Update on Tri-Agency Final Rules on Health Reimbursement Arrangements

60-Minute Read

10/19/20 update: Under IRS Rev. Proc. 2020-43, the $1,800 excepted benefit health reimbursement arrangement (EBHRA) limit will remain at $1,800 for plan years beginning after December 31, 2020, and before January 1, 2022.

On September 30, 2019, the Internal Revenue Service (IRS) published its proposed rules to clarify how the employer shared responsibility provisions and Section 105(h) nondiscrimination rules apply to health reimbursement arrangements (HRAs) and other account-based group health plans that are integrated with individual health insurance coverage or Medicare.

The Centers for Medicare & Medicaid Services (CMS) also previously announced its downloadable tool that gives employers access to specific rate information for the least expensive plan in a certain category (for example, the lowest cost silver plan for self-only coverage offered through the Exchange) based on an employee's age and geographic location. According to CMS, employers will be able to use this tool to determine whether their offer of coverage through an individual coverage HRA would be considered affordable.

Employers that offer individual coverage HRAs beginning on January 1, 2020, before the IRS publishes its final regulations, employers may rely on the proposed regulations:

- Under Section 4980H for periods during any plan year of individual coverage HRAs beginning before the date that is six months following the final regulations' publication; and
- Under Section 105(h) for plan years of individual coverage HRAs beginning before the date that is six months following the final regulations' publication.

The IRS' proposed rule is described below in the Employer Shared Responsibility Provisions and Nondiscrimination sections.

Background

On June 20, 2019, the Department of the Treasury (Treasury), Department of Labor (DOL), and Department of Health and Human Services (HHS) (collectively, the Departments) published their final rules regarding health reimbursement arrangements (HRAs) and other account-based group health plans. The DOL also issued a news release, frequently asked questions, model notice, and model attestations.

The final rules' goal is to expand the flexibility and use of HRAs to provide individuals with additional options to obtain quality, affordable healthcare. According to the Departments, these changes will facilitate a more efficient healthcare system by increasing employees' consumer choice and promoting healthcare market competition by adding employer options.

To do so, the final rules expand the use of HRAs by:

- Removing the prohibition against integrating an HRA with individual health insurance coverage (individual coverage HRA)
- Expanding the definition of limited excepted benefits to recognize certain HRAs as limited excepted benefits if certain conditions are met (excepted benefit HRA)
- Providing premium tax credit (PTC) eligibility rules for people who are offered an HRA integrated with individual coverage
- Assuring HRA and Qualified Small Employer Health Reimbursement Arrangement (QSEHRA) plan sponsors that reimbursement of individual coverage by the HRA or QSEHRA does not become part of an ERISA plan when certain conditions are met
- Changing individual market special enrollment periods for individuals who gain access to HRAs integrated with individual coverage or who are provided QSEHRAs

The final rules were effective on August 19, 2019, and generally apply for plan years beginning on or after January 1, 2020.

However, the final rules under Section 36B (regarding PTCs) apply for taxable years beginning on or after January 1, 2020, and the final rules providing a new special enrollment period in the individual market apply January 1, 2020.

What is an HRA?

An HRA is a type of account-based group health plan funded solely by employer contributions that reimburses an employee for Section 213(d) medical care expenses incurred by the employee, or the employee's spouse, dependents, and children who are not age 27 as of the end of the taxable year, up to a maximum fixed-dollar amount during a coverage period.

These reimbursements are excludable from the employee's income and wages for federal income tax and employment tax purposes. An HRA can allow amounts that remain at the end of the year to be available to reimburse medical care expenses incurred in later years.

Integration Rules

The final rules would allow an HRA to be integrated with individual coverage (other than coverage that consists solely of excepted benefits), including student health insurance coverage, catastrophic plans, individual health insurance coverage sold through a private exchange model, and grandmothered individual health insurance coverage.

The final rules also permit an individual coverage HRA to be integrated with either individual health insurance coverage or Medicare for a participant or dependent who is enrolled in Medicare Part A and B or Part C, if certain conditions are satisfied.

The integration rules would generally apply in the same manner to Medicare coverage as they apply to individual health insurance coverage. An individual coverage HRA that is integrated with Medicare may reimburse premiums for Medicare Part A, B, C, or D, Medigap policies, and other Section 213(d) medical care expenses (subject to the exception regarding taking Medicare entitlement into account). This means that an individual coverage HRA may not, under its terms, limit reimbursement only to expenses not covered by Medicare, as HHS has determined this could amount to a group health plan taking into account Medicare entitlement in violation of the Medicare Secondary Payer rules.

An individual coverage HRA may not be integrated with short-term limited duration insurance, spousal coverage, health care sharing ministries, or TRICARE.

The HRA's integration with individual coverage will comply with the Patient Protection and Affordable Care Act (ACA) requirement of preventive services coverage without cost-sharing and the ACA's prohibition against annual and lifetime limits if the HRA requires the participant and any dependents to be enrolled in individual coverage for each month the individuals are covered by the HRA.

Nondiscrimination

To prevent a plan sponsor (employer) from intentionally or unintentionally, directly or indirectly, steering any participants or dependents with adverse health factors away from the employer's traditional group health plan and into the individual market, the final integration rules prohibit an employer from offering the same class of employees both a traditional group health plan and an HRA integrated with individual coverage.

When an employer offers an HRA that is integrated with individual coverage to a class of employees, the final integration rules require that the HRA be offered on the same terms (both in the same amount and on the same terms and conditions) to all employees within the class.

However, an employer that offers employees in a class of employees a choice between an HSA-compatible individual coverage HRA and an individual coverage HRA that is not HSA-compatible satisfies the "same terms" requirement if both types of individual coverage HRAs are offered to all employees in the class on the same terms.

If an employer allows carryover of unused HRA amounts for use in future plan years, these carryover amounts will be disregarded when determining whether the HRA is offered on the same terms, if the method for determining whether participants have access to unused amounts (and for determining the amount of unused funds) in future years is the same for all participants in a class of employees.

However, an employer would violate the integration rules if it offers a more generous HRA to individuals based on an adverse health factor.

Because HRA participants' individual coverage premiums may vary by age and family size, there is an exception to the "same terms" rule described above. An employer can increase the HRA amount for a class of employees if the increase is attributable to differences in family size or age, subject to the following HRA maximum dollar amount restrictions:

- For an increase in HRA amount attributable to family size, there is no specific limit on an employer's ability to increase HRA amounts based on the number of a participant's dependents covered by the HRA, as long as the same maximum dollar amount attributable to that increase in the number of dependents is made available to all participants in that class of employees with the same number of dependents covered by the HRA.

  When a plan sponsor determines amounts available for participants who enroll during the plan year or who have changes in the number of dependents covered by the HRA during a plan year, the plan sponsor must use the same method for all participants in the class of employees and the method must be determined prior to the plan year.

- For an increase in HRA amount attributable to age differences, the maximum dollar amount available must be made available to all participants in a class of employees who are the same age. Also, the maximum dollar amount available to the oldest participants must not be more than three times the maximum amount available to the youngest participants.

  A plan sponsor may use any reasonable method to determine a participant's age as long as the same method is used for all participants in the class of employees for the plan year and the method is determined prior to the plan year.

The IRS' proposed regulations provide two safe harbors for individual coverage HRAs under Section 105, paragraph (c)(3) regarding nondiscriminatory benefits:

- An employer can vary an individual coverage HRA's maximum dollar amount available to participants who are members of a particular class of employees if the increases are based on the age of each participant and the increases comply with the age-variation rule under the "same terms" requirement described above;
- An employer can vary an individual coverage HRA's maximum dollar amount available to participants within a class of employees or between classes of employees if, within each class of employees, the maximum dollar amount only varies with the "same terms" requirement described above and, with respect to differences in the maximum dollar amount made available for different classes of employees, the classes of employees reflect the classes that the final rule allows (described below).

Satisfying the proposed regulations' safe harbors does not automatically satisfy the prohibition on nondiscriminatory operation under Section 105. For example, if a disproportionate number of highly compensated individuals (HCIs) qualify for and use the maximum HRA amount allowed under the "same terms" requirement based on age in comparison to the number of non-HCIs who qualify for and use lower HRA amounts based on age, then the individual coverage HRA may be discriminatory. If the individual coverage HRA is discriminatory, then the HCIs' excess reimbursements will be included in their income.

Please see this Advisor's Appendix A for examples of the "same terms" requirement.

Classes of Employees

Under the final rules, an employer may only offer:

- the HRA on different terms to different groups of employees, and
- either an HRA integrated with individual health insurance coverage, or a traditional group health plan by groups of employees,

if the groups are the following specific classes of employees, subject to certain exceptions:

1. full-time employees (using either the definition that applies for purposes of §1.105-11(c)(2)(iii)(C) or Section 4980H of the Code, as determined by the employer);
2. part-time employees (using either the definition that applies for purposes of §1.105-11(c)(2)(iii)(C) or Section 4980H of the Code, as determined by the employer);
3. employees who are paid on a salary basis;
4. non-salaried employees (for example, hourly employees);
5. employees whose primary site of employment is in the same rating area;
6. seasonal employees (using either the definition that applies for purposes of §1.105-11(c)(2)(iii)(C) or §54.4980H-1(a)(38) of the Code, as determined by the employer);
7. employees who are included in a unit of employees covered by a collective bargaining agreement (CBA) or a related participation agreement in which the employer participates as described in §1.105-11(c)(2)(iii)(D) (employers may establish separate classes of employees for employees covered by separate CBAs);
8. employees who have not satisfied a waiting period for coverage;
9. non-resident aliens with no U.S.-based income (generally, foreign employees who work abroad);
10. employees who, under all the facts and circumstances, are hired for temporary placement at an entity that is not their common law employer (and not treated as a single employer under Section 414(b), (c), (m), or (o)); or
11. combinations of two or more of the classes of employees above.

Classes of employees are determined based on the employees of a common law employer, rather than the employees of a controlled group of employers.

A plan sponsor that offers a traditional group health plan to a class of employees may prospectively offer employees in that class hired on or after a certain date in the future (the new hire date) an individual coverage HRA (the new hire subclass), while continuing to offer a traditional group health plan to employees in the class hired before the new hire date. A plan sponsor must offer the individual coverage HRA on the same terms to all participants within the new hire subclass. A plan sponsor may set the new hire date prospectively for a class of employees as any date on or after January 1, 2020.

An employer who offers an HRA to former employees would place them in the same class as the employees were in before their service separation. Further, the HRA must be offered to those former employees on the same terms as all other employees within the class. This “same terms” rule does not apply to retiree-only HRAs.

An employer must draft its HRA document to define its classes of employees prior to the beginning of the plan year when the definitions will apply.

Please see this Advisor’s Appendix B for examples of the special rule for new hires.

Minimum Class Size

The final rules include a minimum class size requirement that varies based on employer size and that applies only to certain classes of employees under certain circumstances. The plan sponsor must determine the applicable class size minimum for each plan year of the individual coverage HRA.

If a class of employees is subject to the minimum class size requirement, the class must include the following class size minimums for the individual coverage HRA to be offered to that class:

- 10, for an employer with fewer than 100 employees;
- a number, rounded down to a whole number, equal to 10 percent of the total number of employees, for an employer with 100 to 200 employees; and
- 20, for an employer that has more than 200 employees.

An employer determines its employer size based on its reasonable expectation of the number of employees it expects to employ on the first day of the individual coverage HRA plan year.

The annual determination of whether a class of employees satisfies the applicable class size minimum is based on the number of employees in the class who are offered the individual coverage HRA as of the first day of the plan year.

The minimum class size requirement applies only if the plan sponsor offers a traditional group health plan to at least one other class of employees and offers an individual coverage HRA to at least one class of employees. When the minimum class size requirement applies, it applies only to certain classes that are offered an individual coverage HRA. This means that the minimum class size requirement does not apply to a class of employees offered a traditional group health plan or to a class of employees that is not offered any group health plan.

The minimum class size requirement generally applies to the following classes of employees (applicable classes) who are offered an individual coverage HRA:

1. Salaried employees
2. Non-salaried employees
3. Full-time employees
4. Part-time employees
5. Employees whose primary site of employment is in the same rating area (although the minimum class size requirement does not apply if the geographic area defining the class is a state or a combination of two or more entire states)

The minimum class size requirement applies to a class of employees created by combining any of the applicable classes above with any other class of employees, except that the minimum class size requirement does not apply to a class that is the result of any combination of an applicable class above and the waiting period class.

In the case of full-time employees and part-time employees, the minimum class size requirement applies only to those classes if the employees in either the part-time or full-time class are offered a traditional group health plan while the employees in the other class are offered an individual coverage HRA.

Please see this Advisor's Appendix C for examples regarding classes and the minimum class size requirement.

Opt-Out and Waiver of Future Reimbursements

The HRA must allow participants, including former employees, to opt out of and waive future reimbursements from the HRA at least annually in advance of the plan year. If an employee opts out of an individual coverage HRA, the HRA is considered waived for the employee's eligible dependents as well.

Further, upon employment termination, either the remaining amounts in the HRA must be forfeited or the participant must be allowed to permanently opt out of and waive future reimbursements from the HRA. This ensures that the participant may choose to either claim the PTC, if eligible, or continue HRA participation after service separation.

Forfeiture

The HRA must require that medical care expenses for any individual covered by the HRA will not be reimbursed if the individual ceases to be covered by individual coverage.

An employee's failure to maintain individual coverage would cause prospective forfeiture, rather than retroactive forfeiture. This means that the HRA must allow the employee – who loses coverage under the HRA – to seek reimbursement for substantiated medical care expenses that were incurred during the coverage period prior to the employee's failure to maintain individual health insurance coverage. The HRA may require an employee to submit expenses within a reasonable specified time period.

COBRA

An individual's failure to satisfy the integration requirement of maintaining individual health insurance coverage is not a COBRA qualifying event. This means that if an employee loses eligibility to participate in an individual coverage HRA because the employee failed to maintain individual health insurance coverage, the employee does not have a right to COBRA or other group continuation coverage in the individual coverage HRA.

However, if an employee loses coverage under an individual coverage HRA due to employment termination or a reduction in employment hours, then the employee would experience a COBRA qualifying event. An employee who loses coverage under an individual coverage HRA for these reasons may qualify for a special enrollment period (SEP) to change individual coverage on the Exchange or off the Exchange.

Premium Contributions Through a Cafeteria Plan

If premium contributions are run through a Section 125 cafeteria plan, the employer may permit employees who purchase individual coverage outside the Exchange to pay premiums through the cafeteria plan. However, employers are prohibited from allowing employees who purchase individual coverage on the Exchange to pay premiums through a cafeteria plan.

If an employer makes a salary reduction arrangement under a cafeteria plan, the arrangement must be made available to any participant in a class of employees on the same terms to all participants (other than former employees) in a class of employees.

Individual Coverage Substantiation

To be integrated with individual coverage, the HRA must require participants and any dependents covered by the HRA to be enrolled in individual coverage and to substantiate compliance with this requirement.

An HRA must implement reasonable procedures to verify that individuals whose medical care expenses are reimbursable by the HRA are, or will be, enrolled in individual coverage during the plan year. Annual coverage substantiation must be satisfied, in general, no later than the first day of the HRA plan year.

For individuals, including dependents, who become eligible for the HRA during the HRA plan year, the HRA may establish the date by which the substantiation must be provided, but the date may be no later than the date the HRA coverage begins.

If a new dependent's coverage is effective retroactively, the HRA may establish any reasonable timeframe for the annual coverage substantiation as long as the substantiation is required before the HRA will reimburse medical care expenses for the newly added dependent.

Reasonable enrollment substantiation procedures may include requiring a participant to provide:

- a third party document (for example, from the issuer) showing that the participant and any dependents covered by the HRA are, or will be, enrolled in individual coverage during the plan year (for example, an insurance card or an explanation of benefits for the relevant time period); or
- a participant attestation that the participant and any dependents are or will be enrolled in individual coverage, the date coverage began or will begin, and the coverage provider's name.

Following the initial coverage substantiation, with each new reimbursement request of an incurred medical care expense for the same plan year, the participant must provide substantiation that the participant and any dependents whose medical care expenses are requested to be reimbursed continue to be enrolled in individual coverage for the month when the medical care expenses were incurred. The attestation may be part of the reimbursement request form.

As with enrollment substantiation for the plan year, an HRA may rely on the participant's attestation or documentation unless the HRA has actual knowledge that the participant and any individual seeking reimbursement for the month were not enrolled in individual coverage for the month.

If an HRA subsequently gains actual knowledge that the attestation or document was inaccurate, the HRA may not provide further reimbursement for expenses incurred during the period to which the inaccurate attestation applies.

The Departments provide Individual Coverage HRA Model Attestations for the annual coverage substantiation requirement and the ongoing substantiation requirement. Individual coverage HRAs and their participants may, but are not required, to use the model attestations.

Notice Requirement

The HRA is required to provide a written notice to each participant at least 90 days before the beginning of each plan year.

For participants who are not yet eligible to participate at the beginning of the plan year (or who are not eligible when the notice is provided at least 90 days prior to the beginning of the plan year), the

HRA is required to provide the notice no later than the date on which the HRA may first take effect for the participant.

For a new employer that is established less than 120 days prior to the beginning of the first plan year of the individual coverage HRA, the notice may be provided no later than the date on which the HRA may first take effect for the participant, for that first plan year of the HRA.

Although the Departments will allow for the notice to be provided no later than the date on which the HRA may first take effect for the participant in these two cases, the Departments encourage HRAs to provide the notice as soon as practicable.

The written notice must include

- a description of the HRA's terms, including the maximum dollar amount made available that is used in determining affordability, and when amounts will be available (for example, monthly or annually);
- the date when coverage under the HRA may first become effective and the HRA plan year's start and end dates;
- a statement of the participant's right to opt out of and waive future reimbursement under the HRA;
- a description of the potential availability of the PTC if the participant opts out of and waives the HRA and the HRA is not affordable under the PTC regulations;
- a description of the PTC eligibility consequences for a participant who accepts the HRA;
- a statement that the participant must inform any Exchange to which he or she applies for advance PTC payments of: the availability of the HRA, the HRA amount, the number of months the HRA is available to the participant during the plan year, whether the HRA is available to the participant's dependents, and whether the participant is a current or former employee;
- a statement that the participant should retain the written notice because it may be needed to determine whether the participant is allowed the PTC;
- a statement that the HRA may not reimburse any medical care expense unless the substantiation requirements are met;
- a statement that the participant must inform the HRA if the participant or any dependent whose medical care expenses are reimbursable by the HRA is no longer enrolled in individual coverage;
- the contact information, including phone number, of an individual or group of individuals who participants may contact with their questions about the individual coverage HRA;
- a statement of availability of a special enrollment period for employees and dependents who newly gain access to the HRA (HHS provides model language that an HRA may use to meet this requirement);
- a statement about how the participant may find assistance for determining their individual coverage HRA affordability (the Departments provide model language that an HRA may use to meet this requirement);

- a statement that individual coverage HRAs may be integrated with Medicare and that Medicare beneficiaries are ineligible for the PTC, without regard to whether the individual coverage HRA offered is affordable or provides minimum value (MV), or whether the individual accepts the HRA; and
- a statement that there are multiple types of HRAs and the type the participant is being offered is an individual coverage HRA.

The notice provides some information that participants need in order to understand how the HRA may impact PTC eligibility. (The Departments provide model language describing the PTC consequences of being offered an individual coverage HRA and accepting an individual coverage HRA.)

The notice would also inform participants of their responsibilities under the HRA. If certain requirements are met, the notice would be required to also include a statement to advise participants that the individual coverage HRA is not subject to ERISA.

The written notice is permitted to include other information if it does not conflict with the final rule's required notice information.

Individual coverage HRAs that are subject to ERISA and individual coverage HRAs sponsored by nonfederal governmental plan sponsors must provide notice in a manner reasonably calculated to ensure actual receipt of the material by plan participants covered by the HRA. Individual coverage HRAs that are subject to ERISA must provide the notice in a manner that complies with the DOL's rules. Individual coverage HRAs that are ERISA-covered plans must provide a summary plan description (SPD), summaries of material modifications (SMMs), and summaries of material reductions in covered services or benefits.

The notice may be delivered along with other plan materials including, but not limited to, annual enrollment materials or new hire benefit packages, as long as it satisfies the content and timing requirements specific to the individual coverage HRA notice.

Beyond the written notice, the individual coverage HRA must provide a summary of benefits and coverage (SBC), which will include a description of the coverage, including cost sharing; the exceptions, reductions, and limitations on coverage; and other information.

Premium Tax Credit

An HRA is a self-insured employer-sponsored group health plan. Individuals covered by an HRA are ineligible for the PTC for their Exchange coverage.

An employee's required HRA contribution is the excess of:

1. the monthly premium for the lowest cost silver plan for self-only coverage available to the employee through the Exchange for the rating area where the employee lives, over
2. the monthly self-only HRA amount provided by the employee's employer, or, if the employer offers an HRA that provides for a single dollar amount regardless of whether an employee has self-only or other-than-self-only coverage, the monthly maximum amount available to the employee.

Under the final rules, the monthly self-only HRA amount would be the self-only HRA amount newly made available to the employee under the HRA for the plan year, divided by the number of months in the plan year the HRA is available to the employee.

The monthly maximum amount available to the employee under the HRA, which is relevant if the HRA provides one amount regardless of the number of individuals covered, would be the maximum amount newly made available to the employee under the HRA, divided by the number of months in the plan year the HRA is available to the employee.

An employee who is offered an HRA integrated with individual coverage would not be eligible to claim the PTC for Exchange coverage unless the premium of the lowest cost silver plan for self-only coverage offered by the Exchange for the rating area in which the employee resides less the HRA amount exceeds 9.5 percent (indexed) of the employee's household income.

If the silver-level plan has one rate for tobacco users and one rate for non-tobacco users, then the rate for non-tobacco users will apply to determine affordability of the individual coverage HRA. If a wellness program incentive is allowed in the individual market, the lowest cost silver plan premium will be determined without regard to any premium discount or rebate under that program unless the wellness program incentive relates exclusively to tobacco use.

The Departments adopt the rule that an individual coverage HRA that is affordable is treated as providing MV.

Please see this Advisor's Appendix D for the final rule's examples of determining affordability.

Employer Shared Responsibility Provisions

Generally, an applicable large employer (ALE) will owe "Penalty A" under Section 4980H(a) if it fails to offer an eligible employer-sponsored plan to at least 95 percent of its full-time employees and their dependents and at least one full-time employee is allowed the PTC for the month. If an ALE offers an eligible employer-sponsored plan (including an HRA) to at least 95 percent of its full-time employees and their dependents, the employer would not be liable for Penalty A for that month.

According to the final rules, an ALE may owe "Penalty B" under Section 4980H(b) if at least one full-time employee is allowed the PTC, which may occur if the eligible employer-sponsored plan offered was not affordable or did not provide MV, or if the employee was not offered coverage. An individual coverage HRA that is affordable for a calendar month is treated as providing minimum value for the calendar month.

Under the IRS' proposed rules, an ALE offering an individual coverage HRA would be permitted to use new affordability safe harbors and the general affordability safe harbors under Section 4980H:

1. **Look-back month safe harbor.** In determining an employee's required HRA contribution for a calendar month for purposes of Penalty B, an ALE may use the monthly premium for the lowest cost silver plan for self-only coverage offered through the Exchange for the employee's location for the month specified below:

    - Calendar year plan: an ALE may use the monthly premium for the applicable lowest cost silver plan for January of the prior calendar year.
    - Non-calendar year plan: an ALE may use the monthly premium for the applicable lowest cost silver plan for January of the current calendar year.

    In determining the monthly premium for the lowest cost silver plan based on the applicable look-back month, an employer must use the employee's age for the current plan year and the employee's location for the current calendar month.

For an employee who is or will be eligible for an individual coverage HRA on the first day of the plan year, the employee's age for the plan year is the employee's age on the first day of the plan year. For an employee who becomes eligible for an individual coverage HRA during the plan year, the employee's age for the remainder of the plan year is the employee's age on the date the individual coverage HRA can first become effective for the employee.

In general, an employer may use the monthly premium of the applicable lowest cost silver plan for the applicable look-back month for all calendar months of the plan year.

However, if the employee's location changes during the plan year, the employer must use the employee's new location to determine the applicable lowest cost silver plan used to determine the monthly premium.

2. **Location safe harbor.** In determining an employee's required HRA contribution for a calendar month for purposes of Penalty B, an ALE may use the cost of the applicable lowest cost silver plan for the location of the employee's primary employment site.

   Generally, an employee's primary employment site is the location where the employer reasonably expects the employee to perform services on the first day of the plan year (or on the first day the individual coverage HRA may take effect, for an employee who is not eligible for the individual coverage HRA on the first day of the plan year).

   The employee's primary employment site is treated as changing if the location where the employee performs services changes and the employer expects the change to be permanent or indefinite. The employee's primary employment site is treated as changing no later than the first day of the second calendar month after the employee begins performing services at the new location.

   Remote workers: for an employee who regularly performs services from home or another location that is not on the employer's premises, but who may be required by the employer to work at, or report to, a particular location, the location to which the employee would report is the primary employment site. If an employee works remotely from home or at another location that is not on the employer's premises and does not have an assigned office space or a particular location to which to report, the employee's residence is the primary employment site.

3. **General affordability safe harbors.** The general affordability safe harbors may apply to an ALE's offer of an individual coverage HRA to a full-time employee for purposes of Penalty B. An ALE may satisfy the following general affordability safe harbors by using the employee's required HRA contribution, as determined by taking into account any other safe harbors described in the proposed rule:

   - Form W-2 safe harbor
   - Rate of pay safe harbor
   - Federal poverty line safe harbor

An ALE may rely on information provided by an Exchange in determining whether the offer of an individual coverage HRA is affordable and provides minimum value. To assist employers, the Centers for Medicare & Medicaid Services (CMS) provides a downloadable tool of specific rate information that employers can use to determine whether their offer of coverage through an individual coverage HRA would be considered affordable.

Please see this Advisor's Appendix E for the proposed rule's examples of how the location safe harbor and look-back month safe harbor would apply to individual coverage HRAs.

Individual Coverage and ERISA Plan Status

The DOL clarifies that the ERISA terms "employee welfare benefit plan," "welfare plan," and "group health plan" do not include individual coverage if, among other items, the employer, employee organization, or other plan sponsor is not involved in selecting the individual coverage that is integrated with the HRA.

Under the final rules, the ERISA status of an HRA, QSEHRA, or supplemental salary reduction arrangement would remain unaffected.

However, individual coverage selected by the employee in the individual market and reimbursed by such a plan would not be treated as part of a group health plan, or as health insurance coverage offered in connection with a group health plan, or as a part of any employee welfare benefit plan for purposes of ERISA's Title I, if all the following conditions of the safe harbor are satisfied:

- The purchase of any individual coverage is completely voluntary for employees.
- The employer, employee organization, or other plan sponsor does not select or endorse any particular issuer or insurance coverage. Providing general contact information regarding availability of health insurance in a state (such as providing information regarding www.healthcare.gov or contact information for a state insurance commissioner's office) or providing general health insurance educational information (such as the uniform glossary of health coverage and medical terms) is permitted. A plan sponsor may provide assistance to participants and beneficiaries in shopping for individual health insurance coverage without being considered to endorse any particular coverage if that assistance is unbiased, neutral, uniformly available, and does not steer participants and beneficiaries towards a particular health insurance issuer or coverage.
- Reimbursement for nongroup health insurance premiums is limited solely to individual coverage.
- The employer, employee organization, or other plan sponsor receives no cash or other consideration in connection with the employee's selection or renewal of any individual coverage.
- Each plan participant is notified annually that the individual coverage is not subject to ERISA. For an HRA integrated with individual coverage, the notice must meet the requirements in 29 CFR 2590.702-2(c)(6). For a QSEHRA or an HRA that is not subject to 29 CFR 2590.702-2(c)(6), an employer may use the following model language to satisfy this condition:

  > "The individual health insurance coverage that is paid for by this plan, if any, is not subject to the rules and consumer protections of the Employee Retirement Income Security Act. You should contact your state insurance department for more information regarding your rights and responsibilities if you purchase individual health insurance coverage."

  An employer does not need to provide the notice with a supplemental salary reduction arrangement because the notice will be provided by the HRA or QSEHRA that the salary reduction arrangement supplements.

Individual Market Special Enrollment Periods

To allow employees to take advantage of QSEHRAs and HRAs that are integrated with individual coverage, employees and their dependents may enroll in individual coverage or change from one individual coverage plan to another plan outside of the individual market annual open enrollment period, if they gain access to an individual coverage HRA or a QSEHRA.

Also, an employee or an employee's dependent who gains access to an individual coverage HRA or who is provided a QSEHRA may elect to enroll in or change to different Exchange or off-Exchange individual coverage.

Employees and their dependents who had access to, but who were not enrolled in, an employer's individual coverage HRA during all or at the end of the preceding plan year may use the new special enrollment period (SEP) if they may newly enroll in an individual coverage HRA at the beginning of the subsequent HRA plan year.

Similarly, employees and their dependents who at one time had an individual coverage HRA or a QSEHRA, but then had another type of health coverage (including but not limited to a different individual coverage HRA or a different QSEHRA), and are again newly offered an individual coverage HRA or newly provided a QSEHRA from the same employer may qualify for this SEP.

Generally, qualified individuals, enrollees, and dependents who received notice of their individual coverage HRA's terms at least 90 days before the first day of the individual coverage HRA plan year, must enroll in individual health insurance coverage within 60 days before the date the individual coverage HRA may take effect, which would be the first day of the individual coverage plan year.

Similarly, employees and their dependents who will be provided a QSEHRA and who received notice at least 90 days before the beginning of the plan year, must enroll in individual health insurance coverage within 60 days prior to the first day of the QSEHRA plan year.

However, if the qualified individual, enrollee, or dependents did not receive notice at least 90 days before the first day of the plan year, then the qualified individual, enrollee, or dependents will have 60 days before or after the triggering event to select a qualifying health plan.

If plan selection is made before the day of the triggering event, then the coverage effective date is either the first day of the first month following the SEP triggering event, or, if the triggering event is on the first day of a month, the date of the triggering event. If plan selection is made on or after the day of the triggering event, coverage would take effect the first day of the month following the date of plan selection.

Excepted Benefit HRAs

Some employers want to offer an HRA that is not integrated with non-HRA group coverage, Medicare, TRICARE, or individual coverage. The final rules recognize certain HRAs as excepted benefits. To qualify as an excepted benefit HRA, the HRA must:

1. not be an integral part of the plan;
2. provide benefits that are limited in amount (not to exceed $1,800, indexed for inflation for plan years beginning after December 31, 2020. Under IRS Rev. Proc. 2020-43, the $1,800 limit will remain for plan years beginning after December 31, 2020, and before January 1, 2022.);

3. not provide reimbursement for premiums for certain health insurance coverage (such as individual coverage, coverage under a group health plan (other than COBRA or other group continuation coverage), or Medicare Parts A, B, C, or D); and
4. be made available under the same terms to all similarly situated individuals (as defined by HIPAA's nondiscrimination regulations) regardless of any health factor.

Excepted benefit HRAs may reimburse medical care expenses, such as cost sharing for individual health insurance coverage or group health plan coverage that would not otherwise qualify as excepted benefits, if the conditions above are satisfied.

An excepted benefit HRA is also allowed to reimburse premiums for individual coverage that consists solely of excepted benefits (such as limited scope dental or vision benefits), coverage under a group health plan that consists solely of excepted benefits, COBRA premiums, and short-term limited duration insurance (STLDI) premiums.

Regarding STLDI premium reimbursement, the final rules describe a process that the Departments may use to restrict excepted benefit HRAs from reimbursing STLDI premiums for small, insured employers in a state if certain criteria are satisfied. Before the restriction would be effective, notice of the restriction would be published in the Federal Register to allow plan sponsors time to comply. On February 7, 2020, CMS published a bulletin that instructs states how to submit a written recommendation to restrict excepted benefit HRAs from reimbursing STLDI premiums. According to the bulletin, in most cases, plan sponsors will have 6 months (after HHS publishes notice in the Federal Register) to comply with a STLDI premium reimbursement restriction.

If the excepted benefit HRA has a rollover feature to allow unused amounts to be carried over to later plans years, the carryover amounts will be disregarded when assessing whether the $1,800 limit is exceeded.

If a plan sponsor provides more than one HRA to a participant for the same time period, the amounts made available under all such plans (except HRAs that reimburse only excepted benefits) would be aggregated to determine whether the $1,800 limit has been exceeded. An HRA that reimburses only excepted benefits is exempt from the provisions of the final rules, including the provisions that apply to individual coverage HRAs and excepted benefit HRAs.

An employer can only offer an excepted benefit HRA if traditional group health plan coverage is also made available to the employees who are eligible to participate in the excepted benefit HRA. An employer would not be permitted to offer both an individual coverage HRA and an excepted benefit HRA to any employee.

Excepted benefit HRAs that are ERISA-covered plans must provide a summary plan description (SPD), summaries of material modifications (SMMs), and summaries of material reductions in covered services or benefits.

Applicability Date

The final rules were effective on August 19, 2019. These final rules will generally apply to group health plans and health insurance issuers for plan years beginning on or after January 1, 2020.

The premium tax credit provisions will be effective for taxable years beginning on and after January 1, 2020. The special enrollment period provisions in the individual market will apply January 1, 2020.

Public comments and requests for a public hearing on the IRS' proposed rules are due by December 30, 2019.

Because employers may want to offer individual coverage HRAs beginning on January 1, 2020, before the IRS publishes its final regulations, employers may rely on the proposed regulations:

- Under Section 4980H for periods during any plan year of individual coverage HRAs beginning before the date that is six months following the final regulations' publication; and
- Under Section 105(h) for plan years of individual coverage HRAs beginning before the date that is six months following the final regulations' publication.

6/18/2019
Updated 9/30/2019
Updated 2/7/2020
Updated 10/19/2020

Appendix A

(vii) Examples. The following examples illustrate the provisions of this paragraph (c)(3), without taking into account the provisions of paragraph (d) of this section. In each example, the HRA is an individual coverage HRA that has a calendar year plan year and may reimburse any medical care expenses, including premiums for individual health insurance coverage (except as provided in paragraph (c)(3)(vii)(E) of this section (Example 5)). Further, in each example, assume the HRA is offered on the same terms, except as otherwise specified in the example and that no participants or dependents are Medicare beneficiaries.

(A) Example 1: Carryover amounts permitted–(1) Facts. For 2020 and again for 2021, Plan Sponsor A offers all employees $7,000 each in an HRA, and the HRA provides that amounts that are unused at the end of a plan year may be carried over to the next plan year, with no restrictions on the use of the carryover amounts compared to the use of newly available amounts. At the end of 2020, some employees have used all of the funds in their HRAs, while other employees have balances remaining that range from $500 to $1,750 that are carried over to 2021 for those employees.

(2) Conclusion. The same terms requirement of this paragraph (c)(3) is satisfied in this paragraph (c)(3)(vii)(A) (Example 1) for 2020 because Plan Sponsor A offers all employees the same amount, $7,000, in an HRA for that year. The same terms requirement is also satisfied for 2021 because Plan Sponsor A again offers all employees the same amount for that year, and the carryover amounts that some employees have are disregarded in applying the same terms requirement because the amount of the carryover for each employee (that employee's balance) and each employee's access to the carryover amounts is based on the same terms.

(B) Example 2: Employees hired after the first day of the plan year–(1) Facts. For 2020, Plan Sponsor B offers all employees employed on January 1, 2020, $7,000 each in an HRA for the plan year. Employees hired after January 1, 2020, are eligible to enroll in the HRA with an effective date of the first day of the month following their date of hire, as long as they have enrolled in individual health insurance coverage effective on or before that date, and the amount offered to these employees is pro-rated based on the number of months remaining in the plan year, including the month which includes their coverage effective date.

(2) Conclusion. The same terms requirement of this paragraph (c)(3) is satisfied in this paragraph (c)(3)(vii)(B) (Example 2) for 2020 because Plan Sponsor B offers all employees employed on the first day of the plan year the same amount, $7,000, in an HRA for that plan year and all employees hired after January 1, 2020, a pro-rata amount based on the portion of the plan year during which they are enrolled in the HRA.

(C) Example 3: HRA amounts offered vary based on number of dependents–(1) Facts. For 2020, Plan Sponsor C offers its employees the following amounts in an HRA: $1,500, if the employee is the only individual covered by the HRA; $3,500, if the employee and one dependent are covered by the HRA; and $5,000, if the employee and more than one dependent are covered by the HRA.

(2) Conclusion. The same terms requirement of this paragraph (c)(3) is satisfied in this paragraph (c)(3)(vii)(C) (Example 3) because paragraph (c)(3)(iii)(A) of this section allows the maximum dollar amount made available in an HRA to increase as the number of the participant's dependents covered by the HRA increases and Plan Sponsor C makes the same amount available to each employee with the same number of dependents covered by the HRA.

(D) Example 4: HRA amounts offered vary based on increases in employees' ages–(1) Facts. For 2020, Plan Sponsor D offers its employees the following amounts in an HRA: $1,000 each for employees age 25 to 35; $2,000 each for employees age 36 to 45; $2,500 each for employees age 46 to 55; and $4,000 each for employees over age 55.

(2) Conclusion. The same terms requirement of this paragraph (c)(3) is not satisfied in this paragraph (c)(3)(vii)(D) (Example 4) because the terms of the HRA provide the oldest participants (those over age 55) with more than three times the amount made available to the youngest participants (those ages 25 to 35), in violation of paragraph (c)(3)(iii)(B)(2) of this section.

(E) Example 5: Application of same terms requirement to premium only HRA–(1) Facts. For 2020, Plan Sponsor E offers its employees an HRA that reimburses only premiums for individual health insurance coverage, up to $10,000 for the year. Employee A enrolls in individual health insurance coverage with a $5,000 premium for the year and is reimbursed $5,000 from the HRA. Employee B enrolls in individual health insurance coverage with an $8,000 premium for the year and is reimbursed $8,000 from the HRA.

(2) Conclusion. The same terms requirement of this paragraph (c)(3) is satisfied in this paragraph (c)(3)(vii)(E) (Example 5) because Plan Sponsor E offers the HRA on the same terms to all employees, notwithstanding that some employees receive a greater amount of reimbursement than others based on the cost of the individual health insurance coverage selected by the employee.

Appendix B

(2) Examples regarding special rule for new hires. The following examples illustrate the provisions of paragraph (c)(3) of this section, taking into account the provisions of paragraph (d) of this section, in particular the special rule for new hires under paragraph (d)(5) of this section. In each example, the HRA is an individual coverage HRA that has a calendar year plan year and may reimburse any medical care expenses, including premiums for individual health insurance coverage. The examples also assume that no participants or dependents are Medicare beneficiaries.

(i) Example 1: Application of special rule for new hires to all employees–(A) Facts. For 2021, Plan Sponsor A offers all employees a traditional group health plan. For 2022, Plan Sponsor A offers all employees hired on or after January 1, 2022, an HRA on the same terms and continues to offer the traditional group health plan to employees hired before that date. On the first day of the 2022 plan year, Plan Sponsor A has 2 new hires who are offered the HRA.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(2)(i) (Example 1) because, under the special rule for new hires in paragraph (d)(5) of this section, the employees newly hired on and after January 1, 2022, may be treated as a new hire subclass, Plan Sponsor A offers the HRA on the same terms to all participants in the new hire subclass, and the minimum class size requirement does not apply to the new hire subclass.

(ii) Example 2: Application of special rule for new hires to full-time employees–(A) Facts. For 2021, Plan Sponsor B offers a traditional group health plan to its full-time employees and does not offer any coverage to its part-time employees. For 2022, Plan Sponsor B offers full- time employees hired on or after January 1, 2022, an HRA on the same terms, continues to offer its full-time employees hired before that date a traditional group health plan, and continues to offer no coverage to its part-time employees. On the first day of the 2022 plan year, Plan Sponsor B has 2 new hire, full-time employees who are offered the HRA.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(2)(ii) (Example 2) because, under the special rule for new hires in paragraph (d)(5) of this section, the full-time employees newly hired on and after January 1, 2022, may be treated as a new hire subclass and Plan Sponsor B offers the HRA on the same terms to all participants in the new hire subclass. The minimum class size requirement does not apply to the new hire subclass.

(iii) Example 3: Special rule for new hires impermissibly applied retroactively–(A) Facts. For 2025, Plan Sponsor C offers a traditional group health plan to its full-time employees. For 2026, Plan Sponsor C wants to offer an HRA to its full-time employees hired on and after January 1, 2023, while continuing to offer a traditional group health plan to its full-time employees hired before January 1, 2023.

(B) Conclusion. The special rule for new hires under paragraph (d)(5) of this section does not apply in this paragraph (f)(2)(iii) (Example 3) because the rule must be applied prospectively. That is, Plan Sponsor C may not, in 2026, choose to apply the special rule for new hires retroactive to 2023. If Plan Sponsor C were to offer an HRA in this way, it would fail to satisfy the conditions under paragraphs (c)(2) and (3) of this section because the new hire subclass would not be treated as a subclass for purposes of applying those rules and, therefore, all full-time employees would be treated as one class to which either a traditional group health plan or an HRA could be offered, but not both.

(iv) Example 4: Permissible second application of the special rule for new hires to the same class of employees--(A) Facts. For 2021, Plan Sponsor D offers all of its full-time employees a traditional group health plan. For 2022, Plan Sponsor D applies the special rule for new hires and offers an HRA on the same terms to all employees hired on and after January 1, 2022, and continues to offer a traditional group health plan to full-time employees hired before that date. For 2025, Plan Sponsor D discontinues use of the special rule for new hires, and again offers all full-time employees a traditional group health plan. In 2030, Plan Sponsor D decides to apply the special rule for new hires to the full-time employee class again, offering an HRA to all full-time employees hired on and after January 1, 2030, on the same terms, while continuing to offer employees hired before that date a traditional group health plan.

(B) Conclusion. Plan Sponsor D has permissibly applied the special rule for new hires and is in compliance with the requirements of paragraphs (c)(2) and (3) of this section.

(v) Example 5: Impermissible second application of the special rule for new hires to the same class of employees–(A) Facts. The facts are the same as in paragraph (f)(2)(iv) of this section (Example 4), except that for 2025, Plan Sponsor D discontinues use of the special rule for new hires by offering all full-time employees an HRA on the same terms. Further, for 2030, Plan Sponsor D wants to continue to offer an HRA on the same terms to all full-time employees hired before January 1, 2030, and to offer all full-time employees hired on or after January 1, 2030, an HRA in a different amount.

(B) Conclusion. Plan Sponsor D may not apply the special rule for new hires for 2030 to the class of full-time employees being offered an HRA because the special rule for new hires may only be applied to a class that is being offered a traditional group health plan.

(vi) Example 6: New full-time employees offered different HRAs in different rating areas–(A) Facts. Plan Sponsor E has work sites in rating area 1, rating area 2, and rating area 3. For 2021, Plan Sponsor E offers its full-time employees a traditional group health plan. For 2022, Plan Sponsor E offers its full-time employees hired on or after January 1, 2022, in rating area 1 an HRA of $3,000, its full-time employees hired on or after January 1, 2022, in rating area 2 an HRA of $5,000, and its full-time employees hired on or after January 1, 2022, in rating area 3 an HRA of $7,000. Within each class offered an HRA, Plan Sponsor E offers the HRA on the same terms. Plan Sponsor E offers its full-time employees hired prior to January 1, 2022, in each of those classes a traditional group health plan. On the first day of the 2022 plan year, there is one new hire, full-time employee in rating area 1, three new hire, full-time employees in rating area 2, and 10 new hire-full-time employees in rating area 3.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(2)(vi) (Example 6) because, under the special rule for new hires in paragraph (d)(5) of this section, the full-time employees in each of the three rating areas newly hired on and after January 1, 2022, may be treated as three new hire subclasses and Plan Sponsor E offers the HRA on the same terms to all participants in the new hire subclasses. Further, the minimum class size requirement does not apply to the new hire subclasses.

(vii) Example 7: New full-time employee class subdivided based on rating area–(A) Facts. Plan Sponsor F offers its full-time employees hired on or after January 1, 2022, an HRA on the same terms and it continues to offer its full-time employees hired before that date a traditional group health plan. Plan Sponsor F offers no coverage to its part-time employees. For the 2025 plan year, Plan Sponsor F wants to subdivide the full-time new hire subclass so that those whose work site is in rating area 1 will be offered the traditional group health plan and those whose work site is in rating area 2 will continue to receive the HRA. Plan Sponsor F reasonably expects to employ 219 employees on January 1, 2025. As

of January 1, 2025, Plan Sponsor F has 15 full-time employees whose work site in in rating area 2 and who were hired between January 1, 2022, and January 1, 2025.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is not satisfied in this paragraph (f)(2)(vii) (Example 7) because the new hire subclass has been subdivided in a manner that is subject to the minimum class size requirement, and the class offered the HRA fails to satisfy the minimum class size requirement. Specifically, once the new hire subclass is subdivided the general rules for applying the minimum class size requirement apply to the employees offered the HRA in the new hire subclass. In this case, because the subdivision of the new hire full-time subclass is based on rating areas; a class based on rating areas is an applicable class subject to the minimum class size requirement; and the employees in one rating area are to be offered the HRA, while the employees in the other rating area are offered the traditional group health plan, the minimum class size requirement would apply on and after the date of the subdivision. Further, the minimum class size requirement would not be satisfied, because the applicable class size minimum for Plan Sponsor F would be 20, and only 15 employees in rating area 2 would be offered the HRA.

(viii) Example 8: New full-time employee class subdivided based on state–(A) Facts. The facts are the same as in paragraph (f)(2)(vii) of this section (Example 7), except that for the 2025 plan year, Plan Sponsor F intends to subdivide the new hire, full-time class so that those in State 1 will be offered the traditional group health plan and those in State 2 will each be offered an HRA on the same terms.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(2)(viii) (Example 8) because even though the new hire subclass has been subdivided, it has been subdivided in a manner that is not subject to the minimum class size requirement as the subdivision is based on the entire state.

(ix) Example 9: New full-time employees and part-time employees offered HRA–(A) Facts. In 2021, Plan Sponsor G offers its full-time employees a traditional group health plan and does not offer coverage to its part-time employees. For the 2022 plan year, Plan Sponsor G offers its full-time employees hired on or after January 1, 2022, and all of its part-time employees, including those hired before January 1, 2022, and those hired on and after January 1, 2022, an HRA on the same terms, and it continues to offer its full-time employees hired before January 1, 2022, a traditional group health plan.

(B) Conclusion. The minimum class size requirement applies to the part-time employees offered the HRA in 2022 because the class is being offered an HRA; the special rule for new hires does not apply (because this class was not previously offered a traditional group health plan) and so it is not a new hire subclass exempt from the minimum class size requirement; another class of employees (that is, full-time hired before January 1, 2022) are being offered a traditional group health plan; and the part-time employee class is generally an applicable classes that is subject to the minimum class size requirement. However, because the full-time, new hire subclass is based on the special rule for new hires, the minimum class size requirement does not apply to full-time new hires offered an HRA in 2022.

Appendix C

(f) Examples--(1) Examples regarding classes and the minimum class size requirement. The following examples illustrate the provisions of paragraph (c)(3) of this section, taking into account the provisions of paragraphs (d)(1) through (4) and (d)(6) of this section. In each example, the HRA is an individual coverage HRA that may reimburse any medical care expenses, including premiums for individual health insurance coverage and it is assumed that no participants or dependents are Medicare beneficiaries.

(i) Example 1: Collectively bargained employees offered traditional group health plan; non-collectively bargained employees offered HRA–(A) Facts. For 2020, Plan Sponsor A offers its employees covered by a collective bargaining agreement a traditional group health plan (as required by the collective bargaining agreement) and all other employees (non-collectively bargained employees) each an HRA on the same terms.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(1)(i) (Example 1) because collectively bargained and non-collectively bargained employees may be treated as different classes of employees, one of which may be offered a traditional group health plan and the other of which may be offered an individual coverage HRA, and Plan Sponsor A offers the HRA on the same terms to all participants who are non-collectively bargained employees. The minimum class size requirement does not apply to this paragraph (f)(1)(i) (Example 1) even though Plan Sponsor A offers one class a traditional group health plan and one class the HRA because collectively bargained and non-collectively bargained employees are not applicable classes that are subject to the minimum class size requirement.

(ii) Example 2: Collectively bargained employees in one unit offered traditional group health plan and in another unit offered HRA–(A) Facts. For 2020, Plan Sponsor B offers its employees covered by a collective bargaining agreement with Local 100 a traditional group health plan (as required by the collective bargaining agreement), and its employees covered by a collective bargaining agreement with Local 200 each an HRA on the same terms (as required by the collective bargaining agreement).

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(1)(ii) (Example 2) because the employees covered by the collective bargaining agreements with the two separate bargaining units (Local 100 and Local 200) may be treated as two different classes of employees and Plan Sponsor B offers an HRA on the same terms to the participants covered by the agreement with Local 200. The minimum class size requirement does not apply to this paragraph (f)(1)(ii) (Example 2) even though Plan Sponsor B offers the Local 100 employees a traditional group health plan and the Local 200 employees an HRA because collectively bargained employees are not applicable classes that are subject to the minimum class size requirement.

(iii) Example 3: Employees in a waiting period offered no coverage; other employees offered an HRA–(A) Facts. For 2020, Plan Sponsor C offers its employees who have completed a waiting period that complies with the requirements for waiting periods in § 54.9815-2708 of this chapter each an HRA on the same terms and does not offer coverage to its employees who have not completed the waiting period.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(1)(iii) (Example 3) because employees who have completed a waiting period and employees who have not completed a waiting period may be treated as different classes and Plan Sponsor C offers the HRA on the same terms to all participants who have completed the waiting period. The minimum class size requirement does not apply to this paragraph (f)(1)(iii) (Example 3) because Plan Sponsor C does not offer

at least one class of employees a traditional group health plan and because the class of employees who have not completed a waiting period and the class of employees who have completed a waiting period are not applicable classes that are subject to the minimum class size requirement.

(iv) Example 4: Employees in a waiting period offered an HRA; other employees offered a traditional group health plan–(A) Facts. For 2020, Plan Sponsor D offers its employees who have completed a waiting period that complies with the requirements for waiting periods in § 54.9815-2708 of this chapter a traditional group health plan and offers its employees who have not completed the waiting period each an HRA on the same terms.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(1)(iv) (Example 4) because employees who have completed a waiting period and employees who have not completed a waiting period may be treated as different classes and Plan Sponsor D offers an HRA on the same terms to all participants who have not completed the waiting period. The minimum class size requirement does not apply to this paragraph (f)(1)(iv) (Example 4) even though Plan Sponsor D offers employees who have completed a waiting period a traditional group health plan and employees who have not completed a waiting period an HRA because the class of employees who have not completed a waiting period is not an applicable class that is subject to the minimum class size requirement (nor is the class made up of employees who have completed the waiting period).

(v) Example 5: Staffing firm employees temporarily placed with customers offered an HRA; other employees offered a traditional group health plan–(A) Facts. Plan Sponsor E is a staffing firm that places certain of its employees on temporary assignments with customers that are not the common law employers of Plan Sponsor E's employees or treated as a single employer with Plan Sponsor E under section 414(b), (c), (m), or (o) (unrelated entities); other employees work in Plan Sponsor E's office managing the staffing business (non-temporary employees). For 2020, Plan Sponsor E offers its employees who are on temporary assignments with customers each an HRA on the same terms. All other employees are offered a traditional group health plan.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(1)(v) (Example 5) because the employees who are hired for temporary placement at an unrelated entity and non-temporary employees of Plan Sponsor E may be treated as different classes of employees and Plan Sponsor E offers an HRA on the same terms to all participants temporarily placed with customers. The minimum class size requirement does not apply to this paragraph (f)(1)(v) (Example 5) even though Plan Sponsor E offers one class a traditional group health plan and one class the HRA because the class of employees hired for temporary placement is not an applicable class that is subject to the minimum class size requirement (nor is the class made up of non-temporary employees).

(vi) Example 6: Staffing firm employees temporarily placed with customers in rating area 1 offered an HRA; other employees offered a traditional group health plan–(A) Facts. The facts are the same as in paragraph (f)(1)(v) of this section (Example 5), except that Plan Sponsor E has work sites in rating area 1 and rating area 2, and it offers its 10 employees on temporary assignments with a work site in rating area 1 an HRA on the same terms. Plan Sponsor E has 200 other employees in rating areas 1 and 2, including its non-temporary employees in rating areas 1 and 2 and its employees on temporary assignments with a work site in rating area 2, all of whom are offered a traditional group health plan.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is not satisfied in this paragraph (f)(1)(vi) (Example 6) because, even though the employees who are temporarily placed with customers generally may be treated as employees of a different class, because Plan Sponsor E is also

using a rating area to identify the class offered the HRA (which is an applicable class for the minimum class size requirement) and is offering one class the HRA and another class the traditional group health plan, the minimum class size requirement applies to the class offered the HRA, and the class offered the HRA fails to satisfy the minimum class size requirement. Because Plan Sponsor E employs 210 employees, the applicable class size minimum is 20, and the HRA is offered to only 10 employees.

(vii) Example 7: Employees in State 1 offered traditional group health plan; employees in State 2 offered HRA–(A) Facts. Plan Sponsor F employs 45 employees whose work site is in State 1 and 7 employees whose primary site of employment is in State 2. For 2020, Plan Sponsor F offers its 45 employees in State 1 a traditional group health plan, and each of its 7 employees in State 2 an HRA on the same terms.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(1)(vii) (Example 7) because Plan Sponsor F offers the HRA on the same terms to all employees with a work site in State 2 and that class is a permissible class under paragraph (d) of this section. This is because employees whose work sites are in different rating areas may be considered different classes and a plan sponsor may create a class of employees by combining classes of employees, including by combining employees whose work site is in one rating area with employees whose work site is in a different rating area, or by combining all employees whose work site is in a state. The minimum class size requirement does not apply to this paragraph (f)(1)(vii) (Example 7) because the minimum class size requirement does not apply if the geographic area defining a class of employees is a state or a combination of two or more entire states.

(viii) Example 8: Full-time seasonal employees offered HRA; all other full-time employees offered traditional group health plan; part-time employees offered no coverage–(A) Facts. Plan Sponsor G employs 6 full-time seasonal employees, 75 full-time employees who are not seasonal employees, and 5 part-time employees. For 2020, Plan Sponsor G offers each of its 6 full-time seasonal employees an HRA on the same terms, its 75 full-time employees who are not seasonal employees a traditional group health plan, and offers no coverage to its 5 part-time employees.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(1)(viii) (Example 8) because full-time seasonal employees and full- time employees who are not seasonal employees may be considered different classes and Plan Sponsor G offers the HRA on the same terms to all full-time seasonal employees. The minimum class size requirement does not apply to the class offered the HRA in this paragraph (f)(1)(viii) (Example 8) because part-time employees are not offered coverage and full-time employees are not an applicable class subject to the minimum class size requirement if part-time employees are not offered coverage.

(ix) Example 9: Full-time employees in rating area 1 offered traditional group health plan; full-time employees in rating area 2 offered HRA; part-time employees offered no coverage–(A) Facts. Plan Sponsor H employs 17 full-time employees and 10 part-time employees whose work site is in rating area 1 and 552 full-time employees whose work site is in rating area 2. For 2020, Plan Sponsor H offers its 17 full-time employees in rating area 1 a traditional group health plan and each of its 552 full-time employees in rating area 2 an HRA on the same terms. Plan Sponsor H offers no coverage to its 10 part-time employees in rating area 1. Plan Sponsor H reasonably expects to employ 569 employees on the first day of the HRA plan year.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(1)(ix) (Example 9) because employees whose work sites are in different rating areas may be considered different classes and Plan Sponsor H offers the HRA on the same terms to all full-time

employees in rating area 2. The minimum class size requirement applies to the class offered the HRA in this paragraph (f)(1)(ix) (Example 9) because the minimum class size requirement applies to a class based on a geographic area unless the geographic area is a state or a combination of two or more entire states. However, the minimum class size requirement applies only to the class offered the HRA, and Plan Sponsor H offers the HRA to the 552 full-time employees in rating area 2 on the first day of the plan year, satisfying the minimum class size requirement (because the applicable class size minimum for Plan Sponsor H is 20).

(x) Example 10: Employees in rating area 1 offered HRA; employees in rating area 2 offered traditional group health plan–(A) Facts. The facts are the same as in paragraph (f)(1)(ix) of this section (Example 9) except that Plan Sponsor H offers its 17 full-time employees in rating area 1 the HRA and offers its 552 full-time employees in rating area 2 the traditional group health plan.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is not satisfied in this paragraph (f)(1)(x) (Example 10) because, even though employees whose work sites are in different rating areas generally may be considered different classes and Plan Sponsor H offers the HRA on the same terms to all participants in rating area 1, the HRA fails to satisfy the minimum class size requirement. Specifically, the minimum class size requirement applies to this paragraph (f)(1)(x) (Example 10) because the minimum class size requirement applies to a class based on a geographic area unless the geographic area is a state or a combination of two or more entire states. Further, the applicable class size minimum for Plan Sponsor H is 20 employees, and the HRA is only offered to the 17 full-time employees in rating area 1 on the first day of the HRA plan year.

(xi) Example 11: Employees in State 1 and rating area 1 of State 2 offered HRA; employees in all other rating areas of State 2 offered traditional group health plan–(A) Facts. For 2020, Plan Sponsor I offers an HRA on the same terms to a total of 200 employees it employs with work sites in State 1 and in rating area 1 of State 2. Plan Sponsor I offers a traditional group health plan to its 150 employees with work sites in other rating areas in State 2. Plan Sponsor I reasonably expects to employ 350 employees on the first day of the HRA plan year.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(1)(xi) (Example 11). Plan Sponsor I may treat all of the employees with a work site in State 1 and rating area 1 of State 2 as a class of employees because employees whose work sites are in different rating areas may be considered different classes and a plan sponsor may create a class of employees by combining classes of employees, including by combining employees whose work site is in one rating area with a class of employees whose work site is in a different rating area. The minimum class size requirement applies to the class of employees offered the HRA (made up of employees in State 1 and in rating area 1 of State 2) because the minimum class size requirement applies to a class based on a geographic area unless the geographic area is a state or a combination of two or more entire states. In this case, the class is made up of a state plus a rating area which is not the entire state. However, this class satisfies the minimum class size requirement because the applicable class size minimum for Plan Sponsor I is 20, and Plan Sponsor I offered the HRA to 200 employees on the first day of the plan year.

(xii) Example 12: Salaried employees offered a traditional group health plan; hourly employees offered an HRA–(A) Facts. Plan Sponsor J has 163 salaried employees and 14 hourly employees. For 2020, Plan Sponsor J offers its 163 salaried employees a traditional group health plan and each of its 14 hourly employees an HRA on the same terms. Plan Sponsor J reasonably expects to employ 177 employees on the first day of the HRA plan year.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is not satisfied in this paragraph (f)(1)(xii) (Example 12) because, even though salaried and hourly employees generally may be considered different classes and Plan Sponsor J offers the HRA on the same terms to all hourly employees, the HRA fails to satisfy the minimum class size requirement. Specifically, the minimum class size requirement applies in this paragraph (f)(1)(xii) (Example 12) because employees who are paid on a salaried basis and employees who are not paid on a salaried basis are applicable classes subject to the minimum class size requirement. Because Plan Sponsor J reasonably expects to employ between 100 and 200 employees on the first day of the plan year, the applicable class size minimum is 10 percent, rounded down to a whole number. Ten percent of 177 total employees, rounded down to a whole number is 17, and the HRA is offered to only 14 hourly employees.

(xiii) Example 13: Part-time employees and full-time employees offered different HRAs; no traditional group health plan offered–(A) Facts. Plan Sponsor K has 50 full-time employees and 7 part-time employees. For 2020, Plan Sponsor K offers its 50 full-time employees $2,000 each in an HRA otherwise provided on the same terms and each of its 7 part-time employees $500 in an HRA otherwise provided on the same terms. Plan Sponsor K reasonably expects to employ 57 employees on the first day of the HRA plan year.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(1)(xiii) (Example 13) because full-time employees and part-time employees may be treated as different classes and Plan Sponsor K offers an HRA on the same terms to all the participants in each class. The minimum class size requirement does not apply to either the full-time class or the part-time class because (although in certain circumstances the minimum class size requirement applies to a class of full-time employees and a class of part-time employees) Plan Sponsor K does not offer any class of employees a traditional group health plan, and the minimum class size requirement applies only when, among other things, at least one class of employees is offered a traditional group health plan while another class is offered an HRA.

(xiv) Example 14: No employees offered an HRA–(A) Facts. The facts are the same facts as in paragraph (f)(1)(xiii) of this section (Example 13), except that Plan Sponsor K offers its full-time employees a traditional group health plan and does not offer any group health plan (either a traditional group health plan or an HRA) to its part-time employees.

(B) Conclusion. The regulations set forth under this section do not apply to Plan Sponsor K because Plan Sponsor K does not offer an individual coverage HRA to any employee.

(xv) Example 15: Full-time employees offered traditional group health plan; part-time employees offered HRA–(A) Facts. The facts are the same as in paragraph (f)(1)(xiii) of this section (Example 13), except that Plan Sponsor K offers its full-time employees a traditional group health plan and offers each of its part-time employees $500 in an HRA and otherwise on the same terms.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is not satisfied in this paragraph (f)(1)(xv) (Example 15) because, even though the full-time employees and the part-time employees generally may be treated as different classes, in this paragraph (f)(1)(xv) (Example 15), the minimum class size requirement applies to the part-time employees, and it is not satisfied. Specifically, the minimum class size requirement applies to the part-time employees because that requirement applies to an applicable class offered an HRA when one class is offered a traditional group health plan while another class is offered an HRA, and to the part-time and full-time employee classes when one of those classes is offered a traditional group health plan while the other is offered an HRA. Because Plan

Sponsor K reasonably expects to employ fewer than 100 employees on the first day of the HRA plan year, the applicable class size minimum for Plan Sponsor K is 10 employees, but Plan Sponsor K offered the HRA only to its 7 part-time employees.

(xvi) Example 16: Satisfying minimum class size requirement based on employees offered HRA–(A) Facts. Plan Sponsor L employs 78 full-time employees and 12 part-time employees. For 2020, Plan Sponsor L offers its 78 full-time employees a traditional group health plan and each of its 12 part-times employees an HRA on the same terms. Only 6 part-time employees enroll in the HRA. Plan Sponsor L reasonably expects to employ fewer than 100 employees on the first day of the HRA plan year.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(1)(xvi) (Example 16) because full-time employees and part-time employees may be treated as different classes, Plan Sponsor L offers an HRA on the same terms to all the participants in the part-time class, and the minimum class size requirement is satisfied. Specifically, whether a class of employees satisfies the applicable class size minimum is determined as of the first day of the plan year based on the number of employees in a class that is offered an HRA, not on the number of employees who enroll in the HRA. The applicable class size minimum for Plan Sponsor L is 10 employees, and Plan Sponsor L offered the HRA to its 12 part-time employees.

(xvii) Example 17: Student employees offered student premium reduction arrangements and same terms requirement–(A) Facts. Plan Sponsor M is an institution of higher education that offers each of its part-time employees an HRA on the same terms, except that it offers its part- time employees who are student employees a student premium reduction arrangement, and the student premium reduction arrangement provides different amounts to different part-time student employees.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is satisfied in this paragraph (f)(1)(xvii) (Example 17) because Plan Sponsor M offers the HRA on the same terms to its part-time employees who are not students and because the part-time student employees offered a student premium reduction arrangement (and their varying HRAs) are not taken into account as part-time employees for purposes of determining whether a class of employees is offered an HRA on the same terms.

(xiii) Example 18: Student employees offered student premium reduction arrangements and minimum class size requirement–(A) Facts. Plan Sponsor N is an institution of higher education with 25 hourly employees. Plan Sponsor N offers 15 of its hourly employees, who are student employees, a student premium reduction arrangement and it wants to offer its other 10 hourly employees an HRA for 2022. Plan Sponsor N offers its salaried employees a traditional group health plan. Plan Sponsor N reasonably expects to have 250 employees on the first day of the 2022 HRA plan year, 15 of which will have offers of student premium reduction arrangements.

(B) Conclusion. The same terms requirement of paragraph (c)(3) of this section is not satisfied in this paragraph (f)(1)(xviii) (Example 18). The minimum class size requirement will apply to the class of hourly employees to which Plan Sponsor N wants to offer the HRA because Plan Sponsor N offers a class of employees a traditional group health plan and another class the HRA, and the minimum class size requirement generally applies to a class of hourly employees offered an HRA. Plan Sponsor N's applicable class size minimum is 20 because Plan Sponsor N reasonably expects to employ 235 employees on the first day of the plan year (250 employees minus 15 employees receiving a student premium reduction arrangement). Plan Sponsor N may not offer the HRA to its hourly employees because the 10 employees offered the HRA as of the first day of the plan year does not satisfy the applicable class size minimum.

Appendix D

(ix) Examples. The following examples illustrate the provisions of this paragraph (c)(5). The required contribution percentage is defined in paragraph (c)(3)(v)(C) of this section and is updated annually. Because the required contribution percentage for 2020 has not yet been determined, the examples assume a required contribution percentage for 2020 of 9.78 percent.

(A) Example 1: Determination of affordability–(1) Facts. In 2020 Taxpayer A is single, has no dependents, and has household income of $28,000. A is an employee of Employer X for all of 2020. X offers its employees an HRA described in paragraph (c)(3)(i)(B) of this section that reimburses $2,400 of medical care expenses for single employees with no children (the self- only HRA amount) and $4,000 for employees with a spouse or children for the medical expenses of the employees and their family members. A enrolls in a qualified health plan through the Exchange in the rating area in which A resides and remains enrolled for all of 2020. The monthly premium for the lowest cost silver plan for self-only coverage of A that is offered in the Exchange for the rating area in which A resides is $500.

(2) Conclusion. A's required HRA contribution, as defined in paragraph (c)(5)(ii) of this section, is $300, the excess of $500 (the monthly premium for the lowest cost silver plan for self- only coverage of A) over $200 (1/12 of the self-only HRA amount provided by Employer X to its employees). In addition, 1/12 of the product of 9.78 percent and A's household income is $228 ($28,000 x .0978 = $2,738; $2,738/12 = $228). Because A's required HRA contribution of $300 exceeds $228 (1/12 of the product of 9.78 percent and A's household income), the HRA is unaffordable for A for each month of 2020 under paragraph (c)(5) of this section. If A opts out of and waives future reimbursements from the HRA, A is not eligible for minimum essential coverage under the HRA for each month of 2020 under paragraph (c)(3)(i)(B) of this section.

(B) Example 2: Determination of affordability for a related HRA individual–(1) Facts. In 2020 Taxpayer B is married and has one child who is a dependent of B for 2020. B has household income of $28,000. B is an employee of Employer X for all of 2020. X offers its employees an HRA described in paragraph (c)(3)(i)(B) of this section that reimburses $3,600 of medical care expenses for single employees with no children (the self-only HRA amount) and $5,000 for employees with a spouse or children for the medical expenses of the employees and their family members. B, B's spouse, and B's child enroll in a qualified health plan through the Exchange in the rating area in which B resides and they remain enrolled for all of 2020. No advance credit payments are made for their coverage. The monthly premium for the lowest cost silver plan for self-only coverage of B that is offered in the Exchange for the rating area in which B resides is $500.

(2) Conclusion. B's required HRA contribution, as defined in paragraph (c)(5)(ii) of this section, is $200, the excess of $500 (the monthly premium for the lowest cost silver plan for self-only coverage for B) over $300 (1/12 of the self-only HRA amount provided by Employer X to its employees). In addition, 1/12 of the product of 9.78 percent and B's household income for 2020 is $228 ($28,000 x .0978 = $2,738; $2,738/12 = $228). Because B's required HRA contribution of $200 does not exceed $228 (1/12 of the product of 9.78 percent and B's household income for 2020), the HRA is affordable for B under paragraph (c)(5) of this section, and B is eligible for minimum essential coverage under an eligible employer-sponsored plan for each month of 2020 under paragraph (c)(3)(i)(B) of this section. In addition, B's spouse and child are also eligible for minimum essential coverage under an eligible employer-sponsored plan for each month of 2020 under paragraph (c)(3)(i)(B) of this section.

(C) Example 3: Exchange determines that HRA is unaffordable–(1) Facts. The facts are the same as in paragraph (c)(5)(ix)(B) of this section (Example 2), except that B, when enrolling in Exchange coverage for B's family, received a determination by the Exchange that the HRA was unaffordable, because B believed B's household income would be lower than it turned out to be. Consequently, advance credit payments were made for their 2020 coverage.

(2) Conclusion. Under paragraph (c)(5)(iv) of this section, the HRA is considered unaffordable for B, B's spouse, and B's child for each month of 2020 provided that B did not, with intentional or reckless disregard for the facts, provide incorrect information to the Exchange concerning the HRA.

(D) Example 4: Affordability determined for part of a taxable year (part-year period)–(1) Facts. Taxpayer C is an employee of Employer X. C's household income for 2020 is $28,000. X offers its employees an HRA described in paragraph (c)(3)(i)(B) of this section that reimburses medical care expenses of $3,600 for single employees without children (the self-only HRA amount) and $5,000 to employees with a spouse or children for the medical expenses of the employees and their family members. X's HRA plan year is September 1 to August 31 and C is first eligible to participate in the HRA for the period beginning September 1, 2020. C enrolls in a qualified health plan through the Exchange in the rating area in which C resides for all of 2020. The monthly premium for the lowest cost silver plan for self-only coverage of C that is offered in the Exchange for the rating area in which C resides for 2020 is $500.

(2) Conclusion. Under paragraph (c)(3)(vi) of this section, the affordability of the HRA is determined separately for the period September 1 through December 31, 2020, and for the period January 1 through August 31, 2021. C's required HRA contribution, as defined in paragraph (c)(5)(ii) of this section, for the period September 1 through December 31, 2020, is $200, the excess of $500 (the monthly premium for the lowest cost silver plan for self-only coverage for C) over $300 (1/12 of the self-only HRA amount provided by X to its employees). In addition, 1/12 of the product of 9.78 percent and C's household income is $228 ($28,000 x .0978 = $2,738; $2,738/12 = $228). Because C's required HRA contribution of $200 does not exceed $228, the HRA is affordable for C for each month in the period September 1 through December 31, 2020, under paragraph (c)(5) of this section. Affordability for the period January 1 through August 31, 2021, is determined using C's 2021 household income and required HRA contribution.

(E) Example 5: Carryover amounts ignored in determining affordability–(1) Facts. Taxpayer D is an employee of Employer X for all of 2020 and 2021. D is single. For each of 2020 and 2021, X offers its employees an HRA described in paragraph (c)(3)(i)(B) of this section that provides reimbursement for medical care expenses of $2,400 to single employees with no children (the self-only HRA amount) and $4,000 to employees with a spouse or children for the medical expenses of the employees and their family members. Under the terms of the HRA, amounts that an employee does not use in a calendar year may be carried over and used in the next calendar year. In 2020, D used only $1,500 of her $2,400 maximum reimbursement and the unused $900 is carried over and may be used by D in 2021.

(2) Conclusion. Under paragraph (c)(5)(v) of this section, only the $2,400 self-only HRA amount offered to D for 2021 is considered in determining whether D's HRA is affordable for D. The $900 carryover amount is not considered in determining the affordability of the HRA.

Appendix E

From the IRS' proposed rule, below are examples of how applicable large employers would apply the location safe harbor and look-back month safe harbor when offering an individual coverage HRA to at least some of their full-time employees.

(i) *Example 1 (Location safe harbor and look-back month safe harbor applied to calendar-year individual coverage HRA)—*

(A) *Facts.* For 2020, Employer Y offers all full- time employees and their dependents an individual coverage HRA with a calendar- year plan year and makes $6,000 available in the HRA for the 2020 calendar-year plan year to each full-time employee without regard to family size, which means the monthly HRA amount for each full-time employee is $500. All of Employer Y's employees have a primary site of employment in City A. Employer Y chooses to use the location safe harbor and the look-back month safe harbor. Employer Y also chooses to use the rate of pay safe harbor for its full-time employees. Employee M is 40 years old on January 1, 2020, the first day of the plan year. The monthly premium for the applicable lowest cost silver plan for a 40 year old offered through the Exchange in City A for January 2019 is $600. Employee M's required HRA contribution for each month of 2020 is $100 (cost of the applicable lowest cost silver plan determined under the location safe harbor and the look-back month safe harbor ($600) minus the monthly HRA amount ($500)). The monthly amount determined under the rate of pay safe harbor for Employee M is $2,000 for each month in 2020.

(B) *Conclusion.* Employer Y has made an offer of affordable, minimum value coverage to Employee M for purposes of section 4980H(b) for each month of 2020 because Employee M's required HRA contribution ($100) is less than the amount equal to the required contribution percentage for 2020 multiplied by the monthly amount determined under the rate of pay safe harbor for Employee M (9.78 percent of $2,000 = $196). Employer Y will not be liable for an assessable payment under section 4980H(b) with respect to Employee M for any calendar month in 2020. (Also, Employer Y will not be liable for an assessable payment under section 4980H(a) for any calendar month in 2020 because it offered an individual coverage HRA, an eligible employer- sponsored plan that is minimum essential coverage, to all full-time employees and their dependents for each calendar month in 2020.)

(ii) *Example 2 (Location safe harbor and look-back month safe harbor applied to non-calendar year individual coverage HRA)—*

(A) *Facts.* Employer Z offers all full-time employees and their dependents an individual coverage HRA with a non- calendar year plan year of July 1, 2020 through June 30, 2021, and makes $6,000 available in the HRA for the plan year to each full-time employee without regard to family size, which means the monthly HRA amount for each full-time employee is $500. All of Employer Z's employees have a primary site of employment in City B. Employer Z chooses to use the location safe harbor and the look-back month safe harbor. Employer Z also chooses to use the rate of pay safe harbor for its full-time employees. Employee N is 40 years old on July 1, 2020, the first day of the plan year. The monthly premium for the applicable lowest cost silver plan for a 40 year old offered through the Exchange in City B for January 2020 is $600. Employee N's required HRA contribution for each month of the plan year beginning July 1, 2020, is $100 (cost of the applicable lowest cost silver plan determined under the location safe harbor and the look-back month safe harbor ($600) minus the monthly HRA amount ($500)). The monthly amount determined under the rate of pay safe harbor for Employee N is $2,000 for each month of the plan year beginning July 1, 2020.

(B) *Conclusion.* Employer Z has made an offer of affordable, minimum value coverage to Employee N for purposes of section 4980H(b) for each month of the plan year beginning July 1, 2020, because Employee N's required HRA contribution ($100) is less than the amount equal to the required contribution percentage for plan years beginning in 2020 multiplied by the monthly amount determined under the rate of pay safe harbor for Employee N (9.78 percent of $2,000 = $196). Employer Z will not be liable for an assessable payment under section 4980H(b) with respect to Employee N for any calendar month in the plan year beginning July 1, 2020. (Also, Employer Z will not be liable for an assessable payment under section 4980H(a) for any calendar month in the plan year beginning July 1, 2020, because it offered an individual coverage HRA, an eligible employer-sponsored plan that is minimum essential coverage, to all full-time employees and their dependents for each calendar month in that plan year.)