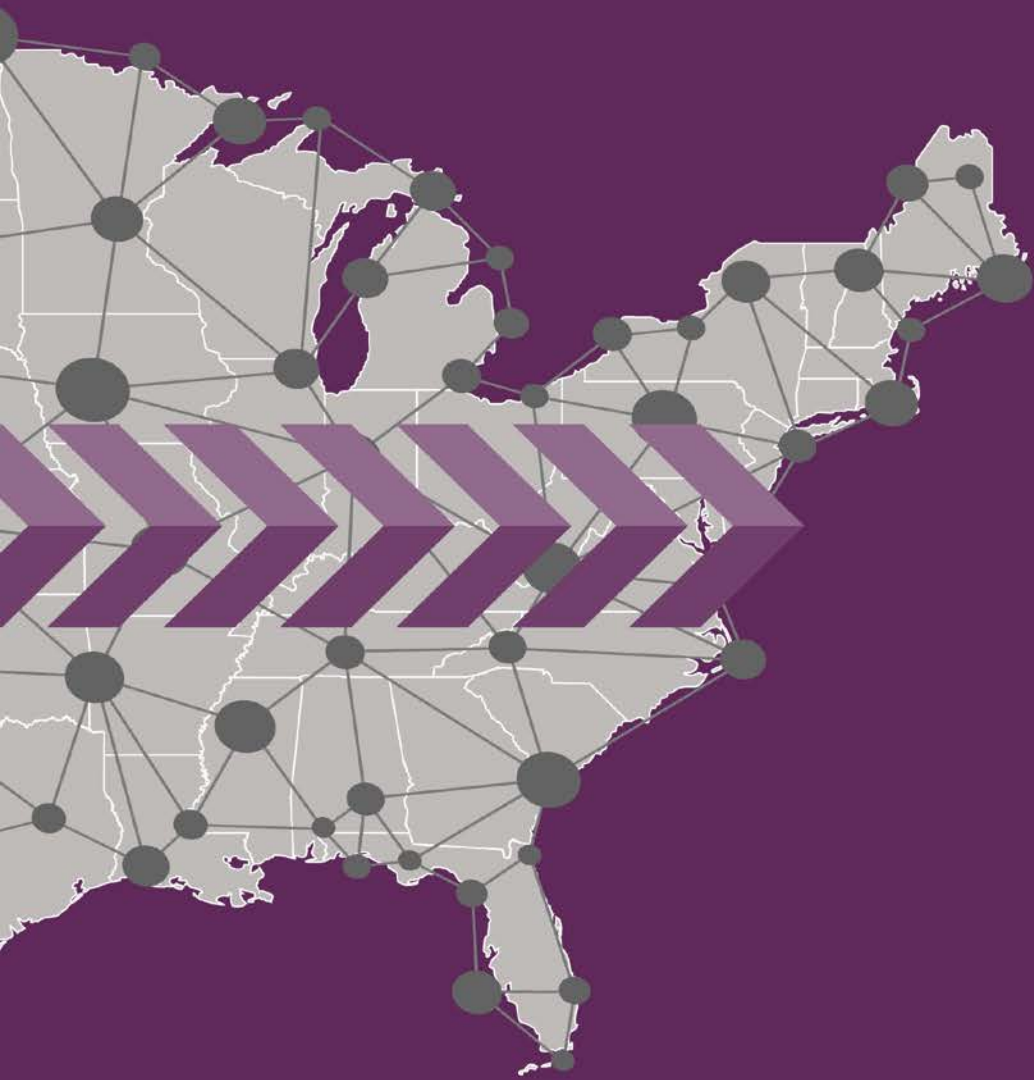

HRA Proposed Regulations: State Implications and Responses

Jason Levitis

JoAnn Volk

Joel Ario

November 28, 2018

STATE Health & Value STRATEGIES

Driving Innovation Across States

A grantee of the Robert Wood Johnson Foundation

About State Health Value Strategies

State Health and Value Strategies (SHVS) assists states in their efforts to transform health and health care by providing targeted technical assistance to state officials and agencies. The program is a grantee of the Robert Wood Johnson Foundation, led by staff at Princeton University's Woodrow Wilson School of Public and International Affairs. The program connects states with experts and peers to undertake health care transformation initiatives. By engaging state officials, the program provides lessons learned, highlights successful strategies, and brings together states with experts in the field. Learn more at www.shvs.org.

Questions? Email Heather Howard at heatherh@Princeton.edu.

About Jason Levitis

Jason Levitis is principal at Levitis Strategies LLC, a healthcare consultancy focusing on the Affordable Care Act's tax provisions and state innovation waivers. He provides technical assistance to states in partnership with State Health and Value Strategies. He is also a nonresident fellow at the Brookings Institution and a senior fellow at Yale Law School's Solomon Center for Health Law and Policy. Until January 2017, he led ACA implementation at the U.S. Treasury Department.

About Georgetown's Center on Health Insurance Reforms (CHIR)

- A team of experts on private health insurance and health reform
- Conduct research and policy analysis, provide technical assistance to federal and state policymakers, regulators, and consumer advocates
- Based at Georgetown University's McCourt School of Public Policy
- Learn more at https://chir.georgetown.edu/

About Manatt Health

Manatt Health integrates legal and consulting expertise to better serve the complex needs of clients across the healthcare system. Combining legal excellence, first-hand experience in shaping public policy, sophisticated strategy insight, and deep analytic capabilities, we provide uniquely valuable professional services to the full range of health industry players. Our diverse team of more than 160 attorneys and consultants from Manatt, Phelps & Phillips, LLP and its consulting subsidiary, Manatt Health Strategies, LLC, is passionate about helping our clients advance their business interests, fulfill their missions, and lead healthcare into the future. For more information, visit https://www.manatt.com/Health.

Objectives

- ✓ Explain rule changes in notice of proposed rulemaking (NPRM)
- ✓ Discuss implications for state insurance markets, consumers, and marketplaces
- ✓ Consider potential state responses

Key Points

- NPRM eases rules for HRAs and similar arrangements, allowing them to pay for individual market premiums
  - Firms can adopt this approach at the firm level or, subject to limitations, at the sub-firm level
- Impact is uncertain, but may include:
  - Large employers could use HRAs to shift older and sicker workers to individual market, resulting in higher premiums, especially in healthier markets
  - Firms that switch to HRAs may shift costs from younger and higher-income workers to older and lower-income ones due to interactions with age rating and Marketplace subsidies
  - Consumer confusion, and operational costs for state-based Marketplaces
- States may not have good options to mitigate effects
- NPRM also creates a new option for an excepted-benefit HRA, though impact is likely to be smaller
- NPRM requests comments on additional changes that could intensify impact
- Comment deadline is December 28

Background

- Long-standing tax law excludes employer-provided health benefits from income
  - Applies to traditional group health plans and account-based benefits like HRAs, FSAs, and HSAs
- HRAs are similar to other account-based benefits but:
  - Must be funded entirely with employer contributions
  - Can be used to pay for a broader set of expenses, including insurance premiums
  - Can be carried over from year to year
  - Were created through administrative guidance
- HRAs are group health plans and thus are generally prohibited under Affordable Care Act (ACA) market rules on annual limits and preventive services
- Obama Administration issued guidance permitting HRAs that were "integrated" with – provided along with – a traditional group health plan
  - Integration with individual market coverage not permitted
- Result: Employers generally cannot provide health benefits by providing pre-tax dollars to help employees buy individual market coverage
- October 12, 2017 Executive Order called for easing these rules
- On October 29, 2018, Departments issued proposed regulations
- On November 19, Treasury released notice on interaction with other provisions

What’s in the NPRM

- Central provision: allows HRAs to be integrated with individual market coverage
  - Firms cannot offer both HRA and traditional coverage to any employee, nor to any two members of the same class of employees
  - Classes may be defined by any combination of several factors (location, age, collectively bargained status, etc.)
  - Employee must demonstrate purchase of individual market coverage
- Secondary provision: creates new excepted benefit HRA
  - Capped at $1,800
  - May be used to purchase short-term but not individual market coverage or group coverage other than COBRA
  - Must be offered together with traditional group health plan, but employee may decline traditional plan and receive only HRA
- Conforming changes, including rules regarding:
  - Interaction between HRAs and PTC, employer mandate, non-discrimination rules etc.
  - Special enrollment period (SEP) for new HRA recipients
- Effective January 1, 2020
- Requests comments on a wide range of issues
- Impact analysis predicts 1% premium increase, 800,000 more covered

Implications of Individual-Market Integration

Potential Challenges for Individual Markets

- The ACA divides the market for health coverage:
  - Individuals and small employers use community-rated markets, shielding them from the cost of sicker individuals
  - Large employers bear the cost of their own risk pool in large group market or by self-insuring
- The NPRM would allow large employers to choose:
  - Continue to bear the cost of their own pool
  - Use HRA to access community-rated individual market
- Which employers will be interested in shifting?
  - Those with a sicker workforce overall
  - Those who can find ways to shift sicker workers, despite safeguards
- Adverse selection spiral limited by PTC population, but could drive out healthier unsubsidized consumers

Which Individual Markets Are Most Likely to Be Impacted?

- **Less Likely:** Markets with poor risk pools, high premiums
  - Only firms with very bad risk pools will harm market
  - There are few very sick firms, so less potential for harm
- **More Likely:** Markets with better risk pools and premiums similar to group premiums
  - Broad range of sicker firms will find shifting attractive and have potential to harm market
  - There are many firms in this range, so greater potential for harm
- *In short, individual markets with healthier risk pools are more likely to be significantly impacted*
  - NPRM's economic impact analysis assumed single nationwide market and so likely missed this dynamic

Other Considerations for Individual Markets

- Market differences and “stickiness” may limit or delay impact
  - Employers and employees may be skeptical of individual market, which may have narrower networks and other differences
- Predictable HRA cost and greater plan choice in individual market may be attractive
  - This could bring in healthier risk at the margin
  - But appeal limited if premiums are, or grow, substantially higher than in the group market
- Could attract healthier workers at sicker firms
  - If sicker firms that don’t currently offer coverage start offering HRA, healthier workers may be drawn to enroll, whereas sicker workers may already be purchasing coverage
  - However, impact may be limited because this is a small group, and by PTC interaction
- Impact of employers’ administrative costs uncertain
  - Employer may prefer avoiding plan selection but find documentation requirement burdensome

Implications for Consumers

- Higher premiums due to shifting sicker workers into the individual market would mean larger costs for unsubsidized
- Firm-level shifting from traditional coverage to HRA is likely to benefit younger workers at the expense of older workers
  - Most traditional group health plans have same employee contribution regardless of age
  - By contrast, pre-ACA, HRA amounts were generally flat, leaving older workers paying more out of pocket
  - Keeping employee contributions equal while switching to HRA:
    - Would require giving much larger HRA contributions to older workers (> 3:1)
    - Would be administratively more challenging and may appear unfair
- Firm-level shifting from not offering coverage to HRA could make lower-income workers ineligible for premium tax credit, while providing substantial benefit of tax exclusion to higher-income workers

See also slide 16 re. potential for consumer confusion

Implications of Excepted Benefit HRA

- Impact on individual market is likely to be small, as primarily involves workers in traditional group health plan, in HRA-subsidized short-term coverage, or going uninsured with standalone HRA
- Could harm older and sicker workers if accompanied by shift to less generous group health plan, while benefiting healthier workers due to tax preference and access to short-term plans
  - Large employers could combine with “skinny” plan to encourage sicker workers to turn down employer coverage
  - Small employers with healthy workforce could use to avoid community rating – this could hurt small-group-market risk pool
- Legal questions about excepted-benefit status and about favoring short-term plans over individual market

Practical Implications of the NPRM Overall for Marketplaces and Consumers

- NPRM creates new rules for how new HRAs affect Marketplace subsidy eligibility
  - Different from rules for conventional coverage and other “HRAs”
- NPRM also creates new SEP for employees becoming HRA-eligible
- **Impact on State-Based Marketplaces**
  - Making subsidy and SEP eligibility determinations requires Marketplace eligibility software to ask detailed questions and to embed eligibility rules
  - Modifying software is expensive and time-consuming, and attempting to do so quickly introduces risk of error
  - Incorporating new HRAs in time for the open enrollment period beginning in the fall of 2019 may be infeasible for state-based Marketplaces
- **Impact on Employees**
  - Rule would mean there were four varieties of benefits referred to as “HRAs,” each with different implications for subsidy eligibility
  - Consumers may misunderstand which “HRA” they are offered and the implications of their options, leading them to miss out on subsidies or other tax benefits or to receive subsidies for which they are ineligible and must subsequently repay
  - Employees receiving the individual-market-integrated HRA will receive a notice under the proposal explaining the relevant rules, but those receiving other HRAs will not

Comments Requested on Additional Easing that Could Intensify Impact

- Shifting sicker workers within firms
  - NPRM allows sicker firms to use HRAs to shift workers to the individual market, but includes measures intended to prevent firms from shifting sicker workers alone
  - But it also requests comments on whether these protective measures are necessary
  - Removing them would magnify the rule's impact on individual markets
- Integration with short-term plans
  - NPRM prohibits integration with short-term plans and concedes that it "would not be sufficient to ensure that the combined benefit package satisfies" the market reforms
  - But comments are requested on whether to allow it
  - Doing so would provide a simpler path to providing coverage that disadvantages older and sicker workers (though questions remain about how many firms would find that attractive)

Potential State Responses

- Unlike short-term and AHP regulations, states do not have easy options to address HRA rule impact
- States could monitor and require reporting, but it will be complicated to sort out the impacts, and delayed impact may make it very difficult to undo any effects
- States may be able to limit HRAs with state tax codes, insurance regulation, individual mandates, or non-discrimination rules, but the details will be tricky, and such efforts may be subject to federal preemption challenges
- **Best immediate option for concerned states is to comment on the proposed rule by December 28**

Discussion

Thank You

Jason Levitis
jason.levitis@gmail.com
203-671-2609

JoAnn Volk
Joann.volk@georgetown.edu
202-687-3944

Joel Ario
jario@manatt.com
518-431-6719

Dan Meuse
dmeuse@Princeton.edu
609-258-7389
www.shvs.org