



Compliance Alert

Final Regulations Permit Individual Coverage HRAs in 2020

June 17, 2019

By: Brian Gilmore, Lead Benefits Counsel, VP

Last week, the Departments of Health and Human Services, Labor, and the Treasury (the “Departments”) released final regulations (to be officially published June 20) revolutionizing the existing ACA landscape with respect to employers and individual health insurance policies.

- **Final Regulations:** <https://www.federalregister.gov/documents/2019/06/20/2019-12571/health-reimbursement-arrangements-and-other-account-based-group-health-plans>
- **News Release:** <https://www.dol.gov/newsroom/releases/ebsa/ebsa20190613>
- **FAQ:** <https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/health-reimbursement-arrangements.pdf>

The final rules permitting Individual Coverage HRAs (ICHRAs) are applicable for plan years beginning on or after **January 1, 2020**.

Prior Guidance

a) **Friday the 13th Guidance**

The prior rules with respect to individual policies date back to the infamous “Friday the 13th Guidance,” from September 13, 2013. ([DOL Technical Release 2013-03](#); [IRS Notice 2013-54](#)).

In short, those rules provided that employers could not directly purchase individual policies or reimburse employees for the cost of individual policies through an “Employer Payment Plan” or a “Non-Integrated HRA.”

b) IRS Notices 2015-17 and 2015-87

For more details on the IRS prohibition of Employer Payment Plans, as clarified in [IRS Notice 2015-17](#), see our previous alert: [IRS Yet Again Reiterates ACA Prohibition of Individual Policy Reimbursement Arrangements](#).

For more details on the ACA integration rules to avoid a prohibited Non-Integrated HRA, as clarified in [IRS Notice 2015-87](#) (the “ACA Potluck Guidance”), see our Office Hours Webinar: [ACA Potluck: IRS Provides Full Serving of New ACA Guidance](#).

c) Employer Payment Plan Prohibition

That previous guidance permitted employers to assist in the purchase of individual policies only as a standard increase in taxable wages (e.g., cash bonus or increase to the employee’s hourly or salary pay rate) intended to cover the cost of an individual policy but not conditioned in any way on the actual purchase of an individual policy.

Employers wishing to provide additional compensation to employees to assist in the purchase of individual market coverage therefore had to ensure: a) the employee had an unrestricted right to receive those funds as cash, b) the employee was not required to use that cash to purchase health coverage, c) there were no health-plan related conditions on receiving the additional cash, and d) the employee was never required to substantiate the purchase of individual market coverage.

d) Non-Integrated HRA Prohibition

Employers offering an HRA had to always meet the integration requirements from the Friday the 13th Guidance. Those rules generally required that the employee be enrolled in an employer-sponsored major medical group health plan (not an individual policy) meeting certain requirements in order to be eligible for reimbursement from the HRA.

In other words, HRAs could not be integrated with individual market coverage.

e) Penalties

Offering an Employer Payment Plan or Non-Integrated HRA for employer reimbursement of individual policies would violate the ACA and trigger \$100/day/employee excise taxes under IRC §4980D. That would result in potential penalties of \$36,500 per employee, per year.

The New Final Regulations

a) Trump Executive Order

The Departments’ new final regulations obliterate the current landscape with a radical new approach to employer interaction with individual policy reimbursement. The new approach stems from President Trump’s [Executive Order 13813](#) from just over a year ago directing the Departments to expand employer ability to offer HRAs for individual policy reimbursement.

For more details, see our Office Hours Webinar: [2018 Year in Review: Plus What Lies Ahead in 2019](#).

b) Summary of the Final Regulations

Important Note: These final regulations are extremely complex, detailed, and comprehensive. The following is a short, high-level overview of the key points only.

Individual Coverage HRA (ICHRA) Requirements

The new integration rules permit HRAs to be integrated with individual policies (an ICHRA) as follows:

1) Employees Covered by ICHRA Must be Enrolled in Individual Policy

- Employees who cease to be covered by the individual policy must forfeit the ICHRA.

2) Employees Must Not Be Eligible for Both ICHRA and Traditional Employer Sponsored Major Medical Group Health Plan

- Employers can divide employees into separate classes eligible for either ICHRA or traditional group health plan (GHP), but not both.
- Classes include full-time employees, part-time employees, seasonal employees, employees in a CBA unit, employees who have not completed the waiting period for the traditional GHP, non-resident aliens with no U.S.-based income, employees based on region (primary work site), and salaried employees, hourly employees, and employees hired through an outside staffing firm.
- Special class size rules apply to ensure the classes are legitimate.
- Employers may also set any date on or after 1/1/20 for which new hires as its own separate class are offered ICHRA, while still offering the traditional GHP to employees hired prior to that date.

3) Employee Pre-Tax Contributions Permitted (But Not for Exchange Coverage)

- The ACA added IRC §125(f)(3), which prohibits employers from allowing employees to make pre-tax salary reduction contributions toward coverage on the Exchange.
- However, employers may permit employees to use the Section 125 cafeteria plan to contribute on a pre-tax basis for non-Exchange individual market coverage.
- This is important because the ICHRA may not cover the full cost of the individual market premium, and the employee would otherwise have no tax-advantaged mechanism to pay the remaining share.
- Republicans have long pushed to permit tax-free HSA distributions for premiums, including individual market and Exchange coverage. That may be the final key to unlocking the individual market for employers. For more details, See our ABD Commentary: [HSAs to Lead the Way After ACA](#).

4) Employers Must Offer the ICHRA on the Same Terms to All Employees Within the Class

- Offering a more generous ICHRA to individuals based on an adverse health factor is not permitted.
- The ICHRA allocation may increase based on age (larger allocations of up to 3x the youngest participant permitted for older employees) or number of dependents (larger allocations for more dependents permitted with no set limits).
- ICHRA carryovers and ability to pay any remaining cost pre-tax with salary reductions must be uniform for each class.

5) Opt-Out Required

- Employees must have the option to opt-out of the ICHRA coverage annually to maintain eligibility for subsidies on the Exchange (the §36B Premium Tax Credit).

6) Substantiation and Verification of Individual Health Insurance Coverage Required

- The ICHRA must have reasonable procedures in place to verify that anyone covered by the ICHRA is actually enrolled in individual health insurance coverage.
- Includes document from a third-party (e.g., the carrier) or attestation by the participant.
- This process can be done annually or monthly, at the employer's option.
- The Departments issued [model annual and monthly individual coverage attestation forms](#) for employees.

7) Notice Requirement

- The employer must provide written notice to eligible participants at least 90 days before the beginning of each plan year describing the ICHRA.
- The notice must include the maximum dollar amount available, whether dependents are eligible for the ICHRA, a statement that an ICHRA is one of many different types of HRAs, the requirement to maintain individual coverage, the date ICHRA coverage is effective and new amounts are made available, the right to opt-out, description of the alternative availability of Exchange subsidies, a statement that the individual will lose Exchange subsidies if covered by the ICHRA, the requirement to notify the Exchange of the ICHRA if applying for subsidies, a statement to retain the notice for Exchange subsidy eligibility purposes, the substantiation requirements, a statement that ICHRA coverage will end if the individual coverage ceases, the employee's responsibility to inform the employer upon loss of individual coverage, contact information for questions about the ICHRA, and the availability of a special enrollment period for Exchange coverage upon newly gaining access to an ICHRA.
- The Departments issued a [model ICHRA notice](#) for this purpose that can be provided to employees.

Excepted Benefit HRAs: The \$1,800 Supplemental EBHRA Option

The final regulations also provide a new mechanism for employers to offer an HRA of up to \$1,800 in value that is not integrated with individual market (or any other) coverage. This is accomplished through permitting HRAs to qualify as an excepted benefit not subject to the ACA market reform provisions under certain conditions.

Excepted Benefit HRAs (EBHRAs) must meet four requirements:

1) EBHRA Is Not Integral Part of the Plan (Eligibility for Traditional GHP)

- Only employees who are eligible for a traditional GHP sponsored by the employer can be eligible for the EBHRA.
- Employees do not have to actually enroll in the traditional GHP to benefit from the EBHRA.

- 2) EBHRA Must Provide Benefits That Are Limited in Amount (\$1,800 Limit)**
 - The amounts made newly available for a plan year in the EBHRA cannot exceed \$1,800.
 - Indexed for inflation for plan year 2021 and beyond (C-CPI-U).
- 3) EBHRA Cannot Reimburse Premiums (Individual or Group)**
 - Only permitted premiums would be excepted benefits like dental or vision coverage, COBRA premiums, and (in certain situations) short-term limited duration policies.
- 4) EBHRA Must Be Available Under Same Terms to All Similarly Situated Individuals**
 - Must be available on same terms regardless of any health factor

ACA Employer Mandate Pay or Play Rules

The IRS separately issued [Notice 2018-88](#) providing the framework for how ICHRAs will be treated under the ACA employer mandate rules in forthcoming regulations.

Most importantly, the Notice confirms that ICHRAs will be treated as an “eligible employer-sponsored plan” to qualify as minimum essential coverage and therefore be treated as an offer of coverage under §4980H(a) (the “A Penalty” or the “Sledge Hammer Penalty”).

The Notice further confirms that an ICHRA that is affordable will be treated as providing minimum value under §4980H(b) (the “B Penalty” or the “Tack Hammer Penalty”).

More complex will be the determination of affordability for ICHRAs under the B Penalty. The Notice proposes that the amount employers make available to employees under the ICHRA will be measured in relation to an “**HRA affordability plan**” on the individual market, which is **the lowest cost silver plan for the employee for self-only Exchange coverage in the rating area where the employee resides**.

While the Notice provides that the three standard affordability safe harbors will apply (federal poverty level, rate of pay, or Form W-2), it further states that the IRS is considering adding an additional three affordability safe harbors that employers can use to address the unique ICHRA circumstances:

1) Proposed Worksite Location Safe Harbor

- This safe harbor would permit employers to have the HRA affordability plan based on the lowest cost silver plan in the rating area of the employee’s primary worksite (as opposed to residence).
- Age-based safe harbors may be included (e.g., age bands or other assumptions) because the cost will vary based on the employee’s age.

2) Proposed Calendar Plan Year Safe Harbor

- Employers with a calendar plan year ICHRA may base the HRA affordability plan cost on the premium in effect for the prior calendar year.
- This is designed to address the fact that Exchange plan premiums are not available until October, which would not provide sufficient planning time for employers.

3) Proposed Non-Calendar Plan Year Safe Harbor

- Employers with a non-calendar plan year may rely on the cost of the HRA affordability plan in the first month of the plan year for the remainder of the plan year.
- This addresses complications with Exchange premiums changing mid-plan year for the ICHRA.

For more details on the ACA employer mandate pay or play affordability rules, see our Compliance Alert: [How the 2019 ACA Affordability Rules Apply to Employers](#).

Summary

These new final regulations are extensive and completely change the ACA landscape for employers going forward.

For the first time, employers will have the realistic opportunity to marry a tax-advantaged, defined contribution approach with an individual coverage market that is available to all employees and dependents regardless of health conditions.

The Departments estimate that roughly 800,000 employers will offer ICHRAs to cover roughly 11 million individuals within five years. They also estimate that traditional group major medical plan coverage will decline by roughly seven million covered individuals over the same period. This major shift could become even more dramatic if employers and employees have positive experiences with the ICHRA approach.

In short, employers that have long desired an alternative method of offering health coverage to employees can look forward to the exciting new ICHRA and EBHRA options becoming available in the near future.

The final regulations are applicable for plan years beginning on and after January 1, 2020.

Disclaimer: The intent of this analysis is to provide the recipient with general information regarding the status of, and/or potential concerns related to, the recipient's current employee benefits issues. This analysis does not necessarily fully address the recipient's specific issue, and it should not be construed as, nor is it intended to provide, legal advice. Furthermore, this message does not establish an attorney-client relationship. Questions regarding specific issues should be addressed to the person(s) who provide legal advice to the recipient regarding employee benefits issues (e.g., the recipient's general counsel or an attorney hired by the recipient who specializes in employee benefits law).