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. Treasury issued additional proposed regulations on September 27, 2019.

Note: This is an update to our earlier article that addressed the June 13, 2019 final regulations. We have incorporated the additional information provided by Treasury in its September 27, 2019 proposed regulations. This new information is identified under *Details about Individual Coverage HRAs* by marking affected Items with an asterisk (*****). Marked items with guidance may be relied upon as a safe harbor until further notice.

The Bottom Line

We'll address the 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** – ICHRAs 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 ICHRA, 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.

Details about Individual Coverage HRAs

ITEM	GUIDANCE
Eligibility	Employees (including former employees) and dependents enrolled in major medical coverage purchased in the public insurance exchange, individual insurance market, or Medicare[1] are eligible to participate. Coverage for any part of a month for which a premium is due qualifies. 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.
Reimbursements	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).
Classes of Employees	Employers may divide their workforces into the following classes of employees: (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 (*Example:* Full-time, salaried employees). If an ICHRA 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 age[4] and family size within a class. If an employer offers an ICHRA to a class, it cannot offer its traditional group health coverage to that class, *except* that an employer may offer traditional coverage to grandfathered members of a class and limit new hires of that class to ICHRAs after a date chosen by the employer.

[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 ICHRA to some former employees within a class and not others so long as the terms are uniform for those offered coverage.
[4] ICHRA contributions for older employees are limited to a maximum of three times the contributions provided to younger employees.

Employee Class Size	If an employer offers traditional group health coverage to some of its employees, a minimum employee class size applies to ICHRAs offered to classes (1) – (5) described above or any combination that includes one of those classes. The minimum class size is: • 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	Individuals who gain access to an ICHRA qualify for a 60-day special enrollment period in the public insurance exchange and individual market.
ACA and the Employer Mandate*	An ICHRA automatically qualifies as “minimum essential coverage” and is an “offer of coverage” for the purposes of meeting the ACA’s employer mandate to offer coverage to at least 95% of full-time employees (FTEs). An ICHRA is deemed “affordable coverage” if the difference between the monthly premium for the lowest cost available silver plan and 1/12th of the annual ICHRA contribution is equal to or less than the applicable affordability safe harbor percentage. There are three factors used to determine the applicable lowest cost available silver plan for an FTE: (1) The FTE’s location; (2) the FTE’s age; and (3) a silver plan cost look-back safe harbor. <u>(1) FTE’s Location</u> An employer may use an FTE’s primary worksite as a safe harbor for the FTE’s location. In general, an FTE’s primary worksite is where the employer reasonably expects the FTE to perform services on the first day of the ICHRA plan year (or the coverage effective date for new hires).[5] If the FTE’s primary worksite changes during the year, the location of the applicable lowest cost available silver plan must also change no later than the 1st day of the 2nd month following the change in primary worksite. For remote employees (e.g. telecommuters): • If the remote employee reports to a work location when not working remotely, this work location is the primary worksite. • If the employee is only expected to work remotely, the employee’s primary residence is the primary worksite. Note: It is possible for a multi-site employer to have more than one FTE primary worksite in the same geographic rating area with different applicable lowest cost available silver plan options as a result. <u>(2) FTE’s Age</u>

[5] An employer could use an FTE’s primary residence. However, the employee class rules will require the employer to use the lowest cost available silver plan with the highest premium applicable to <u>any</u> FTE in the class across the entire class.

	An employer may use the silver plan with the lowest premium cost at the lowest age bracket as the applicable lowest cost silver plan for all ages at a given location. An employer may also use the FTE's age as of the first day of the ICHRA plan year (or the coverage effective date for new hires) for the entire ICHRA plan year. There are no other special rules related to FTE age.[6] <u>(3) Silver Plan Cost Look-Back Safe Harbor</u> To address employer planning concerns: • A calendar year ICHRA may use the premium from the lowest cost silver plan in a given location as of January from the **prior calendar year**. • A non-calendar year ICHRA may use the premium from the lowest cost silver plan in a given location as of January from the **current calendar year**. <u>Affordable Coverage Example</u> In 2020, an employer makes an annual contribution of $6,000 to an FTE's calendar year ICHRA. As of January 2019, the monthly premium for the lowest cost available silver plan for the FTE's primary worksite and age was $600. $600 – ($6,000/12) = $100/month The ICHRA is an affordable offer of coverage for the employee if $100/month is within an affordability safe harbor for that employee in 2020. Under the Rate of Pay safe harbor, this is affordable for an employee whose Rate of Pay income is at least $1,022/month ($100 / 9.78% = $1,022). Under the W-2 safe harbor, this is affordable for an employee who worked the entire calendar year and has Box 1 reportable W-2 wages of at least $12,264 ($1,022 x 12 = $12,264). Consistent with other guidance, if a silver plan bases its premium cost on the completion of certain wellness activities, enrollees are deemed to automatically satisfy all tobacco-based requirements and fail all other requirements. In other words, the applicable premium to use is the premium for non-tobacco users who do not meet any other wellness standard. An ICHRA deemed affordable coverage is automatically deemed to satisfy the ACA's minimum value requirement paired with its individual major medical insurance policy. An employer may vary the use of the ICHRA affordability rules across classes of employees but not within a class of employees.
Silver Plan Database*	The federal agencies intend to provide a national database of lowest cost silver plan information at a later date.
Waiver	Employees must be permitted to waive participation annually at the beginning of the plan year or effective date of coverage.

[6] An employer could rely on the age of the oldest FTE in an employee class as a sort of age-based safe harbor. This may result in a windfall for younger employees paying lower premiums for silver plan coverage.

Exchange Subsidies	An individual who enrolls in an ICHRA is ineligible for subsidies through the public insurance exchange. 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.
Substantiation	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. 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] A model attestation is available. Employees are required to substantiate enrollment in eligible medical coverage (including for any dependents) each time a request for reimbursement is submitted.
ERISA Status, etc.	The ICHRA is itself an employer-sponsored group health plan. 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.
HSA Eligibility	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.
Cafeteria Plan Option	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]
Nondiscrimination*	A compliant ICHRA will generally be deemed to satisfy the applicable nondiscrimination rules under Section 105(h) of the Internal Revenue Code (IRC). However, an ICHRA that disproportionally benefits highly compensated employees may still be found to be discriminatory in actual operation.
Notice Requirements	Employers must provide eligible employees with a notice describing: 1. The terms of the ICHRA, 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. The notice must be provided at least 90 days before the beginning of the plan year. A model notice is available.
ACA Reporting*	The IRS will release guidance addressing ACA reporting on Form 1095-C for ICHRAs at a later date.

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

[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.

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.

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 ICHRA);
- 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 and is not designed to get high cost claimants to waive coverage.[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.[10]

ABOUT THE AUTHORS
Christopher Beinecke is the Employee Health & Benefits National Compliance Leader for Marsh & McLennan Agency.

[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.
[10] The IRC Section 105(h) nondiscrimination rules apply to Excepted Benefit HRAs.