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Employers and Benefits Practitioners Eagerly Await Final Regulations on Expanded Use of HRAs

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The Internal Revenue Service (IRS), Department of Labor (DOL) and Department of Health and Human Services (HHS, together with the IRS and the DOL, the "Agencies") jointly issued proposed regulations (83 Fed. Reg. 54,420) (the "Proposed Regulations") in late 2018 that would expand the situations in which employers could use health reimbursement accounts ("HRAs") without violating certain Affordable Care Act ("ACA") requirements. Of particular note, under the Proposed Regulations, the use of HRAs in connection with individual health insurance coverage would no longer be prohibited if certain conditions are met; prior ACA guidance had effectively prohibited the integration of HRAs with such coverage (see our March 2015 article for more information). Because the guidance in the Proposed Regulations would increase the usability of HRAs by employers, the guidance should be of interest to any employer who offered HRAs to its employees before the prior ACA guidance, and to any employer that wishes to offer HRAs to its employees in future plan years.

Background

HRAs are employer-funded arrangements that are funded solely with employer contributions in order to reimburse participants for eligible medical care expenses. Prior guidance issued by the Agencies in connection with the ACA significantly limited the availability and permitted use of HRAs by employers (see DOL FAQs about Affordable Care Act Implementation Part XI, issued in January 2013; IRS Notice 2013-54, issued in September 2013; DOL FAQs about Affordable Care Act Implementation Part XXII, issued in November 2014; IRS FAQs issued in December 2014; and IRS Notice 2015-17, for more information). The existing guidance states that HRAs are generally considered to be "group

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health plans" under ERISA, and are therefore subject to—but fail to satisfy—the ACA's market reforms (such as the ACA's annual dollar limit prohibition and its preventive services requirements), unless such HRAs can be "integrated" with another group health plan that satisfies the ACA's requirements (as detailed in IRS Notice 2013-54). Further, prior guidance stated that HRAs could not be "integrated" with an individual health insurance policy in order to satisfy the ACA's market reforms, and that maintaining such a noncompliant arrangement would trigger excise taxes to the employer under the ACA of up to $100 per day per affected individual, until the arrangement was corrected or discontinued (as detailed in IRS Notice 2015-17).

Among other things, the Proposed Regulations would effectively supersede aspects of the prior guidance, by allowing employers to "integrate" HRAs with individual health insurance coverage meeting certain requirements, for purposes of satisfying the ACA's market reforms. The Proposed Regulations are discussed in greater detail below.

Overview of the Proposed Regulations

In the preamble to the Proposed Regulations (the "Preamble"), the Agencies refer to Executive Order 13813 (October 12, 2017), in which President Trump, among other things, directed the Agencies to take steps to expand the permitted use and flexibility of HRAs by employers. In response, the Preamble states that the Proposed Regulations aim to carry out the Executive Order's purported goal of "provid[ing] more Americans with additional options to obtain quality, affordable healthcare." The Proposed Regulations seek to achieve this goal by making changes to the existing guidance governing the use of HRAs by employers, including by permitting employers to "integrate" HRAs with individual health insurance policies satisfying certain requirements, and by allowing HRAs that satisfy certain conditions to be considered "excepted benefits" not subject to the ACA's market reforms.

Individual Coverage HRAs

Pursuant to the Proposed Regulations, an HRA would be allowed to be integrated with individual health insurance coverage for purposes of fulfilling the ACA's market reforms, notwithstanding the Agencies' prior guidance, so long as the HRA (and the related individual health insurance coverage) is able to satisfy the six conditions enumerated in the Proposed Regulations. An HRA that satisfies the Proposed Regulations' requirements is referred to herein as an "individual coverage HRA." The conditions set forth in the Proposed Regulations which would need to be met in order for the individual coverage HRA to be considered "integrated" with individual health insurance coverage include the following requirements. First, both the participant (and any dependents whose expenses are reimbursable under the HRA) must actually be enrolled in qualifying individual market health coverage for each month that they are covered by the HRA. Second, the employer may not offer a class of employees both a traditional group health plan and an individual coverage HRA (i.e., the class must be offered either one or the other, but not a choice between the two); note that the Proposed Regulations specify the classes of employees that will be recognized for purposes of the requirements (such as full-time employees, part-time employees, seasonal employees, employees under age 25, union employees, and employees principally located within the same rating area, among others). Third, an employer that offers an individual coverage HRA to a class of employees must offer the HRA on the same terms to each

participant within the class. Fourth, the HRA must (i) allow employees who would otherwise be eligible for a premium tax credit (a "PTC") to opt-out of (and waive future reimbursements from) the HRA, if the HRA is not "affordable" or does not provide "minimum value" (as those terms are defined in the ACA, as clarified in the Proposed Regulations), and (ii) require participants who terminate employment to either forfeit amounts remaining in the HRA or allow such participants to permanently opt out of (and waive future reimbursements from) the HRA. Fifth, employers would be required to verify that participants in the HRA are (or will be) enrolled in individual market health coverage during the applicable plan year, using one of two substantiation methods outlined in the Proposed Regulations. Sixth, the HRA must provide written notice to eligible participants of the HRA's potential effect on their ability to claim a PTC, consistent with the timing and content requirements specified in the Proposed Regulations.

Excepted Benefit HRA

Currently, benefits referred to as "excepted benefits" are exempt from most of the ACA compliance requirements under the ACA that group health plans are subject to; these "excepted benefits" include "limited excepted benefits," which are limited-scope vision or dental benefits or benefits for long-term care, nursing home care, etc., that are either provided under a policy, certificate, or insurance contract that is separate from the employer's group health plan, or are otherwise not an integral part of the employer's group health plan (whether insured or self-insured). The ACA permitted the Agencies to issue regulations establishing other, similar limited benefits as "excepted benefits." The Proposed Regulations propose an additional type of HRA that would qualify as such a "limited excepted benefit," called an "excepted benefit HRA." In order to be considered an excepted benefit HRA under the Proposed Regulations, the HRA must satisfy four requirements: (i) the HRA may only be offered to participants who are also offered coverage under the employer's traditional group health plan for the plan year, (ii) the HRA may only be funded up to $1,800 per year (indexed for inflation for plan years beginning after December 31, 2020), (iii) the HRA may not reimburse premiums for certain types of coverage (including, importantly, premiums for individual or group health coverage, other than COBRA coverage), and (iv) the employer must offer the HRA under the same terms to all similarly situated individuals (as defined in HIPAA) regardless of any health factor.

Questions Raised by the Proposed Regulations

While the Proposed Regulations would expand the availability of HRAs to employees and employers, the proposed expansion also raises many questions and issues, particularly with respect to the proposed requirements for individual coverage HRAs, some of which are discussed below. These questions and issues will need to be addressed in the final regulations or in other future guidance from the Agencies.

Determining Affordability of an Individual Coverage HRA

The Proposed Regulations require employers to use a complex formula to determine whether an individual coverage HRA is "affordable" for purposes of satisfying the Proposed Regulations' requirements. The formula must be applied on an employee-by-employee basis. Because performing individual calculations for each participant would be a significant burden for employers, the IRS issued preliminary guidance in IRS Notice

2018-88 which would provide a safe harbor under which an employer could determine the "affordability" for an employee of the plan with which the HRA would be integrated based on the employee's worksite location. While applying the "location" safe harbor described in the IRS Notice 2018-88 might be less burdensome than performing individual calculations for each employee, it might not be feasible for national employers, especially those with many different worksite locations. Additional guidance on the formula in the Proposed Regulations, as well as more flexible "safe harbor" guidelines, would be welcomed.

Substantiating Individual Health Insurance Coverage

In the Proposed Regulations, the Agencies requested comments on the two substantiation methods that an employer could use to verify that employees enrolled in an individual coverage HRA have purchased individual health insurance coverage that complies with the ACA's market reforms. Many commenters to the Proposed Regulations argued that this requirement, which would effectively require the employer to make the determination as to whether individual coverage satisfies the ACA's market reforms, would be quite burdensome. Suggested alternatives that the Agencies might consider in future guidance could include requiring the insurer providing the individual coverage to the participant to certify enrollment and ACA compliance instead, or having the Agencies seek validation directly from the insurance exchange or the insurer without requiring the employer's involvement.

Next Steps

Importantly, the Agencies clearly state in the Proposed Regulations that employers and individuals cannot rely on the Proposed Regulations. Considering the complex nature of the Proposed Regulations' subject matter and the hundreds of comments received by the Departments by the end of the comment period (December 28, 2018), it is unclear how similar the final regulations will be to the Proposed Regulations. However, employers who have relied on HRAs in the past, or who are interested in offering HRAs similar to those described in the Proposed Regulations, should keep an eye out for the final regulations, which could expand the availability and use of HRAs for future plan years.

March and April 2019 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for March through April. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is usually delayed until the next business day. Please note that the deadlines will generally be different if your

plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

Deadline	Item	Action	Affected Plans
March 1 (60 days after the beginning of the plan year)	Medicare Part D Creditable Coverage Disclosure	Deadline for employers that provide prescription drug coverage to Medicare Part D eligible individuals to disclose to the Centers for Medicaid and Medicare Services (CMS) whether the coverage is "creditable prescription drug coverage" by completing the Online Disclosure to CMS Form here.	Health and Welfare Plans that provide prescription drug coverage to Medicare Part D eligible individuals
March 4	IRS Form 1095-B Individual Statements	Deadline for providers of minimum essential coverage to distribute forms used to report to responsible individuals the months during the year that the individuals satisfied the individual mandate by enrolling in minimum essential coverage. This deadline was extended from its original deadline of January 31. Note that self-insured ALEs can report this information on Form 1095-C. Fully insured plan sponsors that are not ALEs are not required to distribute Form 1095-B, which are distributed by the group health plan insurers	Self-Insured Group Health Plans and Group Health Plan Insurers
	IRS Form 1095-C Individual Statements	Deadline for ALEs to provide a written statement to employees indicating whether the ALEs offered an opportunity to enroll in (and whether the employee did enroll in) minimum essential coverage under the ALE's sponsored plan. This deadline was extended from its original deadline of January 31.	Applicable Large Employers
March 15	Plan Contribution Deadline	Deadline for corporate employer contributions to be made to plan trusts in order for such amounts to be deductible on corporate tax returns (assuming the employer is operating on a calendar-year fiscal	Qualified Retirement Plans

Deadline	Item	Action	Affected Plans
		year). Note that this deadline may be extended if an extension is obtained for the corporate tax return.	
March 15 (2 ½ months after the plan year)	Excess Contributions	Deadline for plan administrator to distribute any excess contributions and earnings from the prior year to avoid 10% excise tax on employer (other than eligible automatic contribution arrangements (EACAs)).	401(k) Plans Other Than EACAs
March 31 (last day of 3rd month following the end of the prior plan year)	Certification of Adjusted Funding Target Attainment Percentage (AFTAP)	Deadline for actuary to certify AFTAP to avoid presumption that AFTAP is 10 points less than prior year AFTAP.	Defined Benefit Plans
April 1	Age 70 ½ Distribution Requirements	Deadline for plan administrator to distribute prior year's required minimum distribution for any terminated employee who reached age 70 ½ or older during the prior year.	Qualified Retirement Plans
April 15	Excess Deferrals	Deadline for plan to distribute prior year's deferrals in excess of Internal Revenue Code (IRC) §402(g) annual dollar limit and related earnings.	401(k) Plans
April 16 (105 days after the end of the plan year)	PBGC 4010 Filing	Deadline for contributing sponsors (and each controlled group member) to file PBGC Form 4010 if: 1) Any single-employer plan in the contributing sponsor's controlled group had a prior year AFTAP of less than 80%; 2) Any single-employer plan in the contributing sponsor's controlled group fails to make a required installment or other required payments to a plan, and as a result, a lien is imposed pursuant to ERISA section 303(k)(1) or IRC section 430(k)(1); or	Defined Benefit Plans

Deadline	Item	Action	Affected Plans
		3) The IRS has granted funding waivers of more than $1 million to any single-employer plan in the contributing sponsor's controlled group and any portion of such waiver is still outstanding.	
April 30 (no later than 120 days after the end of the plan year)	Annual Funding Notice	Deadline for the plan administrator to provide a plan funding notice to the PBGC, to each plan participant and beneficiary and to each employer that has an obligation to contribute under the plan.	Defined Benefit Plans