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Joint Effort Leads to New Health Reimbursement Arrangement Guidance

The U.S. Departments' of Health and Human Services, Treasury, and Labor have jointly issued final regulations that create two new types of HRAs—the Individual Coverage HRA (ICHRA) and the Excepted Benefit HRA (EBHRA). The final regulations, which are applicable to plan years on or after January 1, 2020, are meant to give employers and employees more options when purchasing health insurance and covering out-of-pocket expenses. This guidance was issued in response to the President's Executive Order, released in October 2017.

Certain HRA Definitions and Rules Apply

HRAs are defined as employer-funded accounts used by employees to help pay for out-of-pocket medical expenses. HRAs can cover employees as well as their spouses and dependents. Employees cannot simply take an HRA distribution on their own. They must substantiate their claims and submit the claims to their employer. The employer must then determine if the substantiation is sufficient for reimbursement.

HRAs are generally subject to COBRA and ERISA—including the plan document, summary plan description, and Form 5500 reporting requirements.

General ICHRA Requirements

The ICHRA is unique because the Affordable Care Act (ACA) previously prevented integrating HRAs with individual health insurance. The regulations now permit this integration—allowing employees to purchase individual health insurance on their own and to receive ICHRA reimbursements to help pay for the premiums (including Medicare and Medicare supplemental premiums) and any other qualified medical expenses under IRC Sec. 213(d).

While the ICHRA may be subject to ERISA, the regulations provide a safe harbor that exempts individual health insurance from the complex ERISA rules applicable to employer-sponsored plans—as long as the employer takes certain administrative steps. The regulations specify the employer cannot force the purchase of any individual health insurance, endorse a particular insurance carrier or plan, or receive any compensation in connection with an employee's selection. The employer must also provide an annual notice to employees that the individual health insurance is not subject to ERISA.

Here is a brief summary of the most significant ICHRA requirements.

- Before receiving an ICHRA reimbursement, employees must provide proof of enrollment in an individually purchased health insurance plan (whether purchased on the Exchange or not). The final regulations identify Medicare and student health insurance as eligible individual health insurance.

- The employer generally cannot offer a traditional group health plan *and* an ICHRA to the same class of employees. Classes that employees can be divided into are limited, but include full-time, part-time, seasonal, or geographic locations. Certain minimum class-size requirements may apply, with minimums ranging from 10-20 employees depending on employer size.

- The employer must offer the same ICHRA terms to all employees in a class; but the employer may vary the amounts it *contributes* to employees within each class based on the employee's age, the number of dependents who will be covered, or because of late enrollment during the plan year.

- The employer will not violate the "same terms" requirement by offering an HSA-compatible ICHRA or a traditional ICHRA to the same class of employees.

- The employer may determine the plan design. This includes the contribution amount, the maximum reimbursement per month, and the eligible expenses. The employer may choose to reimburse premiums only, IRC Sec. 213(d) expenses only, or both.

- Employees must be allowed to opt out of the ICHRA before each plan year and also upon termination from employment (if remaining amounts are not forfeited).

- The ICHRA will be subject to COBRA if the loss of ICHRA coverage is due to a qualifying event. An employee's failure to maintain individual health insurance is not a qualifying event.

Factors to Consider Before Offering an ICHRA

Employers should consider a number of factors—some of the biggest takeaways are described below.

ICHRA Affordability Requirement

Employers that are subject to the ACA mandate (employers with 50 or more full-time employees) must provide minimum essential coverage (MEC) that is available to at least 95 percent of their employees and is affordable. Employers offering an ICHRA do not need to be concerned with the MEC requirements: employees must certify that the individual health insurance they purchase meets those requirements.

Employers offering an ICHRA do need to consider whether the ICHRA is affordable. An employer that is subject to ACA and sponsors an ICHRA that is not deemed affordable for enough employees could be subject to penalties. Determining affordability for individual employees could be burdensome to an employer because it would require a calculation based on each employee's household income compared to the lowest cost silver plan in the employee's rating area.

The IRS issued proposed safe harbors in Notice 2018-88 in order to provide guidelines applicable to ICHRA affordability determinations. The final regulations also specify that more guidance will be provided, which should make the affordability determination even more straightforward for employers.

ICHRA Notice and Substantiation Requirements

Because of the ICHRA individual coverage requirement, employers and employees are subject to the following notice and coverage substantiation requirements. These notice requirements do not apply to other HRAs.

- Employees must annually verify that they have coverage under individual health insurance at the time of open enrollment. Employees can meet this requirement by completing a "model attestation" provided by the Department of Labor (DOL).

- Employers must require coverage substantiation from the employee with each request for reimbursement. To meet this requirement, employees can complete a second model attestation provided by the DOL.

- Employers generally must provide a notice to eligible employees 90 days before the beginning of the plan year (generally by October 2 of each year). Among other things, the notice must
  - include information on the ICHRA,
  - explain that the employee's individual health insurance is *not* subject to ERISA, and
  - explain the interaction between the ICHRA and the premium tax credit (PTC).

  This notice is important for employees because they will use the information to help determine if they should 1) enroll in the ICHRA, or 2) decline to participate in the ICHRA in order to take advantage of the PTC. (Employees who enroll in the ICHRA are not eligible for the PTC.)

  Employers may use the DOL's model notice to meet this requirement.

When an ICHRA Might Make Sense

Adopting ICHRAs may make sense both for large employers looking for more affordable healthcare options and for small employers who normally couldn't afford to provide healthcare coverage. Two examples are described below.

> **Large Employer Example:** ABC Company operations concentrate in State X, but it also maintains smaller operations in State Y and State Z. ABC Company provides group health plan coverage to its employees living in State X. ABC Company's small number of employees in State Y and State Z makes it difficult to obtain group insurance coverage in those regions. ABC Company decides to maintain the group health plan for its State X-based employees, and to offer a new ICHRA to its employees in State Y and State Z, which have a different rating area than State X. As a result, the newly created ICHRA benefits the employees in State Y and State Z and allows ABC Company to extend health coverage to all its employees regardless of location.

> **Small Employer Example:** XYZ Company has determined that it cannot afford to provide a group health plan to its 10 employees. Instead, XYZ has decided to offer an ICHRA to all employees. This will help each employee defray some of the cost of purchasing individual health insurance obtained from an Exchange.

General EBHRA Requirements

The new "Excepted Benefit HRA (EBHRA)" needs some clarification because of its name. Created by the regulations, the EBHRA is different from HRAs that reimburse *only* for excepted benefits. Employees may use the new EBHRA to pay for all medical expenses, even ones that are not excepted benefits—including amounts owed as a result of the cost sharing provisions of individual health insurance or group health insurance. EBHRAs must comply with these main requirements.

- The employer must offer group health insurance, but an employee does not have to enroll in the group plan. The employer must have a waiver of coverage on file for each employee that is enrolled in the EBHRA.

- The EBHRA is subject to an annual contribution limit ($1,800 for plan year 2020). For plan years beginning after December 31, 2020, the annual contribution limit may be indexed for cost-of-living adjustments. Employees may carry over unused EBHRA amounts to the following plan year: these amounts will not count toward the annual contribution limit.

- EBHRAs generally cannot reimburse premiums for health insurance (an exception applies for COBRA or other coverage continuation premiums). Employees may receive EBHRA reimbursements for all other IRC Sec. 213(d) medical expenses—including premiums for excepted benefits like vision or dental insurance and short-term limited duration insurance.

- Employers must offer an EBHRA on the same basis to all "similarly situated individuals"; the employer can treat separate groups of employees differently, but they must be grouped based on bona fide employment-based classifications and not on factors like medical history or health status.

- An EBHRA is subject to COBRA if it provides an annual benefit of more than $500.

Next Steps

Employers that decide to offer an ICHRA or EBHRA should ensure that their human resources departments (and other affected associates) are trained on the new HRA requirements—including requirements for providing ICHRA notices and obtaining additional substantiation. They should also be prepared to answer employee questions.

Those seeking additional information on the final regulations may review a DOL news release and a set of FAQs. Ascensus will closely monitor any new developments regarding this guidance. Visit ascensus.com for future updates.