

Legislative Brief

IRS Notice 2002-45: Health Reimbursement Arrangements

This Fickewirth Benefits Advisors Legislative Brief provides basic information about health reimbursement arrangements (HRAs) as addressed in IRS Notice 2002-45. As noted below, this information has been updated for Health Care Reform changes impacting HRAs.

PURPOSE

This notice provides basic information about a type of employer-provided health reimbursement arrangement (HRA) described below.

This notice is divided into eight parts. Part I of the notice describes HRAs and their general tax treatment. Part II of the notice outlines the benefits that may be offered under an HRA. Part III details who may be covered under an HRA. Part IV deals with the interaction between HRAs and cafeteria plans. Part V covers ordering rules for reimbursement from HRAs and section 125 health flexible spending arrangements. Part VI relates to the applicability of section 105(h) nondiscrimination rules to HRAs. Part VII explains how to provide COBRA continuation coverage under HRAs. Part VIII addresses certain other matters.

I. TAX TREATMENT OF HRAS GENERALLY

An HRA is an arrangement that:

- 1) Is paid for solely by the employer and not provided pursuant to salary reduction election or otherwise under a section 125 cafeteria plan;
- 2) Reimburses the employee for medical care expenses (as defined by section 213(d) of the Internal Revenue Code) incurred by the employee and the employee's spouse and dependents (as defined in section 152); and
- 3) Provides reimbursements up to a maximum dollar amount for a coverage period and any unused portion of the maximum dollar amount at the end of a coverage period is carried forward to increase the maximum reimbursement amount in subsequent coverage periods.

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To the extent that an HRA is an employer-provided accident or health plan, coverage and reimbursements of medical care expenses of an employee and the employee's spouse and dependents are generally excludable from the employee's gross income under sections 106 and 105. Assuming that the maximum amount of reimbursement which is reasonably available to a participant under an HRA is not substantially in excess of the value of coverage under the HRA, an HRA is a flexible spending arrangement (FSA) as defined in section 106(c)(2).

II. BENEFITS UNDER AN HRA

To qualify for the exclusions under sections 106 and 105, an HRA may only provide benefits that reimburse expenses for medical care as defined in section 213(d). Each medical care expense submitted for reimbursement must be substantiated. An HRA may not reimburse a medical care expense that is attributable to a deduction allowed under section 213 for any prior taxable year.

Additionally, an HRA may neither reimburse a medical care expense that is incurred before the date the HRA is in existence nor reimburse a medical care expense that is incurred before the date an employee first becomes enrolled under the HRA. Reimbursements for insurance covering medical care expenses as defined in section 213(d)(1)(D) are allowable reimbursements under an HRA, including amounts paid for premiums for accident or health coverage for current employees, retirees and COBRA qualified beneficiaries. However, see Part IV for a discussion relating to cases in which an employer provides an HRA in conjunction with another accident or health plan. If an HRA is an FSA, reimbursable medical care expenses may not include expenses for qualified long-term care services as defined in section 7702B(c). See sections 106(c) and 213(d)(1)(C).

Note: Effective Jan. 1, 2011, Health Care Reform changed the requirements related to reimbursements for over-the-counter (OTC) drugs by HRAs. Under the new requirements, qualified medical expenses include amounts paid for medicines or drugs only if the medicine or drug is a prescribed drug (determined without regard to whether the drug is available without a prescription) or is insulin.

An HRA does not qualify for the exclusion under section 105(b) if any person has the right to receive cash or any other taxable or non-taxable benefit under the arrangement other than the reimbursement of medical care expenses. If any person has such a right under an arrangement currently or for any future year, all distributions to all persons made from the arrangement in the current tax year are included in gross income, even amounts paid to reimburse medical care expenses. For example, if an arrangement pays a death benefit without regard to medical care expenses, no amounts paid under the arrangement to any person are reimbursements for medical care expenses excluded under section 105(b). See section 1.105-2 of the Income Tax Regulations.

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Arrangements formally outside the HRA that provide for the adjustment of an employee's compensation or an employee's receipt of any other benefit will be considered in determining whether the arrangement is an HRA and whether the benefits are eligible for the exclusions under sections 106 and 105(b). If, for example, in the year an employee retires, the employee receives a bonus and the amount of the bonus is related to that employee's maximum reimbursement amount remaining in an HRA at the time of retirement, no amounts paid under the arrangement are reimbursements for medical care expenses for purposes of section 105(b). Similarly, if an employer provides severance pay only to employees who have reimbursement amounts remaining in a purported HRA at the time of termination of employment, no amounts paid under the arrangement are reimbursements for medical care expenses for purposes of section 105(b).

III. COVERAGE UNDER AN HRA

Medical care expense reimbursements under an HRA are excludable under section 105(b) to the extent the reimbursements are provided to the following individuals: current and former employees (including retired employees), their spouses and dependents (as defined in section 152 as modified by the last sentence of section 105(b)), and the spouses and dependents of deceased employees. The term "employee" does not include a self-employed individual as defined in section 401(c). See section 105(g).

Note: Health Care Reform changed the federal tax laws, effective March 30, 2010, by expanding the definition of "dependent" to allow an employee participating in an HRA to exclude from his or her gross income the value of reimbursements provided for an adult child who is under age 27 at the end of the employee's tax year.

An HRA may continue to reimburse former employees or retired employees for medical care expenses after termination of employment or retirement (even if the employee does not elect COBRA continuation coverage). For example, an HRA may have a provision that reimburses a former employee for medical care expenses only up to an amount equal to the unused reimbursement amount remaining at retirement or other termination of employment. The plan may also provide that the maximum reimbursement amount available after retirement or other termination of employment is reduced for any administrative costs of continuing such coverage. Additionally, an HRA may or may not provide for an increase in the amount available for reimbursement of medical care expenses after the employee retires or otherwise terminates employment (even if the employee does not elect COBRA continuation coverage).

Note: IRS Notice 2002-45 provides that self-employed individuals cannot participate in an HRA on a tax-favored basis. This includes sole proprietors, partners in a partnership and more than two percent shareholders in a Subchapter S corporation. However, sole proprietors, partnerships

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or S corporations may sponsor an HRA for their employees. The ownership attribution rules of Code section 318 apply when determining who qualifies as a more than two percent shareholder in an S corporation. Under these rules, family members of owners are treated as owners themselves. Thus, the employee-spouse, children, parents and grandparents of a more than two percent shareholder in an S corporation are all ineligible to participate in the S corporation's HRA.

IV. HRAS AND CAFETERIA PLANS

Employer contributions to an HRA may not be attributable to salary reduction or otherwise provided under a section 125 cafeteria plan. An accident or health plan funded pursuant to salary reduction is not an HRA and is subject to the rules under section 125. However, an HRA is not considered to be paid for pursuant to salary reduction merely because it is provided in conjunction with a cafeteria plan. Additionally, if an employer offers employees a choice between employer-provided non-taxable benefits (e.g., coverage under an HRA and coverage under a health maintenance organization (HMO), with no cash or other taxable benefits available to employees, the choice is not an election to which section 125 applies.

If an employer provides an HRA only in conjunction with another accident or health plan and that other plan is provided pursuant to a salary reduction election under a cafeteria plan, then all the facts and circumstances are considered in determining whether the salary reduction is attributable to the HRA. Assuming that the terms of the salary reduction election indicate that the salary reduction is used only to pay for the specified accident or health plan offered in conjunction with the HRA and not to pay for the HRA itself, the mere fact that an employee may participate in the HRA only if the employee participates in a specified accident or health plan funded pursuant to a salary reduction election does not necessarily result in the salary reduction being attributed to the HRA.

In such situations, if the salary reduction election for a coverage period to fund the specified accident or health plan offered in conjunction with the HRA exceeds the actual cost of the specified accident or health plan coverage for such coverage period, the salary reduction is attributable to the HRA. For purposes of this rule, "salary reduction" includes a choice to forgo receipt of any benefits that would be taxable but for the fact they are offered under a section 125 cafeteria plan.

For any coverage period, for purposes solely of determining whether a salary reduction election exceeds the cost of coverage, the actual cost of the specified accident or health plan coverage for the coverage period may be determined pursuant to the rules for determining the COBRA applicable premium under section 4980B(f)(4). For example, assume that an employer offers an HRA and an employee who participates in the HRA must also participate in the corresponding employee-only or family coverage offered in a high-deductible accident and health plan. If the

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COBRA applicable premium for the high-deductible accident and health coverage would be \$1,800 for the employee-only coverage and \$4,500 for family coverage if such coverage were offered separately from the HRA, then the annual maximum allowable salary reduction election in this case is \$1,800 for employee-only coverage and \$4,500 for family coverage in order for the salary reduction to be treated as not attributable to the HRA.

An arrangement is not treated as an HRA if the arrangement interacts with a cafeteria plan in such a way as to permit employees to use salary reduction indirectly to fund the HRA. Therefore, where an employee who participates in a reimbursement arrangement has a choice among two or more specified accident or health plans to be used in conjunction with the reimbursement arrangement (or a choice among various maximum reimbursement amounts credited for a coverage period) and there is a correlation between the maximum reimbursement amount available under the HRA for the coverage period (disregarding amounts carried forward from previous coverage periods) and the amount of salary reduction election for the specified accident and health plan, then the salary reduction is attributed to the reimbursement arrangement even if the amount of salary reduction election is equal to or less than the actual cost of the other accident or health coverage.

For example, assume an employer offers a reimbursement arrangement plus other specified accident or health plan coverage with the actual cost for family coverage for the specified accident or health plan being \$4,500 and the employee having a choice to salary reduce \$2,500 or \$3,500 to fund this coverage. An employee who elects family coverage and \$2,500 salary reduction receives a \$1,000 maximum reimbursement amount under the reimbursement arrangement for the coverage period and an employee who elects family coverage and \$3,500 salary reduction receives a \$2,000 maximum reimbursement amount under the reimbursement arrangement for the coverage period. In this case, although the maximum allowable salary reduction is not exceeded, a portion of the salary reduction is attributed to the reimbursement arrangement because the increase in salary reduction election is related to a larger maximum reimbursement amount in the reimbursement arrangement for the coverage period. This arrangement is not an HRA and is subject to section 125.

Similarly, assume an employer provides a reimbursement arrangement in conjunction with another accident or health plan. Employees participating in the reimbursement arrangement are reimbursed up to \$1,000 each year for substantiated section 213(d) medical care expenses, and unused amounts remaining at the end of the year are carried forward for reimbursements in later years. The employee-share of the annual premium for the other accident or health plan is \$1,500. Employees have a choice either to use amounts in the reimbursement arrangement to pay for the premium for the other accident or health plan or to pay that premium pursuant to a salary reduction election. Under this plan, the reimbursement arrangement does not reimburse any portion of the premium paid by salary reduction. Because an employee may use the reimbursement arrangement to pay a portion of the premium in lieu of electing to salary

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reduce, the reimbursement arrangement is indirectly funded pursuant to salary reduction. This arrangement does not meet the definition of an HRA because it is funded by salary reduction and it is subject to the rules under section 125.

Further, if the amount credited to a reimbursement arrangement is directly or indirectly based on the amount forfeited under a section 125 FSA, the arrangement will be treated as funded by salary reduction. For purposes of making this determination, facts and circumstances taken into consideration include the manner in which salary reduction is implemented for other accident or health plans offered by the employer.

Because an HRA is paid for solely by the employer and not pursuant to salary reduction, the following restrictions on health FSAs under section 125 are not applicable to HRAs: (1) the prohibition against a benefit that defers compensation by permitting employees to carry over unused elective contributions or plan benefits from one plan year to another plan year; (2) the requirement that the maximum amount of reimbursement must be available at all times during the coverage period; (3) the mandatory twelve-month period of coverage; and (4) except as otherwise provided in this notice, the limitation that medical expenses reimbursed must be incurred during the period of coverage.

As a result, the maximum reimbursement amount for a coverage period (not including amounts carried forward from previous coverage periods) need not be available at all times during the coverage period. Also, an HRA may specify a coverage period for a reimbursement amount that is less than a year. Although claims incurred during one coverage period may be reimbursed in a later coverage period, an unreimbursed claim may be reimbursed in a later coverage period only if the individual was covered under the HRA when the claim was incurred. Additionally, the maximum reimbursement amount credited under the HRA in the future (not including amounts carried forward from previous coverage periods) may be increased or decreased.

However, see section 1.105-11(c)(3)(ii) regarding operational discrimination in favor of highly compensated individuals (as defined in section 105(h)). Thus, if an increase in maximum reimbursement amounts in an HRA favors one or more highly compensated individuals, the HRA may violate these non-discrimination rules.

V. ORDERING RULES FOR HRAS AND Section 125 HEALTH FSAS

A medical care expense may not be reimbursed from a section 125 health FSA if the expense has been reimbursed or is reimbursable under any other accident or health plan. If coverage is provided under both an HRA and a section 125 health FSA for the same medical care expenses, amounts available under an HRA must be exhausted before reimbursements may be made from the FSA. However, a section 125 health FSA will not violate this rule if coverage is provided under both an HRA and a section 125 health FSA and the FSA reimburses a medical care

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expense which is not reimbursable by the HRA. In no case may an employee be reimbursed for the same medical care expense by both an HRA and a section 125 health FSA.

Consistent with these rules, before a section 125 health FSA plan year begins, the plan document for the HRA may specify that coverage under the HRA is available only after expenses exceeding the dollar amount of the section 125 FSA have been paid. For example, if an employer sponsors a section 125 health FSA and an HRA, both of which provide coverage for the same medical care expenses, and the HRA plan document includes a provision that the HRA is not available for reimbursements of medical care expenses that are covered by the section 125 health FSA until after expenses exceeding the dollar amount of the section 125 FSA have been paid, then those medical care expenses may be reimbursed first from the section 125 health FSA and then from the HRA when the amount available under the section 125 FSA is exhausted.

VI. NONDISCRIMINATION RULES APPLICABLE TO HRAS

Section 105(h) sets forth nondiscrimination rules for self-insured medical expense reimbursement plans. To the extent an HRA is a self-insured medical expense reimbursement plan, the nondiscrimination rules under section 105(h) apply to the HRA. See section 1.105-11.

Note: Under Health Care Reform, non-grandfathered, fully insured group health plans will be required to comply for the first time with section 105(h) nondiscrimination rules. These rules were scheduled to be effective for plan years beginning on or after Sept. 23, 2010. However, the nondiscrimination requirements have been delayed indefinitely, pending the issuance of regulations. The regulations will specify the new effective date.

VII. COBRA CONTINUATION COVERAGE

An HRA is a group health plan generally subject to the COBRA continuation coverage requirements. If an individual elects COBRA continuation coverage, an HRA complies with these COBRA requirements by providing for the continuation of the maximum reimbursement amount for an individual at the time of the COBRA qualifying event and by increasing that maximum amount at the same time and by the same increment that it is increased for similarly situated non-COBRA beneficiaries (and by decreasing it for claims reimbursed).

Premiums are determined under the existing rules in section 4980B. An HRA complies with the COBRA requirements for calculating the applicable premium under section 4980B if the applicable premium is the same for qualified beneficiaries with different total reimbursement amounts available from the HRA (and otherwise also satisfies the requirements of section 4980B). For example, if the annual additional reimbursement amount credited under an HRA is \$1,000 and the maximum reimbursement amount remaining for two similarly situated qualified

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beneficiaries at the time of their qualifying events is \$500 and \$5,000, the applicable premium is the same for each individual.

The plan rules of an HRA may provide for continued reimbursements after a COBRA qualifying event regardless of whether a qualified beneficiary elects continuation coverage. For example, an HRA might allow reimbursements up to the unused maximum reimbursement amount following termination of employment. In such a situation, an HRA subject to COBRA must still comply with the COBRA continuation coverage requirements. If a qualified beneficiary elects COBRA continuation coverage in addition to the continued reimbursement amount already available, an HRA complies with the COBRA requirements by increasing the maximum reimbursement amount at the same time and by the same increment that it is increased for similarly situated non-COBRA beneficiaries (and by decreasing it for claims reimbursed).

VIII. OTHER MATTERS

Accident or health plans that meet the definition of an HRA are subject to a variety of statutory rules and provisions, many of which are not addressed in this notice. Among the statutory provisions not addressed in this notice are:

- The deduction limitations under sections 419 and 419A (for employer contributions to welfare benefit funds) and under section 404 (for amounts paid or accrued under plans providing for deferred benefits that are not provided through a welfare benefit fund).
- The application of the nondiscrimination requirements under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), including the extent to which underwritten individual health insurance policies purchased and reimbursed by an HRA are treated as health insurance coverage offered under a group health plan.
- Other requirements under HIPAA, including the requirement that a group health plan provide certificates of creditable coverage.
- The requirements for welfare benefit plans under the Employee Retirement Income Security Act of 1974 (ERISA).

The proposed regulations relating to health FSAs under section 125 state that certain requirements apply whether or not the health FSA is part of a cafeteria plan. Future guidance will modify the proposed regulation under section 125 to clarify that while those rules continue to apply to health FSAs provided pursuant to salary reduction election under a section 125 cafeteria plan, they do not apply to HRAs.

Source: Internal Revenue Service

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