ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: PRACTICAL Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley Gillihan, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as *general guidance* on the subjects covered in the question and are *not provided as legal advice* to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

A NEW ERA OF HRAS BEGINS IN 2020

After a little more than 18 months after the President's Executive Order, the Departments of Labor, Treasury, and Health and Human Services (the "tri-agencies") issued their long-awaited final regulations on health reimbursement arrangements (HRAs). The final regulations expand HRAs in ways that could significantly change the health benefits landscape (especially for small employers) by establishing two new HRAs:

- An HRA that is integrated with certain individual market coverage (IMC) and Medicare (individual coverage HRA (ICHRA)).
- A nonintegrated general purpose HRA that is considered an excepted benefit (excepted benefit HRA (EBHRA)).

The final regulations are effective for plan years beginning on or after January 1, 2020. These new designs should, subject to the availability of traditional individual health insurance coverage, significantly expand the possibilities for defined contribution health coverage—igniting a new HRA-Era beginning in 2020. We address this new guidance in a two-part series. This article addresses the EBHRA, which can be paired with traditional group health plan coverage. Last month we addressed the ICHRA.

EBHRA

What is an EBHRA?

The second of the two new HRAs created by the regulations is a non-integrated, excepted benefit HRA (EBHRA). This new HRA qualifies as an excepted benefit, which means it can reimburse general medical expenses without integration, so long as it satisfies the following conditions:

- The maximum annual contribution to the EBHRA is $1,800, adjusted for inflation. This does not include carryover amounts, which may be unlimited. If the employer offers any other HRA or other account-based group health plan to the employee for the same time period (other than one that reimburses only excepted benefits), the aggregate annual contribution for all such HRAs cannot exceed $1,800.

Practice Pointer:
The aggregate $1,800 contribution maximum does not apply to FSAs or HRAs that reimburse only excepted benefits, such as dental or vision benefits.

- The employee must also be offered nonexcepted, non-account-based group health plan coverage from the same employer, but the employee does not have to enroll in that coverage.
- The employee cannot also be offered an ICHRA.
- The terms and conditions of the EBHRA must be the same for all "similarly situated" individuals (as defined by the HIPAA wellness nondiscrimination rules).

Who are similarly situated employees?

"Similarly situated" employees for EBHRA purposes are employees within the same employment-based classification that is consistent with the employer's usual employment practices, such as full-time, part-time, hourly, salaried, or worksite location.

Does ERISA and HIPAA apply to an EBHRA?

ERISA and all that comes with ERISA applies to EBHRAs. However, since it is an excepted benefit it is exempt from the health insurance reforms and HIPAA's portability and nondiscrimination rules. A plan document and Form 5500 may be required, requests for reimbursements must be handled in accordance with ERISA's claims and appeal procedures, and the employer must furnish participants with a summary plan description (SPD) in accordance with ERISA Section 102—just to name a few of ERISA's requirements.

HIPAA applies to the EBHRA as well – meaning that employers must have a privacy notice, privacy language in the plan document, privacy policies and procedures, business associate agreements, and a HIPAA risk assessment.

Is the EBHRA subject to the Section 105(h) nondiscrimination rules?

Yes! Unlike an ICHRA that is designed to reimburse only IMC premiums, there is no exception from the Section 105(h) rules. Consequently, if an EBHRA offered to salaried employees has a higher benefit amount than the HRA benefit offered to hourly employees, the EBHRA could be considered to be discriminatory.

What expenses can be reimbursed by the EBHRA?

The EBHRA may reimburse most Section 213(d) medical care expenses incurred by participants; however, it may not reimburse any insurance premiums except for COBRA (or other continuation coverage premiums) and premiums for plans that only provide medically related excepted benefits (e.g., dental or vision). IMC premiums, non-COBRA group coverage, and costs of Medicare Part A, B, C, or D would not be eligible expenses. STLDI coverage could, however, be reimbursed under an EBHRA.

PEERING INTO 2020

Beginning in 2020, the following HRAs will be available for consideration:

- An HRA integrated with group health plan coverage
- Retiree-only HRA
- An HRA that only reimburses excepted benefits (such as dental or vision)
- QSEHRA
- ICHRA (new)
- EBHRA (new)

The two new HRAs will give employers, especially smaller to mid-size employers, much more flexibility with the health plan coverage that they make available to employees. For example, employers that desire to offer part-time employees health coverage but couldn't otherwise afford to offer coverage may now be able to offer an ICHRA to such employees. The two new HRAs are only a few short months away from becoming reality, and the open enrollment period for IMC begins in November, so employers should start considerations of the two new HRAs now. ■