

## IRS Releases Proposed ICHRA Rules

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The IRS has issued proposed Individual Coverage HRA (ICHRA) regulations to address employer compliance with §4980H offer of coverage requirements, employer reporting requirements under §6055 and §6056, and §105(h) nondiscrimination rules. Perhaps most importantly, the proposed rules describe how an employer can determine when an ICHRA will be considered an offer of affordable minimum value coverage.

### Background

On June 14, 2019, the Departments of Treasury, Labor, and Health and Human Services (The Departments) issued final regulations expanding the use of Health Reimbursement Arrangements (HRAs). The new rules made significant changes to existing guidance. Employers are currently prohibited from paying for an employee's individual health insurance policy through an HRA, and HRAs offered to employees must be integrated with group health insurance policies. However, beginning January 1, 2020, the rules allow HRAs to be used to pay for individual health insurance policies (an ICHRA), and create a new type of limited excepted benefit HRA (EBHRA). The ICHRA rules impose integration restrictions, limiting ICHRA reimbursement to those who provide proof of enrollment in individual health insurance or Medicare. In addition, the rules include a requirement that the ICHRA be offered on the same terms and conditions to all employees with a class of employees defined in the rules, and prohibit employers from offering both an ICHRA and a traditional group medical plan to the same class of employees. In conjunction with these rules, the IRS issued guidance to clarify how an employer offer of an ICHRA would affect an individual's eligibility for a premium tax credit when purchasing an individual health insurance policy through a public Exchange.

On November 19<sup>th</sup>, 2018, the IRS issued Notice 2018-88 requesting comments on how the new ICHRA rules would interact with employer offer of coverage requirements contained in §4980H and §105(h) nondiscrimination rules. In general, §4980H requires applicable large employers (ALEs) to offer coverage to full-time employees to avoid "shared responsibility" payments. The newly issued proposed rules describe how an ALE can determine when an offer of an ICHRA to employees will be considered an affordable, minimum value offer for purposes of compliance with §4980H. The rules also address how §105(h) nondiscrimination rules apply to an employer offer of ICHRA coverage to employees.

### §4980H(a) Requirement to Offer Minimum Essential Coverage (MEC)

The proposed rules confirm that an ICHRA offer of coverage will be considered an offer of MEC to full-time employees and dependents for purposes of satisfying §4980H(a) requirements, regardless of whether the individuals enroll or waive the offer of coverage. It does not appear that there is a minimum employer contribution requirement to the ICHRA.

### Plan Affordability and Minimum Value

To avoid employer liability under §4980H(b), an ALE must offer coverage that is considered "affordable." To determine affordability for a traditional group health plan, the employer compares the cost for the employee to participate in single coverage under the employer plan with the employee's household income.

When determining whether an offer of ICHRA coverage is affordable, the employer contribution to the ICHRA is subtracted from the premium for the applicable lowest cost silver plan. For purposes of determining eligibility for a premium tax credit, the public Exchange will use the cost to the plan available to the employee based on where the employee resides (the "affordability plan"). The amount of the employer contribution is subtracted from the cost of the affordability plan, and this difference (the cost to the employee) is compared with the employee's household income to determine affordability.

Since the employer typically does not know the employee's household income, the IRS has provided three employer household income safe harbors (HHI safe harbors) – Form W-2, rate of pay, and federal poverty level – that the employer can use to determine affordability for purposes of §4980H(b). These HHI safe harbors will also apply to an offer of ICHRA coverage by an employer.

### Determining the “Affordability Plan” Cost

Individual health insurance plan rates vary by location and age. This variation poses an administrative challenge in determining affordability since the plan premium could be different for each employee. To help address this challenge, the proposed rules provide the following guidance:

- Rates by age – The affordability plan will generally be based on the employee’s age on the first day of the plan year, or when the employee is first eligible for the ICHRA, so it is not necessary to make adjustments in accordance with changes in age during the plan year.
- Location Safe Harbor – Instead of using the lowest cost plan available where the employee resides, an employer can use the cost of the affordability plan at the employee’s primary site of employment. An employee’s primary site of employment is the location at which the employer reasonably expects the employee to perform services, which may be the employee’s residence if the employee does not have a particular assigned office space or a worksite to which to report.
- Look Back Month Safe Harbor – An employer with a calendar year plan may use the monthly premium for the lowest cost silver plan for January of the prior calendar year. An employer with a non-calendar year plan year may use the monthly premium for the affordability plan for January of the current calendar year. The IRS is coordinating with the public Exchanges to provide employers access to location-specific lowest cost silver plan premium data on a month-by-month basis.
- As with group health plans, affordability is based on plan premiums applicable to non-tobacco users.

### Determining Whether the ICHRA Provides “Minimum Value”

An offer of ICHRA affordable coverage will automatically be considered a minimum value offer of coverage for purposes of §4980H.

### **Employer Reporting**

An ICHRA is an offer of minimum essential coverage (MEC) that will require coverage reporting by the employer exactly as it is required for a self-insured group medical plan. The coverage reporting is handled in Part III of Form 1095-C (used by applicable large employers) or Form 1095-B (generally used by small employers).

The IRS is requesting comments on how to report ICHRA offers of coverage on Form 1095-Cs and indicates there will be further guidance. The employee cost to be reported on a 1095-C will probably be based on the affordability safe harbors described above, not on each employee’s actual plan cost. Interestingly, in the preamble to the new rules, the IRS hints at other possible reporting changes being considered because there is no longer an individual mandate requirement.

### **§105(h) Nondiscrimination Rules**

HRAs are subject to the §105(h) nondiscrimination rules that apply to self-insured group health plans. These rules generally require that employer contributions cannot vary by age, or in a way that favors highly compensated individuals. The IRS regulations stipulate that if an employer varies ICHRA contributions between classes designated by the final rules, or by age within a particular class, the employer will not violate §105(h) as long as two requirements are met:

- (1) The same maximum dollar amount attributable to the increase in age is made available to all participants who are the same age within a particular class; and
- (2) The maximum dollar amount made available to the oldest participant(s) is not more than three times the maximum dollar amount made available to the youngest participant(s) within that class of employees.

The IRS warns that an offer of ICHRA coverage could still be considered discriminatory under §105(h) for reasons other than differing employer contribution amounts. For example, if a disproportionate number of older, highly compensated individuals take advantage of the maximum ICHRA reimbursement available (which might be more for older employees), the ICHRA may be found to be discriminatory under §105(h), potentially resulting in highly compensated individuals’ being taxed on reimbursements received.

In addition, for employers who choose to offer an ICHRA to some employees while maintaining a traditional group medical plan for another class of employees, the employer should be aware that this could result in a self-insured

group medical plan being considered discriminatory if the remaining employees eligible for or participating in the traditional group medical plan consist of too many highly compensated individuals (HCIs) or key employees.

### **Summary**

The new IRS rules confirm that an offer of ICHRA coverage will satisfy §4980H(a) requirements and will also clarify how an employer can make an offer of ICHRA coverage that is considered affordable minimum value coverage for purposes of complying with §4980H(b). However, ALEs still face significant administrative challenges in making these determinations, especially employers with locations across the country who will have to account not only for differences in age, but also for differences in cost based on rating area. Employers who choose to offer an ICHRA should carefully consider the impact of §105(h) nondiscrimination rules, in regard to both the ICHRA and to any self-insured group medical plan that may be offered to another class of employees. And finally, all employers offering ICHRA coverage will have to report coverage information to the IRS annually for those who enroll, and ALEs will need to consider the details of employer reporting requirements related to an ICHRA offer once the IRS releases those rules.

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