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Room 5205

Internal Revenue Service

P.O. Box 7604

Ben Franklin Station

Washington, DC 20044

Ladies and Gentlemen,

The Ohio Public Employees Retirement System ("OPERS") appreciates the opportunity to provide comments to the Departments of Treasury, Labor, and Health and Human Services (the "Departments") on the proposed regulations regarding health reimbursement arrangements ("HRAs") and other account-based group health plans (the "Proposed Regulations") and to the Department of Treasury ("Treasury") and the Internal Revenue Service ("IRS") on Notice 2018-88 (the "Notice").

We support the Departments' efforts to facilitate access to HRAs and understand that certain distinctions are necessary to minimize the risk of market segmentation and to protect against health factor discrimination. However, we believe that portions of the Proposed Regulations and the Notice will make it difficult for employers and retirement systems to offer an HRA to certain classes of employees, particularly retirees. Without changes to the Proposed Regulations and the Notice, retirees, who are already an economically vulnerable class of Americans, will be denied HRA access and will continue to face increased financial burdens with respect to their healthcare costs.

To advance HRA access and minimize unnecessary costs for retirees, we recommend the following changes to the Proposed Regulations and the Notice:

1. The classes of employees for HRAs integrated with individual health insurance coverage should include a class for former employees that is not dependent on the individual's class prior to his or her separation from service.
2. Individual health insurance coverage should be defined to include Medicare.



3. With respect to retirees, the Medicare integration rule should be revised to remove the requirement that the employer offer the individuals another group health plan if they were not Medicare-eligible.
4. The final regulations should include relief for HRA plans with rehired retirees.
5. The rule in the Notice should be revised to permit an employer or retirement system to vary the amounts available in an HRA integrated with individual market coverage (referred to here as an “ICHRA”) offered to former employees by age at separation from service and years of service.

Below, we discuss our recommendations in more detail.

I. Background

OPERS is the 12th largest public pension fund in the United States, with a total net position of \$101.4 billion as of the end of 2017. OPERS has more than 1 million members, approximately 210,000 of whom are retirees. Beginning in late 2015, OPERS launched the largest retiree-only HRA plan in the United States for Medicare-eligible retirees and dependents who are enrolled in a Medicare plan through the OPERS Medicare Connector (the “Retiree HRA Plan”). The Retiree HRA Plan provides significant financial support to retirees and their dependents by reimbursing qualified medical expenses, including Medicare premiums. The Retiree HRA Plan now has approximately 143,000 participants.

To preserve the retiree-only status of the Retiree HRA Plan following the issuance of the HRA integration guidance in 2013, OPERS excludes retirees who become employed during retirement by any public employer that contributes to OPERS, even if that was not the employer for whom the individual worked pre-retirement. This exclusion negatively impacts thousands of Retiree HRA Plan participants each year. The financial impact on the retiree is significant, particularly if the re-employment does not satisfy health care needs by offering another plan to the individual. Excluding rehired retirees is also inconsistent with how OPERS treats these individuals for retirement plan purposes because for those purposes, the retiree continues to receive retirement plan benefits during the period of re-employment.

Rehired retirees offer substantial value for many hard-to-fill positions, such as custodians, poll workers, part-time law enforcement officers, and other variable and flexible hour positions. Until they are rehired, these same retirees often rely on the Retiree HRA Plan to fund their medical premiums in retirement.

OPERS cannot rely on the current (pre-Proposed Regulations) integration rules to provide an HRA to the rehired retirees because (1) the retirees are not enrolled in another group



health plan with which the HRA can be integrated and (2) in many cases, neither OPERS nor the employer offers a group health plan (other than the HRA) to the retiree, as required under the Medicare integration rule.

Although OPERS has robust tracking to determine when a Retiree HRA Plan participant is rehired, there is a risk that if OPERS inadvertently allows more than one rehired retiree to continue to participate in the Retiree HRA Plan, the plan will fail to be a retiree-only plan (*i.e.*, it would be considered to have two or more participants who are current employees). This could occur even if the individual works for an entity that was not the employer for whom he or she worked pre-retirement and even if the individual's work is limited in scope or in hours. Because these rehired retirees are not enrolled in another group health plan and/or are not offered another group health plan, any HRA offered to these individuals would fail to satisfy the Affordable Care Act's ("ACA's") annual dollar limit and preventive health services requirements. This, in turn, could subject OPERS or the contributing employers to penalties of up to \$100 per day per affected individual (\$36,500 per year, per participant).

The exclusion of rehired retirees from the Retiree HRA Plan also negatively impacts the retirees themselves. Currently, rehired retirees experience significant frustration and insecurity when they return to employment. The rehired retirees must decide whether to maintain coverage under their individual Medicare plan without the financial support of an HRA or find other coverage. New coverage may include underwriting and new deductibles and might also force individuals to find new doctors, thus interrupting their continuity of care. Seasonal and infrequent employment can cause a rehired retiree to cycle through health plans multiple times a year. Under any scenario, rehired retirees have fewer HRA allowances available to them as a result of their reemployment. This is a particularly unfortunate outcome for older Americans who are simply trying to work to meet their financial needs.

II. Comments on the Proposed Regulations

1. The classes of employees for HRAs integrated with individual health insurance coverage should include a class for former employees that is not dependent on the individual's class prior to his or her separation from service.

The proposed requirement that former employees be treated as belonging to the same class that they were in immediately before separation from service poses a unique problem for employers and retirement systems that want to offer non-retiree-only HRAs to former employees, including those who are rehired but are not eligible for the employer's coverage (*e.g.*, they are rehired on a part-time basis). Although the Proposed Regulations provide a potential pathway by permitting employers to offer HRAs integrated with individual health insurance coverage ("ICHRAs"), this solution will only benefit former employees to the extent an



employer/retirement system can identify the former employee's class prior to separation of service. It also requires that the employer offer an ICHRA to the active employees in that class, which the employer may not want to do for various reasons, including that it offers a comprehensive major medical plan to active employees. Thus, in most cases, retirees currently unable to access HRAs integrated with group coverage or Medicare will continue to be denied HRA access under the Proposed Regulations.

Creating a specified class of former employees that is not dependent on the former employee's class immediately preceding separation from service would remedy this dilemma and enable employers and retirement systems to offer HRAs to a much larger number of retirees, including rehired retirees, who would otherwise lose their retiree HRA access once rehired.

Adding a former employee class would also not implicate the Departments' concern that an employer might manipulate classes in order to transfer risks and costs to the individual market. Former employees who return to the workforce do not present employers the opportunity to alter their employment class to the employer's benefit. Unlike salaried and hourly employees, for example, whose daily tasks and responsibilities may stay the same regardless of their compensation arrangement, an employer would have no ability to influence a former employee's rehired status such that the employer could transfer employees into or out of the class. A former employee's choice to reenter the workforce is an independent one, made on an individualized basis.

Further, currently, employers and retirement systems establish eligibility for a retiree medical plan based on age and years of service and may want to reward employees who have more years of service or are older at retirement by providing them a larger ICHRA amount. Under the current Proposed Regulations, however, employers and retirement systems would not be able to do so because within the class, the amount available can only vary based on current age and the number of dependents.

Recommendation: The integration rules' list of specified employee classes should include a "former employees" class that would not require identification of the class to which the individual belonged immediately prior to his or her separation from service. The amounts available under the ICHRA for the "former employee" class should be permitted to vary based on factors other than age and the number of dependents, such as age at separation from service and years of service.

2. Individual health insurance coverage should be defined to include Medicare.

By permitting HRAs to be integrated with individual health insurance coverage, the Proposed Regulations will enable employees to pay for individual health insurance premiums



with HRA funds, provided that individuals substantiate their enrollment in individual market health insurance. Pre-Medicare eligible retired individuals who participate in an ICHRA presumably would only need to purchase coverage in the individual market. However, individuals enrolled in Medicare will essentially be required to have double coverage because they will need to purchase coverage in the individual market in addition to their Medicare coverage (and individuals receiving Social Security cannot waive Medicare Part A).

The problem with this requirement is twofold. First, it does not align with the Departments' stated objective of "expanding the availability and usability of HRAs." In their current form, the Proposed Regulations do not make ICHRAs available to a significant portion of Americans, namely, individuals enrolled in Medicare. ICHRAs will also not be immediately usable to these individuals, given that they will need to purchase additional coverage in order to access the benefit at all. This results in no net benefit to the individual, because the cost of purchasing individual market coverage would offset the potential savings he or she would receive from the ICHRA, and it certainly does not promote HRA use.

Second, the Proposed Regulations in their current form would impose substantial costs on an already financially vulnerable segment of American workers. Many individuals covered by Medicare are older workers and retirees who, as explained above, reenter the workforce to meet pressing financial needs. Requiring these individuals to purchase additional individual coverage will cause them to pay a much greater monthly amount for coverage. While some retirees could disenroll in Medicare Part B or D, Medicare is more suited to their particular needs than individual market coverage, which may cost a great deal more than Medicare given their age. This raises fairness concerns, especially in light of the fact that many of the persons barred from ICHRA access would likely be older workers in greater need of its financial benefit.

Defining "individual health insurance coverage" to include Medicare would remedy this inequity. Including this definition would provide Medicare enrollees with access to ICHRAs on the same terms as employees and pre-Medicare eligible retirees currently enrolled in individual market coverage. This expanded access would facilitate ICHRA use in accordance with the Departments' objectives and alleviate the need for individuals to purchase costly and unnecessary coverage.

Recommendation: The Proposed Regulations should define individual health insurance coverage to include Medicare.



3. With respect to retirees, the Medicare integration rule should be revised to remove the requirement that the employer offer the individuals another group health plan if they were not Medicare-eligible.

Under the Proposed Regulations, an HRA can be integrated with Medicare if, among other requirements, the employees offered the HRA would be eligible for the employer's non-HRA group health plan but for their Medicare eligibility. This requirement is difficult to satisfy in the rehired retiree context because the employer may not offer any non-HRA group health plan to rehired retirees, regardless of their Medicare eligibility (*e.g.*, the retiree is rehired on a part-time basis), and a retirement system may only offer HRAs to retirees, both pre- and post-Medicare eligible.

Recommendation: The Departments should add a special rule in the rehired retiree context that allows an HRA to be integrated with Medicare in circumstances where the retiree is not offered a non-HRA group health plan if he or she was ineligible for Medicare.

4. The final regulations should include relief for HRA plans with rehired retirees.

As we have previously stated in comments, we recommend that the Departments issue a rule that provides that rehiring a retiree in a limited position under which the individual is not otherwise eligible for the employer's health benefits (*i.e.*, a temporary- or part-time worker) would not affect the "retiree-only" status of an HRA plan. This is a reasonable, good faith interpretation of the law.

Recommendation: The Departments should issue a rule that provides one of the following:

- Rehiring a *de minimis* number of retirees (*e.g.*, 5%) is deemed not to have an effect on the retiree-only status of an HRA plan, even if those retirees are fully engaged from a scope of work or hours standpoint;
- A special Medicare integration rule in the public employer/retirement system context, similar to the Medicare/TRICARE rules described in Notice 2015-17 for active employees. For example, the rule could state that an HRA plan sponsored by a public employer retirement system that requires participants to be enrolled in Medicare is considered integrated for purposes of the annual dollar limit prohibition and the preventive services requirements; or
- Adopt a non-enforcement policy with respect to a retirement system that provides public employer retirees with an HRA plan designed to supplement Medicare and a participant is rehired by another public employer that contributes to the system.



III. Comments on the Notice

1. The rule in the Notice should be revised to permit an employer or retirement system to vary the amounts available in an ICHRA offered to former employees by age at separation from service and years of service.

As stated above, employers and retirement systems would like to incentivize employees by basing the amount available under the ICHRA on age at retirement and years of service. The Notice states that Treasury and the IRS anticipate issuing guidance that would allow employers to vary dollar amounts within a class only if (1) the maximum dollar amount made available to employees who are members of a class increases in accordance with the increase in the price of an individual health insurance policy in the relevant individual insurance market based on the current ages of employees who are members of that class and (2) the same maximum dollar amount based on current age must be made available to all employees who are members of that class.

Recommendation: Solely in the context of ICHRAs offered to former employees, the amount available under the ICHRA should be able to vary based on the age at the time of retirement and years of service.

We appreciate the opportunity to provide comments regarding the Proposed Regulations and the Notice. Should you have any questions, or should you like to discuss our comments further, please contact the undersigned at 614-222-0050.

Respectfully,

A handwritten signature in blue ink, appearing to read "Karen Carraher".

Karen Carraher
Executive Director

A handwritten signature in blue ink, appearing to read "Eric Harrell".

Eric Harrell
General Counsel