

Employees Could Use HRAs to Buy Individual Health Insurance Policies Under Proposed Rules

New HRA option would let employers subsidize individual health insurance policies for employees without violating ACA and ERISA.

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The Trump Administration has proposed regulations that, if finalized in their current form, would expand the use of employer-sponsored health reimbursement arrangements (HRAs) to permit employees to use HRAs to purchase individual health insurance policies, including policies sold on the Affordable Care Act's (ACA) health insurance Exchanges. In addition, stand-alone HRAs would be permissible in limited circumstances. The proposed regulations, if finalized, would be effective in plan years beginning after 2019.

The proposed regulations are the third set of regulations issued under an Executive Order signed by President Trump last year. Two previous sets of regulations, on short-term limited-duration health insurance policies and association health plans, were finalized earlier this year.

Background

An HRA is an account-based arrangement that consists solely of employer money to reimburse medical expenses of employees, retirees, and eligible dependents on a tax-free basis. Money left in an HRA at the end of the year generally can be rolled over to the next year. Under current law, an HRA must be integrated with a traditional group health plan to meet the ACA's rules prohibiting lifetime and annual dollar limits and requiring zero-cost-sharing coverage of in-network preventive care. HRAs that cover fewer than two current employees on the first day of the plan year (e.g., retiree-only plans) are not subject to these integration requirements.

Proposed HRA Regulations

The proposed regulations would create two kinds of HRAs: an "Integrated HRA" and an "Excepted HRA." This bulletin discusses the following:

Integrated HRAs:

- Enrollment.
- Avoiding Health Status Discrimination in Integrated HRAs.
- Individual Insurance Not Part of an ERISA Plan.
- Opt-Out Provision for Premium Tax Credits.
- Notice Requirement.
- ACA Employer Mandate and Integrated HRAs.
- Salary Reduction Arrangements and Individual Health Insurance.
- Maximum Dollar Amounts for Integrated HRAs.
- Integrated HRAs and Post-Employment Health Care Coverage.

- Substantiation and Verification of Individual Health Insurance Coverage.

Excepted HRAs:

- Other Coverage Available.
- Limited Amount.
- Cannot Reimburse Premiums.
- Uniform Availability.

Integrated HRAs

Enrollment. To permit employees to use HRAs to purchase individual health insurance coverage, the proposed regulations would remove the current prohibition against integrating an HRA with individual health insurance coverage and permit an HRA to be integrated with such coverage, including student health insurance, if the following conditions are met:

- Such an HRA (referred to in this bulletin as an “integrated HRA”) must require the participant and any dependents covered by the HRA to be enrolled in individual health insurance coverage (other than coverage that consists solely of excepted benefits) each month. If the individual covered by the integrated HRA merely has the ability to obtain individual health insurance coverage, but does not actually have that coverage, the HRA fails to comply. This proposed requirement applies with respect to all individuals whose medical care expenses may be reimbursed under the HRA, not just the participant (i.e., spouses and dependents);
- If the participant fails to maintain enrollment in individual health insurance coverage, the integrated HRA is forfeited for that month and cannot reimburse medical expenses (in which event, COBRA rules may apply);
- The integrated HRA must require the participant and any dependents to substantiate enrollment via a third-party document or a participant attestation; and
- The proposed rules allow for special enrollment periods for individuals who gain access to an integrated HRA outside of annual enrollment.

If these conditions are not met, the HRA violates the ACA’s prohibition on annual and lifetime dollar limits and the ACA’s requirement to cover preventive care without cost sharing.

Avoiding Health Status Discrimination in Integrated HRAs. The proposed regulations also protect against the possibility that an employer’s offering of an integrated HRA could lead to health care coverage options that discriminate based on health status. An integrated HRA could encourage higher risk individuals (i.e., employees or family members with high expected medical claims) to obtain coverage in the individual insurance market rather than from the employer group health plan, leading to higher premiums in the individual insurance market and destabilizing that market.

To avoid the risks of impermissible health discrimination and market segmentation, the proposed regulations provide the following rules to prevent a plan sponsor from steering any participants or dependents with adverse health factors away from the plan sponsor’s traditional group health plan and into the individual market:

- The proposed regulations prohibit a plan sponsor from offering the same class of employees both a traditional group health plan and an integrated HRA.
- To the extent an employer offers an integrated HRA to a “class of employees,” the HRA must be offered on the same terms to all employees within that class or classes.
- The classes of employees are:

1. Full-time employees (under either the nondiscrimination rules of Section 105(h) or the employer mandate rules of Section 4980H of the Internal Revenue Code (Code));
2. Part-time employees (under either Code Section);
3. Seasonal employees (under either Code Section);
4. Collectively bargained employees;
5. Employees who have not satisfied a waiting period for coverage;
6. Employees who have not attained age 25 prior to the beginning of the plan year;
7. Non-resident aliens with no U.S.-based income (i.e., foreign employees who work abroad);
8. Employees whose primary site of employment is in the same rating area; and
9. A group of participants combining two or more of the above classes of employees.

Individual Insurance Not Part of an ERISA Plan. The proposed regulations clarify that individual health insurance coverage, the premiums of which are reimbursed by the integrated HRA, does not become part of an ERISA plan, if the following conditions are met:

1. The purchase of any individual health insurance coverage is voluntary for employees;
2. The employer does not select or endorse any issuer or insurance coverage;
3. Reimbursement for nongroup coverage is limited to individual health insurance coverage;
4. The employer does not receive any consideration in connection with the employee's selection of individual insurance coverage; and
5. Each participant is notified annually that the individual insurance coverage is not subject to ERISA.

Opt-Out Provision for Premium Tax Credits. If an individual is covered by an integrated HRA for a month, the individual is not eligible for a premium tax credit (PTC) for that month regardless of the amount of reimbursement available under the HRA. In some circumstances, however, an individual might be better off claiming the PTC than receiving reimbursements under an integrated HRA. Therefore, the proposed regulations provide that current employees may be allowed the PTC (if they are otherwise eligible) if they opt out of and waive future reimbursements from the HRA and the HRA is either unaffordable or does not provide minimum value. Furthermore, the proposed regulations require that, upon termination of employment, either the remaining amounts in the HRA must be forfeited or the participant must be allowed to permanently opt out of and waive future reimbursements from the HRA to ensure that the HRA participant may choose whether to claim the PTC.

Notice Requirement. Because integrated HRAs are different than traditional employer-provided health coverage, individuals eligible for integrated HRAs may not recognize that the offer and/or acceptance of the HRA will have consequences for PTC eligibility in the ACA Exchanges. Therefore, to ensure that participants who are eligible to participate in an integrated HRA understand the potential effect that the offer of and enrollment in the HRA might have on their ability to claim the PTC, these proposed regulations require that an integrated HRA provide written notice of the key aspects of an integrated HRA to eligible participants.

ACA Employer Mandate Penalties and Integrated HRAs. Under the employer mandate, an employer offering an integrated HRA is not liable for the potentially larger penalty under Code Section 4980H(a) if the integrated HRA is offered to at least 95% of all full-time employees and their eligible non-spouse dependents. Offering an integrated HRA could also protect an employer from the generally smaller Code Section 4980H(b) penalty if the HRA is affordable and provides minimum value. The government intends to issue guidance on an anticipated safe harbor for determining whether an employer who offers an integrated HRA has made an offer of affordable minimum value coverage for purposes of the Code Section 4980H(b) penalty, regardless of whether the employee who received the offer declines the HRA and claims the PTC.

Salary Reduction Arrangements and Individual Health Insurance. An employer cannot permit employees to make salary reduction contributions to a cafeteria plan to purchase a qualified health plan (including individual health insurance coverage) offered through an ACA Exchange. However, if permitted by the plan, an employee

who purchases individual health insurance coverage outside the Exchange can use salary reduction contributions made through a cafeteria plan to pay the balance of the premium after any HRA funds have been applied. The ability to pay the portion, if any, of the premium for such coverage that is not covered by the HRA by using a salary reduction arrangement under a cafeteria plan must be made available on the same terms to all participants (other than former employees) in a class of employees.

Maximum Dollar Amounts for Integrated HRAs. A plan sponsor that offers an integrated HRA to a class of employees must offer the HRA in the same amount and on the same terms and conditions to all employees within the class. While the proposed regulations do not impose a maximum dollar amount on the integrated HRA (unlike the excepted HRA, as discussed below), whatever maximum dollar amount an employer might impose on the integrated HRA must be made available to all employees within the class or classes. The maximum dollar amount made available under an integrated HRA for participants within a class of employees may increase based on the age of the participant and the number of dependents covered by the HRA. The same maximum dollar amount attributable to those increases must be available to all participants of the same age and number of dependents within the same class of employees, not counting any HRA carryover amounts. With respect to carryover amounts, the methodology and formula for determining the amounts of unused funds must be the same for all participants in a class of employees.

Integrated HRAs and Post-Employment Health Care Coverage. Because eligibility for post-employment health coverage varies widely and may be subject to age, service, or other conditions, the proposed regulations provide that an integrated HRA may be treated as provided on the same terms even if the plan sponsor offers the HRA to some former employees (for example, to all former employees with a minimum tenure of employment) within a class of employees but fails to offer the HRA to the other former employees within the same class of employees. If a plan sponsor offers the HRA to one or more former employee(s) within a class of employees, the HRA must be offered to those former employee(s) on the same terms as all other employees within the class.

Substantiation and Verification of Individual Health Insurance Coverage. The proposed regulations require that the individuals whose medical care expenses may be reimbursed under an integrated HRA must be enrolled in individual health insurance coverage. An integrated HRA must have, and comply with, reasonable procedures to verify that individuals whose medical care expenses are reimbursable by the HRA are (or will be) enrolled in individual health insurance coverage during the plan year.

Excepted HRAs

The proposed rules would create a second category of HRAs called an “excepted HRA,” which is a “stand-alone” HRA that is not integrated with individual health insurance, group coverage, Medicare, or Tricare. An excepted HRA would be recognized as a “limited excepted benefit” (i.e., exempt from many provisions of ERISA and the ACA) if the HRA meets the following rules:

1. **Other coverage available.** Other group health plan coverage that is not an HRA or account-based must be offered for the plan year to the eligible participants;
2. **Limited amount.** The amounts newly made available under the HRA cannot exceed \$1,800 (as indexed for inflation after 2020);
3. **Cannot reimburse premiums.** The HRA cannot provide reimbursement for premiums for certain group health coverage, individual health insurance, and Medicare Parts B/D. It can reimburse COBRA and excepted benefits (e.g., dental/vision); and
4. **Uniform availability.** The HRA is made available on the same terms to all similarly situated individuals.

Resources

The proposed regulations are available [here](#).

The news release is available [here](#).

A fact sheet is available [here](#).

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