GBS Health Benefits Compliance

Individual Coverage Health Reimbursement Accounts (ICHRA)

Background on HRAs

Health reimbursement arrangements (HRAs) are self-insured group health plans that reimburse medical expenses, as defined under Internal Revenue Code (IRC) Section 213(d). An HRA must be paid for solely by the employer.

After the enactment of the Affordable Care Act (ACA), to comply with the ACA mandates an HRA was required to be "integrated" with another group health plan, cover only dental/vision expenses, or cover only retirees.

So, prior to 2016, there were three types of HRAs:

- Integrated HRA: An HRA that is offered to and only provides reimbursements to individuals who are covered under another group health plan.
- Retiree HRA: An HRA that on the first day of the plan year covers fewer than two participants who are current employees.
- Limited-purpose (dental/vision) HRA: An HRA that provides only "excepted benefits," such as limited-scope dental and/or vision coverage.

After 2016, three new types of HRAs were established under new legislation and regulations:

- QSEHRAs (qualified small employer HRAs)
- EBHRA (excepted benefit HRA)
- ICHRA (individual coverage HRA)

In 2016, new legislation established **QSEHRAs** (qualified small employer HRAs) that allow employees to purchase individual coverage. But QSEHRAs can only be offered by employers who are not applicable large employers (ALEs) and that do not offer group health plans (on a controlled group basis). Because of the various restrictions imposed on QSEHRAs, the utilization of QSEHRAs has been limited. It seems that individual coverage HRAs (ICHRAs), discussed below, are replacing QSEHRAs as the preferred arrangement for employers (of all sizes) interested in using individual health insurance coverage with HRAs.

Regulations issued in 2019 established two additional HRA options, an EBHRA (excepted benefit HRA) and an ICHRA (individual coverage HRA) for plan years beginning on or after January 1, 2020.

- An **EBHRA** allows employers of any size to set up limited-dollar HRAs to reimburse employees for IRC Section 213(d) expenses like copays, deductibles, COBRA, dental and vision premiums, premiums for coverage consisting solely of excepted benefits and short-term limited-duration insurance (STLDI) premiums. But an EBHRA may not reimburse premiums for individual health coverage, Medicaid, or non-COBRA group coverage. An employer must offer a traditional group health plan to employees who are offered an EBHRA, but enrollment is not required. There is a maximum contribution amount each year.
- An **ICHRA** allows employers to set up HRAs that can be integrated with, and reimburse premiums for, individual health insurance coverage if certain conditions are met. Employers of any size can establish an individual coverage HRA (ICHRA) that reimburses individual health insurance or Medicare premiums, as well as other out-of-pocket IRC Section 213(d) medical expenses. Unlike QSEHRAs, ICHRAs are not subject to statutory limits on the benefit amount that can be provided, although most employers will establish a limit by plan design.

The significant of an ICHRA is that it allows an employer of any size to reimburse employees for individual coverage. To help employers determine if an ICHRA is a good fit, below is a summary of federal requirements and other considerations when implementing an ICHRA.

ICHRA Requirements

1. Eligibility. Only common law employee who are not offered a choice of an employer-sponsored medical plan are eligible for an ICHRA. Self-employed individuals such as non-employee board members, general partners, and independent contractors may not participate. Common law employees may seek reimbursement for expenses incurred by their spouse or dependents who are also enrolled in individual health coverage, if permitted by the plan.
2. No Choice Between a Traditional Group Health Plan and an ICHRA. The employees who are offered an ICHRA cannot be eligible for another traditional group health plan. For example, the employer cannot offer the choice to enroll in either the employer's major medical plan or an ICHRA. The employer may offer the employees eligible for the ICHRA other excepted benefits, such as limited scope dental and vision, or a health FSA that meets the excepted benefit standard. The employer may also other welfare benefits, such as life and disability.
3. Integration. Participation in an ICHRA is limited to individuals who, for each month that they are covered by the ICHRA, are enrolled in either (1) ACA-compliant individual coverage that complies with the ACA's prohibition on lifetime and annual dollar limits and the preventive services mandate or (2) Medicare (including Parts B, D, Medicare Advantage, and Medicare supplemental insurance). The ICHRA is considered to be integrated with this coverage.
4. Substantiation. Employers must verify that employees are enrolled in individual insurance coverage (or Medicare) by the first day of the plan year or, if joining mid-year, by the date the coverage begins.

- Substantiation methods include:
  - A document from a third party (e.g., the insurer or an Exchange) showing that the participant and any dependents covered by the ICHRA are, or will be, enrolled in individual medical coverage. Examples include an insurance card, explanation of benefits (EOB) document, list of covered individuals from carrier, or document from the Exchange.
  - The participant's attestation, stating that the participant and any dependents covered by the ICHRA are, or will be, enrolled in individual medical coverage, the date coverage began or will begin, and the name of the coverage provider.
- In addition, ongoing substantiations are required with each request for reimbursement, showing that the participant or dependent who incurred the expense for which reimbursement is sought continues to be enrolled in individual medical coverage for the month during which the expense was incurred. This may be in the form of the participant's written attestation (which may be part of the reimbursement request form) or a document from a third party (e.g., an insurer) showing that the participant or dependent, as applicable, was enrolled in individual medical coverage for the applicable month.

5. Funding and Eligible Expenses. There is no statutory limit to the amount an employer can contribute to an ICHRA. Employers may also choose how to fund the HRA, including making the annual amount available upfront or offering it pro rata by pay cycle, monthly, or quarterly throughout the plan year. Eligible expenses include individual health insurance premiums, cost-sharing expenses from individual health care, and Medicare premiums.

6. Same Terms and Conditions / Classes. An ICHRA must be offered on the same terms and conditions to all employees within a class. Except that the ICHRA benefit amount may increase based on age (by up to three times the maximum dollar amount available to the youngest participant) or family size (i.e., number of dependents).
   - Permitted classes:
     - Full-time
     - Part-time
     - Salaried
     - Non-salaried (e.g., hourly)
     - Employees whose primary site of employment is in the same rating area
     - Seasonal employees
     - Collectively bargained (union)
     - Employees who have not satisfied a waiting period
     - Foreign workers
     - Temporary employees
     - Employees who are in a combination of two or more of the above classes

- Classes must meet minimum size requirements if the employer offers a traditional group health plan to one or more classes of employees and offers an ICHRA to one or more other classes of employees. The following classes are subject to the minimum-class-size requirement if they are offered an ICHRA:
  - Full-time employees, if part-time employees are offered a traditional health plan
  - Part-time employees, if full-time employees are offered a traditional health plan
  - Salaried employees
  - Non-salaried employees
  - Employees whose primary site of employment is in the same rating area, unless the rating area is a state or a combination of two or more entire states
  - And a class of employees created by combining at least one of the preceding classes with any other class
- If a class of employees is subject to the minimum-class-size requirement, then the class must consist of a minimum number of employees in order for the ICHRA sponsor to treat that as a separate class of employees. The minimum number of employees that must be in a class of employees subject to the minimum-class-size requirement is as follows:
  - At least 10 employees for employer with fewer than 100 employees
  - At least 10% of total employees for employer with between 100 and 200 employees
  - At least 20 employees for employer with 200 or more employees
- Exceptions to same terms requirement.
  - Age: Employers may increase the dollar amount based on the employee's age as long as it does not exceed three times the max amount for the youngest participant
  - Family size: Employers may increase the dollar amount based on family size
  - Employers cannot vary ICHRA terms by geography arbitrarily, but they can create distinct "rating areas" consistent with ACA guidelines, e.g. based on the primary site of employment

7. Opt-Out. Individuals must have the right to opt-out and waive ICHRA coverage once per plan year and upon termination of employment.

8. Notice. Written notice must be provided to eligible employees explaining the terms of the ICHRA, a statement of rights to opt-out, how participation in an ICHRA may impact their ability to receive a subsidy (premium tax credit) on an Exchange, and other items. The notice must be provided at least 90 days before the beginning of each plan year or no later than the date an employee is first eligible to participate in the ICHRA, if the employee is not eligible to participate at the beginning of the plan year or when the notice is provided to other participants. A model notice for these purposes has been provided by the regulatory agencies.

ICHRA Interaction with Existing Federal Rules

ICHRAs are impacted by existing federal health benefits compliance rules including:

- ACA employer shared responsibility
- Other ACA requirements (e.g., information reporting with 1094/1095 forms)
- Eligibility for premium tax credits
- HSA eligibility
- Section 105(h) nondiscrimination rules
- Section 125 salary reduction rules
- Medicare rules
- ERISA

ICHRA and ACA employer shared responsibility. ICHRAs are available to employers of any size, and therefore, ICHRAs may be sponsored by ALEs that are subject to the ACA's employer shared responsibility provisions and related reporting requirements. ALEs may be subject to potential penalties for (1) failing to offer minimum essential coverage (MEC) at least 95% of full-time employees (and their dependents) or (2) offering coverage that is not affordable or does not offer minimum value.

- *Minimum essential coverage (MEC).* An ICHRA is treated as providing an eligible MEC employer-sponsored plan.
- *Minimum value.* ICHRA coverage that is affordable is treated as providing minimum value.
- *Affordability of ICHRA coverage.*
    - Determine the premium for self-only coverage under the lowest-cost silver plan offered in the rating area where the employee resides (the employee's primary worksite may be used in certain circumstances).
        - CMS released a tool to help employers find the lowest-cost silver plan for the applicable location in states using the federal Exchange platform.
        - Can use the monthly premium for the applicable lowest-cost silver plan for January of the prior calendar year for a calendar year plan. In the case of a non-calendar-year plan, ALEs can use the monthly premium for the applicable lowest-cost silver plan for January of the current calendar year.
    - After determining the lowest-cost silver plan for the area in which the employee resides:
        - Compare that monthly lowest-cost silver plan premium with the monthly amount the employer provides to the employee in the HRA.
        - The difference is the "cost" the employee must "pay" for purposes of calculating affordability.

- After determining the "cost" figure, determine affordability using the existing general affordability safe harbors (W-2, rate of pay, and federal poverty line). The affordability safe harbors must be applied uniformly and consistently for all employees within a class.

ICHRA and other ACA requirements. An ICHRA is a group health plan subject to the ACA's reporting, fees, and notice requirements.

- The ACA requires ALEs to complete forms 1094-C and 1095-C and furnish and file these to employees and the IRS. Small employers with self- or level-funded plans must complete the 1094-B and 1095-B forms for enrolled individuals. The IRS updated the reporting rules to include instructions for reporting on an ICHRA.
- ICHRA plan sponsors are required to report and pay the PCORI fee each July 31.
- Value of the ICHRA must be reported on employees' Forms W-2, Box 12, unless the employer is exempt from the ACA W-2 reporting requirement.
- The summary of benefit coverage (SBC) requirement will also apply.

ICHRA and premium tax credits. Employees and dependents covered by an ICHRA (or offered an affordable ICHRA) are ineligible for premium tax credits. Affordability for the employee is based on the premium for the lowest-cost silver plan for self-only coverage available in the rating area where the employee resides, amounts available under the ICHRA, and the employee's household income.

ICHRA and HSA eligibility. As a reminder, in addition to reimbursing the required individual medical coverage, ICHRAs can be designed to also reimburse IRC Section 213(d) medical care expenses. ICHRAs can be designed to be HSA-compatible by only reimbursing premiums (including premiums for an HSA-compatible high-deductible health plan (HDHP) or excepted benefit vision or dental coverage) or limiting reimbursements in accordance with the HSA rules (i.e., it does not reimburse non-preventive care expenses prior to meeting the HDHP statutory deductible).

ICHRA and Section 105(h) nondiscrimination rules. Under IRC Section 105(h), a self- or level-funded plan may not discriminate in favor of highly compensated individuals. HRAs generally must comply with this Section by regularly conducting nondiscrimination testing. The ICHRA regulations note that while HRAs are generally subject to the Section 105(h) nondiscrimination rules, those rules do not apply to ICHRAs that reimburse only insurance premiums (and not other medical expenses).

On the other hand, an ICHRA that reimburses MORE than just premiums will be subject to the 105(h) nondiscrimination rules. IRS guidance addresses contribution variations based on class or age and allow such variations when permitted under the ICHRA rules. Generally, offering different benefits or contributions to different classes of employees is a red flag under the nondiscrimination rules. However, under the IRS ICHRA guidance, these differences do not violate the Section 105(h) rules, so long as the ICHRA requirements are met.

ICHRA and Section 125 cafeteria plans. Employers with ICHRAs can allow employees to use pre-tax cafeteria plan (Section 125) salary reductions to pay the portion of the premiums for their individual medical coverage not covered by the ICHRA, *so long as the coverage is purchased outside of an Exchange* and subject to applicable cafeteria plan guidance. If offered, salary reductions must be available on the same terms and conditions to all employees within a class (other than former employees).

ICHRA and Medicare rules. There appeared to be inconsistency between Medicare's anti-duplication and secondary payer rules and offering an ICHRA to Medicare-eligible employees, but the ICHRA rules made clarifications to harmonize the ICHRA and Medicare rules. As background, Medicare's anti-duplication rules prohibit the sale of individual medical coverage to an individual enrolled in Medicare and could be viewed as prohibiting Medicare-eligible employees in a class of employees offered an ICHRA from participating. Also, the Medicare secondary payer (MSP) rules prohibit employers subject to those rules from offering incentives to active employees to elect Medicare in lieu of employer-sponsored group health plan coverage.

However, the ICHRA rules make clear that:

- An employer subject to MSP rules may offer an ICHRA to a class of employees without violating those rules, even though some employees in the class are eligible for or enrolled in Medicare. Also, reimbursement of Medicare or Medicare supplemental premiums by the ICHRA is not considered an impermissible financial incentive under the MSP rules.
- For employers subject to the MSP rules, the ICHRA may not limit reimbursement of medical expenses to expenses not covered by Medicare.
- To align the requirement that the ICHRA be offered on the same terms and conditions to all employees in a class with Medicare's anti-duplication rules, the regulations treat Medicare as qualifying individual medical coverage. So, employees must be allowed to qualify for the ICHRA by enrolling in Medicare. This requirement applies without regard to whether the employer is subject to the MSP rules.

ICHRA and ERISA. As is the case with HRAs generally, an ICHRA is subject to other group health plan mandates, including ERISA (unless an exception applies, such as for governmental or church plans). An ICHRA that is subject to ERISA must:

- Adopt a written plan document
- Distribute a summary plan description (SPD)
- Report the plan on Form 5500 (unless a small plan exception applies)
- Develop reasonable claims and appeal procedures
- Comply with the fiduciary rules.

To avoid also sponsoring the individual coverage policies–and therefore being required to take these listed ERISA compliance steps on the participants' individual health coverage–ICHRA plan sponsors should consider taking the steps below to satisfy a safe harbor so that the individual coverage funded by the ICHRA will not also be subject to ERISA:

- The purchase of the insurance must be completely voluntary for participants. That is, do not require participation or purchase of individual health insurance (the substantiation and attestation requirements do not make the purchase involuntary).
- Do not select or endorse any particular issuer or coverage. Information to provide assistance in shopping for coverage may be provided to employees as long as it is unbiased, neutral, uniformly available, and does not steer participants toward a particular insurer or coverage.
- Employers may use electronic payment cards and direct payments to insurers. However, those payment practices should not be limited or favor particular issuers.
- Do not receive consideration in the form of cash or otherwise in connection with an employee's selection or purchase of coverage.
- Notify each participant annually that the individual health insurance coverage they purchase is not subject to ERISA. This requirement may be satisfied using the model notice linked in the Notice section.

Final Considerations

An ICHRA may be a good fit for a small-to-medium-sized employer, an employer with employees to whom coverage otherwise would not be extended (such as part-time employees, where the employer would like to provide some type of coverage to these employees), or an ALE that needs to offer coverage to a few more employees to avoid employer shared responsibility penalties. Large employers have been hesitant to transition their entire workforce to an ICHRA model since it requires the employees to find and purchase their own health coverage.

An employer that has decided to implement an ICHRA must adopt appropriate documents before the beginning of the first plan year, prepare and distribute employee communications (e.g., ICHRA notice and SPD), and set up systems to administer the new plan. Employers interested in ICHRAs should also keep an eye out for additional guidance regarding these arrangements from the regulatory agencies.

February 2025

This document is not intended to be exhaustive, nor should any information be construed as tax or legal advice.