

BACK FROM THE DEAD NEW RULES FOR HEALTH REIMBURSEMENT ACCOUNTS

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Health reimbursement arrangements (“HRAs”) have been around for decades. Revenue Ruling 61-146 provided the initial guidance that the employer reimbursement of individual medical insurance premiums was excluded from the employee’s gross income under IRC 106.

I. ACA PROHIBITION ON REIMBURSEMENT

Once the Affordable Care Act was passed, IRS and DOL guidance changed the rules. IRS Notice 2013-54 and DOL Technical Release 2013-03 confirmed the ACA prohibition of individual payment or reimbursement of individual health insurance premiums by the employer.

II. IRS NOTICE 2015-17

IRS Notice 2015-17 provided significant interim guidance on health reimbursement arrangements. The noteworthy provisions include:

A. Transitional Relief for Small Employers for Insurance Premium Reimbursement to Employees.

The IRS stated that the \$100 per day/per person excise tax under IRC Section 4980D would not be asserted for any failure to satisfy the market reform provisions under the Affordable Care Act by employer payment plans that pay, or reimburse employees for individual health policy premiums or Medicare Part B or Part D premiums (1) for 2014 for employers that are **not** Applicable Large Employers (“ALEs”) for 2014, and (2) for January 1 through June 30, 2015 for employers that are **not** ALEs for 2015.

After June 30, 2015, such employers may be liable for the Code Section 4980D excise tax.

An ALE generally is, with respect to a calendar year, an employer that employed an average of at least 50 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year. Special rules allowed the employer to determine its status as an ALE by reference to a period of at least six consecutive calendar months, as chosen by the employer, during the 2013 calendar year for determining ALE status for 2014 and during the 2014 calendar year for determining ALE status for 2015, as applicable (rather than by reference to the entire 2013 calendar year and the entire 2014 calendar year).

Employers eligible for the relief that have employer payment plans were not required to file IRS Form 8928 solely as a result of having such arrangements for the period for which the employer is eligible for the relief.

This relief did not extend to stand-alone HRAs or other arrangements that reimburse employees for medical expenses other than insurance premiums.

B. Treatment of S-Corporation Health Care Arrangements for 2% Shareholders.

The IRS also stated that until further guidance is issued, the \$100 per day/per person excise tax under IRC Section 4980D will not be asserted for any failure to satisfy the market reforms for a 2% S-Corporation shareholder/employee healthcare arrangement. Taxpayers may continue to rely on Notice 2008-1 with regard to the tax treatment for the payment of health insurance for 2% S-Corporation shareholders.

The guidance in this section does not apply to reimbursements of individual health insurance coverage with respect to employees of an S-Corporation who are not 2% shareholders.

C. Integration of Medicare Premium Payment or Reimbursement Arrangement with a Group Health Plan.

An arrangement under which an employer reimburses (or pays directly) some or all of Medicare Part B or Part D premiums for employees constitutes an employer payment plan, as described in Notice 2013-54, and if such an arrangement covers two or more active employees, is a group health plan subject to the market reforms. An employer payment plan cannot be integrated with Medicare coverage to satisfy the market reform provisions because Medicare coverage is not a group health plan.

If the Medicare premium payments or reimbursements are integrated with a group health plan offered by the employer for purposes of the annual dollar limit prohibition and the preventive services requirements, the payment or reimbursement of such premiums is permitted.

D. Increases in employee compensation to assist with payments of individual market coverage.

An arrangement where an employer increases an employee's compensation, but does not condition the payment of the additional compensation on the purchase of health coverage (or otherwise endorse a particular policy, form, or issuer of health insurance), will not be treated as an employer payment plan. Such arrangement will not be subject to the \$100 per day/per person excise tax under IRC Section 4980D.

E. Insurance Premium Reimbursement Plans.

The IRS provided in the Notice that, although Rev. Rul. 61-146 permitted insurance payments or reimbursements for individual health insurance for employees on a pre-tax basis, this guidance did take into consideration the Affordable Care Act.

This type of arrangement is subject to the market reform provisions of the Affordable Care Act that are applicable to group health plans without regard to whether the employer treats the money as pre-tax or post-tax to the employee. Thus, except as otherwise provided in the Notice, such individual insurance reimbursement plans are subject to the \$100 per day/per person excise tax under IRC Section 4980D.

Notice 2015-87 provided guidance on a multitude of ACA provisions. The guidance included how to deal with employer HRA contributions for premiums and other cost sharing expenses. It provided detail on the concept of “integrated HRAs” and the treatment of employer flex credits for the employer shared responsibility payments and affordable health insurance.

The penalties for paying or reimbursing the individual premiums of employees is found in IRC 4980D. The penalty is \$100 per day/per employee.

III. MINIMUM VALUE REQUIREMENTS

A. Prior to recent changes, HRAs had to meet integration requirements detailed in IRS Notice 2013-54. In order to have an integrated HRA, the employee was required to participate in an employer-sponsored group health plan of either the employee, spouse or parents. The HRA could then be “integrated” with the employer group health plan to provide an integrated package of benefits. HRAs were not permitted to be integrated with individual health insurance policies. To the

extent the health plan did not provide ACA minimum value, the HRA could only provide reimbursement for cost-sharing amounts under major medical and/or non-essential health benefits.

- B. HRAs were prohibited from integrating with individual health insurance plans due to certain ACA provisions. Since an HRA is a group health plan, the HRA would not comply with the ACA prohibition of annual limits on essential health benefits. Since all HRAs have limited benefit levels, this ACA provision would be violated. Also, the HRA itself provided no coverage for any services, and health plans are required to cover preventive services at no cost to the employee-participant.

IV. THE CURRENT WORKAROUND

In order to reimburse employees for individual health insurance policies, the only current option is to give the employees additional taxable compensation.

- A. The payment must be standard compensation subject to all withholdings.
- B. The employees must have the unrestricted right to receive the compensation as cash.
- C. You cannot require the employee to use the added compensation to purchase health insurance.
- D. The employer cannot impose any conditions on the employee receiving the additional compensation.
- E. The employer cannot require the employee to provide proof of health insurance coverage.

V. PRESIDENTIAL EXECUTIVE ORDER STARTS THE BALL ROLLING

The President issued Executive Order 13813 on October 12, 2017 requiring the Secretaries of the Treasury, Labor and Health and Human Services to expand the availability and permitted use of health reimbursement accounts.

VI. NEW HRA REGULATIONS

A. Regulations were issued on June 20, 2019 by the Internal Revenue Service, the Department of Labor, and the Department of Health and Human Services. The new regulations totaled 497 pages in length. The title of the new regulations is:

“New Rules on Health Reimbursement Arrangements
and Other Account-Based Group Health Plans”

B. The regulations include several distinct components:

1. Individual coverage HRAs.
2. Excepted Benefit HRAs.
3. DOL-only safe harbor to clarify that individual health insurance coverage purchased with HRA will not be subject to ERISA, so long as certain conditions are met.
4. IRS-only rule regarding eligibility for premium tax credits for HRA participants and beneficiaries.
5. HHS-only rule creating special enrollment period for individuals who newly gain access to an individual coverage HRA or QSEHRA.

VII. NEW GOVERNMENT APPROVED ACRONYM

ICHRA (pronounced “ICK-RA”). Individual Coverage Health Reimbursement Account.

VIII. NEW INDIVIDUAL COVERAGE HRAs – EFFECTIVE JANUARY 1, 2020

- A. Employees must be enrolled in an individual health insurance policy or Medicare Part A and B or Part C.
- B. Employee cannot be eligible for ICHRA and a traditional group health plan.
- C. Employer must offer the ICHRA on the same terms to each employee class.
- D. Opt-out provisions are required.
- E. Pre-tax employee premium payments are permitted for off-Exchange individual policies.
- F. Substantiation and verification of individual coverage is required.
- G. Advance notice to employees is required.
- H. Plan document requirements – Plan and SPD must be prepared to comply with the Code and ERISA.

IX. NEW INDIVIDUAL COVERAGE HRAs – CLASS RULES

Employers are permitted to create “classes” within their workforce, based on 10 specified “classes” enumerated in the regulations.

- A. Permitted classes (classes may be combined):
 - 1. Full-time employees.
 - 2. Part-time employees.
 - 3. Seasonal employees.
 - 4. Employees covered by a Collective Bargaining Agreement.

5. Employees who have not satisfied a waiting period.
6. Nonresident aliens with no US based income.
7. Employees working in the same rating area.
8. Salaried employees.
9. Non-salaried employees (e.g. hourly).
10. Temporary employees of a staffing firm.

X. NEWLY HIRED EMPLOYEES

The new hire rule allows employers to phase in for employees hired after a certain date. This rule allows employers to subdivide other classes into existing employees and new hires and the minimum class size is not going to apply to this new hire subclass.

- ✓ ICHRA must still be offered on the same terms to all new hires.
- ✓ New hires cannot have a choice between the group plan or ICHRA.
- ✓ Employer can discontinue the special rule at any time. When this happens anyone in the new hire subclass will be absorbed back into the regular class of employees.
- ✓ Cannot be used to offer different ICHRA amounts based on hire date.
- ✓ Class size minimums do not apply unless the new hire subclass is subsequently subdivided and the minimum requirement would otherwise apply.

XI. NOTICE REQUIREMENTS

- A. The notice must be provided to all eligible employees at least 90 days prior to the start of the plan year.

- B. The written notice will be required to include certain relevant information, including:
1. A description of the terms of the HRA, including the maximum dollar amount made available that is used in the affordability determination under the Code Section 36B rules , including information on when the amounts will be made available (for example, monthly or annually at the beginning of the plan year).
 2. A statement of the right of the participant to opt-out of and waive future reimbursement under the HRA.
 3. A description of the PTC eligibility consequences for a participant who accepts the HRA.
 4. A statement on how the participant may find assistance for determining their individual coverage HRA affordability.
 5. A statement that the participant must inform any Exchange to which they apply for advance payments of the PTC of certain relevant information; contact information (including at least a phone number) of an individual or a group of individuals who participants may contact with questions regarding the individual coverage HRA.
 6. A statement that the participant should retain the written notice because it may be needed to determine whether the participant is allowed the PTC.
 7. A statement that the HRA may not reimburse any medical care expense unless the substantiation requirements are satisfied.
 8. A statement of availability of an SEP for employees and dependents who newly gain access to the HRA.

9. The date as of which coverage under the HRA may first become effective and date on which the HRA plan year ends.
10. A statement to clarify further that there are multiple types of HRAs and the type the participant is being offered is an individual coverage HRA.

XII. DEPARTMENT OF LABOR MODEL ATTESTATION FORM

- A. The Department of Labor (DOL) has issued a model attestation form that can be used. Employees must provide proof of enrollment in an individually purchased health insurance plan (whether purchased on the Exchange or not) prior to any reimbursement. The final regulations identify Medicare and student health insurance as eligible individual health insurance. Employees must annually verify that they have coverage under individual health insurance at the time of open enrollment. Employees can meet this requirement by completing a “model attestation” provided by the DOL.
- B. Employers must require coverage substantiation from the employee with each request for reimbursement. To meet this requirement, employees can complete a second model attestation provided by the DOL.

XIII. SPECIAL ENROLLMENT PERIODS

- A. Since enactment of the ACA, there is one time during the year, called “Open Enrollment”, when plans are available on the individual marketplace for individuals to enroll in. Open Enrollment is typically November 1 – December 15th each year (some states extend the deadline). After Open Enrollment has ended, individuals need a qualifying life event called a “Special Enrollment Period” to purchase individual health insurance, such as marriage, divorce, having a baby and moving.

- B. The triggering event for ICHRA SEPs is the first day employees are eligible for coverage. Whether the SEP will take place 60 days before the triggering event or 60 days after depends on whether the employer is subject to the 90-day notice requirement. For new and existing ICHRAs, employers must send eligible employees the required notice at least 90 days before the start of the new plan year. If the employer is subject to this 90-day notice requirement, the 60-day SEP will be BEFORE the triggering event.
- C. For employees who become newly eligible for the ICHRA mid-year, the notice must be sent by the day plan eligibility begins, at the latest. If your company is NOT subject to the 90-day notice requirement, the 60-day SEP is either before OR AFTER the triggering event.
- D. For employees newly hired by employers established less than 120 days prior to the beginning of the first plan year of the HRA, the notice may be provided no later than the date on which the HRA may first take effect for the individual for that first plan year of the HRA.

XIV. ERISA APPLICATION

An ICHRA is a group health plan subject to ERISA. Plan document, summary plan description and Form 5500 requirements apply. The underlying insurance coverage is not an ERISA group health plan if five requirements are met:

- A. The purchase of the underlying insurance is voluntary.
- B. The employer only provides general information on choosing health insurance.
- C. Reimbursement is limited solely to individual health insurance.
- D. The employer receives not direct or indirect consideration for the selection or renewal of individual health insurance.

- E. The employer provides the notice annually that the individual health insurance coverage is not subject to ERISA.

XV. PAY OR PLAY MANDATE AND ICHRAs

- A. The pay or play penalties under IRC 4980H are still around.
- B. The 'A' Penalty 2020: If the employer does not offer coverage to 95% of its full-time employees and one employee receives a subsidy to purchase insurance on the Health Exchange, the Employer is subject to a penalty equal to \$2,570 x every full-time employee (minus 30).
- C. The 'B' Penalty 2020: If the employer offers coverage that is unaffordable (exceeds 9.78% in 2020 of income using a safe harbor method) or does not offer minimum value and any employees qualify for a subsidy to purchase insurance on the Health Exchange, the Employer is subject to a penalty equal to \$3,860 x the number of full-time employees that receive a subsidy to purchase insurance on the Health Exchange.

XVI. PAY OR PLAY, ICHRAs AND IRS NOTICE 2018-88

Notice 2018-88 confirmed that an individual coverage HRA is an eligible employer-sponsored plan and, therefore, an offer of an individual coverage HRA constitutes an offer of an eligible employer-sponsored plan for purposes of Code Section 4980H(a). The notice also explained how Section 4980H(b) (including the HHI safe harbors) would apply to an ALE that offers an individual coverage HRA, described potential additional affordability safe harbors related to offers of individual coverage HRAs, requested comments and provided examples.

XVII. IRS PROPOSED REGULATIONS 54.4980H-5 – ISSUED SEPTEMBER 30, 2019

The regulations and IRS guidance address the expected application to ICHRAs of certain employer shared responsibility rules and describe several potential affordability safe harbors specific to ICHRAs. The preamble also indicates that additional regulations will be proposed on this subject. In the interim, the following guidance has been provided:

- A. Code Section 4980H(a). ICHRAs are considered eligible employer-sponsored plans so an applicable large employer (“ALE”) can count ICHRA offers toward the 95% threshold for avoiding penalties under Code Section 4980H(a).
- B. Affordability Under Code Section 4980H(b). The regulations treat an employee’s required contribution for individual coverage as the excess of the monthly self-only premium for the lowest-cost silver plan offered by the Exchange where the employee resides over the self-only amount made available to the employee under the ICHRA for the month.
- C. To reduce the administrative burden of making that calculation, anticipated guidance would allow ALEs to determine the silver plan premium based on each employee’s worksite (rather than the employee’s residence).
- D. ALEs with calendar year ICHRAs would be able to use the silver plan premium for the prior calendar year to calculate affordability, allowing ICHRA contributions to be determined before premiums are announced for the Exchanges’ November 1st Open Enrollment. To address potential premium changes where an ICHRA plan year spans two calendar years, ALEs would be permitted to assume that the

relevant silver plan's premium for the first month of the plan year will be the same for all months in the plan year.

Additional guidance is expected to explain how the three affordability safe harbors (Form W-2, rate of pay and federal poverty line) apply to ICHRA offers.

- E. Minimum value under Code Section 4980H(b). ICHRA coverage that is affordable, considering the affordability safe harbors and the special rules for ICHRAs, would be treated as providing minimum value for Code Section 4980H(b) purposes.
- F. IRS guidance indicates that employers would be considered to make an offer for purposes of the Code Section 4980H rules with respect to any employee in a designated class to whom the ICHRA is offered, even if the employee (or a dependent child) does not have individual market coverage.

XVIII. PROPOSED AFFORDABILITY SAFE HARBORS

- A. Worksite location safe harbor.
- B. Calendar plan year safe harbor.
- C. Non-calendar plan year safe harbor.

XIX. ESTIMATED IMPACT OF ICHRAs

The government estimates 800,000 employers will offer ICHRAs. By 2024, the government estimates almost 11 million people will be covered by ICHRA.

XX. EXCEPTED BENEFIT HRAs

- A. Under the ACA, HRAs have been required to integrate with a group health plan, unless they fit the narrow criteria to be considered a

stand-alone HRA (like a QSEHRA). However, government regulators have recognized that some employers may wish to offer tax-free reimbursement without regard to whether or not employees have qualified insurance coverage. The Excepted Benefit HRA offers reimbursement options to employees that do not participate in the group health plan.

B. There are four requirements for an HRA to qualify as an Excepted Benefit HRA:

1. The HRA must not be an integral part of the plan.
2. The HRA must provide benefits that are limited in amount (\$1,800 max for 2020).
3. The HRA cannot provide reimbursement for premiums for certain health insurance coverage.
4. The HRA must be made available under the same terms to all similarly situated individuals.