VORYS

Publications

Labor and Employment Alert: Two New Options for Health Reimbursement Arrangements

Related Attorneys

Jennifer Bibart Dunsizer

Dawne McKenna Parrish

Elizabeth Howard

Related Services

Employee Benefits and Executive Compensation

Labor and Employment

CLIENT ALERT | 6.25.2019

A health reimbursement arrangement (HRA) is an arrangement whereby an employer reimburses eligible employees for their medical expenses up to a specified dollar limit. Because an HRA reimburses medical expenses, it is regulated as a group health plan. That is significant because the Affordable Care Act (ACA) prohibits dollar limits on essential health benefits under a group health plan. An HRA by definition has a dollar limit on the reimbursement of medical expenses so the IRS, DOL and HHS (the Departments) view HRAs as violating the ACA prohibition on annual dollar limits in the absence of a specific exception. Up to now, there have been exceptions for four types of HRAs:

HRA paired with a traditional medical plan. In order to use this exception, an employee who is offered an HRA must be: (a) also offered a traditional medical plan by his or her employer and (b) actually enrolled in his or her employer's traditional medical plan or the traditional medical plan sponsored by an employer of a family member.

Retiree-only HRA. Retiree-only HRAs (and other types of retiree-only group health plans) are exempt from the prohibition on dollar limits and most other ACA mandates.

HRA that only covers dental and vision expenses. Dental and vision benefits plans are classified as excepted benefits and, as such, are not subject to the ACA prohibition on annual dollar limits. If an HRA is limited to the reimbursement of dental and/or vision expenses, the HRA would be an excepted benefit, not subject to the ACA prohibition on annual dollar limits.

Qualified Small Employer Health Reimbursement Arrangements (QSEHRA). Only a small employer (generally, an employer with fewer than 50 full-time employees) is permitted to sponsor a QSEHRA. Importantly, and unlike other types of HRAs, a QSEHRA is not classified as a group health plan and so is not subject to the ACA prohibition on annual dollar limits or other mandates. A QSEHRA may reimburse an employee's premiums for individual health insurance. Annual credits to a QSEHRA cannot exceed $5,150 for an employee enrolled in single coverage and $10,450 for an employee enrolled in family coverage.

The new regulations (published June 13, 2019) preserve these preceding exceptions from the ACA prohibition on annual dollar limits and create two more: (1) an excepted benefit HRA and (2) an individual coverage HRA. The two new exceptions will be available for plan years starting on and after January 1, 2020.

Excepted benefit HRA

In order to be exempt from the ACA prohibition on dollar limits, an excepted benefit HRA must meet the following criteria:

- Employees who are offered an excepted benefit HRA must also be offered a traditional medical plan. The crucial difference between the current exemption for an HRA paired with a traditional medical plan and this new exception is that:
  - With an HRA paired with a traditional medical plan, the employee had to be *enrolled* in a traditional medical plan in order to access the HRA.
  - With the new excepted benefit HRA, an employee need only be *offered* a traditional medical plan. Actual enrollment in a traditional medical plan is not required.
- An employer cannot offer both of the two new types of HRAs (i.e., an excepted benefit HRA and an individual coverage HRA) to the same class of employees.
- If an employer wants to offer an excepted benefits HRA to a class of employees, the excepted benefit HRA must be offered on "the same terms to all similarly situated individuals, regardless of any health factor." Further, neither the availability nor the amount of an excepted benefit HRA can be contingent on an employee declining enrollment in the employer's traditional medical plan.
- The annual credit to an excepted benefit HRA cannot exceed $1,800 (indexed starting in 2021). Carryover of unused credits is permitted but not required. If carryovers are permitted, the carryover credits do not count against the $1,800 annual limit.
- An excepted benefit HRA may be used to reimburse medical expenses but cannot be used to reimburse individual health insurance premiums, employee contributions for other health coverage, or Medicare Part B, D or Advantage premiums. The two exceptions are that an excepted benefit HRA can be used to pay: (a) COBRA premiums; and (b) premiums for short term limited duration insurance.
- An excepted benefit HRA must comply with generally-applicable ERISA requirements. For example:
  - The employer would need to provide a summary plan description (SPD) for an excepted benefit HRA. The preamble to the regulations includes a reminder that an SPD for an excepted benefit HRA would need to include "the conditions pertaining to eligibility to receive benefits; a description or summary of the benefits; the circumstances that may result in disqualification, ineligibility, or denial, loss, forfeiture, suspension, offset, reduction, or recovery (for example, by exercise of subrogation or reimbursement rights) of any benefits; and the procedures governing claims for benefits under the excepted benefit HRA." Fortunately, a summary of benefits and coverage (SBC) is not required,
  - If an employee or covered family member has a COBRA qualifying event, he or she must be given the option to continue to participate in an excepted benefit HRA by paying actuarially computed COBRA premiums.

Individual coverage HRA

In order to be exempt from the ACA prohibition on annual dollar limits, an individual coverage HRA must meet the following criteria:

- An employer cannot offer both an individual coverage HRA and a traditional medical plan (or an excepted benefit HRA) to the same class of employees. The regulations specify the permissible classes of employees.
- All employees within a class must be offered the individual coverage HRA on the same terms and conditions, although some variations for age and family size are permitted. Individual variations are not permitted.
- An individual coverage HRA can only reimburse medical expenses (specifically including premiums) for an employee and/or family member who is enrolled in individual health insurance.
  - The individual health insurance can be purchased on a public exchange or a private exchange. Student health insurance counts but short term limited duration insurance does not.
  - Only claims incurred while an individual is actually enrolled in individual health insurance may be reimbursed. The employer will need to get annual verification of enrollment in individual health insurance, plus the employee's attestation of enrollment in individual health insurance with each claim for reimbursement from the individual coverage HRA. The Departments published models of an annual attestation and an attestation to use with claims.
- The employer must provide a notice to newly eligible employees and annually to eligible employees at least 90 days before the start of each plan year. The Departments published a sample notice that can be used for this purpose. Note that this timing may affect open enrollment communications.
- The employer must give employees an annual opportunity to opt out of an individual coverage HRA.
  - That would allow an employee to waive the individual coverage HRA and, instead, potentially qualify for a premium tax credit for the purchase of individual health insurance on an exchange. However, if the individual coverage HRA would have brought the employee's share of the premiums for individual health insurance down to 9.86% (as indexed) of the employee's household income, the offer of the individual coverage HRA counts as an offer of affordable coverage even if waived. An offer of affordable coverage would:
    - Block the employee's entitlement to a premium tax credit (even if the employee waives the individual coverage HRA); and
    - Protect the employer from an "unaffordable coverage" excise tax under Code 4980H(b).
  - The offer of an individual coverage HRA counts as an offer of minimum essential coverage (MEC), regardless of whether the amount is sufficient to be an affordable offer and/or the employee waived the offer. An offer of MEC to at least 95% of an employer's employees would protect an employer from the "no-offer" excise tax under Code 4980H(a).
- An individual coverage HRA must comply with generally-applicable ERISA requirements. For example:
  - The employer would need to provide a summary plan description (SPD) for an individual coverage HRA. In contrast to an excepted benefit HRA, an employer would also need to provide a SBC for an individual coverage HRA. (Unfortunately, an SBC for an individual coverage HRA is unlikely to convey useful information.)

- If an employee or covered family member has a COBRA qualifying event, he or she must be given the option to continue to participate in an individual coverage HRA by paying actuarially computed COBRA premiums.

Note that the reimbursement of individual health insurance premiums by an individual coverage HRA does not cause the individual health insurance to become subject to ERISA as long as the employer does not select or endorse the individual health insurance.

Conclusion

These regulations provide employers with more design options when crafting a benefit plan structure that will meet employee needs and yet protect the employer from penalties. If you would like to discuss your design options, contact a member of the Vorys benefits team