

Compliance Alert

Departments Propose Regulations Permitting HRAs for Individual Policies

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On Tuesday, the Departments of Health and Human Services, Labor, and the Treasury (the “Departments”) issued proposed regulations revolutionizing the existing ACA landscape with respect to employers and individual health insurance policies.

- Proposed Regulations: <https://www.federalregister.gov/documents/2018/10/29/2018-23183/health-reimbursement-arrangements-and-other-account-based-group-health-plans>
- News Release: <https://www.dol.gov/newsroom/releases/ebsa/ebsa20181023>
- Fact Sheet: <https://www.dol.gov/sites/dolgov/files/OPA/factsheets/wh-hra-factsheet.pdf>

The proposed regulations would be applicable for plan years beginning on or after January 1, 2020.

Prior Guidance

a) Friday the 13th Guidance

The prior rules with respect to individual policies date back to the infamous “Friday the 13th Guidance,” from September 13, 2013. ([DOL Technical Release 2013-03](#); [IRS Notice 2013-54](#)).

In short, those rules provided that employers could not directly purchase individual policies or reimburse employees for the cost of individual policies through an “Employer Payment Plan” or a “Non-Integrated HRA.”

b) IRS Notices 2015-17 and 2015-87

For more details on the IRS prohibition of Employer Payment Plans, as clarified in [IRS Notice 2015-17](#), see our previous alert: [IRS Yet Again Reiterates ACA Prohibition of Individual Policy Reimbursement Arrangements](#).

For more details on the ACA integration rules to avoid a prohibited Non-Integrated HRA, as clarified in [IRS Notice 2015-87](#) (the “ACA Potluck Guidance”), see our Office Hours Webinar: [ACA Potluck: IRS Provides Full Serving of New ACA Guidance](#).

c) Employer Payment Plan Prohibition

That previous guidance permitted employers to assist in the purchase of individual policies only as a standard increase in taxable wages (e.g., cash bonus or increase to the employee's hourly or salary pay rate) intended to cover the cost of an individual policy but not conditioned in any way on the actual purchase of an individual policy.

Employers wishing to provide additional compensation to employees to assist in the purchase of individual market coverage therefore had to ensure: a) the employee had an unrestricted right to receive those funds as cash, b) the employee was not required to use that cash to purchase health coverage, c) there were no health-plan related conditions on receiving the additional cash, and d) the employee was never required to substantiate the purchase of individual market coverage.

d) Non-Integrated HRA Prohibition

Employers offering an HRA had to always meet the integration requirements from the Friday the 13th Guidance. Those rules generally required that the employee be enrolled in an employer-sponsored major medical group health plan (not an individual policy) meeting certain requirements in order to be eligible for reimbursement from the HRA.

In other words, HRAs could not be integrated with individual market coverage.

e) Penalties

Offering an Employer Payment Plan or Non-Integrated HRA for employer reimbursement of individual policies would violate the ACA and trigger \$100/day/employee excise taxes under IRC §4980D. That would result in potential penalties of \$36,500 per employee, per year.

The New Proposed Regulations

a) Trump Executive Order

The Departments' new proposed regulations obliterate the current landscape with a radical new approach to employer interaction with individual policy reimbursement. The new approach stems from President Trump's [Executive Order 13813](#) from just over a year ago directing the Departments to expand employer ability to offer HRAs for individual policy reimbursement.

For more details, see our Office Hours Webinar: [2017 Year in Review: Plus What Lies Ahead in 2018](#).

b) Summary of the Proposals

Important Note: These proposed regulations are extremely complex, detailed, and comprehensive. The following is a short, high-level overview of the key points only.

i) Removes the Prohibition of Integrating an HRA with Individual Health Insurance Coverage

The new integration rules permit HRAs to be integrated with individual policies as follows:

1) Employees Covered by HRA Must be Enrolled in an Individual Policy

- Employees who cease to be covered by the individual policy must forfeit the HRA.

2) Employees Must Not Be Eligible for Both an HRA Integrated with an Individual Policy and Traditional Employer Sponsored Major Medical Group Health Plan

- Employer can divide employees into two separate classes eligible for either HRA or traditional GHP (but not both).
- Classes include full-time employees, part-time employees, seasonal employees, employees covered by a CBA, employees who have not completed the waiting period for the traditional GHP, employees under age 26, non-resident aliens with no U.S.-

based income, and employees based on region (primary site of employment in the same rating area).

- The Departments solicit comments on whether employers should be able to offer employees a choice between a traditional GHP and an HRA integrated with individual coverage.

3) Employee Pre-Tax Contributions Permitted (But Not for Exchange Coverage)

- The ACA added IRC §125(f)(3), which prohibits employers from allowing employees to make pre-tax salary reduction contributions toward coverage on the Exchange.
- However, employers may permit employees to use the Section 125 cafeteria plan to contribute on a pre-tax basis for non-Exchange individual market coverage.
- This is important because the HRA may not cover the full cost of the individual market premium, and the employee would otherwise have no tax-advantaged mechanism to pay the remaining share.
- Republicans have long pushed to permit tax-free HSA distributions for premiums, including individual market and Exchange coverage. That may be the final key to unlocking the individual market for employers. For more details, See our ABD Commentary: [HSAs to Lead the Way After ACA](#).

4) Employers Must Offer the HRA on the Same Terms to All Employees Within the Class

- Offering a more generous HRA to individuals based on an adverse health factor is not permitted.
- The HRA allocation may increase based on age (larger allocations for older employees) or number of dependents (larger allocations for more dependents).
- HRA carryovers and ability to pay any remaining cost pre-tax with salary reductions must be uniform for each class.

5) Opt-Out Required

- Employees must have the option to opt-out of the HRA coverage to maintain eligibility for subsidies on the Exchange (the §36B Premium Tax Credit).

6) Substantiation and Verification of Individual Health Insurance Coverage Required

- The HRA must have reasonable procedures in place to verify that anyone covered by the HRA is actually enrolled in individual health insurance coverage.
- Includes document from a third-party (e.g., the carrier) or attestation by the participant.

7) Notice Requirement

- The employer must provide written notice to eligible participants at least 90 days before the beginning of each plan year describing the HRA.
- The notice must include the maximum dollar amount available, statement of the right to opt-out, description of the alternative availability of Exchange subsidies, the eligibility consequences of being covered by the HRA, the requirement to notify the Exchange of the HRA if applying for subsidies, the substantiation requirements, and the employee's responsibility to inform the employer upon loss of individual coverage.

ii) Excepted Benefit HRAs: The \$1,800 Supplemental HRA Option

The proposed regulations also provide a new mechanism for employers to offer an HRA of up to \$1,800 in value that is not integrated with individual market (or any other) coverage. This is accomplished through permitting HRAs to qualify as an excepted benefit not subject to the ACA market reform provisions under certain conditions.

There are four requirements for the HRA to meet this excepted benefit status:

1) HRA Is Not Integral Part of the Plan (Eligibility for Traditional GHP)

- Only employees who are eligible for a traditional GHP can be eligible for the HRA.
- Employees do not have to actually enroll in the traditional GHP to benefit from the HRA.

2) HRA Must Provide Benefits That Are Limited in Amount (\$1,800 Limit)

- The amounts made newly available for a plan year in the HRA cannot exceed \$1,800.
- Indexed for inflation for plan year 2021 and beyond (C-CPI-U).

3) HRA Cannot Reimburse Premiums (Individual or Group)

- Only permitted premiums would be excepted benefits like dental or vision coverage, short-term limited duration policies, and COBRA premiums.

4) HRA Must Be Available Under Same Terms to All Similarly Situated Individuals

- Must be available on same terms regardless of any health factor

iii) ACA Employer Mandate Pay or Play Rules

The proposed regulations would continue to treat an HRA as an “eligible employer-sponsored plan” to qualify as minimum essential coverage and therefore be treated as an offer of coverage under §4980H(a) (the “A Penalty” or the “Sledge Hammer Penalty.”).

The Treasury Department and the IRS intend to issue guidance addressing how and when the HRA could be treated as providing minimum value and being affordable under §4980H(b) (the “B Penalty” or the “Tack Hammer Penalty”). That B Penalty guidance will be especially critical for employers to understand in determining how much to offer through the HRA, and which individual market plan options should be available to employees.

For more details on the ACA employer mandate pay or play affordability rules, see our Compliance Alert: [How the 2019 ACA Affordability Increase to 9.86% Affect Employers.](#)

Summary

These new proposed regulations are extensive and completely change the ACA landscape for employers going forward. The Departments will likely receive a deluge of comments on the rule, and therefore we should expect significant changes before the rules are finalized.

In the meantime, employers wishing to provide alternative means of offering health coverage to employees can look forward to having far more options available in the near future.

The Departments are accepting comments until December 28, 2018.

The regulations, if finalized, would be effective for plan years beginning on and after January 1, 2020.

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