

Considerations for Employers Moving to an ICHRA Group Health Plan Offering



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Agenda

- What is an HRA?
- What is an ICHRA?
 - Substantiation
 - Nondiscrimination Requirements
 - Opt-out / Waiver Requirements
 - Notice Requirements
 - ERISA Safe Harbor
 - ICHRAs and Employer Shared Responsibility
- Comparison of HRAs
- Best practices and Considerations for Employers Thinking About Offering an ICHRA

- On June 13, 2019, the Treasury, DOL and HHS jointly issues final regulations creating a new “Individual Coverage HRA” or “ICHRA”
- Regulations are effective for plan years beginning on or after January 1, 2020
- Any employer can offer ICHRAs to their common law employees (not limited to small employers), but there are restrictions that must be followed
- ICHRAs cannot be offered to self-employed individuals, partners and more than 2% S corporation shareholders

What is a HRA?

- A Health Reimbursement Arrangement (“HRA”) is an employer-funded plan that reimburses employees for qualified medical expenses and, in some cases, insurance premiums
 - No employee contributions (thus, cannot be provided via salary reductions or through a cafeteria plan)
 - Can reimburse expenses for employees, former employees, spouses, tax dependents, and children who are under age 27 as of the end of the taxable year
- Generally, employers will create unfunded “accounts” for each participating employee, and then reimburse the employee for substantiated, qualified medical expenses up to the employee’s HRA account balance
 - Employers can claim a tax deduction for the reimbursements they make through these plans
 - Reimbursement dollars received by employees are generally tax free

What is a HRA?

- Participants can carry-over unused amounts from year-to-year
- Employers generally set a limit for reimbursements per coverage period, but there is no statutory maximum
 - But QSEHRAs have an IRS-imposed limit on the amount that an employer can contribute to an HRA: \$5,250 for individual and \$10,600 for family coverage in 2020
- Not a portable account that moves with the employee from employer to employer (like a HSA)
- No cash-outs for unused amounts (but can allow employees to spend-down)

What is a HRA?

- No specific section of the Code governing HRAs (other than QSEHRAs) but HRAs treated as tax favored under Code Sections 105 & 106
- HRAs are almost always considered “group health plans” under the Code, ERISA and the Public Health Service Act (“PHSA”)
- Subject to the Form 5500 filing requirements, unless an exception applies (e.g., the small plan exception)
- HRAs are generally subject to HIPAA’s Portability and Administrative Simplification Rules
- HRAs are generally subject to COBRA’ continuation requirements (not QSEHRAs)



Individual Coverage HRAs

- Employees and their dependents must be enrolled in individual health insurance coverage before being eligible for any reimbursements under the ICHRA
- ICHRAs can reimburse premiums and/or any Code Section 213(d) medical expenses
- Special enrollment rights in the individual health insurance market have been expanded for individuals who gain access to HRAs integrated with individual insurance coverage

- **For this purpose, “individual insurance coverage” includes:**
 - Individual market coverage (whether offered through the Exchange/marketplace or not)
 - Student health insurance coverage (applicable to certain educational institutions)
 - Grandfathered and grandmothered plans, but not coverage that consists of excepted benefits
 - Medicare Parts A and B or Medicare Part C premiums

- **Individual insurance coverage excludes all of the following:**
 - Coverage under the plan of a spouse
 - Health care sharing ministries
 - Short-term limited duration policies
 - TRICARE

Individual coverage HRAs (ICHRAs)



- An employer cannot offer an employee or a dependent a choice between the ICHRA and a “traditional” group health coverage (i.e., one that is neither account-based nor limited to excepted benefits)
- Exceptions:
 - Special “new hire rule” - may offer an ICHRA to new hires in a permitted class after a specific date (e.g., everyone currently in the class has a traditional GHP but new hires in class get an ICHRA)
 - Excepted benefits (vision or dental coverage) or health FSA permitted (but not an EBHRA)

- An employee and/or a dependent will need to substantiate each month that he or she is covered by health insurance before the ICHRA can be reimbursed
- Such substantiation may be by either:
 - a document from a third party showing that the employee and any dependent are enrolled or
 - an attestation by individuals that they are or will be enrolled in individual health insurance coverage, the date coverage began or will begin and the name of the provider of the coverage.
- To satisfy this requirement, the agencies have developed model forms both for substantiating coverage and requesting a reimbursement for medical expenses

- The Individual Coverage HRA must be offered on the “same terms” to all members of an employee class
- The final regulations contain eleven different “permitted classes”:
 1. full-time employees that can be defined under Code Section 105(h) (35 hours or more or Code Section 4980H (30 hours or more);
 2. part-time employees that can be defined under Code Section 105(h) (less than 35 hours) or Code Section 4980H (less than 30 hours);
 3. seasonal employees that can be defined under Code Section 105(h) (less than 9 months or Code Section 4980H (less than 6 months);
 4. employees who have satisfied a waiting period for coverage;
 5. non-resident aliens with no US source income;
 6. salaried employees.

- The final regulations contain eleven different classes (continued):
 7. employees in a unit covered by a particular collective bargaining agreement;
 8. non-salaried employees;
 9. employees whose primary site of employment is the in the same rating area;
 10. temporary employees; and
 11. a combination of these ten categories
- If former employees are offered reimbursements, then the former employees are treated as being in the same class they were in immediately before the separation from service
- The designated classes are determined on a common-law employer basis and not on a controlled group

- **Medicare eligible employees are not a designated class under the final rule**
 - Medicare’s anti-duplication rules prohibit the sale of individual medical coverage to an individual enrolled in Medicare
 - This could be viewed as prohibiting Medicare-eligible employees in a class of employees offered an ICHRA from participating (i.e., because they would be unable to purchase individual medical coverage), but this would violate the requirement to make the ICHRA available to all employees in the class on the same terms and conditions
 - Medicare secondary payer (MSP) rules prohibit employers subject to those rules from offering incentives to active employees to elect Medicare in lieu of employer-sponsored group health plan coverage
 - The preamble makes the following clarifications to harmonize the ICHRA and Medicare requirements:
 - An employer subject to MSP rules may offer an ICHRA to a class of employees without violating those rules, even though some employees in the class are eligible for or enrolled in Medicare
 - Reimbursement of Medicare or Medicare supplemental premiums by the ICHRA is not considered an impermissible financial incentive under the MSP rules (but cannot limit reimbursement of medical expenses to expenses not covered by Medicare)

- A minimum class size requirement applies if an employer offers a traditional group plan to one class of employees and offers an individual coverage HRA to another class of employees
- The minimum class size:
 - 10 employees if the employer has fewer than 100 employees
 - 10% of employees if the employer has between 100 to 200 employees (rounded down to a whole number)
 - 20 employees if the employer has more than 200 employees
- Number of employees calculated before plan year (based on reasonable expectations)
- Class Size determined on first day of plan year (based on number of people offered the ICHRA)

There are permitted exceptions to the “same terms” requirement:

- The employer can provide a higher dollar amount under the ICHRA on the basis of age or family size so long as the increase in the maximum dollar amount is because of an increase in age or family size is made available to all participants in the class of employee who are the same age or have the same number of dependents covered under the HRA
 - Limit: the premium for the oldest person cannot exceed three times the premium of the youngest person
- An ICHRA can be made available to some former employees but not to all
- Participants can pay the difference on a pre-tax basis under a cafeteria plan, so long as this option is provided to all members of the class and the coverage was not obtained on the Exchange

There are permitted exceptions to the “same terms” requirement (continued):

- Any unused amounts allowed to be carried over to later plan years can be disregarded, so long as the carryovers are offered on the same terms
- Amounts transferred from a prior HRA can be disregarded, so long as the transferred amount rules apply to all participants
- Adjustments to the maximum dollar amount available during the plan year are allowed for newly hired employees and new dependents
- Employees can be offered a choice between an HSA-compatible ICHRA and an ICHRA that is not HSA-compatible

- Code §105(h) generally prohibits self-insured health plans from discriminating in favor of highly compensated individuals with respect to eligibility or benefits
- Code §105(h) nondiscrimination rules do not apply to ICHRAAs that reimburse only insurance premiums
- However, if the plan operates to disproportionately favor highly compensated employees, then the plan can still be considered discriminatory under Code §105

- An individual who is no longer covered by individual health insurance cannot receive reimbursement from the ICHRA
- COBRA will be offered if coverage is lost under the ICHRA because of a circumstance that would constitute a COBRA qualifying event (e.g., reduction in hours)
- The ICHRA must require employees to provide a notice to the employer if their individual coverage is cancelled

ICHRAAs – Opt-out / Waiver Requirement



- An employee must be allowed to opt out and waive future reimbursements on behalf of the employee and all dependents eligible for the ICHRA
 - This option must be offered once every plan year
 - HRA may establish timeframes for enrollment in (and opting out of) the HRA, but an opt-out opportunity must be provided in advance of the first day of the plan year
 - For participants/dependents who become eligible mid-year (or participants who become eligible fewer than 90 days prior to the plan year), this opportunity must be provided during the applicable ICHRA enrollment period

- Upon termination of employment, ICHRA participants must either forfeit the remaining balance (subject to COBRA) or be permitted to permanently opt out of and waive future reimbursements on behalf of themselves and all covered dependents

- General Rule: Notice of ICHRA must be provided 90 days before beginning of plan year. If employee not eligible to participate when notice provided or the beginning of the plan year, then notice provided no later than date employee first eligible to participate
 - Exception – new employer and ICHRA established fewer than 120 days before the beginning of the first ICHRA plan year, the notice can be provided no later than the date the ICHRA is first effective for employees
- There are numerous, specific content requirements (*discussed on next slide*)

The notice must alert the employee to, among other things, the following:

- The terms of the ICHRA, including the maximum dollar amount made available and other specified provisions
- The right to opt out of and waive future reimbursement under the ICHRA
- A specific individual or group to contact for additional information on the ICHRA
- That the ICHRA may not reimburse any medical care expense unless applicable coverage substantiation requirements are met
- Information related to the individual Exchange special enrollment period (SEP) relating to eligibility to enroll in IMC for a newly eligible ICHRA individual
- That the premium tax credit (PTC) for coverage in the Exchange may be available if (1) the participant opts out of and waives the ICHRA; and (2) the ICHRA is not “affordable”
- That the participant should retain the written notice because it may be needed to determine whether a PTC is allowed on the participant’s income tax return.
- That the ICHRA will not reimburse an individual’s medical care expenses that are incurred after that individual’s individual medical coverage ceases, and that the participant must inform the ICHRA if the participant’s or a dependent’s coverage is canceled or terminated

****The Agencies have provided a model notice!***

The employee's required individual health insurance coverage will not be considered employer-sponsored and subject to ERISA if:

- the purchase of insurance by the employee is voluntary
- the employer is not involved in the selection of the coverage (no endorsement)
- the employer does not receive any consideration for providing the coverage to employees
- reimbursement for non-group health insurance premiums is limited solely to individual health insurance coverage that does not consist solely of excepted benefits
- the employee is notified annually (if the employer meets the other conditions) that coverage under the HRA is not subject to ERISA



Proposed IRS Regulations (September 30, 2019):

- provide greater detail on interplay between the ICHRA and employer shared responsibility rules
- Provide affordability safe harbors for ICHRAs
- May be relied on for plan years beginning BEFORE date that is six months AFTER final regulations are published



- **Confirms for Code §4980H(a) penalty purposes that:**
 - ALEs can count ICHRA offers towards 95% threshold
 - Confirms offering an ICHRA is sufficient
- **Confirms for Code §4980H(b) affordability purposes that:**
 - ALEs may continue to use safe harbors, on a uniform and consistent basis per class
 - An employee's required contribution for individual coverage equals the excess of the monthly self-only premium for the lowest cost silver plan offered by the Exchange in the rating area where the employee resides over the self-only amount (or single dollar amount) made available to the employees under the ICHRA for the month
 - ALEs can continue to use the existing general affordability safe harbors (W-2, rate of pay, and FPL) by referencing the employee's required contribution for silver plan coverage
 - CMS has released a tool to help employers find the lowest-cost silver plan for the applicable location in states using the federal Exchange platform



- For Code §4980H(b) **affordability** purposes:
 - Proposes two new safe harbors designed to simplify affordability determinations:
 - The LOCATON SAFE HARBOR and the LOOK-BACK SAFE HARBOR
 - LOCATION SAFE HARBOR - Allows ALEs to determine Silver Plan premium based on employee's primary site of employment, instead of employee's residence
 - Primary site of employment is where employer reasonably expects employees to perform services
 - If employee regularly works from home or at another location, and may be required to work or report to another location, primary site of employment can be the other location
 - If employee regularly works from home and is not required to work or report to another employer location, then employee's home is primary site of employment
 - Special rules provided for primary site changes



Interplay between the ICHRA and employer shared responsibility rules

- For Code §4980H(b) affordability purposes:
 - LOOK-BACK SAFE HARBOR - Allows ALEs to determine Silver Plan premium based on a look-back month before the plan year
 - For calendar year plans – use January of the prior calendar year
 - For non-calendar year plans – use January of the current calendar year
 - Use employees age on first day of current plan year, or if later, first day of ICHRA coverage eligibility
 - Use employee’s location (residence or primary site of employment, as applicable), but updates must be made if employee’s location changes

Interplay between the ICHRA and employer shared responsibility rules

- For Code **§4980H(b) minimum value** purposes:
 - Confirms ICHRA coverage that is affordable is treated as providing minimum value
- **Code §6055 and Code §6056 reporting** purposes:
 - Limited guidance. Many presume ICHRAs will be reported as a self-insured health plan under §6055 and that §6056 reporting will still be required
 - Preamble to proposed regulations state that additional guidance is forthcoming on IRS reporting forms and instructions – due in 2021



Comparing HRAs

Comparing HRAs

	Traditional HRA	QSEHRA	Individual Coverage HRA (ICHRA)	Excepted Benefits HRA (EBHRA)
Overview (Eligible medical expenses and care defined under IRC 213(d))	Account that reimburses employees and/or retirees for out-of-pocket and unreimbursed medical expenses. Employer can decide which services will be reimbursable under the HRA plan	Account that reimburses employees and/or retirees for individual health coverage premiums and/or most eligible medical expenses	Beginning in 2020, account that reimburses employees and/or retirees for qualifying individual health coverage premiums and/or most unreimbursed eligible medical expenses	Beginning in 2020, account that reimburses employees and/or retirees for unreimbursed excepted benefit premiums; eligible medical expenses
Expenses not eligible for reimbursement	GHP premiums paid for pre-tax through cafeteria plan	Plan design can limit to premium-only or premiums and expenses only	Plan design can limit to premium-only or premiums and expenses only	Individual health coverage premiums, Medicare, or non-COBRA group coverage

Comparing HRAs

	Traditional HRA	QSEHRA	Individual Coverage HRA (ICHRA)	Excepted Benefits HRA (EBHRA)
Eligible Employers	Corporations (including sub-S), LLCs, partnerships, sole proprietors	Only employers with less than 50 FTEs Corporations (including sub-S) LLCs, partnerships, sole proprietors	Corporations (including sub-S), LLCs, partnerships, sole proprietors	Corporations (including sub-S), LLCs, partnerships, sole proprietors
Group Health Plan (Medical) Sponsorship Required?	Yes, GHP required	No. GHP sponsorship prohibited	No. GHP sponsorship prohibited for any class of employees offered the ICHRA Can have GHP for a separate class	Yes, GHP required for same class of employees offered the EBHRA

	Traditional HRA	QSEHRA	Individual Coverage HRA (ICHRA)	Excepted Benefits HRA (EBHRA)
ERISA (not church or gov't)	Yes	Yes	Yes (note, non-ERISA safe harbor)	Yes
GHP subject to PHSA mandates	Yes	No – may not offer a GHP	Yes	No
Form 5500	Yes, unless small	No	Likely	Yes
Plan Doc, SPD, Fiduciary	Yes	Yes	Yes	Yes
COBRA	Yes	N/A	Yes	Generally, yes
Carryover Unused Funds	Employer Decides Plan Design	Employer Decides Plan Design	Employer Decides Plan Design	Employer Decides Plan Design

Comparing HRAs

	Traditional HRA	QSEHRA	Individual Coverage HRA (ICHRA)	Excepted Benefits HRA (EBHRA)
Impacts to MEC	MEC is required to participate	Not itself MEC - but MEC is required to participate	ICHRA qualifies as MEC (4980H(a))	Not itself MEC - but MEC must be offered
Satisfy Employer mandate for ALE? (avoid ESRP penalty)	Yes, must offer GHP w/MV to employees in addition to HRA	N/A	Yes, if offer is also considered affordable and minimum value (4980H(b))	Must offer GHP w/ MV to employees in addition to HRA
Impacts to Premium Tax Credit	N/A must be in employer's GHP	Affordable MV Coverage or eligibility can reduce or eliminate	Ineligible for PTC	N/A
Substantiation Required?	Yes, in advance	Yes, in advance	Yes, in advance	Yes, in advance
Offered to all employees on same terms?	Yes	Generally, yes (limited exclusions)	No, but must be consistent by class	Yes

	Traditional HRA	QSEHRA	Individual Coverage HRA (ICHRA)	Excepted Benefits HRA (EBHRA)
Contribution Limits (*indexed annually for inflation)	Plan designed limit	2020: \$5,250* max single; \$10,600* max family/2+	Plan designed limit	2020: \$1,800*
Funding	Employer contributions only	Employer contributions only	Employer contributions only	Employer contributions only
Taxation of Contributions and Reimbursements	Income tax free (federal and most states)	Income tax free (federal and most states)	Income tax free (federal and most states)	Income tax free (federal and most states)
Can an employee in a spouse's GHP participate?	Yes, if plan design allows	Yes, but no tax-free GHP premium reimbursements	No	Yes, but can not reimburse GHP premiums



Best Practices & Additional Considerations

Considerations for Employers Thinking About Offering an ICHRA



- An ICHRA may be a good fit for a small-to-medium-sized employer, an employer with employees to whom coverage otherwise would not be extended, or an ALE that needs to offer coverage to full-time employees to avoid ESRPs
- Before offering an ICHRA, consider the impact on existing benefits (i.e., major medical coverage, health FSAs, HSAs, and any existing HRAs)
- Design decisions include:
 - whether to cover the entire workforce or only one or more classes (keep in mind the minimum-class-size requirement),
 - whether an HSA-compatible ICHRA will be offered,
 - how much the employer will contribute,
 - how coverage will be substantiated, and
 - which expenses the ICHRA will reimburse

Considerations for Employers Thinking About Offering an ICHRA



- An employer that has decided to implement an ICHRA must adopt appropriate documents before the beginning of the first plan year
- Cafeteria plan amendments will also be needed (or a cafeteria plan must be adopted) if ICHRA participants will be allowed to use pre-tax salary reductions to pay the portion of their individual medical coverage premiums not covered by the ICHRA
- Other action items:
 - Prepare and distribute employee communications (e.g., an SPD, ICRA Notice)
 - Set up systems to administer the new plan
 - Stay tuned - additional guidance on ICHRAs is likely forthcoming



Final Questions

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Thank You



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