HEALTH & BENEFITS | NOVEMBER | 2019

Proposed ACA and Nondiscrimination Rules for Individual Coverage Health Reimbursement Arrangements

The IRS has issued proposed regulations describing how the Affordable Care Act ("ACA") employer mandate as well as nondiscrimination testing ("IRC 105(h)") may be satisfied when offering a health reimbursement arrangement coordinated with individual health insurance coverage ("ICHRA")[1]. Employers may generally rely on these proposed regulations for 2020 and until the plan year beginning six months after the final regulations are published.

Background

Effective January 1, 2020, employers of any size will be able to offer employees a "stand-alone" health reimbursement arrangement that employees may use to purchase individual health insurance coverage (on or off an ACA Marketplace), help pay for Medicare premiums and/or be reimbursed for qualified medical expenses. Employers may offer an ICHRA to all employees, or certain classes of employees[2] as defined in final rules issued earlier this year however; any employee offered an ICHRA must not be eligible to enroll in an employer's traditional group health plan (if any). While earlier rules outlined numerous ICHRA design conditions, how these arrangements would satisfy the ACA employer mandate minimum value/affordability requirements and satisfy non-discrimination testing were not addressed.

ACA Employer Mandate

Applicable Large Employers ("ALEs") may be subject to ACA penalties for ("a") failing to offer Minimum Essential Coverage ("MEC") to 95% of the full-time population, or ("b") offering coverage to 95% of full-time employees that does not cover at least 60% of plan costs (minimum value) and/or is not considered affordable using any of the three affordability safe harbors the IRS allows. For the 2020 plan year, a plan is considered affordable if the lowest cost for self-only coverage offered to a full-time employee does not exceed 9.78% of the employee's w-2 wages, base pay or the federal poverty line for an individual ("safe harbors").

ICHRAs and the ACA

The recently released proposed regulations confirm that an offer of an ICHRA to a full-time employee will be considered an offer of MEC and count toward satisfying the 95% threshold for employers to avoid the ACA "a" penalty. Furthermore, an ICHRA that is considered affordable to an employee will be deemed a minimum value plan. The most complex issue is determining if the ICHRA is considered affordable for ICHRA plan members in order to shield the ALE from the ACA "b" penalties. The following are key factors for determining ICHRA affordability:

- The existing ACA affordability safe harbors continue to apply.
- While an ICHRA is funded entirely by the employer, the maximum ICHRA monthly dollar amount the employer makes available may not entirely cover an employee's premium for individual health insurance coverage and therefore, an employee is responsible to pay a portion of their individual health insurance coverage premium.
- Affordability may be based on the employee's age (at the beginning of the plan year or date of initial enrollment) for the lowest cost silver plan for self-only coverage offered in the Marketplace where the employee's primary worksite (at start of the plan year) is located. Special rules apply when an employee's worksite changes. The primary worksite for employees who work remotely could be the office to which the employee may report or the employee's residence, depending on the terms of employment.
- The cost of a self-only silver plan is based on the lowest cost age band in the applicable rating area for the worksite or residence. Employers with calendar year plans may use the monthly premium for the lowest cost silver plan from the prior calendar year. Employers with non-calendar year plans may use the cost for the lowest cost silver plan in effect on January 1 of the current calendar year. Wellness incentives are generally disregarded unless the reward (penalty) applies to tobacco usage in which case the reward is treated as having been earned.

(continued on next page)

- Employers may apply different safe harbors for any ICHRA class of employees on a uniform and consistent basis.
- Employers may not allow salary reduction through a cafeteria plan (Section 125) to pay the portion of the ACA Marketplace premiums not covered by an ICHRA; although salary reduction may be allowed if an employee purchases the individual coverage outside the ACA Marketplace.
- Any employee offered an affordable ICHRA will not be eligible for a premium tax credit when purchasing health insurance coverage from the ACA Marketplace.

Example

- Company A establishes an ICHRA for full-time employees (and dependents) effective January 1, 2020 who all work in Location B.
- Company A will make $500 per month available for employees with self-only coverage and $1,000 per month for employees who elect family coverage.
- Employee Z is 40 years old on January 1, 2020 and enrolls in ICHRA family coverage. The lowest cost silver plan as of January 1, 2019 (prior calendar year) for **self-only coverage** for a 40-year old in Location B's rating area is $700. Therefore, Employee Z's required ACA affordability applicable monthly premium is **$200** ($700 - $500) even though Employee Z elects to purchase more expensive family coverage.
- Company A uses the rate-of-pay ACA affordability safe harbor. Employee Z's monthly rate-of pay is $2,600.
- Company A has made an affordable coverage offer to Employee Z for 2020 because Employee Z's required applicable monthly contribution of $200 is less than the rate of pay safe harbor of $254 [9.78% x $2,600].

How ICHRAs Can Satisfy Nondiscrimination

An ICHRA is a self-funded plan subject to the nondiscrimination rules under IRC 105(h). To satisfy these rules, a plan must generally provide uniform coverage/contributions and not vary benefits based on age and/or years of service.

The proposed rules note the following:

- An ICHRA that ***only reimburses insurance premiums*** is treated as an insured plan and not subject to IRC 105(h) nondiscrimination rules. However, an ICHRA that is designed to reimburse premiums as well as medical expenses would be subject to the nondiscrimination requirements.
- An ICHRA will not fail nondiscrimination testing due to variations in benefits based on age. In our example above, assume the self-only premium for a 25-year old employee of Company A is $400. Even though this employee would benefit more under the ICHRA (i.e. will not have an ACA required premium), the proposed rules will not consider this to be discriminatory.
- The maximum amount available under an ICHRA may vary within a class of employees or between classes without violating the uniform employer contribution requirement if (a) within each class, the maximum dollar amount only varies in accordance with the "same terms" requirement under the ICHRA rules, and (b) with respect to differences in the maximum dollar amount for different classes. An ICHRA is considered offered on the "same terms" even when the maximum made available differs due to the (a) number of dependents, (b) age of the members (the amount made available to the oldest member cannot be greater than three times the amount made available to the youngest member) , and (c) new hires.

An ICHRA could still be discriminatory if highly compensated individuals utilize the maximum ICHRA amount allowed based on age compared to the number of non-highly compensated individuals who use lower HRA amounts based on age. Excess reimbursements will be included in income of highly compensated individuals when the ICHRA is found to be discriminatory.

Next Steps

Now that we have more clarity to help ensure an ICHRA plan can satisfy the ACA employer mandate and IRC nondiscrimination rules, employers and plan sponsors interested in establishing an ICHRA should determine: (i) to whom the ICHRA may be offered, (iii) the benefits the plan will cover (i.e. premium only and/or medical expenses), and (iii) the maximum reimbursement structure that may be offered.

[1] *The term "individual health insurance coverage" refers to coverage purchased from the individual market rather than through a group insurance plan sponsored by an employer, union or other entity. The term self-only coverage refers to the level of coverage purchased for one person.*

[2] *The allowable classes of employees that may be established for an ICHRA include: full-time, part-time, hourly, salaried, seasonal, temporary, as well as employees working in the same geographic location, in a collective bargaining agreement, in a waiting period, or non-resident aliens with no U.S. income.*