



# ACA COMPLIANCE BULLETIN

## HIGHLIGHTS

- If certain requirements are met, Notice 2018-88 proposes that offering an individual coverage HRA would generally:
  - Satisfy an employer's pay or play obligations; and
  - Not fail to meet Section 105 nondiscrimination rules.
- Employers cannot rely on any information provided in this notice.

## IMPORTANT DATES

### November 19, 2018

IRS addressed how a new HRA proposed rule could impact existing federal law requirements.

### January 1, 2020

If finalized, the proposals would take effect beginning with 2020 plan years.

## IMPACT OF INDIVIDUAL COVERAGE HRAs ON THE ACA'S PAY OR PLAY RULES

### OVERVIEW

On Oct. 23, 2018, federal agencies issued a [proposed rule](#) to expand the usability of health reimbursement arrangements (HRAs), which raised issues concerning its application to certain existing federal provisions. As a result, on Nov. 19, 2018, the Internal Revenue Service (IRS) issued [Notice 2018-88](#) to begin developing guidance on the impact of the proposed HRA rule on the following federal requirements:

- ✓ The Section 4980H employer shared responsibility rules under the Affordable Care Act (ACA); and
- ✓ The federal nondiscrimination requirements in Internal Revenue Code (Code) Section 105(h).

### ACTION STEPS

**Taxpayers may not rely on any guidance provided in Notice 2018-88.** The proposals in the notice, if adopted, would not take effect until plan years beginning on and after Jan. 1, 2020.

Comments on Notice 2018-88 and the IRS' proposals will be accepted until Dec. 28, 2018.

### Provided By:

Cowden Associates, Inc.

## COWDEN

444 Liberty Avenue, Suite 605  
Pittsburgh, PA 15222  
Ph: 412.394.9330  
Website: [www.cowdenassociates.com](http://www.cowdenassociates.com)

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## Background

On Oct. 12, 2017, President Donald Trump issued an executive order that directed federal agencies to consider expanding the availability of HRAs and allowing HRAs to be used in conjunction with individual health insurance coverage. HRAs are tax-favored, employer-funded accounts that reimburse employees for health care expenses. Under current regulations, HRAs cannot reimburse employees for the cost of individual health coverage.

The new HRA proposed rule is part of the Departments' efforts to implement the executive order's directives. Beginning in 2020, this proposed rule would allow HRAs to be integrated with individual insurance coverage (known as an individual coverage HRA) for purposes of compliance with the ACA, eliminating the existing prohibition on this type of arrangement. **This means that HRAs could be used to reimburse employees for the cost of individual health coverage on a tax-preferred basis**, if certain conditions are met.

Separate IRS proposed rules were also issued regarding premium tax credit eligibility for individuals offered coverage under an HRA integrated with individual health insurance coverage. Generally, an individual who is covered by an HRA integrated with individual health coverage is ineligible for the premium tax credit.

## Application to the Employer Shared Responsibility Rules

The ACA's employer shared responsibility rules, also known as the employer mandate or "pay or play" rules, require applicable large employers (ALEs) to offer minimum essential coverage that is affordable and provides minimum value to their full-time employees, or pay a penalty. The HRA proposed rule does not address the employer shared responsibility rules, but raises certain issues with respect to how the mandate would apply to an ALE that offers an individual coverage HRA. Notice 2018-88 describes how the IRS may address those issues.

Specifically, Notice 2018-88:

- ✓ Proposes that **an HRA, including an individual coverage HRA, qualifies as an eligible employer-sponsored plan**. Therefore, an ALE that offers an individual coverage HRA to at least 95 percent of its full-time employees (and their dependents) would not be liable for a Section 4980H(a) penalty for the month, regardless of whether any full-time employee received an Exchange subsidy.
- ✓ Requests comments on various methods for ALEs to determine affordability for an individual coverage HRA, and proposes three optional "safe harbor" approaches for identifying the plan to be used to determine affordability (known as the affordability plan). Under these safe harbors, the affordability plan is generally the monthly premium for the lowest cost silver plan for the employee for self-only coverage offered by the Exchange for the rating area in which the employee resides.

The IRS also anticipates issuing future guidance on the application of these rules with respect to the Section 6056 reporting and the requirement to report each full-time employee's required contribution.

## Section 105(h) Nondiscrimination Requirements

Code Section 105(h) contains nondiscrimination rules prohibiting self-insured health plans from discriminating in favor of highly compensated individuals (HCIs) with respect to eligibility or benefits. The **eligibility test** looks at whether a sufficient number of non-HCIs benefit under a self-insured health plan and the **benefits test** analyzes whether the plan provides HCIs with better benefits.

The benefits test includes a uniformity requirement that requires any maximum reimbursement limit attributable to employer contributions to be uniform for all participants, and not vary based on a participant's age or years of service. If a plan fails the benefits test, benefits provided under the discriminatory plan will be taxable to the HCI.

The HRA proposed rule would allow a plan sponsor to:

- ✓ Limit the offer of the individual coverage HRA to members of certain classes of employees and to vary the amounts, terms and conditions of individual coverage HRAs between the different classes of employees. However, within each class of employees, the plan sponsor would be required to offer the individual coverage HRA on the same terms and conditions (including, generally, in the same amount) to all employees who are members of that class; and
- ✓ Increase the maximum dollar amount made available to an employee for any plan year as the age of the employee increases (provided the same maximum dollar amount attributable to the increase in an employee's age is made available to all employees who are members of the same class of employees who are the same age).

To facilitate offering individual coverage HRAs, the IRS anticipates issuing future guidance providing that a covered HRA would meet the uniformity requirement if the covered HRA:

- ✓ **Provides the same maximum dollar amount to all employees who are members of a particular class of employees**, limited to the following classes specified in the HRA proposed rule: full-time employees, using either the Section 105(h) or 4980H definition; part-time employees, using either the Section 105(h) or 4980H definition; seasonal employees, using either the Section 105(h) or 4980H definition; employees covered by a collective bargaining agreement; employees who have not satisfied an ACA-compliant waiting period for coverage; employees who have not attained age 25 prior to the beginning of the plan year; foreign employees who work abroad; and employees whose primary site of employment is in the same rating area; and
- ✓ **Increases the maximum dollar amount made available to members of a particular class of employees in accordance with the increases in the price of an individual health insurance policy based on the ages of the members of that class**, provided that the same maximum dollar amount attributable to the age increase is made available to all members of that class of employees who are the same age.