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.

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AGENCIES PUMP NEW LIFE INTO CDHC WITH HRA GUIDANCE

In late October, the tri agencies (Department of Labor (DOL), Treasury, and Health and Human Services (HHS)) published a much-anticipated proposed regulation regarding health reimbursement arrangements (HRAs). The HRA proposed regulation is a product of an Executive Order issued by President Trump to the agencies to issue guidance making HRAs more flexible.

This proposed regulation, which will be effective for plan years beginning on or after January 1, 2020 (***and cannot be relied on before the effective date***), makes drastic changes to the rules currently applicable to HRAs offered to active employees. Under the proposed regulations, employers of any size will be able to establish HRAs for active employees that reimburse the employee's premiums for major medical insurance purchased in the individual market, subject to certain conditions ("Premium Reimbursement HRA").

PRACTICE POINTER:

Although Premium Reimbursement HRAs are similar to QSEHRAs in many respects, a significant difference is that Premium Reimbursement HRAs will be available to employers of any size whereas QSEHRAs are only available to employers who are not applicable large employers as defined by Code Section 4980H.

In addition, employers will be able to set up non-integrated excepted benefit HRAs that reimburse an employee's general 213(d) medical expenses subject to certain conditions (including that the employee be eligible for other group health coverage sponsored by the same employer) ("Excepted Benefit HRA"). These new excepted benefit HRAs cannot be used to purchase health insurance in either the individual or group market, other than excepted benefit coverage (e.g., dental or vision) and COBRA continuation coverage.

The proposed regulations address the impact of certain health insurance reforms of the Affordable Care Act (ACA) on HRAs. The ACA reforms do not apply to HRAs that only provide excepted benefits (dental, vision) or HRAs covering only former employees (e.g., "stand alone retiree only" HRA). Consequently, such dental/vision and stand alone retiree only HRAs are not affected by the proposed regulations.

PRACTICE POINTER:

The guidance adds two new HRAs to the mix of HRAs types that may be offered by employers:

1) HRAs that are integrated with other group health plan coverage. These are the HRAs that resulted from Notice 2013-54 and its progeny;
2) HRAs that provide excepted benefits, such as dental or vision coverage;
3) QSEHRAs;
4) Stand alone retiree only HRAs (or, HRAs limited to former employees);
5) NEW Premium Reimbursement HRA
6) NEW Excepted Benefit HRA (not to be confused with HRAs that provide excepted benefits, such as dental, vision).

The following is a summary of the proposed rules regarding the two new HRAs.

PREMIUM REIMBURSEMENT HRA

If the regulations are finalized as proposed, an employer of any size may establish an HRA that reimburses the employee's premiums for major medical insurance purchased in the individual market ("IM Coverage") provided that certain requirements are satisfied.

PRACTICE POINTER: As a threshold matter, the IM Coverage must qualify as minimum essential coverage. This includes both grandfathered and non-grandfathered individual market coverage. IM Coverage does not include dental or vision only coverage. Also, IM Coverage does not include short-term, limited-duration insurance (STLDI), which is not considered individual market insurance. Nevertheless, the agencies request comments as to whether a Premium Reimbursement HRA should be able to reimburse STLDI premiums.

The following are the requirements applicable to premium reimbursement HRAs:

- Only those active employees and their dependents who are actually enrolled in IM Coverage can be eligible for the HRA. Substantiation of IM Coverage is required both initially and when expenses are submitted for reimbursement.

PRACTICE POINTER: Although various substantiation methods are discussed, the agencies indicate that employee attestation of IM Coverage is sufficient. No specific guidance is provided regarding the timing of the initial substantiation of IM Coverage. Must this be provided as a prerequisite to initial enrollment in the Premium Reimbursement HRA or can employers simply wait until the first expense is submitted for reimbursement? Additional guidance will be helpful.

- The HRA must be offered to all eligible employees within a "designated" class on the same terms and conditions. Benefits within a designated class may only vary by age and family size. The designated classes identified in the regulations are:
  - Full-time (as defined in accordance with Code Section 105 or 4980H).
  - Part-time (as defined in accordance with Code Section 105 or 4980H).
  - Seasonal (as defined in accordance with Code Section 105 or 4980H).
  - Employees subject to a collective bargaining agreement.
  - Employees subject to a waiting period.
  - Nonresident aliens with no U.S. source income.
  - Employees under age 25 before the beginning of the plan year.
  - Employees whose principal place of employment is in the same rating area. The rating area is defined as the rating area used for ACA premium rating requirements in the individual market. Essentially this will allow employers to offer or vary the benefits based on worksite location.
  - Any combination of two or more of the classes. For example, full-time union employees would be a designated class.

PRACTICE POINTER: Employers will be able to vary the benefits between designated classes or offer benefits to one more designated classes but not others. For example, employers will be able to offer full-time employees a Premium Reimbursement HRA with a maximum reimbursement of $2000 and offer part-time employees a Premium Reimbursement HRA with a maximum reimbursement of $1000. The IRS also issued Notice 2018-88, which provides a safe harbor under the Code Section 105(h) nondiscrimination rules. Under that safe harbor, a Premium Reimbursement HRA that varies the benefits for different designated classes will not be treated as violating the Code Section 105(h) rules to the extent that all members of the designated class receive the same benefit.

- The employer cannot also offer group major medical coverage to the class of employees who are offered a Premium Reimbursement HRA.

PRACTICE POINTER: Another major difference between the Premium Reimbursement HRA and the QSEHRA is that a QSEHRA sponsoring employer and *any other controlled group member* could not offer ANY group health plan coverage to their employees (including major medical, dental, vision and Health FSA coverage). A Premium Reimbursement HRA sponsoring employer could not only offer group major medical coverage to classes of employees who are not offered the Premium Reimbursement HRA but the employer could also offer excepted benefits to participants in the Premium Reimbursement HRA.

- A "QSEHRA-like" notice must be provided 90 days before the start of the plan year or before the effective date of coverage if the employee becomes eligible after the start of the plan year.
- Employees must be allowed to opt out and waive benefits at least annually.

In a rather surprising twist, the employer may also allow participants in the Premium Reimbursement HRA to pay their portion of any IM premium with pre-tax salary reductions through a Code Section 125 cafeteria plan ("Supplemental Cafeteria Plan"). However, the IM Coverage must not be Exchange coverage. . Under Section 125(f)(3), Exchange coverage cannot be paid for or reimbursed with salary reductions made through the cafeteria plan. As with the Premium Reimbursement HRA, the Supplemental Cafeteria Plan must be offered to all employees in the class on the same terms.

PRACTICE POINTER: The guidance does not appear to go so far as to allow cafeteria plans to pay premiums for IM Coverage in the absence of a Premium Reimbursement HRA. In other words, it may still not be permissible (following the guidance in Notice 2013-54) to include IM Coverage in a cafeteria plan to the extent that some of the premiums for the IM Coverage are not also reimbursed by the Premium Reimbursement HRA.

Since the Premium Reimbursement HRA may be offered by applicable large employers, such employers may wonder how such coverage will be treated for purposes of the employer shared responsibility rules. The proposed regulations and additional subsequent guidance (Notice 2018-88) indicate the following with respect to the intersection of the employer shared responsibility rules and the Premium Reimbursement HRA rules:

- The premium reimbursement HRA qualifies as minimum essential coverage (MEC). Consequently, an employer who offers a Premium Reimbursement HRA (or a combination of group major medical coverage and Premium Reimbursement HRA coverage) to at least 95% of its full-time employees in a month will not be liable for the tax under Code Section 4980H(a) (aka the "sledgehammer") for that month.
- It is also possible for the Premium Reimbursement HRA to be considered affordable and minimum value for purpose of the tax under Section 4980H(b) (aka the "tackhammer" tax). Premium reimbursement HRA coverage that is considered "affordable" is also considered to provide minimum value. And the Premium Reimbursement HRA coverage is considered affordable for a month if the required contribution (the excess of the self only premium for the lowest cost silver plan in the applicable rating area over 1/12 of the annual reimbursement from the Premium HRA for self only coverage) is less than the product of the required contribution percentage (9.86% in 2019) and 1/12 of the employee's household income. The IRS has indicated that employers may continue to use the affordability safe harbors set forth in the Code Section 4980H regulations to determine affordability since they will not know the employee's household income.

PRACTICE POINTER: The guidance seems to suggest that an employer is considered to make an offer for purposes of the 4980H rules with respect to any employee in a designated class to whom the Premium Reimbursement HRA is offered even if the employee (or dependent child) does not have IM Coverage. Nevertheless, additional clarification would be helpful.

APPLICATION OF ERISA

As is the case with HRAs generally, the HRA itself will be subject to the other group health plan mandates, including ERISA and COBRA.

The DOL has also proposed regulations that would clarify that the individual market policies paid for by the HRA are not subject to ERISA, even though the HRA is, so long as requirements similar to the voluntary plan safe harbor are satisfied. For example, the employer cannot endorse a specific coverage or participate in the selection of the policies offered through the plan.

PRACTICE POINTER: Unlike the Premium Reimbursement HRA, COBRA does not apply to QSEHRAs. This may make QSEHRAs more attractive to some small employers. On the other hand, QSEHRAs are subject to more restrictive requirements, such as a prohibition against an offer of ANY group health plan coverage by any employer in the same controlled group.

MEDICARE PREMIUM REIMBURSEMENT

Medicare coverage does not qualify as IM Coverage; however, the current guidance regarding reimbursement of Medicare B and D premiums appears to be largely unaffected by these proposed regulations.

PRACTICE POINTER: It is worth noting that the agencies did not take the opportunity to add the Medicare premium reimbursement guidance in Notice 2015-17 to either the final regulations issued in 2015 or these proposed regulations—leaving open the possibility that the 2015-17 guidance will go away.

EXCEPTED BENEFIT HRA

An employer may also offer a non-integrated HRA that reimburses general medical expenses, including COBRA, STLDI, and excepted benefit premiums, but not other group or any individual market health premiums. Such an HRA is permissible, and will qualify as an excepted benefit, subject to the following conditions:

- The maximum annual contribution is $1,800, adjusted for inflation (does not include carryover amounts, which may be unlimited).
- The employee must also be offered group major medical coverage from the same employer, but the employee does not have to enroll in that coverage.
- The employee cannot also be offered a premium reimbursement HRA.
- The terms and conditions must be the same for all "similarly situated" classes of employees (as defined by the HIPAA wellness nondiscrimination rules).

PRACTICE POINTER: Similarly situated classes of employees may be different from the designated classes of employees prescribed for the Premium Reimbursement HRA. For example, hourly employees and salaried employees would be two different similarly situated class of employees whereas neither salaried nor hourly are included in the designated classes of employees. ■