Drinker Biddle

Client Alert

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Expanded Usability of HRAs Under the Proposed Rule

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On October 23, 2018, the Internal Revenue Service, the Department of Labor, and the Department of Health and Human Services (the "Departments") released a proposed rule (the "Proposed Rule") broadening the use and flexibility of health reimbursement arrangements (HRAs). The Proposed Rule comes in response to President Donald Trump's executive order calling for the Departments to expand employers' ability to offer HRAs to their employees and allow HRAs to be used in conjunction with nongroup coverage.

An HRA is an employer-funded account-based plan that reimburses employees for the cost of certain medical care expenses on a tax-free basis. The Proposed Rule introduces two new types of HRAs: (1) an HRA that is integrated with individual health care coverage (referred to here as an "Integrated HRA") and (2) an HRA that reimburses employees for certain limited benefits (an "Excepted Benefit HRA"). These two new HRAs are described below.

Integrated HRAs

Current regulatory guidance prohibits employers from offering HRAs that reimburse employees for the cost of individual health insurance coverage. The proposed rule would remove that prohibition, allowing the HRA to be "integrated" with individual health insurance coverage as long as the following requirements are met:

Individual Health Care Coverage

The Integrated HRA must require participants and any dependents covered by the HRA to be enrolled in individual health insurance coverage and to substantiate compliance with this requirement. The individual health insurance coverage could be coverage purchased through the Exchange or through the private individual insurance market and would include student health insurance. The Proposed Rule would create a special enrollment period to enroll in individual health care coverage for individuals who become eligible for an Integrated HRA.

Drinker Biddle Comment: *While the Proposed Rule does not mandate particular substantiation procedures, it states that such procedures must be "reasonable" and could require a participant to verify his or her enrollment in individual coverage by either personally attesting to enrollment or providing a document from a third party (such as an insurance issuer) that shows that the participant is (or will be) enrolled in individual coverage. A participant would also be required to substantiate his or her continued enrollment in individual coverage throughout the plan year each time he or she makes a request for reimbursement under the Integrated HRA and this too could be in the form of a written attestation. The Proposed Rule notes that this follow-up substantiation could be part of the form used to request reimbursement. The fact that employers will be able to rely on employee attestations is helpful.*

ERISA Does Not Apply

The Proposed Rule states that the individual health insurance coverage reimbursed by the HRA in compliance with these requirements would not be considered a group health plan for ERISA purposes if certain conditions are met. These conditions include: that the purchase of the coverage by the employee be voluntary, that the employer not be involved in the selection of the coverage and not receive consideration in connection with the employee's selection of the coverage, and that the employee be notified annually that the coverage is not subject to ERISA. This is good news for employers because it means that the arrangement will not be subject to the reporting, disclosure, fiduciary and enforcement rules of ERISA.

Cannot be Eligible for Both the Integrated HRA and Group Health Plan

Employers would not be permitted to offer an Integrated HRA and a traditional group health plan to the same class of employees. By restricting employees from choosing between these two options, the Proposed Rule intends to prevent an employer from steering employees away from group health plan coverage in favor of individual coverage that is bolstered by the Integrated HRA. However, employers could offer a traditional group health plan to one group of employees and an Integrated HRA to a different group of employees, as long as the specified groups fall within certain permitted categories. Those categories are: full-time employees, part-time employees, seasonal employees, employees covered by a collective bargaining agreement, employees who have not satisfied a coverage waiting period, employees who have not attained age 25, nonresident aliens with no U.S.-based income, and employees whose primary site of employment is in the same rating area.

Drinker Biddle Comment: *Note that the classes of employees identified by an employer must fall within the specified categories. For example, an employer could offer traditional group health coverage to full-time employees and provide an integrated HRA for part-time employees to purchase individual health insurance policies. However, an employer could not draw a similar distinction between hourly and salaried employees. The Departments explain that in the case of hourly and salaried status, an employer could easily change this employment status in order to transfer risk from its group health plan to the individual market.*

Same Terms

An Integrated HRA would be required to be offered on the "same terms" to all employees within a category. This requirement is aimed at preventing employers from offering a more generous HRA to certain individuals within a class on the basis of health status. However, the Proposed Rule clarifies that it would be permissible for employers to offer a higher dollar amount under an Integrated HRA to certain individuals within a class on the basis of age or family size to account for higher premiums on the individual market. Also, employers could decide to offer an Integrated HRA to some but not all former employees (for example, only to former employees with a minimum number of years of service). If the premium is not fully covered by the HRA, then employees would be permitted to pay for coverage on a pre-tax basis under a cafeteria plan as long as it is provided on the same basis to all employees within the class and only if the coverage is purchased off-Exchange.

Drinker Biddle Comment: *The Departments intend to issue guidance describing a safe harbor that would allow increases in the maximum reimbursement amounts based upon age without violating Internal Revenue Code Section 105(h), the nondiscrimination rules that apply to HRAs. Additional guidance on the impact of this structure in the context of the Code Section 125 cafeteria plan nondiscrimination rules would also be welcome.*

Opt Out

Under current rules, HRA-eligible participants are not eligible for a premium tax credit (PTC) on the Exchange. The Proposed Rule recognizes that some individuals may be better off claiming the PTC than receiving reimbursements under the HRA because the HRA either is unaffordable or does not provide minimum value. To address this, the Proposed Rule allows employees to take advantage of the PTC (if they are otherwise eligible) by opting out of and waiving future reimbursements from the Integrated HRA under these circumstances. The Proposed Rule contains metrics for determining whether the Integrated HRA would be considered "affordable" coverage and describes a safe harbor determination for affordability.

Notice

Plan sponsors would be required to provide written notice of the Integrated HRA to eligible participants at least 90 days before the beginning of each plan year. The notice would need to contain relevant information about the Integrated HRA, including the terms of the HRA, the maximum available dollar amount, a statement of the participant's right to opt out of the HRA, and an explanation of eligibility consequences regarding the PTC if the participant accepts the HRA.

With respect to the impact of these new arrangements on the employer mandate under the Patient Protection and Affordable Care Act (PPACA), the Proposed Rule notes that the Treasury Department and IRS anticipate issuing guidance on the question of whether employers offering Integrated HRAs would be treated as having made an offer of coverage that both is affordable and provides minimum value.

Drinker Biddle Comment: *Integrated HRAs may be particularly attractive to small employers who are not required to offer coverage under the employer mandate but who wish to provide workers with health care coverage as a means of attracting talent and retaining employees. Through an Integrated HRA, small employers can reimburse employees for the cost of obtaining their own individual health care coverage, either through an Exchange or through the private individual insurance market. An Integrated HRA may also appeal to larger employers who want to retain their current group health plan but wish to provide the Integrated HRA to certain classes of employees - - especially if the PPACA penalties can be avoided.*

Excepted Benefit HRAs

The second new HRA arrangement that is described under the Proposed Rule is an "Excepted Benefit HRA," which would reimburse employees for certain limited benefits. An individual would be eligible to participate in an Excepted Benefits HRA regardless of whether he or she has any other health care coverage. The following requirements would apply:

Not an Integral Part of the Group Health Plan

Plan sponsors must offer other group health plan coverage to the same classes of employees to whom the Excepted Benefit HRA is offered, so that the HRA is not an "integral part" of the group health plan offered by the plan sponsor. While plan sponsors would be required to offer both types of coverage, employees would not be required to enroll in the plan sponsor's group health plan in order to participate in the HRA.

Limited in Amount

Employers can offer up to $1,800 per year through an Excepted Benefit HRA, adjusted annually for inflation.

Reimbursement Only for Certain Types of Coverage

Excepted Benefits HRAs would only be permitted to reimburse premiums for excepted benefits (such as dental or vision coverage), short-term limited-duration policy premiums, and COBRA premiums.

Uniform Availability

Plan sponsors would be required to make Excepted Benefit HRAs available on the same terms to all similarly situated individuals, regardless of any health factor, to prevent discrimination based on health status.

Drinker Biddle Comment: *Under the Proposed Rule, an employer would not be permitted to offer both an Integrated HRA and an Excepted Benefit HRA to the same employee, but an employer could offer one of these HRA arrangements to one class of employees and the other HRA arrangement to a different class of employees. Therefore, if these rules are finalized, employers who are considering offering one or both of these arrangements will want to consider the differing requirements of each and the impact and overall benefit to each employee class.*

The Proposed Rule would make significant changes to existing rules providing employers with additional health care options to offer employees. The Proposed Rule would apply for plan years starting on or after January 1, 2020. The Departments are accepting comments on the Rule until December 28, 2018, and we expect that there will be a considerable number of comments, including comments on the guidance expected to be issued under the Rule. Drinker Biddle will provide updates on these developments as they unfold.

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