

BACK FROM THE DEAD

NEW RULES FOR HEALTH REIMBURSEMENT ACCOUNTS

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Pre-ACA HRAs

- Revenue Ruling 61-146 holds that if an employer reimburses an employee's substantiated premiums for non-employer sponsored hospital and medical insurance, the payments are excluded from the employee's gross income under Code §106.

ACA Background: Prior Individual Coverage Guidance

IRS Notice 2013-54; DOL Technical Release 2013-03

- Guidance confirmed the ACA prohibition of individual coverage payment/reimbursement by employers
- Guidance provided that employers cannot directly purchase individual policies or reimburse employees for the cost of individual policies through an “Employer Payment Plan” or a “Non-Integrated HRA”

ACA Background: Prior Individual Coverage Guidance

Penalties

IRC §4980D

- Employers offering an Employer Payment Plan or Non-Integrated HRA for employer reimbursement of individual policies violates the ACA market reform rules
- **Penalty is \$100/day/employee excise taxes—resulting in potential penalties of \$36,500 per employee per year**

Pre-2020 ACA State of the Law: HRA “Integration” Required

The Current ACA HRA Integration Rules – Simplified Version

Non-Integrated HRA Prohibition

- Employers offering an HRA have had to meet the “integration” requirements stemming from the IRS Notice 2013-54
- Those rules generally require that the employee be enrolled in an employer-sponsored major medical group health plan meeting certain requirements to be eligible for reimbursement
- **Most important piece is that HRAs could not be integrated with individual market coverage**

Why Prohibited?

- Non-integrated HRAs cannot satisfy the ACA market reform requirements for group health plans
 1. Does not comply with the ACA prohibition of annual limits on the dollar amount of essential health benefits; and
 2. Does not satisfy the ACA requirement to provide certain preventive services without imposing any cost-sharing requirements for the services

The Workaround: Increase in Employee Compensation

Increases in Employee Taxable Compensation Permitted

- Employers may increase an employee's standard taxable compensation to assist an employee with payments of individual market coverage
- The additional compensation cannot be conditioned on the purchase of the individual health coverage
- Also cannot otherwise endorse a particular policy, form, or issuer of health insurance
- Only permitted to inform employee about the Marketplace and §36B premium tax credit

Executive Order 13813: Direction to Issue New Regulations

IRS/DOL/HHS REGULATIONS

- IRS/DOL/HHS issued 497 pages of regulations on June 20, 2019
- New Rules on Health Reimbursement Arrangements and other Account-Based Group Health Plans

New Government Approved Acronym

**ICHRA
(Pronounced “ICK-RA”)**

**Individual Coverage Health
Reimbursement Account**

Individual Coverage HRAs: 2020 and Beyond

New Rules for Plan Years Beginning On or After January 1, 2020: Individual Coverage HRAs (ICHRAs) Permitted With Seven Conditions

1 Employees Covered by ICHRA Must Be Enrolled in an Individual Policy

- Employees who lose coverage under the individual policy forfeit the HRA

2 Employees Must Not Be Eligible for Both ICHRA and Traditional Plan

- Must exclude employees eligible for the ICHRA from eligibility for the traditional employer-sponsored major medical group health plan (GHP) (must amend plan)
- Specific class rules on which employees can be offered the ICHRA vs. the traditional GHP
- Specific class size rules to ensure that the classes are legitimate
- Employers may also set any date on or after January 1, 2020 for which new hires as its own separate class are offered the ICHRA, while still offering the traditional GHP to employees hired prior to that date

Individual Coverage HRAs: The New Landscape in 2020

New Rules for Plan Years Beginning On or After January 1, 2020: Individual Coverage HRAs (ICHRAs) Permitted With Seven Conditions

3 Employers Must Offer the ICHRA on Same Terms to Each Employee Class

- Cannot offer a more generous ICHRA based on adverse health conditions
- Can increase ICHRA allocation based on age or number of dependents
- Larger allocations of up to 3x the youngest participant permitted for older employees (no set limit on dependent adjustment allocations)

4 Opt-Out Required

- Employees must have the option to opt-out of the HRA coverage to maintain eligibility for subsidies on the Exchange (the \$36B premium tax credit)

Individual Coverage HRAs: The New Landscape in 2020

New Rules for Plan Years Beginning On or After January 1, 2020: Individual Coverage HRAs (ICHRAs) Permitted With Seven Conditions

5 Employee Pre-Tax Contributions Permitted Off Exchange

- ACA added §125(f)(3) prohibiting employee pre-tax salary reduction contributions toward coverage on the Exchange
- Employer may permit employees to use Section 125 cafeteria plan to contribute on a pre-tax basis to non-Exchange individual market coverage (must amend plan)
- Important because ICHRA may not cover the full cost of the premium

6 Substantiation and Verification of Individual Coverage Required

- ICHRA must have reasonable procedures in place to verify that employees are actually enrolled in individual policy
- Can include third-party (carrier) documentation or employee attestation
- Model attestation forms (annual and monthly) available from the DOL

Individual Coverage HRAs: The New Landscape in 2020

**New Rules for Plan Years Beginning On or After January 1, 2020:
Individual Coverage HRAs (ICHRAs) Permitted With Seven Conditions**

7 Notice Requirement

- Employer must provide written notice to eligible employees at least 90 days prior to the start of each plan year describing the ICHRA terms
- Model notice available from the DOL

Individual Coverage HRAs: Class Rules

**Classes determine which employees will be eligible for the
ICHRA vs. the traditional GHP**

Permitted Classes

- Full-time employees
- Part-time employees
- Employees in a geographic region
- Seasonal employees
- CBA unit of employees
- Employees in their waiting period for traditional GHP coverage
- Non-resident aliens with no U.S.-based income
- Salaried employees
- Hourly employees
- Outside staffing firm temps
- Any combination of classes

Individual Coverage HRAs: Class Rules

**Classes determine which employees will be eligible for the
ICHRA vs. the traditional GHP**

Minimum Class Size

Employers with <100 Employees

- 10 employee minimum

Employers with 100-200 Employees

- 10% of the total number of employees minimum

Employers with >200 Employees

- 20 employee minimum

Notes

- - Employer size determined in advance of the ICHRA plan year based on expected employee count on first day of plan year
- - Class size is based on the employer's offers of ICHRA coverage on first day of plan year (not actual enrollment)

Newly Hired Employees

- The final rules include a special rule to allow employers to maintain a traditional group health plan for current employees while beginning to offer an individual coverage HRA to newly hired employees in the same classification of employees.

Individual Coverage HRAs: The New Landscape in 2020

Required Notice Content

1. A statement of the right of the employee to opt-out of the ICHRA
2. A description of the potential availability of the §36B premium tax credit (PTC) if the employee opts-out of the ICHRA and the ICHRA is unaffordable
 - The maximum dollar amount available for each participant (including proration for mid-year entry, if any)
 - Whether the cost of individual coverage for family members are also eligible expenses - A statement that the ICHRA is not a QSEHRA
 - A statement that the HRA requires the participant and any dependents to be enrolled in individual health coverage
 - A statement that Short Term Limited Duration Insurance (STLDI) and excepted benefits are not eligible expenses
 - A statement that the individual coverage reimbursed by the ICHRA is not subject to ERISA
 - The ICHRA coverage effective date (including mid-year enrollees), plan year date, and the dates on which new amounts will be made available under the ICHRA

Individual Coverage HRAs: The New Landscape in 2020

Required Notice Content

3. A statement that if the employee does not opt-out of the ICHRA, the employee cannot claim the PTC for any month the ICHRA coverage is in place (regardless of affordability)
4. A statement that ICHRA participants must inform the Exchange of the ICHRA amount available for the plan year if applying for advance payments of the PTC
 - Must include whether the ICHRA is also available to dependents
 - The date on which ICHRA coverage is effective, and the plan year beginning and end date
 - Whether the participant is a current or former employee

Individual Coverage HRAs: The New Landscape in 2020

Required Notice Content

5. A statement that the participant should retain the notice in case it is needed to determine eligibility for the Premium Tax Credit (PTC) on the individual tax return
6. A statement that the ICHRA will not reimburse any expense that is unsubstantiated
7. A statement that if the individual coverage ceases, the ICHRA will not reimburse any medical expenses incurred after coverage ceases
 - Including a statement that the participant must inform the ICHRA if coverage terminates retroactively (and the date of such retroactive termination)

Individual Coverage HRAs: The New Landscape in 2020

Required Notice Content

8. The contact information (including a phone number) for an individual or group of individuals who participants may contact to receive additional information about the ICHRA
9. A statement of the availability of a special enrollment period to enroll in or change individual health insurance coverage (on or off the Exchange) for the participant and any dependents who newly gain access to the ICHRA and are not already covered by the ICHRA

Individual Coverage HRAs: Notice Timing

Employers must provide the required notice to ICHRA-eligible employees within specific set timeframes to ensure timely enrollment in individual coverage.

General 90-Day Rule

90-Day Requirement

- Employer must provide the notice to ICHRA-eligible employees at least 90 calendar days before the beginning of each plan year

Calendar-Year ICHRA

- Provide notice to ICHRA-eligible employees no later than October 3

Exceptions

Employees Not Eligible to Participate at Start of Plan Year

- Employer must provide the notice no later than the date on which the ICHRA may first take effect for the employee (includes new hires and newly eligible participants)

New Employer First ICHRA Plan Year

- For a new ICHRA that is established less than 120 days before the start of the first ICHRA plan year, employer must provide the notice no later than the date on which the ICHRA may first take effect

Individual Coverage HRAs: Special Enrollment Periods

New Special Enrollment Periods for Individual Coverage

- Permits employees/dependents to enroll in individual coverage outside of the standard open enrollment period when an employee/dependent newly gains access to an ICHRA (the “triggering event”)

Special Enrollment Period Timing

- General Rule—60 Days In Advance of Event: The general rule is that employees have 60 days before the triggering event (i.e., date the ICHRA coverage is effective) to select a plan for special enrollment effective as of the date of the triggering event (or first of the month following if the triggering event is mid-month, which would be unusual for an ICHRA effective date)
 - Calendar Plan Year ICHRA Example
 - Employer will provide ICHRA notice to employees no later than October 3 (90 days in advance of plan year)
 - Employee has special enrollment period from November 2 – December 31 (60 days in advance of triggering event)
 - Individual policy and ICHRA coverage are both effective January 1 (the “triggering event” date)

Individual Coverage HRAs: ERISA Application

The ICHRA is an ERISA Group Health Plan

- As with all HRAs, an ICHRA is a group health plan subject to ERISA (Plan/SPD and 5500 rules apply)

The Underlying Individual Coverage is Not an ERISA Group Health Plan

- Five conditions to avoid application of ERISA to the individual coverage:
 1. Purchase of individual coverage is completely voluntary - Conditioning ICHRA participation on purchase of individual coverage is still voluntary (No employer endorsement of any particular insurance carrier or coverage)
 2. Employer may provide general information including how to access healthcare.gov or the uniform glossary of medical terms that applies to SBCs
 3. Reimbursement of premiums is limited solely to individual health insurance coverage
 4. The employer receives no consideration (cash or otherwise) in connection with the employee's selection or renewal of the individual coverage
 5. The employer provides notice annually to each participant that the individual health insurance coverage is not subject to ERISA (DOL model language)

The ACA's Employer Mandate "Pay or Play" §4980H Penalties

§4980H(a)—The "A Penalty" ICHRA VERSION

- Must offer MEC to at least 95% of full-time employees
- IRS Notice 2018-88
 - "An HRA, including an individual coverage HRA, is an eligible employer-sponsored plan. Therefore, if an ALE were to offer an eligible employer-sponsored plan (including an individual coverage HRA) to at least 95 percent of its full-time employees (and their dependents), the ALE would not be liable for a payment under section 4980H(a) for the month, regardless of whether any full-time employee is allowed the PTC for purchasing individual health insurance coverage from an Exchange"

The ACA's Employer Mandate "Pay or Play" §4980H Penalties

§4980H(b)—The "B Penalty" ICHRA VERSION

- The offer of MEC must
 - Be affordable; and
 - Provide minimum value (MV)
- Minimum Value:
 - Plan covers at least 60 percent of the total cost of benefits that are expected to be incurred under the plan.
- Affordability: Complicated