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HRA Proposal Raises Questions Regarding Existing Retiree HRAs

The administration's HRA (health reimbursement arrangement) proposal made headlines October 23 because it has the potential to significantly change the way employers provide health coverage – enabling further shift to defined contribution style health benefits. An HRA is an account balance (usually notional, not funded) that an employee can use to pay health premiums or reimburse other health expenses.

One aspect of the proposal should be of immediate interest to employers who already offer retiree HRAs coupled with private health exchanges. As part of the proposal, the Department of Labor for the first time is “clarifying” whether an HRA combined with private individual health insurance will be a plan subject to ERISA. It is crucial for employers that only the HRA, and not the individual insurance coverages, be considered part of an ERISA plan.

Proposed DOL Safe Harbor

The DOL concludes that the individual health insurance coverages reimbursed by an HRA would **not** be considered an ERISA plan if-

- The purchase of individual coverage is “completely voluntary” (although employers can still require coverage to be purchased as a condition for participation in the HRA).
- The employer does not “select or endorse any particular issuer or insurance coverage.” **AND**
- The employer receives no consideration, cash or otherwise, in connection with the employee's selection or renewal of individual coverage.

Issues Outstanding

The DOL leaves unanswered significant questions and issues:

- If an employer limits the use of HRA funds to a set of individual coverages (for example, offered by a particular private exchange), is the coverage still “voluntary” and has the employer avoided “endorsing” any particular coverage?
- If a navigator or private exchange provider that is hired or endorsed by the employer helps an employee find appropriate coverage, is that an endorsement of coverage that is attributed to the employer?

- Can an employer directly hire or “endorse” a particular navigator or exchange provider (which is a very common arrangement)?
- Can commissions from purchases of individual coverage be used to reduce expenses of maintaining the plan? (Again, this is very common among existing arrangements.)
- Even if the individual coverage is not part of the ERISA plan per the DOL safe harbor, is a navigator or private exchange hired or endorsed by the employer still part of the ERISA plan? (Many employers and private exchange providers view only the HRA itself as part of the ERISA plan.)
- What is considered the group health plan for COBRA purposes (not changed under the proposal)? Does it include the individual coverage or access to a navigator or private exchange in addition to HRA coverage?

What’s Next?

Many employers have already moved, or are seriously considering moving, to HRA-based medical coverage for retirees. In our experience working with employers, the major retiree health insurance exchange providers typically avoid identifying any potential issue relating to the ERISA plan status of the HRA and exchange. Employers who do not raise the issue and seek protection leave themselves with unnecessary potential exposure. Going forward, employers should be even more vigilant on this issue in light of the potential for heightened Department of Labor and plaintiff attorney focus.

For more information, contact any member of the Ivins Compensation & Benefits practice.

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