

FINAL REGS EXPAND OPPORTUNITIES FOR EMPLOYERS TO OFFER ACCOUNT-BASED GROUP HEALTH PLANS

Hodgson Russ Employee Benefits Alert
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On June 13, 2019, the Internal Revenue Service, U.S. Department of Labor, and U.S. Department of Health and Human Services (“Agencies”) issued final regulations (see source reference at the end of this alert) expanding opportunities for employers of all sizes to offer two new types of health reimbursement arrangements (“HRAs”) to employees:

1. Individual Coverage HRAs (“ICHRA”). ICHRAs are integrated with individual health insurance coverage or Medicare, allowing employees and dependents to reimburse premiums for such coverage, as well as other eligible medical expenses.
2. Excepted Benefit HRAs (“EBHRA”). EBHRAs allow employees to pay for eligible medical expenses up to an annual \$1,800 (indexed) dollar limit.

These Final Regulations are a substantial departure from previous guidance regarding HRAs. Effective January 1, 2020, employers will have far greater plan design options for implementing these account based plans.

Individual Coverage Health Reimbursement Arrangements (ICHRAs)

Under previous guidance, stand-alone, general purpose HRAs violated the Affordable Care Act’s (“ACA”) prohibitions against annual dollar limits on essential health benefits and the requirement to cover preventative services without cost-sharing. Thus, prior guidance generally required an HRA to be integrated with an ACA-compliant group health plan, or limited to covering only retirees or reimbursing only limited-scope benefits (e.g., vision and dental expenses).

In a significant course reversal, the Final Regulations now allow an HRA to be integrated with individual market health insurance or Medicare coverage, subject to certain rules, including a:

- Requirement that all individuals covered by an ICHRA be enrolled in individual health insurance or Medicare;
- Prohibition against offering a choice between ICHRA coverage and coverage under a traditional group health plan to the same class of employees;

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- Requiring ICHRAs to generally be offered on the same terms to all participants within a class of employees;
- Opportunity before each plan year and at retirement to opt out of and waive future reimbursements; and
- Providing a written notice to participants at least 90 days before the plan year begins, or before the date the participant is first eligible to participate.

1. ERISA Safe harbor

Although an ICHRA is a group health plan subject to ERISA, the Final Regulations create a safe harbor exception under which the individual health insurance coverage integrated with the ICHRA is exempt from ERISA with the following conditions:

- The purchase of the individual health insurance coverage is completely voluntary;
- The employer does not endorse any issuer or health insurance coverage;
- The reimbursement of individual health insurance coverage does not apply to coverage consisting solely of excepted benefits;
- The employer receives no consideration in connection with the employee's selection or renewal of individual health insurance coverage; and
- The employer provides annual written notice to each participant that the individual health insurance coverage is not subject to ERISA.

2. Compliance with the ACA's Employer Mandate

An ICHRA is a self-insured employer sponsored group health plan that qualifies as minimum essential coverage. An employer sponsoring an ICHRA will be considered to have provided minimum essential coverage and avoid the Code Section 4980H(a) excise tax so long as coverage is offered to substantially all full-time employees. In addition, if the ICHRA is affordable, it will be deemed to offer minimum value under the Final Regulations and will also avoid the Code Section 4980H(b) excise tax.

Excepted Benefit Health Reimbursement Arrangements (EBHRAs)

The EBHRA is a general purpose HRA that is permitted to reimburse qualifying medical expenses under Code Section 213 (d), subject to the following requirements:

- The employer must provide other group health plan coverage that is not: (i) an account-based group health plan, or (ii) coverage limited to excepted benefits;
- The maximum annual reimbursement must be limited to \$1,800 (indexed);
- The EBHRA may not reimburse premiums for individual health insurance coverage, or Medicare, but may reimburse premiums for COBRA, excepted benefits and, in some cases, short-term, limited-duration coverage;

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- The EBHRA must be available on a uniform basis to similarly-situated individuals (as defined under the HIPAA non-discrimination rules); and
- The EBHRA may not be offered to employees who are also offered an ICHRA.

EBHRAs are self-insured group health plans subject to ERISA's requirements and are also subject to Code Section 105(h)'s non-discrimination rules.

We anticipate these additional options will increase demand for these types of benefits, especially with certain types of employers. For example, large employers with low paid or variable hour workforce. These benefits will likely provide greater cost certainty for employers and provide protection against potential penalties under the Employer Shared Responsibility Payment provisions of the ACA.

Federal Register, Vol. 84, No. 119, Thursday, June 20, 2019, Final Rules: 26 CFR Parts 1 and 54, 29 CFR Parts 2510 and 2590, and 45 CFR Parts 144, 146, 147, and 155, "Health Reimbursement Arrangements and Other Account-Based Group Health Plans."

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