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# Proposed Rules Clarify Individual Coverage HRAs

Charmaine Naut | Capital Management Enterprises, Inc | 610-265-9677 | [cnaut@cme-group.com](mailto:cnaut@cme-group.com)

On September 30, 2019, the IRS published proposed regulations to clarify the application of the employer mandate under the Affordable Care Act (“ACA”) and certain nondiscrimination rules under the Internal Revenue Code (“Code”) Section 105(h) to health reimbursement arrangements (“HRAs”) integrated with individual health insurance coverage (individual coverage HRAs, or “ICHRAs”). Notably, the proposed regulations provide information on how to determine when an individual policy is “affordable” and of a “minimum value” and provide some relief under the Code Sec. 105(h) rules.

## Background

Beginning with the 2020 plan year, employers are permitted to offer an ICHRA. This is an arrangement where the employer integrates individual health insurance coverage with an HRA when other traditional group health plan coverage is not offered, subject to certain conditions.

The rules that created this new HRA did not address how it would interact with the employer mandate and nondiscrimination provisions.

## Employer Mandate

The employer mandate penalties apply to applicable large employers (“ALEs”) who fail to offer minimum essential coverage to at least 95% of their ACA full-time employee population (the “A” Penalty) or who do so, but that coverage is not affordable or not of a minimum value (the “B” Penalty).

This section describes highlights from the proposed regulation on this topic.

## Minimum Essential Coverage

An offer of an ICHRA counts as an offer of minimum essential coverage for “A” Penalty purposes.

## Affordability

- **Safe Harbor.** There are currently three affordability safe harbors (federal poverty line, W-2 and rate of pay). The proposed rule confirms use of one of these safe harbors to determine affordability of an ICHRA is permitted. Additionally, the proposed regulations provide a new safe harbor for ICHRAs – an ALE may base affordability on the lowest cost silver plan for self-only coverage offered through the Exchange where the employee's primary site of employment or residence is located.
- **Date to determine lowest cost silver plan.** ALEs use the monthly premium for January of the prior calendar year (or for January of the current calendar year for a non-calendar-year plan) to determine the lowest cost silver plan.
- **Classes of employees.** An ALE may choose to apply the safe harbors for any class of employees, provided the ALE does so on a uniform and consistent basis for all employees in the class.
- **Primary site.** An employee's primary site of employment generally is the location at which the employer reasonably expects the employee to perform services on the first day of the plan year (or on the first day the ICHRA may take effect, for an employee who is not eligible for the ICHRA on the first day of the plan year). Special rules address what happens when an employee's worksite changes.
- **Remote work.** In the case of an employee who regularly works from home or at another worksite that is not on the employer's premises but who may be required by his or her employer to work at, or report to, a particular worksite, such as a teleworker with an assigned office space, the worksite

to which the employee would report to provide services if requested is considered the primary site of employment. For other employees who work remotely, the employee's residence is the primary site of employment.

- **Age.** The lowest cost silver plan for an employee is the lowest cost silver plan for the lowest age band in the applicable rating area. The employee's age is based on the employee's age as of the first day of the plan year (or, if the employee becomes eligible for the ICHRA after the first day of the plan year, the first date the ICHRA can become effective for that employee).
- **Wellness incentives.** If there is a wellness incentive, the premium is determined without regard to that incentive unless the incentive relates exclusively to tobacco use, in which case the incentive is treated as earned.
- **Data availability.** Lowest cost silver plan data will be made available by HHS for employers in all states that use the federal Exchange. CMS has released a tool. Regarding state exchanges, HHS has begun discussing the information it plans to make available.

## Minimum Value

An ICHRA that is affordable is deemed to provide minimum value.

## Code Section 105(h) Nondiscrimination

For self-funded health plans, including HRAs, any maximum limit attributable to employer contributions must be uniform for all participants and for all dependents of employees who are participants and may not be modified by reason of a participant's age or years of service.

The proposed rules indicate that:

- An ICHRA does not fail Code Sec. 105(h) nondiscrimination testing solely due to the variation based on age.
- The maximum amount available under an ICHRA may vary within a class of employees or between classes without violating the uniform employer contribution requirement if (a) within each class, the maximum dollar amount only varies in accordance with the “same terms” requirement under the ICHRA rules, and (b) with respect to differences in the maximum dollar amount for different classes.

Note that satisfying the terms of the safe harbors under the proposed regulations does not automatically satisfy the prohibition on nondiscriminatory operation. Thus, for example, if a disproportionate number of HCIs qualify for and utilize the maximum HRA amount allowed under the same terms requirement based on age in comparison to the number of non-HCIs who qualify for and use lower HRA amounts based on age, the ICHRA may still be found to be discriminatory, with the result that excess reimbursements of the HCIs will be included in their income.

An ICHRA that only reimburses insurance premiums is treated as an insured plan and is not subject to the Code § 105(h) rules.

## Code Section 125

An employer generally may not provide an Exchange plan as a benefit under its cafeteria plan. However, for an employee who purchases off-Exchange individual health insurance coverage, the employer may permit the employee to pay the balance of the premium for the coverage through its cafeteria plan.

## Effective Date

- The proposed regulations related to the employer mandate apply beginning January 1, 2020.
- The proposed regulations under Code Section 105(h) apply beginning with the 2020 plan year.
- Employers may rely on the proposed regulations until the plan year beginning after six months following the publication of any final regulations.

For the regulations, visit: <https://www.govinfo.gov/content/pkg/FR-2019-09-30/pdf/2019-20034.pdf>