

Individual Coverage HRAs: Practicalities and Potential Pitfalls for Employers (PART ONE)

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This article is part one of a two-part article examining many of the issues that employers and other plan sponsors may want to consider when deciding whether to offer employees an Individual Coverage Health Reimbursement Arrangement (ICHRA), which was created by final regulations (the “final regulations”) released on June 13, 2019 by the Departments of Labor, Health and Human Services, and the Treasury (the “Departments”) and which will be effective January 1, 2020. This first article provides background on the final regulations and discusses the circumstances when offering an ICHRA may be advantageous for employers. The second article will examine areas that employers will need to consider before deciding to offer an ICHRA (such as “affordability” for employer shared responsibility purposes, and interaction with nondiscrimination rules). For an in-depth look at the substance of the new regulations (including the new excepted benefits HRA), please see this Tiffany Santos article from July 2019: [Final Regulations Issued — Key Highlights](#).

Background

Prior to the release of the final regulations, in order to comply with certain requirements of the Affordable Care Act (ACA) (i.e., the prohibition against annual or lifetime limits on essential health benefits, and the obligation to provide federally required preventive care with no cost-sharing), an HRA covering two or more current employees was required to be integrated with an ACA-compliant group health plan. An HRA could not be integrated with an individual health insurance policy, whether purchased on the ACA Health Insurance Marketplace (also known as the “Exchange”) or elsewhere, or be offered on a “stand-alone” basis.¹

In response to President Trump’s October 12, 2017 Executive Order, “Promoting Healthcare Choice and Competition Across the United States”² the Departments will now permit an HRA to be integrated with an individual health insurance policy beginning January 1, 2020, and allow employers, regardless of size, to make contributions to help employees pay for the cost of individual health insurance coverage without regard to any statutory annual dollar maximum. Federal

regulators have predicted that 800,000 employers (with 11 million employees) will adopt an ICHRA over the next five years (approximately 156 million people currently receive health coverage through an employer, and enrollment in the Health Insurance Marketplace is estimated at 11.4 million people in 2019).³ Whether or not that estimate holds true will depend on many factors, including the stability of the individual insurance marketplace, the future of the ACA,⁴ and any other future major healthcare reform at the federal level.

When Offering An ICHRA May Be Advantageous

The chief advantage of offering an ICHRA as opposed to traditional employer-sponsored group health plan coverage is that it transfers much of the financial risk from the employer to the individual marketplace, thus allowing for more predictable costs for the employer from year to year (however, stay tuned for the discussion on “affordability” in the second part of this article). The downside is that, for many employers, the benefits offered to employees (including, of course, health coverage) are critical to employee recruitment and retention. Offering an ICHRA will also result in employers giving up nearly all control regarding the kinds of health benefits they offer to their employees.

Additionally, the final regulations created strict rules regarding the kinds of employees (and the combination of employees) who can be offered an ICHRA. The chief concern of regulators in designing the ICHRA rules was to ensure that the availability of ICHRAs would not result in adverse selection in the individual insurance market. In other words, the regulators designed the ICHRA rules so that it would be more difficult for employers to keep younger and healthier employees enrolled in traditional group health plan coverage, while steering sicker and older employees to the individual insurance market through the use of an ICHRA. The regulations prevent this, chiefly, in four ways:

1. prohibiting employers from offering a choice between a group health plan and an ICHRA to the same class of employees;
2. requiring that an ICHRA be offered on the same terms (i.e., same amount and otherwise on the same terms and conditions) to all employees within a class of employees (subject to certain limited exceptions);⁵
3. defining “permissible classes” of employees so that it would be difficult for employers to strategically manipulate the population of each class to target high-risk individuals; and
4. requiring that certain classes of employees offered an ICHRA must meet a minimum size (10–20 employees depending on employer size).⁶

While these requirements may help achieve the policy goal of preventing adverse selection in the individual insurance market, they also present challenges for employers when deciding whether or not to adopt an ICHRA and to which classes (or combination of classes) of employees it would be offered.

Below, we examine certain scenarios in which offering an ICHRA may be an attractive option for an employer.

The Part-Time Workforce of Large Employers

It appears unlikely that most large employers will replace their current employer-sponsored group health plans with ICHRAs for their full-time employees (given the role that employer-sponsored health coverage plays in employee recruitment and retention). However, offering an ICHRA to part-time employees may be an attractive option to employers looking to provide some sort of benefit to their part-time workforce. Employers need to be aware that because the regulations require that the ICHRA be offered on the same terms to *all* employees within the same class, the employer would be required to offer the ICHRA to *all* of its part-time employees (even employees working a very limited number of hours).

The Small Workforce of a Large Employer Working in a High-Cost Area

Under the regulations, a permissible class includes employees working in the same geographic area (generally the same insurance rating area, state or multi-state region). For employers with a small number of employees working in a high-cost area, it may make financial sense to offer these employees an ICHRA instead of traditional group health plan coverage. For example, an employer that has the bulk of its employees working in California, but a small number of employees working remotely in Alaska, may want to offer its Alaskan employees an ICHRA, while maintaining traditional group health plan coverage for its California employees. However, as noted above, the class size of employees offered an ICHRA must meet certain minimum requirements. So, this option would be unavailable to employers with a very small number of employees working remotely in high-cost areas (if the class size was based purely on geographic area).

Small and Medium-Sized Employers

For small employers (under 50 employees) and medium-sized employers (under 500 employees), the financial advantages of more stable health care costs may outweigh any negative impact on employee recruitment and retention. The ICHRA may be a particularly attractive option for small employers who currently find it too cost-prohibitive to offer traditional group health plan coverage to their employees.

“Phasing In” the ICHRA

The regulations permit the ICHRA to be phased in over time. This allows an employer to continue to offer a group health plan to a class of employees, while offering an ICHRA to employees within that same class who are hired after a certain date (any date after January 1, 2020 is permitted to be used). This may be an attractive option for employers who are looking to take advantage of the financial benefits of the ICHRA, but are concerned about the disruption it would cause to current employees. However, employers may also want to keep in mind that there are currently no definitive rules regarding the treatment of former employees who are rehired after the ICHRA is implemented.

The second article will examine areas that employers will want to consider before offering an ICHRA to their employees, such as:

- How to determine whether ICHRA coverage is “affordable” for employer shared responsibility purposes;

- The interaction between ICHRA coverage and nondiscrimination rules;
- The prohibition on employers promoting or endorsing any particular individual insurance coverage.

If you have any questions regarding this article, please contact its author.

¹ Please note that “retiree-only” HRAs have never been subject to these restrictions and are unaffected by the final regulations.

² This Executive Order also directed the relevant Departments to expand access to Association Health Plans (AHPs) and to expand the availability of Short-Term, Limited Duration Insurance (STLDI). Both AHP and STLDI regulations have now been issued (although parts of the new AHP regulations were subsequently enjoined by a federal court). It is notable that while both the expansion of AHPs and STLDI were seen by many as likely having a negative impact on the individual insurance market, the success of ICHRAs will likely depend on having a robust individual insurance market.

³ [Kaiser Family Foundation “Health Insurance Coverage of the Total Population.”](#)

⁴ In 2018, a Federal District Court, in *Texas v. U.S.*, determined that the entirety of the ACA was unconstitutional because, in 2017, Congress zeroed out the individual mandate penalty as part of the Tax Cuts and Jobs Act. Oral arguments in the Fifth Circuit Court of Appeals were heard in July 2019. The lawsuit will likely be resolved by the Supreme Court.

⁵ The final regulations permit the contribution amount to vary by age or family size. However, the maximum dollar amount available to the oldest participant cannot be greater than three times the maximum dollar amount available to the youngest participant.

⁶ The minimum class size requirement generally applies to the following classes of employees offered an ICHRA: (1) salaried employees; (2) non-salaried employees; (3) full-time employees; (4) part-time employees; and (5) employees whose primary site of employment is in the same rating area (although the minimum class size requirement does not apply if the geographic area defining the class is a state or a combination of two or more entire states).

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