

**AUGUST 16, 2019**

## **NEW (AND POTENTIALLY EXCITING) OPTION FOR HEALTH CARE COVERAGE - INDIVIDUAL COVERAGE HEALTH REIMBURSEMENT ARRANGEMENTS**

If employees are insured under individual policies of health insurance, can their employer pay the premiums for that coverage? Right now, the answer is “no,” subject to limited exceptions for certain small employers and S corporations. Beginning January 1, 2020, however, that answer will change and employers of all sizes will be able to pay or reimburse the premiums for coverage under individual policies of health insurance, but only if certain conditions are met. This new option could prove quite attractive for employers that don’t want to bother with all the hassles associated with offering group health plan coverage to their employees. Depending on an employer’s individual circumstances, there also could be a significant opportunity for savings.

### **Why Can’t Employers Reimburse Employees for Individual Health Policies Under Current Law?**

The answer gets a little bit technical, but it’s basically as follows: If an employer pays the cost of its employees’ coverage under individual policies of insurance, either directly or by reimbursing the employees, the employer has created what the Internal Revenue Service calls an “employer payment plan.” From the IRS’s point of view, this employer payment plan is itself a type of group health plan. As such, it is subject to the coverage mandates under the Affordable Care Act, such as the requirement that the plan provide preventive care with no co-payments or deductibles and that there be no annual or lifetime limits on essential health benefits. Because, however, the arrangement is merely an arrangement to pay premiums and not anything more than that, there is no way that it can satisfy these coverage mandates. As a result, an employer offering this type of [individual payment plan will be subject to an excise tax of \\$100.00 per day](#) per affected participant, unless the employer is somehow able to fit within an exception.

### **What Are the Exceptions Under Current Law?**

Under current law, there are only two exceptions to the prohibition against employer payment of the cost of coverage under individual policies of insurance that most employers might ever expect to encounter:

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- (1) **Small Employers / QSEHRAs.** At the end of 2016, Congress approved legislation that allows smaller employers to reimburse their employees for the cost of coverage under individual policies of insurance, but only if the employer adopts a “qualified small employer health reimbursement arrangement” (“QSEHRA”). There are a number of conditions that must be met if an employer wants to do this. Among other conditions:
  - (a) The employer cannot be an “applicable large employer,” which means that a QSEHRA can only be offered by employers with no more than 50 full-time employees or their equivalents;
  - (b) The employer cannot offer any other type of group health plan to its employees; and
  - (c) The QSEHRA must be entirely funded by the employer. Pre-tax salary reduction contributions are not permitted.

These conditions are summarized in more detail in the [Alert](#) that we prepared after this legislation was approved by Congress.

- (2) **More-Than-2%-Shareholders in an S Corporation.** An S Corporation is allowed to pay the premiums for a more-than-2%-shareholder. However, it is not allowed to pay the premiums for anyone else.

### What’s Changing as of January 1, 2020?

Earlier this year, final regulations were issued that will allow employers of *all sizes* to reimburse their employees for the cost of coverage under individual policies of insurance through the establishment of what is known as an “individual coverage health reimbursement arrangement” (or “ICHRA”), but only if certain conditions are met. The regulations, which were adopted by the IRS, Department of Labor, and Centers for Medicare & Medicaid Services, formally take effect on January 1, 2020, and represent a significant change in current law.

### What Are the Conditions for Reimbursing Employees for Coverage Under Individual Policies?

There are five conditions that must be met:

- (1) **Condition #1 – Must Verify that the Employee Has Individual Health Coverage.** Before reimbursement can be made, an individual must have a policy of individual health insurance coverage (including Medicare), and the ICHRA established by the employer must have reasonable procedures to verify the individual’s enrollment. Although coverage obtained on the Exchange won’t count, virtually any other individual policy of health insurance will suffice.

- (2) **Condition #2 – Cannot Offer Both Traditional Coverage and Reimbursement Through an ICHRA to the Same “Class” of Employees.** For any given “class” of employees, an employer may offer either an ICHRA or a traditional group health plan. It cannot, however, offer both at the same time to the same class of employees. It is one or the other, and employees must not be given a choice.

The permissible “classes” of employees are listed in the regulations, and include full-time employees, part-time employees, salaried employees, hourly employees, seasonal employees, and employees who are employed in the “same rating area” as defined in other regulations. Employers can also phase the ICHRA in by offering it only to new hires, while continuing to offer to traditional group health plan coverage to everyone else. Importantly, though, the regulations provide that a class may be required to include at least a minimum number of employees in some (but not all) instances.

- (3) **Condition #3 – Same Terms and Conditions for All Employees in a “Class.”** If an ICHRA is offered, it must be offered on the same terms to all employees in the same class. However, the regulations will allow the employer to provide higher annual contributions to older employees and/or to employees with more dependents. The amount of the ICHRA can also be proportionally reduced for employees who become eligible during the middle of the plan year.
- (4) **Condition #4 – Written Notice Required.** If an ICHRA is offered, a written notice will have to be provided to each employee in a class at least 90 days before the first day of a plan year, although this 90-day rule will not apply in the first year of the ICHRA. If the employee did not become eligible until after the notice had been provided, the notice must be provided no later than the date the employee does become eligible. Additionally, this notice must contain information as specified in the regulations.
- (5) **Condition #5 – Written Plan Document Required.** An ICHRA will be required to have a written plan document that specifies the terms and conditions that will apply. In other words, it must specify how the ICHRA will work.

## How Will Other Laws Apply to an ICHRA?

The regulations address questions that are likely to come up about an ICHRA as follows:

- (1) **Not an ERISA Plan or a Group Health Plan.** An ICHRA will not be treated as either an ERISA “employee welfare benefit plan” or a “group health plan.” This means, among other things, that the employer will not be subject to an excise tax by offering it.

- (2) **ACA Mandate to Make Coverage Available.** On the other hand, if an employer is an “applicable large employer” and, as such, is subject to a penalty if it does not make minimum essential coverage available to substantially all of its full-time employees (i.e., the so-called “sledgehammer penalty”), the regulations provide that this requirement will be satisfied through the offering of an ICHRA.
- (3) **ACA Mandate to Offer Coverage that is “Affordable.”** An applicable large employer may also be subject to a separate penalty if it offers coverage that is not “affordable” and/or does not provide “minimum value.” The IRS will be issuing future guidance that provides a safe harbor to avoid this so-called “tack-hammer” penalty for employers who offer an ICHRA. In other words, the IRS anticipates finding a way to say that, if you offer an ICHRA and you provide a minimum level of contributions, you will be protected against the tack-hammer penalty.

### **Can Employees Pay Their Share of the Cost Using Pre-Tax Dollars?**

The new regulations will allow an employee to pay the difference between the dollar amount that is provided by an employer and the cost of the employee’s coverage using pre-tax dollars through the employer’s Section 125 cafeteria plan. This provision will, however, only apply to individual coverage that is purchased outside the Exchange.

If you have questions regarding these regulations, the possible establishment of an ICHRA for your business, or the Affordable Care Act in general, please feel free to contact Steven Smith, Brad Schlozman, or Eric Namee at (316) 267-2000.