



Zombie Benefits – Are Health Reimbursements Arrangements (HRAs) Back From the Dead?

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Zombie Benefits – Are Health Reimbursements Arrangements (HRAs) Back From the Dead?

WRITTEN ON NOVEMBER 7, 2018 BY NANCY K. CAMPBELL

The Affordable Care Act (“ACA”) has not been kind to health reimbursement arrangements (“HRAs”). Many employers got rid of HRAs, or integrated them with a major medical plan, in order to avoid significant penalties under the ACA. At one point it appeared that after-tax HRAs did not have to comply with the ACA. However, as noted in our March 11, 2015 SW Benefits Blog, **“IRS Issues More Guidance On Employers That Pay For Individual Health Insurance Policies for Employees – Gives Limited Relief to Small Employers.”** the IRS clarified that even after-tax HRAs are also subject to the ACA rules.

The proposed regulations that were published in the Federal Register on October 29, 2018 breathe new life into HRAs. They offer some exciting new opportunities for both large and small employers. However they do not take effect until plan years beginning on or after January 1, 2020, and may not be relied upon until then. Accordingly, these new HRAs are not a benefit that employers can offer for the 2019 calendar year. However in the interim, employers may want to begin considering whether these new HRAs are a benefit that they want to offer in 2020 or later.

Two New Types of HRAs

In addition to the integrated HRAs that may be offered under ACA, the proposed regulations provide for two new types of HRAs:

- **HRAs Integrated with Individual Health Insurance Coverage (“IHIC”):** Under this rule, HRAs can be “integrated” with, and reimburse premiums for, IHIC if certain conditions are met. This is a significant change from the current ACA rules, which do not allow HRAs to pay for IHIC. Some of the conditions that this new type of HRA are required to meet include: 1) the participant and dependents covered by the HRA are required to actually be enrolled in IHIC that does not consist solely of excepted benefits; 2) the employer cannot offer a “traditional” medical plan to the same class of employees; 3) the HRA is required to be offered on the same terms to all participants within a class, although carryovers of unused amounts can be disregarded for this purpose and higher accounts can be offered to older employees and employees with larger families; 4) participants are required to be allowed to opt out of the HRA every year and when they terminate employment; 5) employers are required to have reasonable procedures to verify that participants have IHIC and require coverage substantiation each time a reimbursement request is made; and 6) the employer are required to provide notice 90 days before each plan year that includes certain specified information about the HRA including, but not limited to, the maximum dollar amount under the HRA, the right to opt out, the potential

availability of the premium tax credit, and an explanation that accepting the HRA may render the individual ineligible for premium tax credits. The regulations set forth the permissible “classes” of employees as including, among others, full-time employees, part-time employees, seasonal employees, and employees who have not satisfied a permissible waiting period.

- **Excepted Benefit HRAs:** Under this rule, employers may offer an excepted benefit HRA that meets the following requirements: 1) the employer makes other group health plan coverage available that is not an excepted benefit and is not an HRA or other account based plan, to employees for the same plan year; 2) no more than \$1,800 (indexed after 2020 for inflation) can be newly made available under the HRA each year (carryovers of unused amounts are disregarded for the \$1,800 cap); 3) the HRA cannot reimburse premiums for IHIC, group health plan coverage (other than COBRA coverage), Medicare Parts B or D, but it may reimburse premiums for such coverage that consists of only excepted benefits (such as dental or vision coverage); and 4) the HRA is required to be made available to all similarly situated employees.

It is worth noting that these two new HRAs are mutually exclusive. Therefore, an employer can offer one, but not both, HRAs to the same class of employees.

Other Important Changes

- **ERISA Exception for Individual Health Insurance Coverage (“IHIC”):** The Department of Labor (the “DOL”) has also issued a proposed regulation that will exempt from ERISA, IHIC that is paid by an HRA integrated with IHIC, if certain requirements are met. In order for the IHIC to be exempt from ERISA: 1) the purchase of the IHIC is required to be completely voluntary for participants and beneficiaries, but is it permissible if the employer requires the participant to purchase coverage in order to participate in the HRA; 2) the employer cannot select or endorse any particular health insurer or health coverage; 3) reimbursement for nongroup health insurance premiums is limited solely to individual health insurance coverage as defined by the DOL; 4) the employer receives no consideration in the form of cash or otherwise for the employee’s purchase of IHIC; and 5) the employer annually notifies each participant that the IHIC is not subject to ERISA. This is a really important exception. It means the HRA itself would be subject to ERISA, but the IHICs purchased using HRA funds would not.
- **Cafeteria Plan Benefits:** The preamble to the proposed regulations clarifies that employers that offer an HRA integrated with IHIC may allow employees to use pre-tax salary reductions under a Section 125 plan to pay a portion of their IHIC premiums not covered by the HRA. Due to Section 125 restrictions, it does not appear that a Section 125 plan may allow salary reductions to be used to purchase a Health Care Exchange policy. Only off-Exchange policies appear to be permitted. If allowed, this feature must be made available on the same terms and conditions to all employees in a class.

- **Premium Tax Credit Eligibility:** The proposed regulations also provide guidance on how an individual offered an HRA integrated with IHIC will be treated for purposes of the premium tax credits that are available to some employees who purchase coverage through a Health Care Exchange.
- **Health Care Exchange Special Enrollment:** The Department of Health and Human Services (“HHS”) issued a proposed regulation that establishes a new special enrollment period for employees and dependents who gain coverage under an HRA integrated with IHIC (or are provided a QSEHRA – see below), allowing them to enroll in IHIC, or to change from one IHIC option to another.

Section 4980H Large Employer Mandate

Large employers are subject to penalties if any full-time employee receives a premium tax credit or cost-sharing reduction and either: (a) the employer fails to offer minimum essential health coverage to 95% of its full-time employees (and their dependents); or (b) the employer offers minimum essential health coverage to 95% of its full-time employees (and their dependents), but the coverage is either not affordable or does not provide minimum value. Missing the 95% test even slightly, for example, coming in at 94%, will require the employer to pay a \$2,000 annual penalty for each full-time employee (minus the first 30 full-time employees). The rules are explained in more detail in our *“Health Care Reform’s Employer Shared Responsibility Penalties: A Checklist for Employers.”*

Come 2020, an HRA integrated with IHIC may be a new way for employers to offer health coverage to employees and avoid some of

the penalties under Code Section 4980H. To some degree, HRAs may already be used to avoid some of these penalties. However, because of the ACA penalties that applied to HRAs that allow employees to purchase IHIC, an HRA integrated with IHIC is not a viable option before 2020. Although the proposed regulations do not indicate how an HRA integrated with IHIC will satisfy the large employer mandate, the Departments have indicated they will issue a safe harbor for purposes of determining whether an employer that offers an HRA integrated with IHIC will be treated as having made an offer of affordable minimum value coverage for purposes of Code Section 4980H, regardless of whether the employee who receives the offer declines the HRA and claims a premium tax credit.

QSEHRAs

Small employers were the first to get relief from the ACA impact on HRAs in the form of the 21st Century Cures Act (the “Cures Act”). Under those rules, small employers may set up “qualified small employer health reimbursement arrangements” (“QSEHRAs”) to help their employees pay for medical expenses. The QSEHRA rules appear to be largely unaffected by these new proposed regulations. For more information about QSEHRAs, see our February 22, 2017 blog, ***“Curing What Ails You – Relief for Small Employer HRAs,”*** and ***IRS Notice 2017-67***, issued in October 2017, which provides guidance in a series of FAQs.

Retiree Medical HRAs

Stand-alone retiree medical HRAs that allow retirees to purchase IHIC, such as Medicare supplement policies, appear to be unaffected by the proposed regulations.

Conclusion

The proposed regulations could have a significant impact on how some employers offer health insurance to their employees starting in 2020. Although the rules apply to employers of all sizes, it is expected that small and mid-size employers may find the new rules most beneficial. Employers with current HRAs may also need to consider whether these new rules impact their current HRAs in any way before 2020.

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