# Two New Types of HRAs Expand Health Coverage for Employers and Employees

On February 4, 2019, WageWorks issued an alert concerning proposed regulations permitting two new types of Health Reimbursement Arrangements (HRAs) that would be available for plan years starting on or after January 1, 2020. The proposed regulations were finalized, with several important changes, on June 13, 2019. Although there were not many changes from the proposed regulations, this alert will provide an overview of these two new types of HRAs as provided for in the final regulations.

The final regulations created two new types of HRAs. An Individual Coverage HRA and an Excepted Benefit HRA. Both reverse the previous Administration's position on how HRAs operate under the Affordable Care Act (ACA). The final regulations will be effective for plan years starting on or after January 1, 2020; however, employers wishing to set up these new HRAs for the coming plan year will need to make decisions well before the end of 2019 because of plan document and employee notice requirements.

These two HRAs provide employers with significant new flexibility in how they fund health coverage through HRAs. This flexibility empowers individuals to take greater control over what health insurance benefits they receive and the Treasury Department estimates that more than 10 million employees will benefit from this change within the next decade.

The final regulations remove the current prohibition on using HRA funds to purchase individual health insurance coverage; however, an array of stipulations apply to assure these new HRAs do not contribute to instability in the individual market and that they coordinate with current ACA premium subsidies. Both types of HRAs include nondiscrimination rules that limit their use. The nondiscrimination rules for these HRAs are designed to protect older and sicker individuals against negative consequences and to prevent employers from incentivizing employees who may be unhealthy or more costly to leave the employer's group health plan for a plan purchased on the individual market.

The Departments of Treasury, Labor, and Health and Human Services estimate that once employers fully adjust to the new rules, roughly 800,000 employers will offer the Individual Coverage HRA.

**Individual Coverage Health Reimbursement Arrangement (ICHRA)**

An ICHRA may be integrated with individual health plan coverage in order to reimburse individual coverage premiums and qualified medical out-of-pocket expenses, provided that the ICHRA satisfies a few conditions.

**Enrollment**

First, the employer cannot offer any employee a choice between an ICHRA and employer-sponsored group health plan coverage. Plus, the participants and their dependents must be enrolled in health insurance coverage purchased in the individual market or Medicare Parts A, B, or C. Substantiation of individual coverage must take place at enrollment and with each reimbursement request.

If the participant and all dependents covered by the ICHRA cease to be covered by individual health insurance, the participant must forfeit the ICHRA. If a participant or dependent loses coverage under the ICHRA for a reason other than cessation of individual health insurance coverage, COBRA and other continuation coverage requirements may apply.

The employer must offer the ICHRA on the same terms to all employees in a "class" and employees must have the ability to opt-out of receiving the ICHRA so that they may receive a premium tax credit for coverage purchased in the individual marketplace.

**Classes of Employees**

Permissible “classes” of employees are:

- full-time,
- part-time,
- salaried,
- hourly,
- employees in the same rating area,
- seasonal,
- collectively bargained,
- those who have not satisfied a waiting period for health coverage, and
- non-resident aliens with no U.S. income.

Employers may create a class based on a group of participants described as a combination of two or more of the permissible classes of employees, *i.e*., coverage of just salaried and hourly employees in one rating area.

**Minimum Size of a Class of Employees**

There are minimum class size requirements for the following classes: full- and part-time, hourly, salaried, rating area, and waiting period. However, the minimum class size requirement applies only if a plan sponsor offers a traditional group health plan to one or more classes and offers an ICHRA to one or more other classes of employee. The minimum class size requirement does not apply to a class of employees offered a traditional group health plan or a class of employees that are not offered coverage.

Employers with less than 100 employees must have a minimum class size of at least 10 employees. Employers with 100 to 200 employees must have a minimum class size of at least 10% of all employees. For those employers with 200 or more employees, the employer must have a minimum class size of at least 20. The size of any employer is based on the common law employer standard, not on a controlled group basis, and is determined based on the anticipated number of employees at the beginning of the plan year.

Before each plan year, a plan sponsor must determine for the plan year which classes of employees it intends to treat separately and the definition of the relevant class(s) it will apply. No changes may be made to the classes for that entire plan year.

The minimum class size requirement does not apply if the rating area defining a class of employees is a state or a combination of two or more entire states. In addition, full-time employees are not an applicable class subject to the minimum class size requirement if part-time employees are not offered coverage.

**Exceptions to “Same Terms and Conditions” within the Same Class of Employees**

An ICHRA must generally be offered to all employees in a class on the same terms and conditions. There is an exception, however, for giving different amounts based on age, family size, and current versus former employees. If the amount is based on age, the oldest participant may only receive three times as much as the youngest participant.

There are also special rules for newly hired and former employees. Through a new hire rule, employers can offer new employees an ICHRA while grandfathering existing employees in a traditional group health plan. Those employees who have and those employees who have not completed a waiting period may be treated as different classes. The new hire rule may only be applied to a class that is being offered a traditional group health plan and no minimum number of new hires is applied.

Employers may offer the ICHRA to some, but not all, former employees within a class of employees without running afoul of the new rules.

New employees or new dependents joining the ICHRA after the plan year has begun may be treated as having the full annual election that was available on the first day of the plan year or a pro-rated amount based on the portion of the plan year the new hires or dependents are covered by the ICHRA. This rule would be applicable to all participants and must be determined prior to the beginning of the plan year.

The final regulations also made a point of not only disallowing discrimination among a class of employees, but also not allowing “benign” discrimination. This is the practice of discriminating in favor of sicker or costlier employees.

Additionally, individual coverage that is integrated with an ICHRA is not subject to the Employee Retirement Security Act (ERISA) provided five requirements are met:

1. Participation in the ICHRA is voluntary;
2. The employer has no role in the selection or endorsement of any individual coverage products;

3. The employer receives no consideration from coverage providers;
4. Annual notification is provided that states the individual insurance is not subject to ERISA; and
5. There is a limit on reimbursement.

The final rules provide a safe harbor for employers wishing to use a private exchange for their employees.

A section 125 cafeteria premium plan can be offered with an ICHRA for "excess contributions" to cover the premium cost over and above the benefit offered by the employer through the ICHRA. As a reminder, a cafeteria plan cannot be used for Exchange coverage premiums, but can be utilized for other individual coverage.

**Opt Out Provision, Carry Over, and Transfer Amounts**

In order for employees to receive a Premium Tax Credit (PTC) for premiums paid for coverage purchased on an Exchange, they must not receive coverage elsewhere or have certain medical coverage.

To that end, employees must be able to opt out, at least annually, and at termination of employment, their right to ICHRA coverage. Participants may forfeit their account, or opt out in order to start to receive a tax credit for premiums paid for coverage on the Exchange.

Unused amounts in the ICHRA may be carried over and made available to participants in later years and are disregarded for purposes of determining whether an ICHRA is offered on the same terms and conditions. If employees were participants covered by a prior HRA sponsored by their employer, unused amounts may be transferred to the new ICHRA. These funds are also disregarded for purposes of determining whether the ICHRA is offered on the same terms and conditions for all participants in the class of employees.

**Health Savings Account (HSA)-compatible ICHRAs**

An ICHRA may be designed to be offered alongside an HSA. It could offer only coverage for individual premiums, excepted benefits such as vision and dental care, and post-deductible out-of-pocket expenses.

**Notices**

And finally, employers offering an ICHRA must provide written notice to each eligible employee at least 90 days before the beginning of each plan year or the date on which the individual first becomes eligible to participate in the ICEHRA.

Although lengthy, the examples provided within the regulations are quite lucid and provide many every-day illustrations of how ICHRAs may be offered.

**Excepted Benefit Health Reimbursement Arrangement (EBHRA)**

This HRA reverses the previous Administration's stance by allowing a new type of HIPAA–excepted benefit.

This new status as an excepted benefit means that the employee who is covered under the EBHRA is not considered enrolled in "minimum essential coverage" and would not be precluded from receiving a premium tax credit on an Exchange. These are the requirements that must be met in order to offer EBHRAs:

1. The employer must offer other major medical health coverage. However, participants in the EBHRA do not have to be enrolled in the health coverage, they just simply must be offered the coverage;
2. The EBHRA is limited to $1,800 annually (not including rollovers from year to year), subject to annual indexing;
3. If unused amounts are allowed to be carried forward to later plan years, the carryover amounts are disregarded for purposes of determining whether benefits are limited in amount;
4. If more than one HRA or other account-based group health plan is provided, the plans are aggregated to determine whether the benefits are limited in amount, except HRAs that only reimbursed excepted benefits are not included in this calculation.
5. The EBHRA cannot reimburse individual health insurance premiums or Medicare Part A, B, C, or D; but may reimburse eligible health care expenses and COBRA premiums or contributions, short-term limited-duration insurance (STLDI), and excepted benefit coverage premiums such as for dental and vision insurance;
6. EBHRAs must be made available to all similarly situated employees; and
7. The employer cannot offer both an ICHRA and an EBHRA.

A special enrollment period in the individual market is available for individuals who gain access to an ICHRA or who are provided a Qualified Small Employer HRA (QSEHRA Part 1 and Part 2) mid-year.

Plan years for both an ICHRA and EBHRA are generally 12 months. However, they do not have to be on a calendar year and may be a short plan year. Short plan years would need to prorate any annual limits for just the months covered by the short plan year. Note that an employer cannot offer both an ICHRA and an EBHRA to the same class of employees.

With the EBHRA, the employer might want to offer an additional separate HRA that only provides vision and or dental benefits (which are themselves excepted benefits). This would allow participants to utilize the $1,800 EBHRA limit plus have additional funds available for vision and dental expenses.

Still to be addressed is the small group market reform implemented by some states that does not allow employers to pay any portion of premiums for individual health insurance policies. Although implemented, states may or may not enforce this edict.

WageWorks will keep you apprised of any new developments as they occur.

FAQs for ICRHRAs: contains model notice to employees and model attestations of initial and ongoing substantiation requirement of health insurance coverage.