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## A New Era of HRAs Begins in 2020

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On October 12, 2017, President Trump issued Executive Order 13813 (EO 13813) “Promoting Healthcare Choice and Competition Across the United States,” which, among other things, directed the Secretaries of the Treasury, Labor, and HHS (“Tri-agencies”) to expand employer access to HRAs. In October of 2018, the Tri-Agencies issued proposed regulations in response to the Trump Administration’s directive.

The proposed regulations add two new HRAs to the slate of HRA designs that are permissible. These two new HRAs could change the landscape of employer provided coverage. This article addresses the proposed regulations and speculates what impact they may have on future employer sponsored health coverage.

### Introduction

#### *A Rose by Any Other Name is Still a Rose?*

What is an “HRA?” It might seem odd to begin with such a seemingly simply question with such a seemingly obvious answer but recent observations of “clever” plan designs that purport to skirt existing rules by renaming or re-characterizing HRAs as something else (e.g. a “MERP”) suggest we must begin here. An HRA is any defined contribution, medical expense reimbursement arrangement funded solely by the sponsoring employer. The term “HRA” was originally used by the IRS in IRS Notice 2002-45 to described defined contribution, employer-only funded reimbursement arrangements that allowed unused contributions to carry over from year to year; however, since 2002, the Tri-agency guidance has not made a distinction between HRAs with carry overs and HRAs without carry overs. Thus, an HRA is an HRA no matter what you want to call it.

#### *What prompted the proposed regulations?*

In 2016, Congress took an initial step to expand the scope of HRAs by creating a new type of HRA, a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA). QSEHRAs allow small employers to integrate an HRA with IMC coverage under certain circumstances. QSEHRAs only go so far. First and foremost, they are limited to employers that average less than 50 full-time equivalents in the prior calendar year. In other words, QSEHRAs are only available to employers who are not applicable large employers as defined for purposes of the employer shared responsibility rules. Second, the reimbursement was limited each year (adjusted annually by the IRS based on inflation). Last, the requirements to establish a QSEHRA were very complex.

The proposed regulations, which cannot be relied on prior to plan years beginning on or after January 1, 2020, create two new HRAs that move away from the group health plan integration requirements imposed by the Tri-agencies after the ACA became effective—allowing HRAs sponsored by employers of all sizes

to be integrated with IMC coverage and to offer standalone HRAs that reimburse general medical expenses without any integration required.

## **IMC HRA**

### ***What is an IMC HRA?***

HRAs sponsored by employers of any size may be integrated with IMC for purposes of PHSA Section 2711 if the following requirements are satisfied:

- The HRA is limited to employees and their dependents who are enrolled in IMC that qualifies as ACA compliant coverage (as defined by Code Section 5000A) for each month that they are covered by the HRA. The employer must obtain substantiation from the employee that the employee and any covered family members have IHIC that qualifies as minimum essential coverage both initially and thereafter each time expenses are submitted for reimbursement. The regulations indicate that employee attestation of IMC is sufficient unless the employer has knowledge to the contrary.
- The employer must offer the IMC HRA on the same terms and conditions to all eligible employees within a “designated” class. The **ONLY** variations to benefits offered to employees in a designated class can be based on family size and age. 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. This will essentially 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 separate and apart from any other designated class.

**OCA Practice Pointer:** The HRA is a self-funded medical reimbursement plan subject to Code Section 105, including but not limited to the Section 105(h) nondiscrimination requirements. Offering different benefits to different classes of employees could run afoul of the Code Section 105(h) nondiscrimination rules. Likewise, offering different benefits based on age could run afoul of the nondiscrimination rules. Since the regulations allow variations between the designated classes and within a class based on age, the IRS has indicated that future guidance is likely to exempt the IMC HRA from the Code Section 105(h) rules so long as they satisfy the IMC HRA requirements.

- If employees are offered the IMC HRA, the employer cannot also offer those employees group health plan coverage that provides other than excepted benefits.

**OCA Practice Pointer:** Although the employee who is offered an IMC HRA cannot also be offered traditional major medical coverage, the employee could be offered excepted benefit coverage alongside the IMC HRA, such as a Health FSA.

- Employees must be allowed to opt out and waive benefits at least annually and upon termination (subject to COBRA requirements).

- The employer must provide a notice to employees 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). The notice must alert the employee to, among other things, the following:
  - the terms of the HRA, including the maximum dollar amount made available;
  - the right to opt-out of and waive future reimbursement under the HRA;
  - the premium tax credit for coverage in the Exchange may be available (i) if the participant opts out of and waives the HRA and (ii) the HRA is not “affordable” for purposes of Code Section 36B (the code section governing premium tax credits and subsidies).
  - The employee’s obligation to inform any Exchange to which they apply for a premium subsidy of the of the terms of the HRA;
  - A statement that it is the responsibility of the participant to inform the HRA if the participant or any dependent whose medical care expenses are reimbursable by the HRA is no longer enrolled in qualifying IMC.

**OCA Practice Pointer:** IMC HRA coverage is considered affordable for a month for purposes of Code Section 36B and the Exchange if the required contribution (the excess of the monthly self only premium for the lowest cost silver plan in the employee’s rating area over 1/12 of the annual reimbursement from the IHIC 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.

***What is the maximum reimbursement for an IMC HRA?***

There is no regulatory prescribed maximum reimbursement for an IMC HRA. Also, unused amounts may carry over from year to year without limitation.

***What expenses are reimbursable from an IMC HRA?***

Any expense that qualifies as “medical care” under Code Section 213(d).

***Does ERISA apply to the IMC HRA?***

The DOL issued separate guidance indicating that ERISA applies to the HRA part of the IMC HRA, and it will apply to the policies into which the IMC HRA is integrated unless the employer otherwise satisfies ERISA’s voluntary plan safe harbor (except, of course, the prohibition against employer contributions). The DOL further notes that sponsors of an IMC HRA that should be careful not to endorse any particular carrier or coverage.

***Can an HRA be integrated with Medicare?***

The proposed regulations do not address integration with Medicare; however, it appears that the special Medicare integration rules in the final market reform regulations and Notice 2015-17 continue to be applicable.

***Can IMC participants pay the excess IMC premiums with pre-tax salary reductions?***

In a surprising twist, the regulations indicate that employees may pay the share of the IMC premiums not paid for by the IMC HRA with pre-tax salary reductions through a “supplemental” cafeteria plan maintained

by the employer. The supplemental cafeteria plan would only be available for IMC purchased *outside of the Exchange*.

**OCA Practice Pointer:** The regulations do not go so far as to allow employees to pay for IMC premiums with pre-tax salary reductions to the extent that the IMC is not paid for in part through the IMC HRA. Such an arrangement will still violate the requirements first prescribed in IRS Notice 2013-54.

***Can “applicable large employers” use an IMC HRA to avoid employer shared responsibility excise taxes?***

Yes, they possibly can. The proposed regulations and subsequent guidance issued by the IRS (see Notice 2018-88) address the application of the employer shared responsibility rules to an IMC HRA:

- The IMC HRA qualifies as minimum essential coverage (MEC); therefore, an employer who offers a IMC HRA (or a combination of group major medical coverage and IHIC HRA coverage) to at least 95% of its full-time employees in a month will evade the excise tax under Code Section 4980H(a) (aka the “sledgehammer”) for that month.
- The applicable large employer could also avoid the Code Section 4980H(b) tax (AKA “the Tack hammer Tax) if the IMC HRA coverage is affordable (see above for description of IMC HRA affordability rules for the Exchange). If the coverage is affordable, it will also be considered to provide minimum value. The IRS has prescribed the following special rules to facilitate the employer’s affordability calculation:
  - The rating area used by the employer may be the rating area for the employee’s primary situs of employment.
  - Employers may determine affordability for a year using the silver plan premiums from the prior calendar year or, if the plan year spans two calendar years, the premiums for the first month of the plan year, even if the silver plan premiums change during the plan year.
  - The IRS has indicated employers may continue to use the Code Section 4980H affordability safe harbors for purpose of determining whether the IHIC HRA is “affordable” and provides minimum value for purposes of Code Section 4980H. In addition,

**Excepted Benefit HRA**

***What is an Excepted Benefit HRA?***

The 2<sup>nd</sup> of the two HRAs created by the proposed regulations is a non-integrated, excepted benefit HRA (“Excepted Benefit HRA”). 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 excepted benefit HRA is \$1,800, adjusted for inflation. This does not include carryover amounts, which may be unlimited. If any other Excepted Benefit HRAs are offered to the employee for the same time period, the aggregate annual contribution for all such HRAs cannot exceed \$1800.

**OCA Practice Pointer:** Although not clear, one interpretation of the rules suggests that that the aggregate \$1800 contribution maximum does not apply HRAs that provide excepted benefits, such as dental or vision benefits. Clarification from the Tri-agencies would be helpful.

- The employee must also be offered group health plan coverage that provides other than excepted benefits from the same employer, but the employee does not have to enroll in that coverage.
- The employee cannot also be offered an IMC HRA.
- The terms and conditions 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 are employees within the same employment-based classification that is consistent with the employer’s usual practice. This will result in different classes than the “designated classes” prescribed for IHIC HRAs. For example, hourly employees and salaried employees would be two different similarly situated class of employees whereas neither salaried nor hourly employees are included in the designated classes of employees.

***Does ERISA apply to the Excepted Benefit HRA?***

ERISA and all that comes with that applies to the Excepted Benefit HRAs. The fact that it is an excepted benefit only means it is exempt from the health insurance reforms and HIPAA’s portability and non-discrimination rules. Thus, a form 5500 may be required and the employer must furnish participants with a summary plan description in accordance with ERISA 102—just to name a few of ERISA’s requirements.

***Is the Excepted Benefit HRA subject to the Code Section 105(h) nondiscrimination rules?***

Yes! Unlike the IMC HRA, there is no exception from the Code Section 105(h) rules. Consequently, if an Excepted Benefit HRA offered to salaried employees has a higher benefit amount than the Excepted Benefit HRA offered to hourly employees, the Excepted Benefit HRA could be discriminatory with respect to highly compensated employees covered under the Excepted Benefit HRA offered to salaried employees.

***What expenses can be reimbursed by the Excepted Benefit HRA?***

The Excepted Benefit HRA may reimburse most Code Section 213(d) medical care expenses incurred by participants; however, it may not reimburse any insurance premiums except (i) COBRA or other continuation coverage premiums and (ii) premiums for plans that only provide excepted benefits (e.g. dental or vision).

**Peering into 2020**

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

- 1) HRA integrated with group health plan coverage
- 2) Retiree only HRA
- 3) An HRA that only reimburses excepted benefits (such as dental or vision)
- 4) QSEHRA
- 5) IMC HRA (new)
- 6) Excepted Benefit HRA (new)

The two new HRAs will give employers, especially smaller to mid-size employers much more flexibility with respect to the health plan coverage that they make available to employees. For example, employers who desire to offer part-time employees health coverage but couldn’t otherwise afford to offer coverage

may now be able to offer an IMC HRA to such employees. Although the two new HRAs are almost a year away from becoming reality, you should start your considerations of the two new HRAs now.