

Supporting Statement - Part A
Excepted Benefit Health Reimbursement Arrangements
(CMS-10727 /OMB control number: 0938-NEW)

A. Background

The Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (HHS) (collectively, the Departments) issued regulations on June 20, 2019, titled “Health Reimbursement Arrangements and Other Account-Based Group Health Plans” (the HRA rule) (84 FR 28888) under section 2711 of the Public Health Service Act (PHS Act) and the health nondiscrimination provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104-191 (HIPAA nondiscrimination provisions). In the HRA rule, the Departments authorized a new form of HRA (the individual coverage HRA), and recognized certain HRAs as limited excepted benefits (the excepted benefit HRA), for plan years beginning on or after January 1, 2020.

Under the HRA rule, benefits provided under an HRA or other account-based group health plan (other than a health flexible spending arrangement) will qualify as limited excepted benefits not subject to PHS Act title XXVII requirements if they: (1) are offered by a plan sponsor that also offers traditional group health plan coverage that is not limited to excepted benefits for the plan year to the participant; (2) are funded with amounts newly made available for each plan year that do not exceed \$1,800, adjusted annually in a manner set forth in the final rules; (3) do not reimburse premiums for individual health insurance coverage, group health plan coverage (other than COBRA continuation coverage or other continuation coverage), or Medicare, except for coverage that consists solely of excepted benefits; and (4) are made available under the same terms to all similarly situated individuals, regardless of any health factor.

In the preamble to the HRA rule, the Departments noted that long-standing notice requirements under Part 1 of ERISA already apply to private-sector, employment-based plans. The Departments explained that under those notice requirements, excepted benefit HRAs that are subject to ERISA generally should provide information on eligibility to receive benefits, annual or lifetime caps or other limits on benefits under the plan, and a description or summary of the benefits. Accordingly, the HRA rule included a cross-reference to existing ERISA notice provisions for excepted benefit HRAs that are subject to ERISA, to help ensure that sponsors of such excepted benefit HRAs are aware of their obligations under those provisions. The HRA rule, however, did not finalize any notice requirements in addition to those ERISA already imposes on ERISA-covered plans. It also did not subject plans that are not subject to ERISA, such as excepted benefit HRAs offered by non-federal governmental employers, to similar notice requirements.

HHS believes individuals offered excepted benefit HRAs by non-federal governmental plan sponsors should also have access to clear information about their excepted benefit HRA. Therefore, in the HRA rule, HHS announced its intent to propose notice requirements with respect to excepted benefit HRAs offered by non-federal governmental plan sponsors in

future notice and comment rulemaking. HHS indicated that it anticipated proposing that a non-federal governmental plan excepted benefit HRA would be required to provide a notice that describes conditions pertaining to eligibility to receive benefits, annual or lifetime caps or other limits on benefits under the plan, and a description or summary of the benefits consistent with the requirements of Department of Labor (DOL) summary plan description regulations at 29 CFR 2520.102-3(j)(2) and (3). Further, HHS indicated that, under its anticipated proposal, this notice would be required to be provided in a time and manner consistent with the requirements of DOL regulations at 29 CFR 2520.104b-2(a).¹

B. Justification

1. Need and Legal Basis

In the final rule “Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2021; Notice Requirement for Non-Federal Governmental Plans” (CMS-9916-F), we added a new paragraph (b)(3)(viii)(E) to 45 CFR 146.145 that require excepted benefit HRAs offered by non-federal governmental entities to provide notice consistent with the discussion in the preamble to the HRA rule.² Specifically, an excepted benefit HRA offered by a non-federal governmental plan sponsor will be required to provide a notice that describes conditions pertaining to eligibility to receive benefits, annual or lifetime caps or other limits on benefits under the excepted benefit HRA, and a description or summary of the benefits available under the excepted benefit HRA. This is generally consistent with the content requirements of DOL summary plan description regulations at 29 CFR 2520.102-3(j)(2) and (3), although the content of the excepted benefit HRA notice provided by a non-federal governmental plan sponsor will not have to include every data element specified in those DOL regulations. The notice must be provided in a manner reasonably calculated to ensure actual receipt by participants eligible for the excepted benefit HRA, such as by providing the notice in the same manner in which the plan sponsor provides other notices or plan documents to plan participants.

This notice must be provided no later than 90 days after the employee becomes a participant in the excepted benefit HRA and annually thereafter. Under applicable rules at 45 CFR 144.103, “participant” is defined as having the meaning given the term under section 3(7) of ERISA, which states, “any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.” Under existing DOL regulations at 29 CFR 2520.104b-2(a), ERISA-covered plans, including ERISA-covered excepted benefit HRAs, generally are required to furnish a copy of the notice to each participant no later than 90 days after the employee becomes a participant in the plan.

Therefore, the notice must be provided no later than 90 days after the first day of the excepted benefit HRA plan year, or in the case of an employee who becomes a participant

¹ 84 FR 28888 at 28941.

² Ibid.

after the start of the plan year, no later than 90 days after the employee becomes a participant in the excepted benefit HRA.

2. Information Users

The notice sent by the excepted benefit HRAs to eligible participants will provide employees with information regarding excepted benefit HRAs offered by their employers. The notice will describe conditions pertaining to eligibility to receive benefits, annual or lifetime caps or other limits on benefits under the excepted benefit HRA, and a description or summary of the benefits available under the excepted benefit HRA.

3. Use of Information Technology

The notice may be provided electronically to participants.

4. Duplication of Efforts

There is no duplication of efforts for these information collection requirements (ICRs).

5. Small Businesses

Small businesses are not significantly affected by this collection.

6. Less Frequent Collection

If this information collection is conducted less frequently, not all eligible individuals will have timely information regarding the excepted benefit HRAs being offered by their employers.

7. Special Circumstances

There are no special circumstances.

8. Federal Register/Outside Consultation

A Federal Register notice was published on February 6, 2020 (85 FR 7088), as part of a notice of proposed rulemaking (“Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2021; Notice Requirement for Non-Federal Governmental Plans” (CMS-9916-P)), providing the public with a 60-day period to submit written comments on these ICRs.

We also sought comment on whether sponsors of non-Federal governmental excepted benefit HRAs should be required to provide the notice annually after the initial notice; or whether, after providing the initial notice, they should only be required to provide the notice with respect to plan years for which the terms of the excepted benefit HRA change from the

previous plan year and if so, what type or magnitude of change should trigger such a subsequent notice.

A summary of comments and response is included in Appendix 1.

9. Payments/Gifts to Respondents

No payments or gifts are associated with these ICRs.

10. Confidentiality

Privacy of the information provided will be protected to the extent provided by law.

11. Sensitive Questions

These ICRs involve no sensitive questions.

12. Burden Estimates (Hours & Wages)

To derive wage estimates, we generally used data from the Bureau of Labor Statistics to derive average labor costs (including a 100 percent increase for fringe benefits and overhead) for estimating the burden associated with the ICRs.³ Table 1 below presents the mean hourly wage, the cost of fringe benefits and overhead, and the adjusted hourly wage. As indicated, employee hourly wage estimates have been adjusted by a factor of 100 percent.

TABLE 1: Adjusted Hourly Wages Used in Burden Estimates

Occupation Title	Occupational Code	Mean Hourly Wage (\$/hour)	Benefits and Fringe Overhead (\$/hour)	Adjusted Hourly Wage (\$/hour)
Compensation and Benefits Manager	11-3111	\$63.87	\$63.87	\$127.74
Lawyer	23-1011	\$69.34	\$69.34	\$138.68

ICRs Regarding Notice Requirement for Excepted Benefit HRAs

An excepted benefit HRA offered by a non-federal governmental plan sponsor must provide a notice that describes conditions pertaining to eligibility to receive benefits, annual or lifetime caps or other limits on benefits under the plan, and a description or summary of the benefits. This notice will be provided on an annual basis no later than 90 days after the first day of the excepted benefit HRA plan year (or, if a participant is not eligible to participate at

³ See May 2018 Bureau of Labor Statistics, Occupational Employment Statistics, National Occupational Employment and Wage Estimates at https://www.bls.gov/oes/current/oes_stru.htm.

the beginning of the plan year, no later than 90 days after the employee becomes a participant in the excepted benefit HRA).

We estimate that for each excepted benefit HRA offered by a non-federal governmental plan, a compensation and benefits manager will need 1 hour (at \$127.74 per hour) and a lawyer will need 0.5 hours (at \$138.68 per hour) to prepare the notice. The total burden for an HRA plan sponsor will be 1.5 hours with an equivalent cost of approximately \$197. This burden will be incurred the first time the non-federal governmental plan sponsor provides an excepted benefit HRA. In subsequent years, the burden to update the notice is expected to be minimal and therefore is not estimated.

We estimate that approximately 901 state and local government entities will offer excepted benefit HRAs each year.⁴ The total burden to prepare the notices in the first year will be approximately 1,352 hours with an equivalent cost of approximately \$177,569. In subsequent years, these employers will incur only printing and material costs.

TABLE 2. Annual Burden

Year	Estimated Number of Non-Federal Governmental Employers Offering HRAs	Estimated Number of Notices to all Eligible Participants	Total Annual Burden (hours)	Total Estimated Labor Cost
2020	901	193,715	1,352	\$177,569
2021	901	193,715	0	0
2022	901	193,715	0	0
3 year Average	901	193,715	451	\$59,190

13. Capital Costs

Excepted benefit HRAs offered by non-federal governmental plans will provide the notice to eligible participants every year. We estimate that plan sponsors will provide printed copies of these notices to approximately 193,715 eligible participants annually.⁵ We anticipate that the notices will be approximately 1 page long and the cost of materials and printing will be \$0.05 per notice. We assume that these notices will be provided along with other benefits information with no additional mailing cost. We assume that approximately 54 percent of notices will be provided electronically and approximately 46 percent will be provided in print along with other benefits information. Therefore, state and local government entities providing excepted benefit HRAs to their employees will print approximately 89,109 notices at a cost of approximately \$4,455 annually.

⁴ HHS assumes that only 1 percent of state and local government entities will offer excepted benefit HRAs.

⁵ HHS assumes that excepted benefit HRAs will be offered to all employees of state and local government entities that offer excepted benefit HRAs. This is an upper bound, and the actual number of eligible participants is likely to be lower if excepted benefit HRAs are offered to only some employee classes.

TABLE 3. Annual Burden and Costs

CFR Section	Year	Number of Respondents	Number of Responses	Burden per Response (hours)	Total Annual (Hours)	Labor Rate (\$/hour)	Cost Per Response	Total Cost	Response Type	Frequency
45 CFR 146.145(b)(3)(viii)(E)	2020	901	193,715	1.5	1,352	\$131.39	\$0.94	\$182,025	Third Party Disclosure	Annual
	2021	901	193,715	0	0	\$131.39	\$0.02	\$4,455		
	2022	901	193,715	0	0	\$131.39	\$0.02	\$4,455		
	3 year Average	901	193,715	--	451	--	--	\$63,645		

14. Cost to Federal Government

There is no cost to the federal government.

15. Changes to Burden

This is a new collection of information.

16. Publication/Tabulation Dates

There are no plans to publish the outcome of the information collection.

17. Expiration Date

There are no instruments associated with these ICRs.