits. These HRAs are NOT "Excepted Benefit HRAs".

- Maximum amount that can be contributed by aµn employer or other plan sponsor for a plan year is $1,800 (indexed for inflation beginning in 2021);
  - Unused amounts may be rolled over (carryover amounts are disregarded for purposes of determining the $1,800 limit);
- Must be offered in conjunction with a traditional group health plan;
  - But, employees are not required to enroll in employer's traditional group health plan, to be covered by the employer's Excepted Benefit HRA;
- Must be uniformly available to all similarly situated individuals in accordance with the non-discrimination requirements of HIPAA;

If you have any questions regarding this article, please contact its author.

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[1] A "QSEHRA" is a qualified small employer health reimbursement arrangement that is available to employers that are not "applicable large employers" (i.e., generally, fewer than 50 full-time employees) and do not offer any group health plan to employees. It may reimburse health insurance premiums up to a certain maximum per year (for 2019, $5,150 for an employee-only QSEHRA and $10,450 for a QSEHRA that reimburses expenses of family members).