



ICHRA Affordability Determination & Non-Discrimination Rules

IRS Statements and Announcements

On June 20, 2019, the Internal Revenue Service, the Department of the Treasury, the Department of Labor and the Department of Health and Human Services issued final rules regarding Health Reimbursement Arrangements (HRAs) and other account-based group health plans. Specifically, the final rules allow HRAs and other account-based group health plans to be integrated with individual health insurance coverage or Medicare, if certain conditions are satisfied (an Individual Coverage HRA or ICHRA). The final rules also set forth conditions under which certain HRAs and other account-based group health plans will be recognized as limited excepted benefits (an Excepted Benefit HRA or EBHRA).

Employer Shared Responsibility Provisions, Certain Non-Discrimination Rules, and ICHRA

On November 19, 2018, the IRS and the Department of the Treasury issued Notice 2018-88 describing the application of the employer shared responsibility provisions in section 4980H of the Internal Revenue Code (Code) to an applicable large employer that offers an ICHRA, the application of certain non-discrimination rules in section 105(h) of the Code to certain ICHRAs, and potential safe harbors for those provisions. The IRS and the Department of the Treasury also requested comments on the issues addressed in Notice 2018-88.

On September 30, 2019, the IRS and the Department of the Treasury issued proposed regulations clarifying the application of the employer shared responsibility provisions in Code section 4980H and the non-discrimination rules in Code section 105(h) to ICHRAs and providing proposed safe harbors for the application of those provisions to ICHRAs, with certain changes compared to the potential safe harbors described in Notice 2018-88.

In January 2021, the IRS released final regulations addressing how the employer shared responsibility provisions and certain Code 105(h) non-discrimination rules apply to ICHRAs. These final regulations were withdrawn by the IRS for further review prior to their publication. Until publication of the final regulations, tax payers are permitted to rely on the proposed regulations.

Questions and Answers about ICHRA and Safe Harbors

The proposed regulations under Code section 4980H that were issued on September 30, 2019 provide safe harbors for determining whether an offer of an ICHRA pursuant to the June 2019 final rules is an offer of minimum value, affordable coverage for purposes of the employer shared responsibility provisions. These regulations are proposed to apply for periods beginning after December 31, 2019. Under the proposed regulations, which may be relied upon for periods during any plan year of an ICHRA beginning before the date that is six (6) months following the publication of any final regulations, an ICHRA that is considered affordable under the applicable safe harbor(s) provides minimum value. Proposed Treas. Reg. § 54.4980H-5(f)(3).

Employers **do not have to use all** the safe harbors to determine affordability. Employers may use the safe harbors for calculating affordability for all employees, or when calculating a particular class of employees.

IRS Established 3 Safe Harbors:

1. The Look-Back Month Safe Harbor

To determine the ICHRA's affordability for the current year, this safe harbor allows a calendar-year ICHRA to use the cost of the lowest-cost silver plan offered on the Exchange in the employee's rating area during January of the *prior* year (known as the look-back month). Employers maintaining non-calendar year ICHRAs may also use this safe harbor, but the look-back month will be January of the *current* year.

2. Affordability Safe Harbor

Employers must also consider the employee's household income. Employers are permitted to use either a safe harbor based on the employee's Form W-2 income, the employee's rate of pay, or the federal poverty line.

a. Form W-2 Wages

Under the Form W-2 wages safe harbor, the ICHRA is deemed affordable if the required contribution for the employee (the amount of premium not covered by the ICHRA) does not exceed 9.61 percent (subject to cost-of-living adjustments) of that employee's W-2 wages for the calendar year. Employers are allowed to use the employee's wages entered in Box 1 of Form W-2.

The proposed regulations state that employers should not add back any W-2 reductions under IRC Sec. 36B (e.g., 401(k) or IRC Sec. 125 cafeteria plan contributions). When determining affordability, employers may not use W-2 wages from a prior year. They must use the current calendar year W-2 wages when determining affordability. This will require the employer to project the W-2 wages for each employee at the beginning of the current calendar year. Or the employer can use either the rate-of-pay or the poverty-line safe harbor described below.

b. Rate-of-Pay

The ICHRA will be deemed affordable for a calendar month if the required contribution for the employee (the amount of premium not covered by the ICHRA) does not exceed 9.61 percent (subject to cost-of-living adjustments) of an amount equal to 130 hours multiplied by the lesser of 1) the employee's hourly rate of pay as of the first day of the coverage period (generally the first day of the plan year), or 2) the employee's lowest hourly rate of pay during the calendar month.

Example: If an employee earns \$15 per hour, the employer should perform the following calculation.

$$\text{\$15} \times 130 \text{ hours} = \text{\$1,950}$$

$$\text{\$1,950} \times .0961 = \text{\$187.39}$$

The above example indicates the ICHRA to be affordable if the required contribution for the employee (the amount of premium not covered by the ICHRA) is less than \$187.39.

For employees paid on a salary basis, the ICHRA will be affordable if the employee's required contribution (the amount of premium not covered by the ICHRA) for the calendar month does not exceed 9.61 percent of the employee's monthly salary.

c. Federal Poverty-Line

Under the federal poverty-line safe harbor, an applicable large employer member's offer of ICHRA coverage to an employee is treated as affordable if the employee's required contribution (the amount of premium not covered by the ICHRA) for the calendar month does not exceed

9.61 percent of a monthly amount. This amount equals 1/12 of the federal poverty line for a single individual for the applicable calendar year.

3. Location Safe Harbor

When determining an ICHRA's affordability, an employer must use the lowest-cost silver plan in the employee's rating area. This requires the employer to know where the individual lives.

The proposed regulations provide that the employer may generally use the primary site of employment where the employee will be reasonably expected to perform services on the first day of the plan year. It should be noted that the proposed regulations also address issues related to employees that change worksites midyear, who regularly work from home or in other remote locations, or who work only remotely.

IRS Q&A

Q. How does an employer determine if an offer of an ICHRA is considered affordable for purposes of the employer shared responsibility provisions?

A. Whether the offer is affordable for purposes of the employer shared responsibility provisions is based on the lowest cost silver plan for self-only coverage provided for the residence of an employee, or, under the location safe harbor, an employee's primary site of employment.

An additional safe harbor allows an employer to determine affordability of an ICHRA with a calendar year plan year using the lowest cost silver plan for self-only coverage for January of the prior year. For an ICHRA that does not have a calendar year plan year, the employer may determine affordability of the HRA using the lowest cost silver plan for self-only coverage for January of the current year. Regulations under Code section 36B (PDF) provide similar rules referencing the lowest cost silver plan for self-only coverage for the location of an employee's residence for determining the employee's eligibility for a premium tax credit if the employee is offered an ICHRA.

Q. For any location and year, how can an individual or an employer determine the lowest cost silver plan for self-only coverage for a particular month?

A. Individuals and employers may use the Employer Lowest Cost Silver Plan Premium Look-up Table to determine the lowest cost silver plan for any location, for determining if an employer's offer of an ICHRA is affordable either for purposes of whether an individual qualifies for the premium tax credit under Code section 36B, or for purposes of whether the employer's offer of the ICHRA satisfies a safe harbor under the proposed regulations under Code section 4908H.

To make this easier, the IRS designed a downloadable tool to help employers decide whether to offer an ICHRA. This tool will give employers access to health insurance premium data by geographic location. The tool provides specific rate information for the least expensive plan in a certain category (the "lowest cost silver plan") based on an eligible employee's age and geography. Employers can use this tool in deciding the funding level for an ICHRA. **In particular, large employers (ALEs), who are subject to the ACA's employer mandate requirements, can use this tool to determine whether their offer of coverage through an ICHRA would be considered affordable based on standards established in the new HRA rules.** (Note: This tool only applies if the state is participating in the federal program.)

To access the tool directly, click here: <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Employer-Initiatives/Employer-Initiatives>

Non-Discrimination Testing

The proposed regulations also provide more information on non-discrimination testing.

The guidance found under IRC Sec. 105(h) prohibits discrimination in relation to benefits, in both plan design and plan operation. To be non-discriminatory in design, employers must provide uniform contributions to all participants, and amounts cannot vary based on age or length of service. If the plan fails this non-discrimination requirement, the excess reimbursements become taxable to the highly compensated individuals (HCIs).

The ICHRA rules, however, provide certain exceptions to this non-discrimination requirement. If the ICHRA provides reimbursement for premiums only, it does not have to meet discrimination rules. Also, contributions may increase based on the number of dependents covered and based on the participant's age—as long as the oldest participants do not receive an amount greater than three times what the youngest participants receive. An ICHRA that follows these exceptions within each class of employees (as specified in the ICHRA final regulations) will not fail to meet the requirement to provide non-discriminatory benefits as a matter of plan design.

Even if an ICHRA follows these exceptions, it may still be considered discriminatory in operation. If an ICHRA is discriminatory in operation and too many HCIs use the maximum ICHRA benefit, the excess reimbursements will become taxable to the HCIs.

DISCLAIMER:

The information provided in this document is for informational purposes only and employers should seek legal counsel in determining affordability.