

Office Hours

Individual Coverage HRAs: The ICHRA Revolution Begins January 1, 2020

Audio

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ICHRAs: The Big Picture

Are ICHRAs THE Health Plan Defined Contribution Solution?

A New Form of HRA that Has the Potential to be as Revolutionary as the 401(k) Plan

- Employers have long desired a defined contribution alternative to the traditional employer-sponsored major medical group health plan
- There have been false starts in the past (e.g., flex credits, private exchanges)
- But no vehicle has truly provided the potential to reshape the offering in a manner like ICHRAs paired with a PCE-free and community rated individual market
- Smaller employers are likely to immediately jump at ICHRAs as an attractive alternative—but the bigger question is how long before mid-sized and large employers follow?
- Also, will employees demand ICHRAs as a superior offering because of the increased choice in plan options and increased portability?

What are the Main Topics Covered?

- Current state of the law prohibiting ICHRAs or any similar alternative
- The new final ICHRA regulations and seven main requirements for compliance
- Special rules for notices, ERISA, class distinctions, and mid-year enrollment
- How the ACA employer mandate rules apply to ICHRAs
- What are the estimated effects, and what is likely to develop in the near to mid-term future

ACA Background: Prior Individual Coverage Guidance

The Friday the 13th Guidance (September 13, 2013)

IRS Notice 2013-54; DOL Technical Release 2013-03

- The beginning of a long series of (particularly IRS) guidance confirming the ACA prohibition of individual coverage payment/reimbursement by employers
- **Guidance provided that employers cannot directly purchase individual policies or reimburse employees for the cost of individual policies through an “Employer Payment Plan” or a “Non-Integrated HRA”**

The IRS ACA Potluck Guidance (2015)

IRS Notice 2015-17; IRS Notice 2015-87

- Additional guidance reiterating the IRS prohibition of Employer Payment Plans and Non-Integrated HRAs
- Confirmed that even taxable reimbursements are prohibited, and that integration rules apply to employees, spouses and dependents

Penalties

IRC §4980D

- Employers offering an Employer Payment Plan or Non-Integrated HRA for employer reimbursement of individual policies violates the ACA market reform rules
- **Penalty is \$100/day/employee excise taxes—resulting in potential penalties of \$36,500 per employee per year**

Current (Pre-2020) ACA State of the Law: HRA “Integration” Required

The Current ACA HRA Integration Rules

MV Integration Requirements

- 1) Employer offers major medical **that provides minimum value (MV)** to the employee
- 2) Employee covered by HRA is also enrolled in a group major medical plan **that provides MV**—whether through that employer or a spouse/DP/parent
- 3) HRA is available only to employees enrolled in a group major medical plan **that provides MV**—whether through that employer or a spouse/DP/parent
- 4) Employee is permitted to permanently opt-out of HRA at least annually and upon termination

Non-MV Integration Requirements

- 1) Employer offers major medical to the employee
- 2) Employee covered by the HRA is also enrolled in group major medical—whether through that employer or a spouse/DP/parent
- 3) HRA is available only to employees enrolled in a group major medical plan—whether through that employer or a spouse/DP/parent
- 4) **HRA reimburses only cost-sharing amounts under the major medical and/or non-essential health benefits**
- 5) Employee is permitted to permanently opt-out of HRA at least annually and upon termination

Current (Pre-2020) ACA State of the Law: HRA “Integration” Required

The Current ACA HRA Integration Rules

SIMPLIFIED VERSION

Non-Integrated HRA Prohibition

- Employers offering an HRA have had to meet the “integration” requirements stemming from the Friday the 13th Guidance
- Those rules generally require that the employee be enrolled in an employer-sponsored major medical group health plan meeting certain requirements to be eligible for reimbursement
- **Most important piece is that HRAs could not be integrated with individual market coverage**

Why Prohibited?

- Non-integrated HRAs cannot satisfy the ACA market reform requirements for group health plans
 - 1) Does not comply with the ACA prohibition of annual limits on the dollar amount of essential health benefits; and
 - 2) Does not satisfy the ACA requirement to provide certain preventive services without imposing any cost-sharing requirements for the services

The (Less-Than-Ideal) Workaround: Increase in Employee Compensation

Increases in Employee Taxable Compensation Permitted

- Employers may increase an employee's standard taxable compensation to assist an employee with payments of individual market coverage
- Such additional compensation cannot be conditioned on the purchase of the individual health coverage
- Also cannot otherwise endorse a particular policy, form, or issuer of health insurance
- Only permitted to inform employee about the Marketplace and §36B premium tax credit

Practical Result

- Employers can provide a bonus or a raise intended to address the cost for the employee to purchase individual coverage—but in no way actually tied to such coverage
- Employees may use the bonus/raise money to buy individual coverage or a plane ticket to Maui—employer cannot in any way monitor/enforce/condition payment for health coverage

Checklist to Avoid Prohibited Employer Payment Plan

- 1) Payment is standard taxable income (subject to withholding and payroll taxes)
- 2) Employee has an unrestricted right to receive the compensation as cash
- 3) Employee not required to use the compensation to purchase health coverage
- 4) No health plan-related conditions on the employee receiving the additional compensation
- 5) Employee never required to substantiate the purchase of individual market coverage

Executive Order 13813: Direction to Issue New Regulations

EXECUTIVE ORDERS

Presidential Executive Order Promoting Healthcare Choice and Competition Across the United States

— HEALTHCARE | Issued on: October 12, 2017



Sec. 4. Expanded Availability and Permitted Use of Health Reimbursement Arrangements. Within 120 days of the date of this order, the Secretaries of the Treasury, Labor, and Health and Human Services shall consider proposing regulations or revising guidance, to the extent permitted by law and supported by sound policy, to increase the usability of HRAs, to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage.

Individual Coverage HRAs: The New Landscape in 2020

Final Rules Effective Plan Years Beginning On or After January 1, 2020: Individual Coverage HRAs (ICHRAs) Permitted With Seven Conditions

1

Employees Covered by ICHRA Must Be Enrolled in an Individual Policy

- Employees who lose coverage under the individual policy forfeit the HRA

2

Employees Must Not Be Eligible for Both ICHRA and Traditional Plan

- Must exclude employees eligible for the ICHRA from eligibility for the traditional employer-sponsored major medical group health plan (GHP)
- Specific class rules on which employees can be offered the ICHRA vs. the traditional GHP
- Specific class size rules to ensure that the classes are legitimate
- Employers may also set any date on or after January 1, 2020 for which new hires as its own separate class are offered the ICHRA, while still offering the traditional GHP to employees hired prior to that date

3

Employers Must Offer the ICHRA on Same Terms to Each Employee Class

- Cannot offer a more generous ICHRA based on adverse health conditions
- Can increase ICHRA allocation based on age or number of dependents
- Larger allocations of up to 3x the youngest participant permitted for older employees (no set limit on dependent adjustment allocations)

Individual Coverage HRAs: The New Landscape in 2020

Final Rules Effective Plan Years Beginning On or After January 1, 2020: Individual Coverage HRAs (ICHRAs) Permitted With Seven Conditions

4

Opt-Out Required

- Employees must have the option to opt-out of the HRA coverage to maintain eligibility for subsidies on the Exchange (the §36B premium tax credit)

5

Employee Pre-Tax Contributions Permitted Off Exchange

- ACA added §125(f)(3) prohibiting employee pre-tax salary reduction contributions toward coverage on the Exchange
- However, employer may permit employees to use Section 125 cafeteria plan to contribute on a pre-tax basis to non-Exchange individual market coverage
- Important because ICHRA may not cover the full cost of the premium

6

Substantiation and Verification of Individual Coverage Required

- ICHRA must have reasonable procedures in place to verify that employees are actually enrolled in individual policy
- Can include third-party (carrier) documentation or employee attestation
- Model attestation forms (annual and monthly) available from the DOL

7

Notice Requirement

- Employer must provide written notice to eligible employees at least 90 days prior to the start of each plan year describing the ICHRA terms
- Model notice available from the DOL

Individual Coverage HRAs: Class Rules are Important!

Classes determine which employees will be eligible for the ICHRA vs. the traditional GHP, as well as how much will be made available under the ICHRA.

Permitted Classes

- Full-time employees
- Part-time employees
- Employees in a geographic region
- Seasonal employees
- CBA unit of employees
- Employees in their waiting period for traditional GHP coverage
- Non-resident aliens with no U.S.-based income
- Salaried employees
- Hourly employees
- Outside staffing firm temps
- Any combination of classes

Minimum Class Size

Employers with <100 Employees

- 10 employee minimum

Employers with 100-200 Employees

- 10% of the total number of employees minimum

Employers with >200 Employees

- 20 employee minimum

Notes

- Employer size determined in advance of the ICHRA plan year based on expected employee count on first day of plan year
- Class size is based on the employer's offers of ICHRA coverage on first day of plan year (not actual enrollment)

Individual Coverage HRAs: The New Landscape in 2020

The Notice Requirement

- Employers must provide written notice to each eligible employee at least 90 days prior to the start of each plan year describing the ICHRA terms
- Employees who become newly eligible mid-year (or after the 90-day period prior to the start of the year) must receive the notice no later than the date ICHRA takes effect

Required Notice Content (Ten Items)

The notice must include the following ten provisions (and may include any additional information that does not conflict with the required content):

- 1) **A description of the terms of the HRA:**
 - The maximum dollar amount available for each participant (including proration for mid-year entry, if any)
 - Whether the cost of individual coverage for family members are also eligible expenses
 - A statement that the ICHRA is not a QSEHRA
 - A statement that the HRA requires the participant and any dependents to be enrolled in individual health coverage
 - A statement that Short Term Limited Duration Insurance (STLDI) and excepted benefits are not eligible expenses
 - A statement that the individual coverage reimbursed by the ICHRA is not subject to ERISA
 - The ICHRA coverage effective date (including mid-year enrollees), plan year date, and the dates on which new amounts will be made available under the ICHRA

Individual Coverage HRAs: The New Landscape in 2020

Required Notice Content (Ten Items Cont'd)

- 2) **A statement of the right of the employee to opt-out of the ICHRA**
- 3) **A description of the potential availability of the §36B premium tax credit (PTC) if the employee opts-out of the ICHRA and the ICHRA is unaffordable**
 - Including a statement that the employer's offer of ICHRA coverage—even if the employee opts-out—will prohibit the employee from receiving the PTC if the ICHRA is affordable
 - Including a statement of how the participant may find assistance determining affordability
 - Also a statement that when the employee terminates employment, the affordable ICHRA offer will no longer render the former employee ineligible for the PTC
 - A statement that Medicare enrollment blocks the PTC regardless of the ICHRA status
- 4) **A statement that if the employee does not opt-out of the ICHRA, the employee cannot claim the PTC for any month the ICHRA coverage is in place (regardless of affordability)**
- 5) **A statement that ICHRA participants must inform the Exchange of the ICHRA amount available for the plan year if applying for advance payments of the PTC**
 - Must include whether the ICHRA is also available to dependents
 - The date on which ICHRA coverage is effective, and the plan year beginning and end date
 - Whether the participating is a current or former employee

Individual Coverage HRAs: The New Landscape in 2020

Required Notice Content (Ten Items Cont'd)

- 6) **A statement that the participant should retain the notice in case it is needed to determine eligibility for the Premium Tax Credit (PTC) on the individual tax return**
- 7) **A statement that the ICHRA will not reimburse any expense that is unsubstantiated**
- 8) **A statement that if the individual coverage ceases, the ICHRA will not reimburse any medical expenses incurred after coverage ceases**
 - Including a statement that the participant must inform the ICHRA if coverage terminates retroactively (and the date of such retroactive termination)
- 9) **The contact information (including a phone number) for an individual or group of individuals who participants may contact to receive additional information about the ICHRA**
- 10) **A statement of the availability of a special enrollment period to enroll in or change individual health insurance coverage (on or off the Exchange) for the participant and any dependents who newly gain access to the ICHRA and are not already covered by the ICHRA**

Individual Coverage HRAs:

Notice Timing

Employers must provide the required notice to ICHRA-eligible employees within specific set timeframes to ensure timely enrollment in individual coverage.

General 90-Day Rule

90-Day Requirement

- Employer must provide the notice to ICHRA-eligible employees **at least 90 calendar days before the beginning of each plan year**

Calendar-Year ICHRA

- Provide notice to ICHRA-eligible employees **no later than October 3**

Exceptions

Employees Not Eligible to Participate at Start of Plan Year

- Employer must provide the notice no later than the date on which the ICHRA may first take effect for the employee (includes new hires)

New Employer First ICHRA Plan Year

- For a new employer that is established less than 120 days before the start of the first ICHRA plan year, employer must provide the notice no later than the date on which the ICHRA may first take effect

Individual Coverage HRAs: The New Landscape in 2020

DOL ICHRA Model Notice (Six Pages!)

<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/health-reimbursement-arrangements.pdf>

Individual Coverage HRA Model Notice

USE THIS NOTICE WHEN APPLYING FOR INDIVIDUAL HEALTH INSURANCE COVERAGE

[Enter date of notice]

You are getting this notice because your employer is offering you an individual coverage health reimbursement arrangement (HRA). Please read this notice before you decide whether to accept the HRA. In some circumstances, your decision could affect your eligibility for the premium tax credit. Accepting the individual coverage HRA and improperly claiming the premium tax credit could result in tax liability.

This notice also has important information that the Exchange (known in many states as the "Health Insurance Marketplace") will need to determine if you are eligible for advance payments of the premium tax credit. An Exchange operates in each state to help individuals and families shop for and enroll in individual health insurance coverage.

You may also need this notice to verify that you are eligible for a special enrollment period to enroll in individual health insurance coverage outside of the annual open enrollment period in the individual market.

Individual Coverage HRAs: The New Landscape in 2020

DOL ICHRA Model Annual Attestation Form

<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/health-reimbursement-arrangements.pdf>

Individual Coverage HRA Model Attestation: Annual Coverage Substantiation Requirement

Instructions: You have been offered an individual coverage health reimbursement arrangement (HRA) to help you pay for medical care expenses. To enroll in this individual coverage HRA, you must be enrolled in individual health insurance coverage, Medicare Part A (Hospital Insurance) and B (Medical Insurance), or Medicare Part C (Medicare Advantage). You should have received a notice that describes the individual coverage HRA that you are being offered. If you have not, or if you have questions about the individual coverage HRA, contact [add contact information].

If you plan to enroll in the individual coverage HRA, you must complete this form to confirm that you will have individual health insurance coverage, Medicare Part A and B, or Medicare Part C while you are covered by the HRA. If your family members will also be covered by the individual coverage HRA, you need to fill out the applicable section of this form on their behalf.

You must sign and date the form. Your family members do not need to sign or date the form. Please return the completed form to [add instructions for returning the form]. You must return the form by [add deadline for returning the form.]

I attest to the following:

I, _____, am covered (or will be covered) by the following health
(insert name)
coverage: _____
(insert name of insurance company or indicate "Medicare")

This health coverage began (or will begin) on _____.
(insert date coverage began or will begin)

Individual Coverage HRAs: The New Landscape in 2020

DOL ICHRA Model Monthly Attestation Form

<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/health-reimbursement-arrangements.pdf>

Individual Coverage HRA Model Attestation: Ongoing Substantiation Requirement

Instructions: To receive reimbursement for medical care expenses under your individual coverage health reimbursement arrangement (HRA), you must complete this form for each request for reimbursement.

The individual coverage HRA will reimburse you for a medical care expense incurred during a month only if you have (or had) individual health insurance coverage, Medicare Part A (Hospital Insurance) and B (Medical Insurance), or Medicare Part C (Medicare Advantage) during that month. Similarly, the individual coverage HRA will reimburse you for a medical care expense your family member incurred during a month only if the family member has (or had) individual health insurance coverage, Medicare Part A and B, or Medicare Part C during that month. In this form, you are attesting that you (or your family member) meet this requirement. *[If this form is not combined with the form used to seek reimbursement of medical care expenses, add a statement that the reimbursement form is separate.]*

You must sign and date this form. Your family member does not need to sign or date the form. Please return the completed form to *[add instructions for returning the form, including any applicable deadline]*.

Complete the following if you're requesting reimbursement of your medical care expense from the individual coverage HRA.

I attest to the following:

I, _____, am requesting reimbursement for a medical care
(insert name)
expense incurred during _____, and for that month I am (or was) covered under
(insert month, year)
the following health coverage: _____.
(insert name of insurance company or indicate "Medicare")

Individual Coverage HRAs: Special Enrollment Periods

New Special Enrollment Periods for Individual Coverage

- Permits employees/dependents to enroll in individual coverage outside of the standard open enrollment period when an employee/dependent newly gains access to an ICHRA (the “triggering event”)

Special Enrollment Period Timing

- **General Rule—60 Days In Advance of Event:** The general rule is that employees have 60 days before the triggering event (i.e., date the ICHRA coverage is effective) to select a plan for **special enrollment effective as of the date of the triggering event** (or first of the month following if the triggering event is mid-month, which would be unusual for an ICHRA effective date)

Calendar Plan Year ICHRA Example

- Employer will provide ICHRA notice to employees no later than October 3 (90 days in advance of plan year)
 - Employee has special enrollment period from November 2 – December 31 (60 days in advance of triggering event)
 - **Individual policy and ICHRA coverage are both effective January 1 (the “triggering event” date)**
- **Exception—60 Days Before or After Event:** If the employer doesn’t have to provide the notice until the day ICHRA coverage takes effect (e.g., newly eligible employees), the special enrollment period is extended to 60 days before or after the triggering event
 - **Plan selection in the SEP that is 60 days on or after the triggering event will result in coverage that is effective as of the first day of the month following the date of plan selection**

New Hire ICHRA Example

- **Employee is hired July 15 and is eligible for ICHRA coverage effective August 1 (the triggering event date)**
- Two SEP options: July 15 – July 31 (prior to triggering event) or August 1 – September 30 (60 days after triggering event)
- Plan selection on or before July 31 (prior to triggering event) would provide for an August 1 effective date
- Plan selection on September 30 (last day of the post-triggering event SEP) would mean an October 1 policy effective date

Individual Coverage HRAs: ERISA Application

The ICHRA is an ERISA Group Health Plan

- As with all HRAs, an ICHRA is a group health plan subject to ERISA

The Underlying Individual Coverage is Not an ERISA Group Health Plan

- Five conditions to avoid application of ERISA to the individual coverage:
 - 1) Purchase of individual coverage is **completely voluntary**
 - Conditioning ICHRA participation on purchase of individual coverage is still voluntary
 - 2) **No employer endorsement** of any particular insurance carrier or coverage
 - Employer may provide general information including how to access healthcare.gov or the uniform glossary of medical terms that applies to SBCs
 - 3) Reimbursement of premiums is **limited solely to individual health insurance coverage**
 - 4) The employer receives **no consideration (cash or otherwise)** in connection with the employee's selection or renewal of the individual coverage
 - 5) The employer provides **notice annually** to each participant that the individual health insurance coverage is not subject to ERISA (model language below)
 - *"The individual health insurance coverage that is paid for by this plan, if any, is not subject to the rules and consumer protections of the Employee Retirement Income Security Act. You should contact your state insurance department for more information regarding your rights and responsibilities if you purchase individual health insurance coverage."*

The ACA's Employer Mandate “Pay or Play” §4980H Penalties

§4980H(a)—The “A Penalty”

Aka: The “Sledge Hammer Penalty”

- **Failure to offer MEC to at least 95% of all full-time employees (and their children to age 26) in 2016 and beyond**
- The A Penalty is triggered by at least one such full-time employee who is not offered MEC enrolling in subsidized exchange coverage
- **2019 A Penalty liability is \$2,500 annualized (\$208.33/month)* multiplied by all full-time employees**
- **30 full-time employee reduction from multiplier in 2016 and beyond**

§4980H(b)—The “B Penalty”

Aka: The “Tack Hammer Penalty”

- Applies where the employer is not subject to the A penalty
- **Failure to:**
 - 1) **Offer coverage that's affordable**
 - 2) **Offer coverage that provides MV**
 - 3) **Offer MEC to a full-time employee (where the employer has still offered at a sufficient percentage to avoid A Penalty liability)**
- The B Penalty is triggered by any such full-time employee enrolling in subsidized exchange coverage
- **2019 B Penalty liability is \$3,750 annualized (\$312.50/month)* multiplied by each such full-time employee who enrolls in subsidized exchange coverage**
- Note that although the B Penalty amount is higher (\$3,750 vs. \$2,500), the multiplier is generally much lower (only those full-time employees not offered affordable/minimum value coverage who enroll in subsidized exchange coverage)

*Projected

The ACA's Employer Mandate “Pay or Play” §4980H Penalties

§4980H(a)—The “A Penalty”
Aka: The “Sledge Hammer Penalty”

SIMPLIFIED VERSION

- Must offer MEC to at least 95% of full-time employees
- To avoid the “A Penalty”
- 2019 A Penalty liability is \$2,500 annualized (\$208.33/month)* multiplied by all full-time employees (reduced by first 30)

§4980H(b)—The “B Penalty”
Aka: The “Tack Hammer Penalty”

SIMPLIFIED VERSION

- The offer of MEC must:
 - a) Be affordable; and
 - b) Provide minimum value (MV)
- To avoid the “B Penalty”
- 2019 B Penalty liability is \$3,750 annualized (\$312.50/month)* multiplied by each such full-time employee who enrolls in subsidized exchange coverage

*Projected

The ACA's Employer Mandate “Pay or Play” §4980H Penalties

§4980H(a)—The “A Penalty”
Aka: The “Sledge Hammer Penalty”

STANDARD HRA VERSION

Must offer MEC to at least 95% of full-time employees

- MEC includes any “eligible employer-sponsored plan”:
 - Fully insured group health plan
 - Self-insured group health plan
 - HRAs are an eligible employer-sponsored plan (MEC) as a self-insured group health plan
 - Cannot be an excepted benefit (e.g., dental/vision only)
- **IRS Notice 2013-54:**
 - *“Note that coverage provided through an HRA, other than coverage consisting solely of excepted benefits, is an eligible employer-sponsored plan and, therefore, minimum essential coverage under Code §5000A.”*

§4980H(b)—The “B Penalty”
Aka: The “Tack Hammer Penalty”

STANDARD HRA VERSION

- The offer of MEC must:
 - a) Be affordable; and
 - b) Provide minimum value (MV)
- Amounts made available for the current plan year under an HRA used to pay premiums for the major medical plan are generally counted as employer contributions for affordability
- Amounts made available for the current plan year under an integrated HRA only used for cost-sharing count toward the medical plan's value for determining if the plan provides MV

The ACA's Employer Mandate “Pay or Play” §4980H Penalties

§4980H(a)—The “A Penalty”
Aka: The “Sledge Hammer Penalty”

ICHRA VERSION

Must offer MEC to at least 95% of full-time employees

- IRS Notice 2018-88
 - “An HRA, including an individual coverage HRA, is an eligible employer-sponsored plan.
Therefore, if an ALE were to offer an eligible employer-sponsored plan (including an individual coverage HRA) to at least 95 percent of its full-time employees (and their dependents), the ALE would not be liable for a payment under section 4980H(a) for the month, regardless of whether any full-time employee is allowed the PTC for purchasing individual health insurance coverage from an Exchange”

§4980H(b)—The “B Penalty”
Aka: The “Tack Hammer Penalty”

ICHRA VERSION

- The offer of MEC must:
 - a) **Be affordable;** and
 - b) **Provide minimum value (MV)**
- Minimum Value: **Easy!**
 - “Therefore, an individual coverage HRA that is affordable ... *would be treated as providing MV for purposes of section 4980H.*”
- Affordability: **Complicated!**
 - See following slides

General ACA Affordability Safe Harbors

The IRS has confirmed that the pay or play affordability safe harbors are indexed to inflation in the same manner as affordability is determined on the exchange. For 2020, the applicable percentage decreases to 9.78% (down from 9.86% in 2019).

- **2020 Federal Poverty Line Safe Harbor:** 9.78% of the Federal Poverty Line

2019 Federal Poverty Line (Continental U.S.): \$12,490

2020 Monthly Employee-Share of Premium for Lowest-Cost Plan Limit: \$101.79

- **2020 Rate of Pay Safe Harbor:** 9.78% of Rate of Pay

Hourly Employees: 9.78% of Employee's Hourly Rate of Pay x 130

Salaried Employees: 9.78% of Employee's Monthly Salary

- **2020 Form W-2 Safe Harbor (Not Recommended):** 9.78% of Box 1 Wages

Form W-2 safe harbor provides no predictability because Box 1 unknown until January of following year

Box 1 does not include many forms of compensation, including 401(k) deferrals and Section 125 salary reductions for health and welfare plan coverage

May work if employer sets employee contribution amount at a fixed percentage of income—but most employers aren't interested in this approach

ICHRA ACA Affordability Safe Harbors

The IRS has proposed three additional safe harbors in Notice 2018-88 to address the challenges that employers will face with respect to ICHRAs. These are based on the “**HRA affordability plan,**” **which is the lowest cost silver plan for the employee for self-only coverage offered by the Exchange for the rating area in which the employee resides.**

1

Proposed Worksite Location Safe Harbor

- HRA affordability plan may be based on the lowest cost silver plan on the Exchange **in the rating area of the employee’s primary worksite**
- Not required to use plan in rating area of employee’s place of residence
- IRS requests comments on potential age-based safe harbors because cost varies based on the employee’s age (e.g., age bands or other assumptions)

2

Proposed Calendar Plan Year Safe Harbor

- Employers with a calendar plan year ICHRA **may base HRA affordability plan cost on the premium in effect for the prior calendar year**
- Designed to address the fact that Exchange plan premiums are not available until October, which would not provide sufficient planning time for employers
- IRS reiterates §36B PTC eligibility unaffected by these safe harbors

3

Proposed Non-Calendar Plan Year Safe Harbor

- Employers 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
- Addresses complications with Exchange premiums changing mid-year

Individual Coverage HRAs: Estimated Effects

The Departments Anticipate ICHRA Transitions from 2020-2028

- The Departments estimate that roughly 800,000 employers will offer ICHRAs
- It will take employers five years (2024) to fully adjust to the ICHRA landscape
- **By 2024, there will be roughly 11 million covered by ICHRAs per “microsimulation modeling”**
- Traditional group health major medical plan coverage will decline by ~7 million (4.5%)

TABLE 2—ESTIMATED EFFECTS OF INDIVIDUAL COVERAGE HRAs ON INSURANCE COVERAGE AND TAX REVENUES, 2020–2029

Calendar year	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029
Change in Coverage [Millions]: ^a										
Individual health insurance coverage with HRA	1.1	2.7	5.3	8.1	10.9	11.0	11.2	11.4	11.4	11.4
Traditional group health plan	-0.6	-1.7	-3.3	-5.0	-6.7	-6.8	-6.8	-6.8	-6.9	-6.9
Individual health insurance coverage without HRA	-0.4	-0.9	-1.8	-2.7	-3.6	-3.6	-3.7	-3.8	-3.8	-3.8
Uninsured	-0.1	-0.2	-0.3	-0.5	-0.6	-0.7	-0.7	-0.7	-0.7	-0.8

Potential Individual Market Changes

- By 2020, over 150 million (pre-65) will be enrolled in employer-sponsored group health plans
 - Compared to only about 15 million in the individual market
- ICHRAs have the potential to reshape the individual market risk pool in a significant way
- Roughly 80% in group health plans are relatively healthy, only 20% relatively unhealthy
 - Healthy persons in GHPs have health costs that are about ¼ of average individual market enrollee
- **If 5 million moved from employer-sponsored GHPs to the individual market at the standard ratio of healthy to unhealthy of 4 to 1, individual market premiums would fall about 3%**

The ACA:

Excepted Benefit HRAs

Final Rules Effective Plan Years Beginning On or After January 1, 2020: Excepted Benefit HRAs (EBHRAs) Permitted With Four Conditions

Another new option in 2020 allowing employers to offer an HRA of up to \$1,800 that is not integrated with individual market (or any other) coverage. Expands the current definition of “excepted benefits” not subject to ACA market reform provisions for EBHRA.

1

EBHRA is Not Integral to Part of the Plan (Eligibility for Traditional GHP)

- Only employees eligible for traditional GHP can be eligible for EBHRA
- Employees do not have to actually enroll in the traditional GHP

2

EBHRA Must Provide Benefits That Are Limited in Amount

- Amounts made newly available for a plan year cannot exceed \$1,800
- Indexed for inflation for plan year 2021 and beyond (C-CPI-U)

3

EBHRA Cannot Reimburse Premiums (Individual or Group)

- The only permitted premiums would be excepted benefits like dental or vision coverage, COBRA premiums, and in some cases STLDI premiums

4

EBHRA Must Be Available Under Same Terms to All Similarly Situated

- The EBHRA must be available to all similarly situated individuals on the same terms regardless of any health factor

What About HSAs?

Graham-Cassidy Bill Was the Last ACA Repeal/Replace Attempted

- Bill focused on state block grants to provide more flexibility for states to address health care reform
- Came close to receiving enough support in September 2017 despite lingering quietly for most of the year, but ultimately came up just short when three Senators announced they could not support the bill
- **President Trump's proposed budget for FY 2020 proposes ACA repeal and replaces with Graham-Cassidy**

HSA Changes Proposed in Graham-Cassidy

1) **Doubling the Contribution Limit**

- Increasing the HSA annual contribution limit to match the HDHP OOPM (2020: \$6,900 / \$13,800)

2) **Return to 10% Additional Tax**

- Additional tax for non-medical distributions prior to age 65 would decrease from ACA 20% level to 10%

3) **Spousal Catch-Up Contributions**

- Permits both catch-up eligible spouses to make the \$1,000 additional contribution to the same HSA

4) **HSA Establishment Grace Period**

- Tax-free distributions of expenses incurred prior to HSA establishment (within 60 days of HDHP enrollment)

5) **OTC Medicines and Drugs**

- Eliminates ACA Rx requirement for tax-free distribution of OTC medicine or drug (other than insulin)

6) **HSAs Grow Up (to Age 26)**

- Incorporates §105 ACA definition of dependent to include children to age 26 (replacing §152 definition)

7) **HSAs for Premiums**

- Permits tax-free distributions for any individual market policy premium (potential similar effect as ICHRAs)

HSAs and Premium Payments: The Large HSA Opt-Out Approach

Factors that Would All Line Up in Favor HSAs for Individual Policies

- 1) HSA contribution limits doubled to \$13,000+ for family HDHP coverage
- 2) Tax-free HSA distributions to pay for individual market premiums (regardless of age/circumstances)
- 3) An individual market that largely prohibits pre-existing condition exclusions and medical underwriting (Graham-Cassidy may permit states to impose in certain circumstances)
- 4) Repeal of the ACA employer mandate pay or play provisions
- 5) Broader individual market than Qualified Health Plans on the Exchange (permitting lower-cost, less rich plans to be available)

The Large HSA Opt-Out Approach

- It's fairly common now for employers to offer relatively small opt-out credits to employees with access to other coverage (e.g., through a spouse/domestic partner/parent)
- Opt-out credit could shift to become an enticement for employees to join individual market

Example:

- Employer offers three traditional employer-sponsored group health plan medical plan options
- Employer offers an opt-out credit equal to the employer-share of the premium for the lowest-cost plan option for employees who verify HDHP enrollment in individual policy
- The opt-out credit is deposited directly into the employee's HSA (not as taxable cash!)

Result:

- Employee uses the large HSA opt-out credit to pay for the individual HDHP coverage on a tax-free basis
- Employees might choose a lower actuarial value plan (e.g., 58% based on previous proposals) that results in a lower premium than today's plans
- Where the HSA opt-out credit exceeds the premium cost, the employee can save the balance for cost-sharing amounts and/or long-term savings (as employees are already accustomed to with HSAs)

HSA FTW?



HSAs and Premium Payments: The Large HSA Opt-Out Approach

Employer Advantages

- Opt-out is tied to the employer-share of the premium for the lowest-cost plan
- Reduced administrative costs and challenges for employees opting-out
- May reduce total costs depending on multiple factors
 - Prior waiver rate, prior opt-out credit amount, number of employees choosing the large HSA opt-out credit as an alternative to more expensive tiers of coverage, etc.

Employee Advantages

- Provides increased flexibility in plan options (any individual market HDHP coverage)
- Tax-advantaged HSA contributions and distributions for premiums and cost-sharing
- Ability to save excess opt-out credit amounts for long-term purposes

Potential Short-Term Implications (1-5 Years)

- Likely an approach more attractive to smaller employers at the outset
 - Competitive forces will still require robust, traditional group health plan offerings for most large employers
- Will likely gain traction and momentum over a five-year window, similar to ICHRAs
- Also will start driving a significant portion of “good” risk (full-time employees) into the individual market for the first time in generations
- Has the potential to stabilize the individual market as the risk pool improves
- More employees will value this option, which will in turn make it more important for employers as a recruiting/retention feature

HSAs and Premium Payments: The Large HSA Opt-Out Approach

Potential Intermediate-Term Implications (5-10 Years)

- Mid-sized and larger employers will likely also begin to offer the large HSA opt-out credit
- Will become more of a necessity to respond to competitive forces resulting from employees who have experienced the opt-out credit and create market demand
- **Employees with low to average health risk will likely flock to the opt-out credit in larger numbers**
 - Many will see the ability to pay a low premium (albeit for less rich benefits) and save the balance in the HSA as a more compelling option than higher premium traditional employer-sponsored GHPs

Potential Long-Term Implications (10+ Years)

- **A potential paradigm shift away from the predominance of the employer-sponsored major medical plan coverage (currently covering roughly 55% of population)**
 - Movement toward a more attractive, stable, tax-efficient, and affordable individual market alternative than we have had in the past century
- As more “good” risk continues to migrate to the individual market, employer-sponsored group health plans face a potential death spiral scenario spurred by adverse selection

HSAs and Premium Payments: The Large HSA Opt-Out Approach

ICHRA + HSAs for Premiums = Individual Market Takeover?

- Unlocking the individual market to employers in a tax-advantaged manner that provides affordable, guaranteed access regardless of health conditions is a long-term game changer
 - This could be the recipe for an eventual individual market takeover driven by ICHRAs and HSAs that may be used for premium costs
- Will the traditional employer-sponsored group health plan go the way of the traditional defined benefit pension plan?
 - In other words, are ICHRAs/HSAs the new 401(k)-style defined contribution alternative employers always wanted on the health benefit side?
 - Or is it the new flex credit or private exchange defined contribution fad that never gains mainstream traction?

The Individual Market: Employer Issues Pre-ACA

Pre-Existing Condition Exclusions and Individual Medical Underwriting

- Employers needed to establish a group health plan to ensure employees (and their dependents) with significant health conditions could access full coverage
- On the individual market, insurance carriers were able to medically underwrite and/or deny coverage to individuals with costly health conditions
- This gave employer-sponsored coverage an enormous advantage
 - Particularly after the 1996 enactment of HIPAA's portability provisions that prohibited most pre-existing condition exclusions and individual medical underwriting in the group market only

No Individual Income Tax Parity

- Employers could have offered “stand-alone” HRAs designed to reimburse individual coverage in the same manner as the new ICHRA
- Employers could also have directly paid or reimbursed individual market coverage through an “Employer Payment Plan” (IRS Revenue Ruling 61-146)
- However, that generally wasn't a viable option for the underwriting reasons above

What About Young and Healthy Employees?

- Opt-out credits designed to encourage individual coverage could have been viable for healthy employees, but there was no tax-advantaged way to incentivize the approach
- Individuals could deduct medical expenses (including premiums) only to the extent those costs exceeded 7.5% of their adjusted gross income
- The “historical accident” of World War II-era wage controls has provided powerful incentives to receive health insurance through an employer-sponsored group health plan

The Individual Market: Employer Issues Under the ACA

Stand-Alone HRAs and Employer Payment Plans Prohibited

- The Friday the 13th guidance and beyond we already covered
- Employers generally have not liked the idea of providing an unrestricted taxable bonus or raise to employees intended to cover the cost of an individual policy
- The lack of control and adverse tax consequences do not make the approach desirable

The ACA Employer Mandate

- Applicable Large Employers (ALEs) must offer minimum essential coverage that is affordable and provides minimum value to avoid large potential employer mandate penalties
- ALEs have been very reluctant to drop their health plans because not only would they likely need to offer a significant boost in taxable wages (and potentially a gross up) to be competitive, they would also face the §4980H(a) “A Penalty” or “Sledge Hammer Penalty”
 - The 2019 annualized A Penalty amount is projected at \$2,500 multiplied by all full-time employees (reduced by the first 30)
- While it is possible the total cost could be less than the cost of offering a fully compliant employer-sponsored group health plan, it has generally proven undesirable

The Individual Market: Employer Issues Under the ACA

Limited Choices and Narrow Networks

- In many parts of the country, there have been relatively few choices available in the individual market (primarily the Exchange) for consumers
 - The Exchange did not develop into a robust marketplace as intended in those areas
- In areas where the Exchanges have provided some reasonable level of choice, there is still a common issue of narrow network limitations
 - Many view the Exchange as providing coverage closer to Medicaid (which has long had much more narrow provider offerings) than an employer-sponsored GHP, and therefore less desirable
- Employers facing the need to recruit and retain workers have generally found the prospect of moving employees to the Exchange coverage as a non-starter

Adverse Selection

- There are still strong incentives for employers to offer group health plan coverage, and strong incentives for employees to receive employer coverage
 - These tax, coverage, and competitive incentives have in many ways been exacerbated by the ACA's push for more to be covered by employer-sponsored GHPs
- The result continues to be that most of the “good” risk (i.e., the full-time employee demographic) remains in the employer market
 - The individual market continues to struggle to retain sufficient good risk

Individual Coverage HRAs

Top Three Items You Need to Know for 2020 and Beyond

Three Key Points to Remember:

A

Beginning in 2020, employers will be able to offer Individual Coverage HRAs (ICHRAs). These ICHRAs will provide a tax-advantaged mechanism for employers to reimburse the cost of employees' individual policies. ICHRAs mark a dramatic departure from the current ACA prohibition of such arrangements that has been a key enforcement area in the past.

B

ICHRAs have the potential to radically transform the current paradigm that is dominated by traditional employer-sponsored major medical group health plans. It will likely be a far simpler approach for employers to use ICHRAs, and in many ways it satisfies the defined contribution structure that has long been a goal for many employers.

C

Estimates are that within five years of ICHRAs being available, ~11 million employees will be covered by an ICHRA. Will the introduction of the ICHRA be analogous to the 401(k)? In other words, is the employer-sponsored group health plan destined to go the way of the defined benefit pension plan?

Content Disclaimer

Individual Coverage HRAs: The ICHRA Revolution Begins January 1, 2020

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Thank you!

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