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IRS GUIDANCE ON HRAS, FSAS AND EAPS: PLAN AMENDMENTS MAY BE REQUIRED

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Among the many reforms under the Affordable Care Act ("ACA") is the prohibition on imposing annual dollar limits on essential health benefits ("Annual Dollar Limit Prohibition"). In addition, non-grandfathered group health plans must provide certain preventive services without any cost-sharing requirements ("Preventive Services Requirement"). There has been wide-spread speculation as to how these market reforms would affect health reimbursement arrangements ("HRAs"), health flexible spending accounts ("FSAs") and other employer reimbursement arrangements.

Health Reimbursement Arrangements

In the preamble to 2010 interim final regulations, Treasury and the Departments of Labor and Health and Human Services ("Departments") stated that an HRA that is integrated with a group health plan that complies with the Annual Dollar Limit Prohibition, would be acceptable (despite the HRA having an annual dollar limit) since the combined benefit satisfies the Annual Dollar Limit Prohibition.

In 2013 FAQs, the Departments explained that an HRA will not be considered to be integrated with a primary group health plan offered by an employer unless the HRA is available only to employees who are covered under the primary group plan and such group plan satisfies the Annual Dollar Limitation Prohibition.

Notice 2013-54 ("Notice") provides additional guidance and imposes new requirements on the integration of HRAs with major medical plans. According to the IRS, an employer-sponsored HRA cannot be integrated with individual market coverage. Therefore, an HRA used to purchase coverage on the individual market will violate the Annual Dollar Limit Prohibition. Not only an HRA but any other type of group health plan used to purchase coverage on the individual market is not integrated with that individual market coverage. A similar analysis applies to the Preventive Services Requirement. An HRA that is integrated with a group health plan will comply with the Preventive Services Requirement to the extent the group health plan with which the HRA is integrated complies with the Preventive Services Requirement. Consequently, a group health, including an HRA, used to purchase coverage on the individual market will also fail the Preventive Services Requirement.

An HRA can be integrated with a group health plan only according to one of two integration methods — one that requires minimum value or one that does not require minimum value.

Under the integration method in which minimum value is not required, an HRA will be considered integrated with another group health plan if:

- The employer offers a group health plan (other than the HRA or excepted benefits);
- The employee receiving the HRA is actually enrolled in the non-HRA group health plan;
- The HRA is available only to employees who are enrolled in the non-HRA group health plan (regardless of whether the employer sponsors the non-HRA group health plan);
- The HRA is limited to reimbursement of copayments, coinsurance, deductibles and premiums under the non-HRA group coverage, as well as medical care that does not constitute essential health benefits.

Alternatively, if the HRA provides for a broader range of reimbursements, the HRA will be integrated with a group health plan if:

- The employer offers a group health plan that provides minimum value;
- The employee receiving the HRA is actually enrolled in the group health plan providing minimum value (regardless of whether the employer sponsors the plan); and
- The HRA is available only to employees who are actually enrolled in the non-HRA minimum value group coverage.

Under either integration method, the terms of the HRA must permit an employee (current or former) to permanently opt out of and waive future reimbursement for the HRA at least annually and upon termination of employment, either the remaining HRA amounts are forfeited or the employee is permitted to permanently opt out of and waive future reimbursements from the HRA. This opt-out feature is needed so as not to preclude the former employee's ability to claim a premium tax credit through the Exchange.

Nonetheless, upon a loss of coverage under a group health plan, an employee may continue to use the amounts remaining in the integrated HRA for reimbursement of eligible medical expenses in accordance with the terms of the HRA without triggering a failure under the market reforms.

In order to comply with the new HRA integration rules, plan amendments may be required before the start of plan years beginning on or after January 1, 2014, when the Notice generally takes effect.

Health Flexible Spending Accounts

Interim final regulations include an exemption from the Annual Dollar Limit Prohibition for health FSAs. The Notice clarifies that the exemption applies only if the health FSA is offered through a cafeteria plan. Consequently, any health FSA that is not offered through a cafeteria plan will be subject to the Annual Dollar Limit Prohibition and by its design will fail to comply. However, a health FSA will still be subject to the Preventive Services Requirement unless the health FSA is an excepted benefit (i.e., the maximum benefits cannot exceed two times the participant's salary reduction election, and the employer also makes major group health coverage available). An employer health FSA that does not qualify as excepted benefits is not considered integrated with a group health plan and will fail the Preventive Services Requirement by design. The Departments are considering whether an HRA may be treated as a health FSA for purposes of exclusion from the Annual Dollar Limit Prohibition but even such treatment would not relieve the HRA from other ACA requirements, namely the Preventive Services Requirement, which the HRA would fail if not already integrated with a group health plan. This same analysis applies even if the HRA reimburses only premiums.

Employee Assistance Programs

Benefits under an employee assistance program ("EAP") will be considered excepted benefits only if the EAP does not provide significant benefits in the nature of medical care or treatment. Until final rulemaking, employers can use a reasonable, good faith interpretation as to what constitutes significant medical benefits.

Bottom Line

This guidance essentially puts an end to stand-alone HRAs and to health FSAs offered outside of a cafeteria plan. Although an HRA with fewer than two participants who are current employees on the first day of the plan year (i.e., retiree-only HRA) is an excepted benefit and exempt from the ACA market reforms, retiree-participants are not left unscathed. The Notice confirms that a stand-alone HRA reimbursing retirees for the purchase of individual health insurance coverage would still be considered minimum essential coverage. Consequently, a retiree covered under the stand-alone HRA would not be eligible for a premium tax credit on the Exchange for any month in which funds are retained in the HRA (even during periods of time after the employer has ceased making contributions).
