**October 2019**

# New Individual Coverage HRA Turns the Clock Back to Pre-ACA Health Care Options

The Section 105 medical reimbursement plan was a great option for small businesses that wanted to provide health care coverage to their employees—until Obamacare destroyed much of the benefit by requiring the plans to provide Affordable Care Act (ACA)-compliant minimum essential coverage.[1]

Given the choice of offering non-compliant coverage and being subjected to a $100 penalty per day per employee,[2] or offering *no* health coverage (an option for employers with 49 or fewer full-time employees[3]), most sane small employers chose the latter.

The Qualified Small Employer Health Reimbursement Arrangement (QSEHRA) was introduced in 2017. It took some of the sting out by allowing employers with fewer than 50 employees to reimburse certain health care costs, up to a set dollar limit, without fear of the $100-per-day-per-employee penalty.[4]

And while the QSEHRA option remains on the table for small employers, there's now an even better option available to employers of all sizes.

## *New ICHRA Is QSEHRA Plus*

Starting January 1, 2020, employers can offer a new type of HRA called the Individual Coverage HRA, or ICHRA.[5]

The ICHRA allows you to

- reimburse (free of payroll and income tax) employees' individual health care premiums and other permitted medical expenses,[6] up to a dollar limit *you* choose—not one imposed by the government;
- offer a regular group health plan (or not—it's your choice) to certain employees and ICHRAs to other employees;
- let employees pay for coverage, beyond the amount you reimburse, via a cafeteria plan if those employees have off-Exchange[7] individual insurance coverage;
- offer higher reimbursement levels to older workers and workers with more dependents;

- allow employees to roll over excess ICHRA funds from year to year, without limitation; and
- help employees out with their health care costs without fear of running afoul of the ACA and its dreaded $100 per-employee-per-day penalty.

Read on to find out if an ICHRA could be right for your business, and if so, how to get the ball rolling.

## *Business Owner Eligibility*

The ICHRA is a plan for employees.[8]

If you own a C corporation, you and your employees are eligible to participate in the ICHRA.

More-than-2-percent S corporation owners[9] and their family members[10] are not considered employees and therefore cannot participate in the ICHRA (see Update: 2018 Update Health Insurance for S Corporation Owners for alternate strategies).

Sole proprietors are also not employees[11] and cannot participate in the ICHRA. But if you're a sole proprietor who's married, you can go through the back door by employing your spouse as a W-2 employee and accessing, as a dependent, his or her ICHRA.

## *Employee Eligibility*

ICHRAs are available *only* to employees enrolled in[12]

- individual Exchange coverage,
- other individual insurance coverage, or
- Medicare.

If you already offer a traditional group health plan, you cannot offer an ICHRA to the employees who are eligible for the group plan.[13] Employers are legally barred from giving employees a choice between a group plan and the ICHRA.

But you can offer a traditional group health plan to some classes of employees and the ICHRA to other classes of employees. Classes[14] may be distinguished on the following factors:[15]

- Full-time employees
- Part-time employees
- Employees working in the same geographic location
- Seasonal employees
- Employees covered by the same collective bargaining agreement
- Employees who have not satisfied a waiting period
- Nonresident aliens with no U.S. income
- Salaried workers
- Non-salaried (e.g., hourly) workers
- Temporary employees
- Any group formed by a combination of two or more of the groups listed above

You also have the option of grandfathering existing employees who are members of (or offered) a traditional group health plan and offering new employees the ICHRA.[16]

Members within a given class must be treated comparably,[17] though the dollar amounts offered can be increased for older employees[18] and employees with more dependents.[19]

Minimum class size requirements[20] apply if you are offering a traditional group health plan to some employees and the ICHRA to other employees. The minimum class sizes are[21]

- 10 employees, for employers with fewer than 100 employees;
- 10 percent of the total number of employees, for employers with 100 to 200 employees; and

  20 employees, for employers with more than 200 employees.

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## *Integration with Cafeteria Plans*

What happens if the reimbursement amount you provide is insufficient to cover an employee's premiums? Can you allow the employee to pay the balance pretax through a cafeteria plan?

Yes, but only if the employee has a non-Exchange health plan. The tax code prohibits employees from making salary reduction contributions to a cafeteria plan to purchase coverage offered through the Exchange.[22]

But if the employee has a non-Exchange plan, this is permissible, subject to the existing rules that govern cafeteria plans.

## *ICHRA Eliminates the Premium Tax Credit*

The government offers a premium tax credit (PTC),[23] based on income level and household size, to help offset the cost of purchasing health insurance on the government Exchange.

Employees eligible for a PTC can still take advantage of it if they are participating in a QSEHRA plan, but their credit is reduced by the amount of the QSEHRA reimbursement.[24]

The ICHRA, on the other hand, eliminates the PTC—any employee offered an ICHRA is ineligible for the PTC, even if he or she ultimately declines the ICHRA.[25]

The one exception is if the ICHRA is deemed "unaffordable" under the terms of the ACA.[26] In that instance, an employee would be able to turn down the ICHRA and receive the PTC.

## *Annual and Ongoing Certification Requirements*

The ICHRA requires plan sponsors to keep track of two types of substantiation:

1. Annual coverage:[27] all ICHRA participants and covered family members must certify that they are enrolled in individual health insurance coverage or Medicare.

2. Ongoing substantiation:[28] before receiving a reimbursement, participants must certify that the person who incurred the charge (whether self or family member) was covered by individual health insurance or Medicare during the month the charge was incurred.

The Department of Labor has provided two model attestations, which we have adapted to Word and provided for your use. We also have a model ICHRA reimbursement request that you can provide to your employees.

Here are the links to the notices and reimbursement request:

- ICHRA model notice
- ICHRA model attestation
- ICHRA reimbursement request

## *The Clock Is Ticking*

Employers can start offering ICHRAs on January 1, 2020.

You don't need to provide the 90 days required notice in the first year, so you still have time to get your plan in place before January 1.[29]

But keep in mind that your employees will need to obtain individual insurance coverage and many may need to use the open enrollment period that runs from November 1 through December 15. This means you should have your notice to the employees before November 1 if you want your ICHRA effective on January 1, 2020.

The model notice includes information on Exchange enrollment.

Similarly, new employees not eligible to participate in an ICHRA at the beginning of a plan year, or not eligible when the notice is otherwise provided, may be notified up to the first effective day of when they can participate in the ICHRA.[30]

At least annually, employees must be given the opportunity to opt out of the ICHRA and waive the right to future reimbursements.[31] An opt-out statement is included in the model notice.

## *ERISA*

An employer ICHRA plan is subject to the requirements of ERISA, including the responsibilities to provide a plan document, a summary plan description (SPD), summary of benefits and coverage (SBC), and other required notices and disclosures. The good news is that the model notice gives you much of what you need here.

The new law provides that the individual health plans purchased by your employees are *not* subject to ERISA, provided the following safe-harbor requirements are met:[32]

1. An employee's purchase of any individual health insurance coverage is voluntary (the fact that individual health insurance coverage must be purchased in order to participate in an ICHRA does not make it involuntary).

2. The employer does not endorse any specific issuer or insurance coverage, though employers may provide general information, such as directing employees to HealthCare.gov or a state insurance commissioner's office.

3. Reimbursement for individual health insurance premiums is limited to individual health insurance coverage that does not consist solely of excepted benefits.

4. The employer does not receive cash or other kickbacks in connection with the employee's selection or renewal of coverage.

5. All plan participants are notified annually that their individual health insurance coverage is not subject to ERISA (this statement is included in the model notice).

## *Takeaways*

The law giveth and the law taketh away—and then the law giveth again, for employers looking to help employees with their health insurance costs.

The QSEHRA was (and remains) a solid option for small employers, but the new ICHRA offers more flexibility and it's also available to large employers.

You can now reimburse employees for some or all of their individually purchased insurance premiums, in addition to other qualified medical costs, up to any amount you choose. Plus, there's no limitation on rollover amounts or on the size of employer that can participate.

You even have the option of offering traditional group health insurance and the new ICHRA, as long as you don't offer both to the same class of employees.

Here are the links to the ICHRA model notices and reimbursement request:

- ICHRA model notice

  ICHRA model attestation

- ICHRA reimbursement request
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Client Letter on This Article for Use by Tax Pros. Click Here.

1 IRS Notice 2013-54.
2 IRC Section 4980D(b)(1).
3 IRC Sections 4980H(a), (c)(2).
4 PL 114-255.
5 TD 9867, Federal Register Vol. 84, No. 119, p. 28888 – 29097; Reg. Section 54.9802-4.
6 IRC Section 213(d) 2018.
7 ACA Exchange coverage is also known as Marketplace coverage. In this article we will use the term “Exchange” exclusively.
8 TD 9867, Federal Register Vol. 84, No. 119, p. 28888.
9 IRC Section 1372(a).
10 IRC Section 318.
11 IRC Section 105(g).
12 Reg. Sections 54.9802-4(c)(1)(i); 54.9802-4(e).
13 Reg. Section 54.9802-4(c)(2).
14 Reg. Section 54.9802-4(d).
15 Reg. Section 54.9802-4(d)(2).
16 Reg. Section 54.9802-4(d)(5).
17 Reg. Section 54.9802-4(c)(3).
18 Reg. Section 54.9802-4(c)(3)(iii)(B).
19 Reg. Section 54.9802-4(c)(3)(iii)(A).
20 Reg. Section 54.9802-4(d)(3)(ii).
21 Reg. Section 54.9802-4(d)(3)(iii)(A).
22 IRC Section 125(f)(3).
23 IRC Section 36B.
24 IRC Section 36B(c)(4)(B).
25 Reg. Section 54.9802-4(c)(6)(ii)(C).
26 Id.; Reg. Section 1.36B-2(C)(5). An employee-friendly explanation of affordability is available at https://www.healthcare.gov/glossary/affordable-coverage/.
27 Reg. Section 54.9802-4(c)(5)(i).
28 Reg. Section 54.9802-4(c)(5)(ii).
29 Reg. Section 54.9802-4(c)(6)(i)(C).
30 Reg. Section 54.9802-4(c)(6)(i)(B).
31 Reg. Section 54.9802-4(c)(4).
32 29 CFR Section 2510.3-1(l).