



## ALERTS

### New Health Reimbursement Arrangements Will Be Key For Some Employers

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The U.S. Departments of Treasury, Labor, and Health and Human Services issued final rules regarding health reimbursement arrangements (HRAs) and other account-based group health plans on June 13, 2019, which provide new opportunities for employers to offer HRAs to employees while complying with the Patient Protection and Affordable Care Act (ACA). The final rules are generally applicable for plan years beginning on and after Jan. 1, 2020.

#### What's New?

- Prior to the guidance in the final rules, most HRAs that reimbursed employees for the cost of health insurance purchased by an employee on the individual market violated the ACA.
- The final rules establish two ways that an employee may use an HRA while buying health insurance in the individual market:
  1. Funds in "Individual Coverage HRAs" (ICHRAs) may be used by employees to purchase individual health insurance coverage or Medicare.
  2. Funds in "Excepted Benefit HRAs" (EBHRAs) may be used by participants to pay for most out-of-pocket medical expenses except premiums for individual health insurance coverage or Medicare; employer contributions are subject to an annual limit.

## RELATED PEOPLE



**Lori L. Shannon**

Partner  
Chicago

P 312-214-5664  
F 312-759-5646  
[lori.shannon@btlaw.com](mailto:lori.shannon@btlaw.com)

## RELATED PRACTICE AREAS

Benefits and Compensation

## Individual Coverage HRA

Under the final rules, an ICHRA will allow individuals to purchase qualifying individual health plan coverage or Medicare if certain conditions are satisfied, in compliance with the ACA.

- All individuals covered by the ICHRA must be enrolled in certain individual health insurance plans or Medicare coverage for each month the individual participates in the ICHRA. An individual is not eligible for a premium tax credit (PTC) for any month for which the individual is covered by an ICHRA.
- The same “class” (e.g., collectively bargained, seasonal, waiting period, full-time, part-time, salaried, non-salaried, etc.) of employees may not be offered both an ICHRA and a traditional group health plan.
  - If an employer offers an ICHRA to an employee in a given class, it must offer the ICHRA on the same terms to all employees in that class, but may offer a traditional group health plan to employees in a different class.
  - For purposes of determining employee classes, a common law employer standard is applied, rather than a controlled group standard.
  - A “minimum” class size rule applies to certain classes of employees. The minimum is determined based on the size of the employer.
  - Under a special transition rule for new employees, an employer may offer an ICHRA to a newly hired employee in a certain class even though the employer offers traditional group health plan to ongoing employees in the same class.
- The same terms must apply to members of a class, subject to a few exceptions. Key exceptions include:
  - Age: Older participants in an ICHRA may have greater maximum amounts available to them than younger participants, but the same amount of “age” increase must apply to all similarly aged participants in the same class. The maximum dollar amount made available to the oldest participant in a plan may not exceed three times the amount available to the youngest participant in the plan. Proposed regulations are anticipated that will describe how an employer may increase the maximum dollar amount under an ICHRA based on a participant’s age without violating the nondiscrimination rules of Internal Revenue Code (IRC) Section 105(h).
  - Number of Dependents: The maximum dollar amount available to a participant in an ICHRA may increase based on the number of the participant’s dependents covered under the ICHRA, provided that the increase is applied on a uniform basis within the class.
  - Former Employees: An ICHRA may be offered to only some former employees within a class. If an ICHRA is offered to

some former employees in a class, it must be offered to the former employees on the same terms as it is offered to all other active employees in that class. Employers may continue to offer retiree-only HRAs that are not subject to these integration rules.

- Amounts in an ICHRA that are not used by a participant during a plan year may be carried over to subsequent years if the terms for determining carryover amounts are applied uniformly within the class.
- Participants must be permitted to opt out of and waive future reimbursements from an ICHRA at least annually and upon termination of employment.
- Substantiation and verification of individual health insurance coverage or Medicare is required.
  - Reasonable procedures to substantiate and verify coverage include (1) documentation by a third party, or (2) attestation by the participant (which would likely ease the administrative burden on the employer).
  - New verification is required prior to any expense being reimbursed, which may make use of a debit card for reimbursements difficult.
- Notice requirements apply.
  - An employer must provide written notice to eligible employees at least 90 days before the beginning of each plan year that their participation in the ICHRA will make them ineligible for a PTC.
  - For participants who are not eligible for the ICHRA at the beginning of the plan year, the notice must be given no later than the date on which the participant is first eligible to participate in the ICHRA.
  - There are specific content requirements for the notice regarding the terms of the ICHRA and the participant's rights. Model language for the notice that satisfies requirements is available.
  - Amounts that will be newly available to participants under the ICHRA must be determined prior to the start of the plan year in order to satisfy the notice requirement.
- Additional key points for ICHRAs include:
  - Generally, an HRA is a group health plan that is subject to ERISA. Individual insurance coverage integrated with an ICHRA is not subject to ERISA if certain safe harbor criteria are met.
  - Employees who participate in an ICHRA or a qualified small-employer HRA may use a cafeteria plan to pay for their share of the premiums for individual insurance on a pre-tax basis without resulting in the individual insurance being

considered part of the group health plan.

- Any ICHRA that is considered affordable automatically satisfies the “minimum value” requirement. There is no minimum employer contribution that an employer must provide to participants with respect to an ICHRA, but employers that intend to use an ICHRA (rather than a traditional group health plan) to avoid all employer mandate penalties will likely need to contribute larger amounts to ensure that the individual coverage is “affordable” under the ACA. The IRS has indicated that it will issue guidance on this point soon.
- A special enrollment period for obtaining individual market coverage may apply to individuals eligible for an ICHRA. Additional guidance on this point is expected to be issued by Nov. 1, 2019.

## Excepted Benefit HRA

An Excepted Benefit HRA is a stand-alone HRA that allows an employer to provide a limited annual amount to active employees to use on a tax-free basis for reimbursement of medical expenses without the burden of monitoring the employees’ other health plan coverage, if any. The EBHRA does not provide “minimum essential coverage” for purposes of the ACA. An employer who offers an EBHRA and is subject to the ACA must still offer compliant group health plan coverage in order to avoid ACA penalties. Participation in an EBHRA does not prevent an employee from claiming a PTC for coverage purchased on an exchange.

Requirements for EBHRAs include:

- The employer must offer other non-account based minimum essential coverage under a group health plan to employees.
- The amount of new annual employer contributions (i.e., not including carryover amounts) cannot exceed a specified amount (indexed for inflation), which is \$1,800 in 2020.
- EBHRA funds may be used to reimburse any medical expense defined in IRC Section 213(d) with the exception of premiums for individual health insurance coverage (other than COBRA coverage) and Medicare. Premiums for COBRA, dental, vision and short-term limited duration insurance premiums may be reimbursed.
- An EBHRA must be made available on a uniform basis to all similarly situated employees (e.g., full-time, part-time, occupation type, collectively bargained employees, geographic distinction, length of service or date of hire).
- No additional notice requirement applies to EBHRAs that are subject to ERISA.

## What Actions Should Employers Consider Taking?

- Discuss these new HRA alternatives with employee benefits counsel to determine whether the new options will satisfy goals for

providing healthcare benefits to employees, while complying with ACA requirements.

- Consult insurance brokers and third-party administrators to compare costs of coverage alternatives.
- Discuss implementation of changes and ongoing plan administration.
- Prepare participant communication materials for enrollment in connection with plan changes.
- Amend plan documents and summary plan descriptions to reflect plan design changes.

To obtain more information regarding this alert, contact the Barnes & Thornburg attorney with whom you work or Lori Shannon at 312-214-5664 or [lori.shannon@btlaw.com](mailto:lori.shannon@btlaw.com).

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