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# Ten things employers should know about individual coverage HRAs

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According to the 2018 Annual Survey of Employer Health Benefits conducted by the Kaiser Family Foundation, the percentage of small employers offering health benefits to their employees has declined since 2010, the year provisions of the Patient Protection and Affordable Care Act (ACA) first became effective.[1] Between 2010 and 2018, the percentage of employers with 3-9 workers offering employee health coverage declined 12%, from 59% to 47%. A similar 12% decline in employee health coverage occurred with respect to employers with 10-24 workers over the same period (76% to 64%). Employers with 25-49 workers experienced the largest decline in employee health coverage with a 21% decline since 2010 (92% to 71%). The smallest coverage decline occurred with respect to employers with 50-199 workers (a 4% decline from 95% to 91%). On average, there was a 12% decline in employee health coverage by employers with fewer than 200 employees from 2010 to 2018.

On October 12, 2017, President Trump signed an executive order, titled “Promoting Health Choice and Competition Across the United States,” directing several federal agencies to propose regulations or revise outstanding guidance to “increase the usability of health reimbursement arrangements (HRAs), to expand employers’ ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage.[2]

On June 13, 2018, the U.S. Departments of Treasury, Labor and Health and Human Services issued final regulations regarding the establishment of individual coverage health reimbursement arrangements (ICHRAs). ICHRAs permit employer contributions to be used to reimburse employees for individual health insurance premiums.[3] To be eligible for an ICHRA, an individual must be enrolled in individual health insurance that satisfies Section 2711 (no lifetime or annual limits) and Section 2713 (coverage of preventive services) of the Public Health Services Act. Individual health insurance can be obtained through the ACA Exchange or via a non-Exchange provider. Employer contributions to the ICHRAs do not constitute taxable income to the employees and are not subject to employment taxes.

The following are 10 key elements of ICHRAs that employers should consider before offering them to employees.

## 1. ICHRAs are an alternative to traditional group health plan coverage

ICHRAs are offered by employers as an alternative to traditional group health plan coverage. Under the regulations, an employer is not permitted to offer an employee a choice between an ICHRA and group health coverage. Nor can an employer offer an ICHRA to an employee to whom it offers any other group health plan. However, as noted below, an employer may offer an ICHRA to one class of employees and a traditional group health plan to another class of employees.

## 2. Employers can offer different ICHRA coverage to different classes of employees

An employer can offer an ICHRA under different terms and conditions provided that all employees in the same class are treated the same. For example, an employer can offer a traditional group health plan to salaried employees and an ICHRA to hourly employees.

The following classes can be subject to different terms and conditions:

- Full-time employees;
- Part-time employees;

- Employees working in the same geographic location (e.g., state, insurance rating area, or multistate region)
- Seasonal employees;
- Employees covered by the same collective bargaining agreement;
- Employees who have not satisfied a waiting period;
- Non-resident aliens with no U.S. income;
- Salaried employees;
- Non-salaried employees
- Temporary employees of staffing firms; or
- An combination of the above classes

The regulations require that the terms “full-time, “part-time” and “seasonal” be defined in accordance with specified definitions under existing federal law.

### 3. A minimum class size may apply to ICHRAs

In order to avoid adverse selection in the individual insurance market, the final regulations require that employee classes satisfy certain minimum size requirements if an employer offers a traditional group health plan to some employees and an ICHRA to other employees based on (i) full-time versus part-time status, (ii) salaried versus hourly status, or a (iii) geographic location that is smaller than a state. The minimum requirements are:

- Ten employees for employers with less than 100 employees;
- 10% of all employees for employers with between 100 and 200 employees; and
- Twenty employees for employers with more than 200 employees.

### 4. There is no dollar limit on an employer’s annual contribution to an employee’s ICHRA

The final regulations do not impose a dollar limit on the annual contribution an employer makes to an employee’s ICHRA. Generally, all employees in the same class must receive the same level of annual contribution. However, the final regulations permit an employer to increase the contribution to an employee’s ICHRA based on the employee’s age or number of dependents. However, the maximum contribution made for the oldest ICHRA participant cannot exceed three times the maximum contribution made for the youngest ICHRA participant.

### 5. An ICHRA can satisfy the Employer Mandate under the ACA

If an employer is an applicable large employer (ALE) subject to the ACA employer mandate (i.e., at least 50 full-time equivalent employees in the prior year), it is possible that an offer of an ICHRA will satisfy the employer mandate. First, the ALE must offer an ICHRA (and/or other eligible employer-sponsored coverage) to a least 95% of its full-time employees (and their dependents). Second, the offer of ICHRA must be affordable and provide minimum value, as defined under the ACA. In November 2018, the Internal Revenue Service (IRS) issued Notice 2018-88 setting forth proposed safe harbors for qualifying as an “affordable” ICHRA.[4] The IRS has requested comments on the safe harbors and will issue proposed regulations with additional guidance in the future.

### 6. ICHRA must substantiate that participating employees and their dependents are enrolled in individual health insurance

An ICHRA must substantiate that participating employees and their dependents are covered by individual health insurance or Medicare. The ICHRA may rely on documentation or an attestation provided by employees regarding individual health coverage unless it has actual knowledge than an employee or one of his or her dependents is not enrolled in individual health coverage. The Departments of the Treasury, Labor, and Health and Human Services have issued a model attestation form that ICHRAs can use for this purpose.[5]

### 7. ICHRA must provide notice to employees describing the ICHRA and the interaction of the ICHRA and the ACA premium tax credit

At least 90 days before the beginning of each plan year, the ICHRA must provide a written notice to each participant that incorporates ten areas of information described in the regulations, including the impact of ICHRA participation on eligibility for the ACA premium tax credit and the employee’s right to opt out of the ICHRA (see discussion below).

Under the ACA, an employee may be eligible for a premium tax credit to help pay for health insurance coverage for the employee and his dependents purchased through the ACA Exchange. Eligibility depends on the following factors:

- The employee or a dependent must be enrolled in health insurance coverage through an ACA Exchange for at least one month of a calendar year;
- The employee or dependent was not eligible for affordable coverage through an employer-sponsored plan that provides minimum value or eligible for government health coverage such as Medicare or Medicaid;
- The employee's household income is at least 100%, but no more than 400% of the federal poverty line for his or her family size.

An employee is not eligible for the premium tax credit if he or she is covered by an ICHRA. If the employee opts out of the ICHRA, he or she may be eligible for the premium tax credit if other requirements are satisfied.

The Departments of the Treasury, Labor, and Health and Human Services have issued a model notice for use by ICHRAs that will constitute good faith compliance with the notice requirement.[6]

## 8. Employees can opt out of an ICHRA at least annually

Given the possible impact on an employee's ability to claim the ACA premium tax credit, the final regulations require that an employee be permitted to opt out of an ICHRA and waive future reimbursements on behalf of the employee and his or her dependents at least annually.

## 9. ICHRAs are not subject to ERISA if certain requirements are met

An ICHRA will not be considered an employee benefit plan subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA), if the following apply:

- An employee's purchase of individual health insurance is voluntary;
- The employer does not select or endorse an insurance carrier or individual health insurance product;
- The employer does not receive any consideration in connection with an employee's enrollment or renewal in individual health insurance; and
- An employee is notified annually that the individual health insurance is not subject to ERISA.

## 10. Effective date

The final regulations become effective August 19, 2019 and apply for plan years beginning on or after January 1, 2020.

## Conclusion

Although employers of any size can offer ICHRAs, they are expected to have the greatest impact on small to mid-size employers. Guidance issued with the final regulations estimates that 800,000 employers will adopt ICHRAs to pay for individual insurance coverage for employees and their dependents and that about 800,000 uninsured individuals will obtain coverage through ICHRAs. There is some debate whether ICHRAs will have an adverse impact on the ACA Exchange.

Whether or not it currently offers employee health coverage, an employer should review the available guidance on ICHRAs and weigh the relative advantages of this new coverage option before adopting an ICHRA for some or all of its employees.

*Lori Jones is the chair of Thompson Coburn's Employee Benefits practice.*

1. http://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2018 ↩
2. https://www.whitehouse.gov/presidential-actions/presidential-executive-order-promoting-healthcare-choice-competition-across-united-states ↩
3. Prior to the final regulations, individual health insurance premiums could only be reimbursed via a "qualified small employer health reimbursement arrangement" (QSEHRA) that was subject to annual contribution limitations. ↩
4. 2018-49 I.R.B. 817(December 3, 2018) ↩
5. https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB87/individual-coverage-model-attestation.pdf ↩
6. https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB87/individual-coverage-model-notice.pdf ↩

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