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# FINAL HRA REGULATIONS: ROADMAP TO THE FUTURE, OR BRIDGE TO NOWHERE?

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# **HRA BACKGROUND AND ACA COMPLICATIONS**

# HRA Background and ACA Complications

- Health Reimbursement Arrangements (HRAs) are employer created and unsecured accounts used to pay Internal Revenue Code (Code) Section 213(d) medical expenses on a tax-free basis
  - Validated in Internal Revenue Service (IRS) Notice 2002-45 and Revenue Ruling 2002-41
- Cannot accept any employee pre-tax or after-tax contributions
- Unused amounts can roll over to subsequent year(s) if desired by employer
- Typically used as a supplement to active employee health plan
- Sometimes a method to turn “defined benefit” employer subsidy of health plan into a “defined contribution” of a fixed dollar amount for use in paying medical plan premiums, copays, out-of-pocket costs, etc.
  - Defined contribution approach more common in the context of a retiree medical plan and/or Medicare supplemental benefits

# HRA Background and ACA Complications

- HRAs were lightly regulated until the Affordable Care Act (ACA) came along in 2010
  - The ACA prohibits annual or lifetime dollar limits on Essential Health Benefits and requires preventive care benefits (Public Health Service Act (PHSA) Sections 2711 and 2713)
- Given the objectives of the then-current administration to boost the ACA and protect Exchanges, HRAs were deemed to be health plans subject to these two ACA rules—and that HRAs violated both rules
  - This was the fatal flaw which led to 9 years of additional rules
- Administration also determined that long-standing “employer payment plans” where employers reimburse employees for individual health insurance premiums also violated both rules

# HRA Background and ACA Complications

- This ACA consequence for HRAs led to rules:
  - Integrating HRAs with group health plans, Medicare and TRICARE
    - But preventing the use of HRAs for individual health insurance policies
  - Protecting HRAs linked to retiree-only health plans
  - Practically prohibiting employer payment plans
- Congressional frustration with the ACA complications imposed on HRAs led to passage of The 21<sup>st</sup> Century Cures Act in late 2016
  - Created Qualified Small Employer Health Reimbursement Arrangements (QSEHRAs) which essentially allow HRAs to work as originally designed for small businesses, with some guardrail restrictions and requirements
- Executive Order (EO) 13813 (10.12.2017) to “increase the usability of HRAs...”

# **FINAL HRA REGULATIONS**

# Final HRA Regulations

- Tri-Agency (IRS, DOL, HHS) final regulations published June 20, 2019
  - Generally effective 2020
- Major Components:
  - “Individual Coverage HRAs”
    - Allowed to reimburse receipt of individual insurance coverage for employee and dependents
      - Both Exchange and non-Exchange coverage
      - Also Medicare A, B & C (Medicare Advantage)
      - Not for short-term limited-duration, dental, vision or other excepted benefits
    - Cannot offer the same individuals any employer group health coverage
      - This is the major prohibition here

# Final HRA Regulations

- No dollar cap on individual coverage HRA amount
- May differentiate offer between 10 different classes of employees (full-time/part-time/salaried/non-salaried/union, etc.)
  - New size requirements for offer of coverage...note that purchase of coverage is not required....merely an offer
    - Size ranges from minimum of 10 to 20, depending upon size of the employer (100 to 200 employees)
  - Can combine classes
  - Special new hire rules to facilitate phase out of defined benefit model



# Final HRA Regulations

- May vary HRA funds on basis of age or family size
  - Must otherwise be uniform
  - Maximum age differential of 3:1
- Must be able to opt out of HRA (due to ACA subsidy concerns, but does not salvage ACA subsidy if otherwise affordable)
  - Exchanges directed to determine affordability
- Must substantiate actual coverage (annually and for each reimbursement)
  - Permissible to accept employee's attestation unless employer has actual knowledge the attestation is inaccurate
  - Model notices available

# Final HRA Regulations

- Must supply notice about HRA 90 days before the beginning of a plan year
  - Can use current ERISA electronic safe harbor methods
  - Model notice available
  - Shorter period for new hires or new plans
- Note that HRA will create problems for HDHP/HSA policies unless HRA:
  - Premium only
  - Limited to post-deductible expenses

# Final HRA Regulations

- Emphasizes that cafeteria plans CAN be used for pre-tax purchase of off-Exchange individual policies
  - CANNOT be used for Exchange policies
  - Begins---but does not finish---process of equalizing tax incentives for health coverage across an employer's workforce
- Apparently revives (within rules) employer payment plans

# Final HRA Regulations

- ERISA considerations
  - Strengthens guidance regarding when the underlying individual market plan is not endorsed by an employer and, thus, not subject to ERISA
    - HRA will always be subject to ERISA (for employers subject to ERISA)
  - Must be:
    - Voluntary
    - No selection or endorsement
      - Appears to jeopardize third-party market navigators due to:
        - Limitations on educational material
        - Limitations on permissible policies
    - Premiums limited to individual plan
    - No employer compensation
    - Annual notice that ERISA is inapplicable to individual policy

# Final HRA Regulations

- Creates new excepted benefit—“Excepted Benefit HRAs”
  - Only in conjunction with offer of group health coverage (enrollment not required)
    - This is the major prohibition here
  - Limited to \$1,800 annually (indexed)
    - Does not apply to amounts rolled over from prior year(s)
  - Can be used for short-term plans, COBRA, dental, vision, and Code Section 213(d) expenses
  - Cannot be used for:
    - Group health plan premiums
    - Individual plan
    - Medicare Part A, B, C, or D premiums

# Final HRA Regulations

- Also addresses:
  - Premium Tax Credit Eligibility
  - Individual Market Special Enrollment Periods

# Final HRA Regulations

- But, fundamentally, final regulations fail to undo the ACA regulators' prior "own goal"
  - Still, though, may contain seeds of a future pure "defined contribution" model for larger employers to exit the group health market
  - Future "defined contribution" model depends, for any employer subject to the ACA, heavily on promised ACA Shared Responsibility guidance
- Unclear if these final regulations regarding individual market HRAs practically spell the end for QSEHRAs
  - Differences in ERISA application, employer size, dollar cap, etc.

# **NOTICE 2018-88**



# Notice 2018-88

- Notice 2018-88 was issued November 19, 2018
- “Intended to initiate and inform the process of developing guidance ....”
- Addresses, in a “Here’s what we are thinking—How do you react to it?” format, proposed ideas and possible safe harbors to allow large employers to satisfy ACA Shared Responsibility rules through a stand-alone HRA found in the final Tri-Agency regulations
  - Also addresses possible IRC 105(h) changes
- Planned to be effective January 2020

# Notice 2018-88

- Major points:
  - HRAs are an eligible employer-sponsored plan that would, if offered to enough full-time employees, satisfy the 4980H(a) penalty
  - HRAs will satisfy 4980H(b) if the HRA is “affordable”

# Notice 2018-88

- Affordability safe harbor:
  - Lowest-cost silver plan in rating area of primary site of employment (location safe harbor)
    - Requests comment on age issues
  - Location, but for the prior calendar year (prior calendar-year safe harbor)
  - Location, but first month affordability determination (non-calendar-year safe harbor)
- Safe harbors must be consistent
- Addresses proposed reporting approach

# Notice 2018-88

- Permits usage of three current affordability safe harbors:
  - Form W-2 wages
  - Rate of pay
  - Federal poverty line
- If affordable, treated as providing minimum value
- Also contains IRC Section 105(h) nondiscrimination testing rules

# Notice 2018-88

- Example:
  - Facts:
    - 2020 HRA offer to 95% plus of FTEs
    - One employment site (Chicago)
    - Single employee age 21
    - Lowest-cost silver plan (2019 prior calendar-year safe harbor)
      - Celtic Insurance Company Ambetter Balanced Care 11; \$288 per month
    - Federal poverty line affordability safe harbor (est. \$100 per month)
      - \$288 minus \$100 = \$188 monthly HRA contribution
      - Compare to estimated monthly \$317 ACA (b) penalty (~\$3,800 annual ACA penalty for 2020)

# Notice 2018-88

- Major flaw: Older employees
  - Single employee age 60
  - Lowest-cost silver plan (2019 prior calendar-year safe harbor)
    - Celtic Insurance Company Ambetter Balanced Care 11; \$780 per month
  - Federal poverty line affordability safe harbor (est. \$100 per month)
    - \$780 minus \$100 = \$680 monthly HRA contribution
    - Compare to estimated monthly \$317 ACA (b) penalty
  - Much more than monthly estimated \$317 ACA (b) penalty

# Notice 2018-88

- Open questions:
  - Will the final regulations, and eventual affordability rules, entice anyone to abandon employer group health coverage and provide a compliant HRA?
    - Health of individual market/Exchange will play a large role here
    - Decisions regarding age used for affordability will also be critical
  - Would it be better for regulators to undo “own goal”?
    - Absent legislation, it appears with final HRA regulations that this ship has sailed
  - Do these affordability proposals meet the objectives of EO 13813?
  - Will the Section 105(h) nondiscrimination rules be workable?

**QUESTIONS?**



# Biography



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Leader of Morgan Lewis's health and welfare task force, Andy R. Anderson is often recognized for his work in counseling clients on employer, individual, and insurer issues created by the Affordable Care Act, and regulatory compliance issues in relation to the Internal Revenue Code, ERISA, COBRA, HIPAA, and Mental Health Parity. Tax-exempt organizations and Fortune 500 companies turn to Andy for handling their benefit plans, and legal review surrounding welfare benefit plans, government self-correction programs, cafeteria plans, and VEBAs.

# Biography



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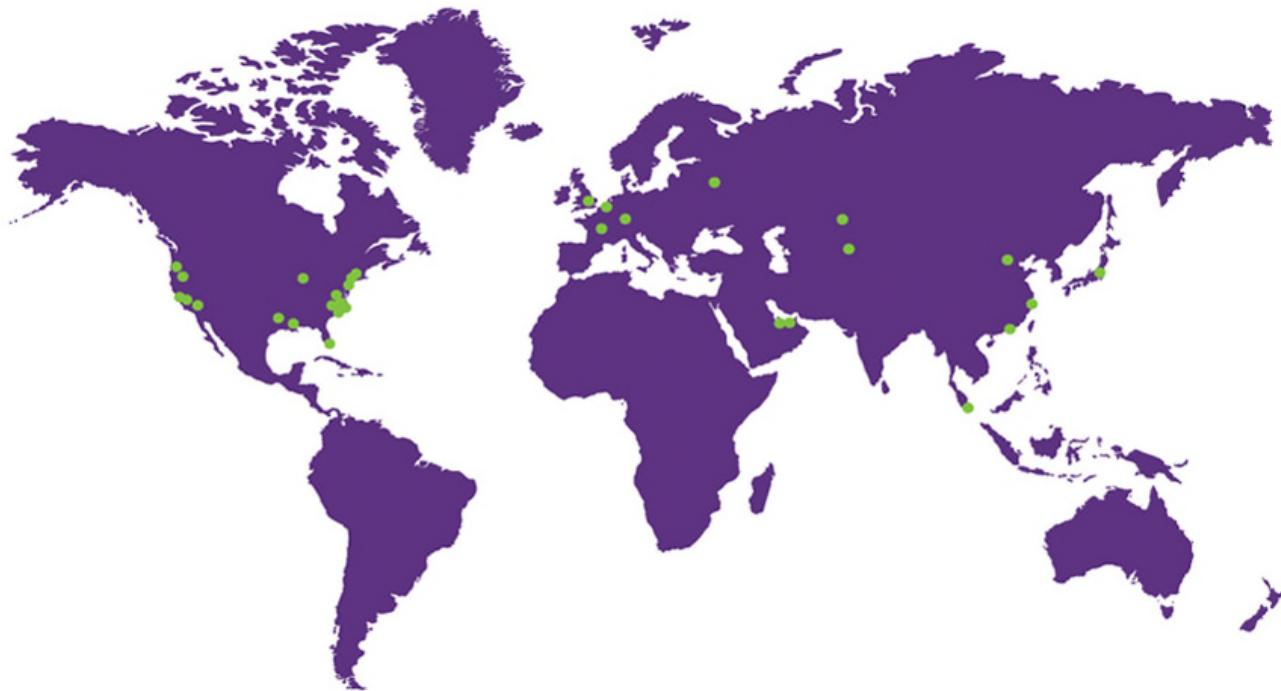
Saghi (Sage) Fattahian counsels clients on all aspects of health and welfare plans. She works with clients to comply with the complicated, shifting requirements under the US Internal Revenue Code, ERISA, ACA, COBRA, HIPAA, MHPAEA, GINA, and state and local laws. She assists health and welfare plans and their sponsors with daily operations and plan administration, including preparing and maintaining plan documents and related materials; reviewing and negotiating services agreements with third parties; consulting on operational issues; and assisting with claims and appeals.

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