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New Health Reimbursement Arrangements Allowed Under Final Rules

The President signed an Executive Order on October 12, 2017, directing the U.S. Departments of Labor, Treasury, and Health and Human Services (collectively, the “Agencies”) to consider rules expanding the availability and permitted uses for Health Reimbursement Arrangements (HRAs). The clear intent was to ultimately enable employers to offer HRAs to employees that can be used to purchase individual insurance policies. The Agencies issued a set of final regulations addressing this and related issues on June 13, 2019.

The Bottom Line

We’ll address the final rules in more depth under *Details about Individual Coverage HRAs* below, but the main takeaways are:

- 1) **Premiums** – Employers will be able to offer HRAs to employees that can be used to pay for individual health insurance coverage and Medicare premiums. These will be referred to as “Individual Coverage HRAs” or “ICHRAs” in this article.
- 2) **Employer mandate** – Individual Coverage HRAs can be used to avoid the Employer Shared Responsibility provisions (also known as the “employer mandate”) penalties under the Affordable Care Act (ACA).

However

- 3) **It’s one or the other** – An employer can offer traditional group health coverage to a class of employees or an Individual Coverage HRA, but not both (with a very limited exception).

So, when exactly?

The effective date is for plan years beginning on or after January 1, 2020, which is unchanged from the earlier proposed rules. There is every indication that both the federal and state-run public insurance exchanges will not be ready to handle the anticipated increase in enrollment, adjust product offerings, or make accurate eligibility determinations until much later, so 2020 may prove chaotic for individuals covered by ICHRAs and the employers offering them.

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Details about Individual Coverage HRAs

ITEM	GUIDANCE
Eligibility	<p>Employees (including former employees) and dependents enrolled in major medical coverage purchased in the public insurance exchange, individual insurance market, or Medicare¹ are eligible to participate.</p> <p>Coverage for any part of a month for which a premium is due qualifies.</p> <p>Employees who are enrolled in coverage consisting solely of excepted benefits,² short-term limited duration insurance, TRICARE, or health care sharing ministry coverage are ineligible.</p>
Reimbursements	<p>The ICHRA may be designed to limit reimbursements solely for individual insurance premiums, or it can be designed to also allow reimbursements for qualified medical expenses (so long as the expenses are not limited to medical expenses not covered by Medicare).</p>
Classes of Employees	<p>Employers may divide their workforces into the following classes of employees:</p> <ol style="list-style-type: none"> 1. Full-time employees 2. Part-time employees 3. Employees working in the same geographic location (generally, the same insurance rating area, state, or multi-state region) 4. Salaried workers 5. Non-salaried workers (such as hourly employees) 6. Seasonal employees 7. Employees covered by a collective bargaining agreement 8. Employees eligible for the employer's traditional group health coverage who are in a waiting period 9. Non-resident aliens with no U.S.-based income 10. Temporary employees of staffing firms 11. Any group formed by combining two or more of the above classes (<i>Example:</i> Full-time, salaried employees). <p>If an Individual Coverage HRA is offered to a class, it must be offered on the same terms to <u>all</u> employees within the class.³ Benefit levels can vary only based on age⁴ and family size within a class.</p> <p>If an employer offers an Individual Coverage HRA to a class, it cannot offer its traditional group health coverage to that class, <i>except</i> that an employer may offer traditional coverage to grandfathered members of a class and limit new hires of that class to Individual Coverage HRAs after a date chosen by the employer.</p>

¹ Oddly, fully insured student health insurance also qualifies.

² This is based on HIPAA's "excepted benefits" rule.

³ An employer can offer an Individual Coverage HRA to some former employees within a class and not others so long as the terms are uniform for those offered coverage.

⁴ Individual Coverage HRA contributions for older employees are limited to a maximum of three times the contributions provided to younger employees.

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Employee Class Size	<p>If an employer offers traditional group health coverage to some of its employees, a minimum employee class size applies to Individual Coverage HRAs offered to classes (1) – (5) described above or any combination that includes one of those classes.</p> <p>The minimum class size is:</p> <ul style="list-style-type: none"> • 10 employees for an employer with < 100 employees, • 10% of the total number of employees, for an employer with 100 to 200 employees, and • 20 employees for an employer with > 200 employees.
Special Enrollment Period	<p>Individuals who gain access to an Individual Coverage HRA qualify for a 60-day special enrollment period in the public insurance exchange and individual market.</p>
ACA and the Employer Mandate	<p>An Individual Coverage HRA automatically qualifies as “minimum essential coverage” and is an “offer of coverage” for the purposes of satisfying the ACA’s employer mandate.⁵</p> <p>An Individual Coverage HRA is deemed “affordable coverage” if the difference between the monthly premium for the lowest-cost available silver plan and 1/12th of the annual Individual Coverage HRA contribution is equal to or less than the applicable affordability safe harbor percentage.⁶</p> <p><u>Affordable Coverage Example</u></p> <p>In 2020, an employer makes an annual contribution of \$3,600 to an employee’s Individual Coverage HRA. The monthly premium for the lowest cost available silver plan in the area is \$400.</p> <p>$\\$400 - (\\$3,600/12) = \\$100/\text{month}$</p> <p>The Individual Coverage HRA is an affordable offer of coverage for the employee if \$100/month is within an affordability safe harbor for that employee in 2020.</p> <p>An Individual Coverage HRA (with its individual major medical insurance policy) deemed affordable coverage is automatically deemed to satisfy the ACA’s minimum value requirement.</p>
Waiver	<p>Employees must be permitted to waive participation annually at the beginning of the plan year or effective date of coverage.</p>
Exchange Subsidies	<p>An individual who enrolls in an Individual Coverage HRA is ineligible for subsidies through the public insurance exchange.</p> <p>An individual who waives coverage may be eligible for subsidies if the HRA is not considered an offer of affordable, minimum value coverage by the employer.</p>

⁵ The final rules do not require a minimum ICHRA contribution amount for this, but the IRS intends to release additional guidance that may address this issue.

⁶ Yes, accuracy will be largely dependent upon the timely availability of exchange premium information. This may make it more attractive to offer non-calendar year Individual Coverage HRAs with plan years beginning in February or March.

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Substantiation	<p>Employers are required to adopt reasonable substantiation procedures to confirm participants are enrolled in eligible medical coverage and communicate these to eligible employees no later than the first day of the plan year or effective date of coverage.</p> <p>The rules indicate an employer may rely on the employee's attestation of coverage or require reasonable proof of enrollment (such as an ID card).⁷</p> <p>Employees are required to substantiate enrollment in eligible medical coverage (including for any dependents) <u>each</u> time a request for reimbursement is submitted.</p> <p>A <u>model attestation</u> is available.</p>
ERISA Status, etc.	<p>The Individual Coverage HRA is itself an employer-sponsored group health plan.</p> <p>The individual insurance coverage reimbursed by the ICHRA will not be considered an ERISA plan offered by the employer so long as the employer does not sponsor it or play a role in its selection.</p>
HSA Eligibility	<p>An individual who uses the ICHRA to purchase qualified high deductible health plan coverage is eligible to contribute to a health savings account unless the ICHRA can also be used to pay for general medical expenses.</p>
Cafeteria Plan Option	<p>An employer may allow employees within a class to pay for any remaining premium for eligible medical coverage through the employer's cafeteria plan, but this is not available for coverage purchased through the public insurance exchange.⁸</p>
Notice Requirements	<p>Employers must provide eligible employees with a notice describing:</p> <ol style="list-style-type: none"> 1. The terms of the Individual Coverage HRA, 2. Contact information for assistance, 3. The availability of a special enrollment right for individual coverage, and 4. The effect the ICHRA may have on the employee's eligibility for a subsidy in the public insurance exchange. <p>The notice must be provided at least 90 days before the beginning of the plan year.</p> <p>A <u>model notice</u> is available.</p>

The employee class and class size limitations should make it difficult for an employer to simply shift its highest cost claimants to the individual market. That said, some classes of employees may incur higher medical expenses than others, and an employer could still shift a more expensive class to the individual market. The ICHRA may also provide employers with a lower, fixed cost coverage alternative to provide to certain classes of employees that present less significant attraction and retention challenges than others.

⁷ This may make the ICHRAs vulnerable to being used to pay for premiums for ineligible coverage.

⁸ Employers are not required to permit this, and it might prove complex to administer.

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And for Good Measure...

The Agencies also created another category of HRA known as an “Excepted Benefit HRA” that may be offered on a standalone basis exempt from the ACA’s mandates if all of the following are true:

- The employer offers traditional group health coverage to the employee whether or not the employee elects it (this means the employee cannot also be offered an Individual Coverage HRA);
- The maximum annual contribution is \$1,800 (indexed);
- Reimbursements are limited to general medical expenses and premiums for COBRA, short-term limited duration insurance, and other excepted benefits coverage (this can include many types of non-major medical health coverage); and
- The Excepted Benefit HRA is available on a uniform basis to all similarly situated employees.⁹

An Excepted Benefit HRA does not interfere with an individual’s eligibility for subsidies in the public insurance exchange. This form of HRA may be an interesting alternative to a traditional opt-out credit. It does not require the employee to actually enroll in other group health coverage to avoid impacting affordability calculations for the employer’s traditional group health coverage, and the HRA contributions aren’t subject to payroll taxes.



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⁹ This is based on HIPAA’s “similarly situated groups” rule and is not tied to the permitted classes of employees under the Individual Insurance HRA.