



West Virginia Offices of the Insurance Commissioner

Advisory for Employers, Insurance Brokers, Benefit Advisors, and other Stakeholders on New Federal Rules on Health Reimbursement Arrangements

January 17, 2020

Summary: Employers should use caution if considering providing a new kind of health reimbursement arrangement (HRA) to their workers in 2020. Key government systems are not ready for the new rules, creating risk that employers and employees could owe substantially more at tax time and employees could forfeit health benefits.

What You Need to Know:

- On June 20, 2019, the federal government released complex new regulations on health reimbursement arrangements (HRAs), which are a type of account-based employee health benefit.
- Under the new rules, employers can – under certain circumstances – provide their workers with a new kind of HRA, known as an “individual coverage HRA,” that workers can use to purchase coverage in the individual market, beginning in 2020.
- The new rules are complicated and difficult to understand, especially for employees.
- And the federal government released the new rules too late for the health insurance Marketplaces to fully incorporate them into their application systems for the 2020 enrollment.
- As a result, employees offered an individual coverage HRA may receive incorrect eligibility determinations or make errors in attempting to follow the rules.
- These mistakes can have substantial negative consequences for both employees offered HRAs and employers offering them.
- Employees who receive advance payments of the premium tax credit in error, or make other errors, face higher tax bills and the possibility of forfeiting their health benefits.
- Employers could face unexpected payroll tax or employer mandate liability, be required to amend tax filings, or potentially risk plan disqualification.
- Employers can avoid these risks by not relying on individual coverage HRAs for 2020 and instead considering other options to provide health coverage.
- ***Bottom Line: Not offering individual coverage HRAs for 2020 will help employers avoid the risk of negative tax and financial consequences for themselves and their employees.***

Key Risks for Employers and Employees Using New HRAs:

- ***Employee Liability for Marketplace Subsidies Granted in Error.*** Employees offered an individual coverage HRA – like those offered conventional employer-sponsored coverage – are in many cases ineligible for Marketplace tax credits. The Marketplaces have not been fully updated to take HRAs into account in determining tax credit eligibility. As a result, individuals offered HRAs for 2020 could receive subsidies in error and have to repay them upon tax filing.

- **Employer Mandate Liability.** If an employee mistakenly receives a tax credit, the IRS may assess a mandate penalty against the employer, putting the onus on the employer to show that the HRA was an “affordable” coverage offer.
- **Unexpected Income and Payroll Tax Liability for Employers and Employees.** Employees offered an HRA along with a salary reduction agreement (also referred to as a “cafeteria plan” or a “section 125 plan”) must enroll in off-Marketplace coverage to use the two together. This rule is likely to confuse employees, especially since they will generally need to visit the Marketplace to find out if their HRA is considered affordable. If workers mistakenly purchase coverage on-Marketplace, any tax benefit under the salary reduction agreement will be disallowed, which may create unexpected income and payroll tax liability and amended tax filing obligations for employees and employers. If the employer accidentally reimburses the employee for the Marketplace coverage, there is a risk of more severe consequences, like plan disqualification.
- **Risk of Forfeiture of Health Benefits.** The new HRAs may be used only with individual market coverage – not more limited coverage like short-term, limited-duration insurance. But consumers face challenges differentiating ACA-compliant coverage from more limited coverage. Employees who purchase the wrong coverage – even inadvertently – will generally be unable to switch and potentially forfeit their benefits.

What to Do if You Decide to Take the Risk and Offer Your Workers Individual Coverage HRAs:

- **Provide Clear Written Information to Workers Offered HRAs.** Federal law requires employers offering HRAs to provide their employees with a clear explanation of its terms and associated rules. The federal government released a model notice that may be used, but it omits key information: the requirement to purchase coverage off-Marketplace when using an HRA with a salary reduction agreement. Employers should ensure that the notice they provide includes all relevant information.
- **Provide Enrollment Assistance and Counseling.** Even with clear written information, employees are likely to have difficulty understanding the complex new rules, especially given that the Marketplace will not be fully ready. [Cuts to federal funding for enrollment assistance mean less help is available.] To reduce the risk of error and adverse consequences, employers should make trained benefit counselors available to help employees comply with the rules.
- **Consider Offering a Simplified Benefit to Minimize Risk of Error.** As noted above, using an HRA along with a salary reduction agreement requires employees to enroll in the individual market outside of the Marketplace. Given likely confusion about this rule, employers may wish to refrain from offering a salary reduction agreement. (It’s important to note that forgoing a salary reduction agreement does not address the financial and tax risks from potential mistakes about Marketplace subsidy eligibility.)

See the following *Model Notice* that you can customize for your employees.

Model Notice Employers May Provide to Employees Regarding Individual Coverage HRAs

Summary. Recent federal regulations on health reimbursement arrangements (HRAs) require employers (and other plan sponsors) offering individual coverage HRAs to give employees offered the HRA a notice containing key information about the HRA and the rules that apply to it. The model notice beginning on the next page may be used to satisfy the notice requirement. The notice must be customized with specific information about the HRA.

Background. On June 20, 2019, the Departments of the Treasury, Labor, and Health and Human Services (the Departments) issued [final regulations](#) allowing employers (and other plan sponsors) that meet certain requirements to offer a new kind of HRA, referred to as an individual coverage HRA. Unlike many HRAs, individual coverage HRAs can be used to help pay for coverage in the individual health insurance market. Employers and other plan sponsors offering individual coverage HRAs must provide a written notice to all employees (including former employees) who are eligible for the individual coverage HRA. The final regulations explain the requirements for the notice.¹

About the Model Notice. The model notice beginning on the next page may be used to satisfy the notice requirement. To use this model notice, it must be customized to provide information specific to the HRA offered (indicated with *italicized* prompts in brackets). In addition, the notice may be modified based on the terms of the HRA.

This notice is based on a similar model notice [released](#) by the Departments. The Departments have indicated that it will consider use of that version to be good-faith compliance with the notice requirement and that employers may also include additional information in the notice. The version below includes the same required information as the Departments' version and much of the same text, but with some additional information and clarifications. The most important change is providing language explaining that employees using an HRA together with a salary reduction agreement must purchase coverage in the individual market *outside* the Marketplace. Failing to obey this rule could have negative tax consequences for both employees and employers. Employers should use the notice with this language for employees offered a salary reduction agreement along with the HRA; employees not offered a salary reduction agreement should receive the notice with the alternate language.

NOTE: *This cover page should not be included with the notice provided to employees.*

¹ For information on when the notice must be provided, see 26 CFR 54.9802-4(c)(6)(i), 29 CFR 2590.702-2(c)(6)(i) and 45 CFR 147.123(c)(6)(i). For the required contents for the notice, see 26 CFR 54.9802-4(c)(6)(ii), 29 CFR 2590.702-2(c)(6)(ii) and 45 CFR 147.123(c)(6)(ii). The notice must include a description of each item listed in the regulations and may include any additional information that does not conflict with the required information.

INFORMATION ABOUT YOUR INDIVIDUAL COVERAGE HRA

Have this information at hand when you visit [Healthcare.gov](https://www.healthcare.gov) or your state health insurance Marketplace to learn about your health care options.

[Enter date of notice]

You are getting this notice because your employer is offering you an **Individual Coverage Health Reimbursement Arrangement (HRA)** [for 2020]. An HRA is an employee health benefit that reimburses you for your health care expenses up to a certain dollar amount. An individual coverage HRA is a new type of HRA that can be used to help purchase an individual health insurance policy.

You can either accept the HRA or opt out. The best choice for you depends on your other health care options. For example, if you are eligible for Medicaid, then that may be more affordable for you than purchasing coverage using the HRA.

You may use the HRA only if you are enrolled in individual health insurance coverage or in Medicare. You may not accept the HRA and also receive financial assistance (premium tax credit) from the Marketplace. Being offered an HRA may affect whether you are eligible for Marketplace financial assistance. The Marketplace in your state will help you understand your options using the information below. Visit [Healthcare.gov/marketplace-in-your-state/](https://www.healthcare.gov/marketplace-in-your-state/) to find the Marketplace in your state.

Keep this notice for your records, as you may need to refer to it to receive benefits from your HRA or when you file your federal income tax return for [2020].

Key Information about Your HRA Offer

- (1) **HRA Type.** The type of HRA you have been offered is an **Individual Coverage HRA**.
- (2) **Coverage Period.** [Insert information about when the HRA is first available to the participant and information about when the HRA plan year begins and ends. If applicable, insert explanation of rules when a participant becomes eligible shortly before or during a plan year].
- (3) **Family Members.** Your family members [insert are also/aren't] eligible for the HRA. This means that the HRA [insert can/can't] be used to reimburse for their health care expenses, including the cost of their health insurance. [Revise as needed if some, but not all, family members are eligible.]
- (4) **Maximum Dollar Amount.** The maximum dollar amount available through the HRA is [insert dollar amount(s) and frequency (annual, monthly, etc.) and describe applicable terms for any variation based on family size or age]. [NOTE: If the HRA varies amounts based on family size, add the following: The maximum amount available to purchase coverage for the participant alone (sometimes referred to as "self-only coverage") is [insert dollar amount(s) and describe any applicable variation based on age]. This is the amount the Marketplace will use to figure out how the HRA affects your subsidy eligibility. [Add any rules regarding the proration of the maximum dollar amount that applies to any participant (or dependent, if applicable) who is not eligible to participate in the HRA for the entire plan year. Also add information about when amounts newly made available under the HRA will be made available (for example, monthly or annually).]
- (5) **Enrollment Process.** [Insert relevant information about procedures to accept or opt out of the HRA, and applicable timing.]

Additional Information about Your Individual Coverage HRA Offer

I. The Basics

What's an individual coverage HRA?

An individual coverage HRA is an arrangement under which your employer reimburses you for your medical care expenses (and sometimes your family members' medical care expenses), up to a certain dollar amount for the plan year. If you enroll in an individual coverage HRA, **you must also be enrolled in** individual health insurance coverage or Medicare for each month you are covered by the HRA. If your family members are covered by the HRA, **they must also be enrolled in** individual health insurance coverage or Medicare for each month they are covered by the HRA. (Learn more at <https://www.healthcare.gov/ichra/>)

The individual coverage HRA you are being offered is employer-sponsored health coverage. This is important to know if you apply for health insurance coverage on the Marketplace.

Note: There are different kinds of HRAs. The HRA that your employer is offering you, as described in this notice, is an **individual coverage HRA**. It is not a qualified small employer health reimbursement arrangement (QSEHRA) or any other type of HRA.

Can I opt out of the individual coverage HRA?

Yes. You can opt out of the HRA for yourself (and your family members, if applicable). *[Insert information on how and when participants may opt out.]* Even if you opt out, being offered an HRA may affect whether you're eligible for a tax credit – see section IV below.

[Add statement as to whether, upon termination of employment, the participant's HRA is forfeited or the participant is given the chance to opt out at that time.]

If I accept the individual coverage HRA, do I need to be enrolled in other health coverage too?

Yes. You (and your family members, if applicable) must be enrolled in individual health insurance coverage or Medicare for each month you (or your family members) are covered by the HRA. Individual health insurance coverage must generally be "ACA-compliant," meaning it satisfies the Affordable Care Act's requirements related to pre-existing conditions, covered benefits, and coverage limits. (In rare cases, coverage held continuously since 2013 may also qualify even if it doesn't satisfy all the ACA requirements.) You may not use the HRA with more limited coverage like a short-term limited-duration plan, coverage consisting solely of "excepted benefits" (for example, a dental- or vision-only plan), or a health care sharing ministry.

II. Getting Individual Health Insurance Coverage

[* USE THIS TEXT FOR EMPLOYEES NOT OFFERED A SALARY REDUCTION AGREEMENT: *]

How can I get individual health insurance coverage?

You can enroll in individual health insurance coverage either through the Marketplace or outside of the Marketplace – for example, directly from an insurance company. If you enroll outside of

the Marketplace, be sure that you are enrolling in “ACA-compliant” coverage, as described above.

If you already have qualifying individual health insurance coverage, you do not need to change that coverage to meet the HRA’s health coverage requirement.

Note: People in most states use HealthCare.gov to enroll in coverage through the Marketplace, but some states have their own Marketplace. To learn more about the Marketplace in your state, visit <https://www.healthcare.gov/marketplace-in-your-state/>.

If you are enrolled in Medicare Part A and B or Medicare Part C, your enrollment in Medicare will meet the HRA’s health coverage requirement. For information on how to enroll in Medicare, visit www.medicare.gov/sign-up-change-plans.

[* END OF TEXT FOR EMPLOYEES NOT OFFERED A SALARY REDUCTION AGREEMENT *]

[* USE THIS TEXT FOR EMPLOYEES OFFERED A SALARY REDUCTION AGREEMENT: *]

How can I get individual health insurance coverage?

You can enroll in individual health insurance coverage either through the Marketplace or outside of the Marketplace – for example, directly from an insurance company. But you may be better off enrolling in individual coverage *outside* the Marketplace. That’s because your employer is also offering you a “salary reduction agreement” that lets you use pre-tax dollars to pay for the share of your health insurance premium not covered by the HRA. Federal law prohibits using salary reduction agreements to help pay for Marketplace coverage. To receive the full tax benefit available to you, you must enroll in individual coverage outside the Marketplace.

If you enroll outside of the Marketplace, be sure that you are enrolling in “ACA-compliant” coverage, as described above.

If you have questions about this rule, ask the contact listed in section IV below.

If you are enrolled in Medicare Part A and B or Medicare Part C, your enrollment in Medicare will meet the HRA’s health coverage requirement. For information on how to enroll in Medicare, visit www.medicare.gov/sign-up-change-plans.

[* END OF TEXT FOR EMPLOYEES OFFERED A SALARY REDUCTION AGREEMENT *]

When can I enroll in individual health insurance coverage?

Generally, anyone can enroll in or change their individual health insurance coverage during the individual market’s annual open enrollment period from November 1 through December 15. (Some state Marketplaces may provide additional time to enroll.) If your individual coverage HRA starts on January 1, you (and your family members, if applicable), generally should enroll in individual health insurance coverage during open enrollment.

In certain circumstances, such as when your individual coverage HRA starts on a date other than January 1 or if you are newly hired during the HRA plan year, you (and your family members, if applicable) can enroll in individual health insurance coverage outside of open enrollment using a special enrollment period.

If you qualify for a special enrollment period, make sure you enroll on time:

- If you are newly eligible for HRA coverage that would start at the beginning of the HRA plan year, you generally need to enroll in individual health insurance coverage within the 60 days before the first day of the HRA plan year.
- In other circumstances, you may enroll in individual health insurance coverage up to 60 days before the first day that your HRA can start or up to 60 days after this date.

If you decide to accept your individual coverage HRA, **enroll in individual health insurance coverage as soon as possible** to get the most out of your HRA.

Note: If you enroll in individual health insurance coverage through this special enrollment period, you may need to submit a copy of this notice to the Marketplace or the insurance company to prove that you qualify to enroll outside of the open enrollment period. For more information on special enrollment periods, visit HealthCare.gov or the website for the Marketplace in your state.

Do I need to get new individual health insurance coverage each year if I want to enroll in my individual coverage HRA each year?

Yes. Individual health insurance coverage is typically sold for a 12-month period starting January 1 and ending on December 31. If your HRA starts on January 1, you will either need to get new individual health insurance coverage or re-enroll in your individual health insurance coverage.

If you are enrolled in Medicare, your Medicare coverage generally will remain in place year to year.

Do I need to substantiate (prove) my (and my family members') enrollment in individual health insurance coverage or Medicare to use the individual coverage HRA?

Yes. You must substantiate that you (and your family members, if applicable) will be enrolled in individual health insurance coverage or Medicare for the period you will be covered by the HRA. *[Add description of when the HRA requires this substantiation to be provided and to whom it should be provided].*

Also, each time you seek reimbursement of a medical care expense from the HRA, you must substantiate that you (or the family member(s) whose medical care expense you are seeking reimbursement for) had (or have) individual health insurance coverage or Medicare for the month during which the expense was incurred.

[Add description of the reasonable substantiation procedures established or provide information on where to find information about those procedures.]

What happens if I am (or one of my family members is) no longer enrolled in individual health insurance coverage or Medicare?

If you (or a family member, if applicable) are no longer enrolled in individual health insurance coverage or Medicare, the HRA won't reimburse you for medical care expenses that were incurred during a month when you (or your family member, as applicable) did not have individual health insurance coverage or Medicare. This means that **you may not seek reimbursement for medical care expenses incurred when you (or your family member, if applicable) did not have individual health insurance coverage or Medicare.**

Note: If your (or your family member's) individual health insurance coverage or Medicare is terminated retroactively, you must notify your HRA of the termination and its effective date.

III. Information About the Premium Tax Credit

What is the premium tax credit?

The premium tax credit is a tax credit that helps eligible individuals and their families pay their premiums for health insurance coverage purchased through the Marketplace. The premium tax credit is not available for health insurance coverage purchased outside of the Marketplace. Your ability to claim the premium tax credit may be limited if your employer offers you coverage, including an HRA.

People who enroll in Marketplace coverage may be able to receive advance payments of the premium tax credit, which are paid directly to your insurance company to lower your monthly premium. To find out if you are eligible, visit the Marketplace and complete the application. For more information about the premium tax credit, including advance payments, see irs.gov/aca.

Does being offered an individual coverage HRA affect whether I can claim the premium tax credit for my Marketplace coverage?

If you are a current employee, it depends:

- If the HRA is considered **affordable**, you **may not claim** the premium tax credit for yourself or any family members eligible for the HRA. This is true even if you opt out of the HRA.
- If the HRA is considered **unaffordable** and you opt out of the HRA, you **may claim** the premium tax credit for yourself and any family members enrolled in Marketplace coverage if you are otherwise eligible.

If you are a former employee, the offer of an HRA will not prevent you from claiming the premium tax credit (if you are otherwise eligible for it), regardless of whether the HRA is considered affordable – as long as you don't accept the HRA.

How do I know if the individual coverage HRA I've been offered is considered affordable?

The Marketplace website will help you determine whether your individual coverage HRA is considered affordable. To find your state's Marketplace, visit: <https://www.healthcare.gov/marketplace-in-your-state/>.

Do I need to provide any of the information in this notice to the Marketplace?

Yes. Be sure to have this notice with you when you visit the Marketplace. If you're applying for advance payments of the premium tax credit, you'll need to provide information from the section called "Key Information about your HRA Offer" beginning on page 1 of this notice.

If I accept the individual coverage HRA, can I claim the premium tax credit for my Marketplace coverage?

No. You may not claim the premium tax credit for your Marketplace coverage for any month you are covered by the HRA, even if the HRA is considered unaffordable. Also, you may not claim the premium tax credit for the Marketplace coverage of any family members for any month they are covered by the HRA.

If I'm enrolled in Medicare, am I eligible for the premium tax credit?

No. If you have Medicare, you aren't eligible for the premium tax credit for any Marketplace coverage you may have.

IV. Other Information You Should Know

Who can I contact if I have questions about the individual coverage HRA?

Contact: *[Add contact information (including a phone number) for an individual or a group of individuals who participants may contact in order to receive additional information regarding the HRA.]*

[For use by an HRA subject to ERISA that meets the safe harbor set forth in 29 CFR 2510.3-1(l): **Is the individual health insurance coverage I pay for with my individual coverage HRA subject to ERISA?**

The individual health insurance coverage that is paid for with amounts from your individual coverage HRA, if any, is not subject to the rules and consumer protections of the Employee Retirement Income Security Act (ERISA). If you have questions about your rights and responsibilities under your individual health insurance plan, you should contact your health insurer or state insurance department.]