Kilpatrick

JULY 18, 2019

Impact of New Department of Labor HRA Regulations on Retiree-Only HRAs

by Martha L. Sewell

On June 13, 2019, the Department of Labor (the "DOL"), along with the Departments of Treasury and Health and Human Services, released final regulations expanding the use of health reimbursement arrangements (HRAs). Since their issuance, plan sponsors have questioned the impact of the new regulations on retiree-only HRAs.

In the past 15 years, there has been a significant shift from traditional retiree medical coverage to retiree plan designs that involve the use of an HRA. In general, a post-65 retiree-only HRA is structured to reimburse retirees for individual Medicare supplemental coverage premiums or individual Medicare Advantage coverage premiums. In some cases, a post-65 retiree-only HRA will also reimburse other premiums, such as dental and vision, as well as medical expenses. A pre-65 retiree-only HRA works in the same way, except it reimburses individual medical coverage premiums instead of Medicare supplemental or Medicare Advantage premiums. In most retiree-only HRA arrangements, a private exchange is used to provide the retirees with access to individual coverage. The private exchange functions as an insurance broker that assists retirees in choosing the right individual coverage to fit their needs and enrolls the retirees in the chosen coverage.

HRA Final Regulations

In the HRA final regulations, the DOL created a new safe harbor for individual coverage which is purchased using HRA funds. If an HRA reimburses premiums for individual coverage and the arrangement satisfies the requirements for the new safe harbor, the individual coverage will not be an "employee welfare benefit" plan under ERISA. The language in the regulations which describes the new safe harbor makes it clear that it does apply to retiree-only HRAs. At the same time, in the preamble, the Department indicated that private exchanges could be structured to comply with the new safe harbor, but recognized that some private exchange structures would not qualify under the safe harbor (e.g., a design that severely limits choice of insurer).

Given the discussion in the regulation (primarily in the preamble) regarding private exchanges and the new safe harbor, some plan sponsors are asking if their retiree-only HRAs are impacted. The short answer is that the DOL comments should not impact many retiree-only HRAs that utilize private

exchanges. For many arrangements, the individual coverage does not satisfy the general requirements of ERISA to be an ERISA-covered plan. As a result, there is no need for an exemption from ERISA because the individual coverage does not qualify as an ERISA-covered plan and therefore is not subject to ERISA. On a related note, it is clear that the new safe harbor is in fact a safe harbor. The DOL notes in the preamble that the new safe harbor is intended to clearly define circumstances in which a workplace arrangement falls outside of the scope of a plan under ERISA without necessarily specifying all the circumstances under which a workplace arrangement could avoid ERISA plan status. In other words, the final HRA regulations make clear that the rule is just a safe harbor for a clearly defined situation.

ERISA General Rule

To be an "employee welfare benefit plan" subject to ERISA, the arrangement must satisfy the following four elements (referred to as the "ERISA General Rule") –

- There must be a plan, fund or program;
- That is established or maintained by an employer;
- For the purpose of providing [ERISA covered benefits] through the purchase of insurance or otherwise;
- To participants and beneficiaries.

Generally, the question of what constitutes a plan, fund or program for ERISA purposes has been decided by the courts. In Fort Halifax Packing Co. v. Coyne, the U.S. Supreme Court established the fundamental principle that an arrangement only becomes an ERISA plan when there is an ongoing administrative responsibility or scheme to make eligibility determinations and to calculate benefits.

Application of the ERISA General Rule to Individual Insurance Coverage Obtained from a Private Exchange

Prior to the issuance of the new HRA final regulations, most employers treated non-coordinated, individual insurance policies as exempt from ERISA. This is especially true for post-65 retiree arrangements where the individual policy benefits are not coordinated with any employer plan and the employer is prevented from making plan design decisions. For example, individual Medicare supplemental policies or individual Medicare Advantage policies are not coordinated with an employer plan, and policy design is regulated by Federal law.

The issuance of the new HRA final regulations should not change the historical interpretation of ERISA that plan sponsors have relied upon to exempt individual policies which are purchased using funds from a retiree-only HRA, from the requirements of ERISA. Many private exchanges structure the individual insurance policy exchange with the following characteristics –

- The retirees voluntarily choose the individual policies in which to enroll.
- The retirees complete all necessary enrollment paperwork.

- The policies are individual policies in the name of the retiree or his/her spouse/partner.
- The retirees are personally liable for the payment of 100% of the premiums (regardless of any HRA reimbursement).

If the plan sponsor does not select the menu of insurers who offer the individual policies, does not select the individual coverage levels, and has no involvement in the design of the individual policies or eligibility or claims determinations, such arrangement should be exempt under the ERISA General Rule. This is based upon the fact that under the above arrangement there is no administrative scheme as it relates to the individual policies and the plan sponsor really has no involvement and no decisions to make. Instead, the individual coverage is a transaction that occurs only between the retiree and the insurer.

It is true that, in the arrangement described above, the premiums for individual coverage are reimbursed from the HRA. However, this further underscores the fact that the plan sponsor does not have any involvement with respect to the individual coverage policies. The HRA is itself an ERISA employee welfare benefit plan, and reimbursing premiums and other claims is an administrative function of the HRA – not the plan sponsor.
Thus, to determine whether individual insurance policies which are purchased using funds in a retiree-only HRA are exempt from ERISA, a plan sponsor should first examine whether the requirements of the ERISA General Rule are satisfied. In many cases, the requirements of the ERISA General Rule will not be satisfied – meaning that the individual policies are not subject to ERISA, thereby negating the need to rely on a safe harbor.