



# ACA COMPLIANCE BULLETIN

## HIGHLIGHTS

- + If certain requirements are met, the rule proposes that offering an ICHRA would generally satisfy an employer's pay or play obligations.
- + ALEs may use the affordability safe harbors to determine affordability for an ICHRA.
- + These rules are proposed to apply beginning Jan. 1, 2020.

## IMPORTANT DATES

### September 30, 2019

The IRS published a proposed rule on how the ACA's pay or play rules and Code Section 105(h) nondiscrimination requirements will affect ICHRAs.

### January 1, 2020

If finalized, the proposals would take effect beginning with 2020 plan years.

## PROPOSED RULE ON THE IMPACT OF ICHRAS ON THE ACA'S PAY OR PLAY RULES

### OVERVIEW

Beginning Jan. 1, 2020, some employers will be able to offer individual coverage HRAs (ICHRAs) to help employees pay for individual health insurance. ICHRAs were established by a [final rule](#) published on June 20, 2019, which raised questions about how existing federal rules will apply to ICHRAs.

As a result, on Sept. 30, 2019, the Internal Revenue Service (IRS) published [proposed regulations](#) on how the following federal requirements will affect ICHRAs:

- + The Section 4980H employer shared responsibility rules under the Affordable Care Act (ACA); and
- + The federal nondiscrimination requirements in Internal Revenue Code (Code) Section 105(h).

### ACTION STEPS

**Taxpayers generally may rely on the guidance provided in the proposed rule prior to a final rule being issued.**

Comments on the proposed rule will be accepted until Dec. 30, 2019.



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## BACKGROUND

Beginning in 2020, HRAs may be integrated with individual insurance coverage through use of an individual coverage HRA (ICHRA) for purposes of compliance with the ACA, eliminating the existing prohibition on this type of arrangement. **This means that HRAs may be used to reimburse employees for the cost of individual health coverage on a tax-preferred basis**, if certain conditions are met.

*The proposed rule provides that an HRA, including an ICHRA, qualifies as an eligible employer-sponsored plan for purposes of compliance with the employer shared responsibility rules.*

On Nov. 19, 2018, the IRS issued [Notice 2018-88](#) to begin developing guidance on the impact of the proposed HRA rule on the ACA's employer shared responsibility rules and the Code Section 105(h) federal nondiscrimination requirements. Separate IRS [final rules](#) were also issued regarding premium tax credit eligibility for individuals offered coverage under an HRA integrated with individual health insurance coverage (PTC rules). Generally, an individual who is covered by an HRA integrated with individual health coverage is ineligible for the premium tax credit.

Under the final PTC rules, an ICHRA is considered to be affordable for a month if the employee's required HRA contribution for the month does not exceed 1/12 of the product of the employee's household income for the taxable year and the required contribution percentage. The required HRA contribution is the excess of:

- + The monthly premium for the lowest cost silver plan for self-only coverage of the employee offered in the Exchange for the rating area in which the employee resides (the PTC affordability plan); over
- + In general, the self-only amount the employer makes newly available to the employee under the ICHRA for the month (the monthly HRA amount).

Under the final PTC rules, an ICHRA that is affordable is treated as providing minimum value. The final PTC rules apply for taxable years beginning on or after Jan. 1, 2020.

## APPLICATION OF THE EMPLOYER SHARED RESPONSIBILITY RULES TO ICHRAS

The ACA's employer shared responsibility rules, also known as the employer mandate or "pay or play" rules, require applicable large employers (ALEs) to offer minimum essential coverage that is affordable and provides minimum value to their full-time employees, or pay a penalty. The proposed rule addresses the application of the employer shared responsibility rules to ICHRAs. Note that these rules do not apply to employers that are not ALEs, or in situations where ALEs offer an ICHRA to part-time employees.

Specifically, the rule proposes that **an HRA, including an ICHRA, qualifies as an eligible employer-sponsored plan**. Therefore, an ALE that offers an ICHRA to at least 95% of its full-time employees (and their dependents) would not be liable for a Section 4980H(a) penalty for the month, regardless of whether any full-time employee received an Exchange subsidy.

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In addition, for purposes of the Section 4980H(b) penalty, the proposed rule provides that:

- + An ALE offering an ICHRA to a class of employees may use the employer shared responsibility rules' affordability safe harbors in determining whether the offer of the HRA is affordable for purposes of the Section 4980H(b) penalty. In applying the affordability safe harbors to an offer of an ICHRA, the employee's required HRA contribution is to be used, taking into account any other applicable safe harbors under the proposed regulations. For this purpose, the employee's "required HRA contribution" generally is the excess of the premium for self-only coverage under the lowest-cost silver plan offered in the rating area where the employee resides, over the self-only amount the employer makes newly available to the employee under the ICHRA.
- + An ICHRA that is affordable for purposes of the pay or play rules is deemed to provide minimum value.

The proposed rule provides safe harbors to simplify the determination of the applicable lowest-cost premium for ALEs, including:

- + A safe harbor that would allow ALEs to use a look-back month before the plan year; and
- + A safe harbor that would allow ALEs to use employees' primary worksite rather than their residence.

## APPLICATION TO THE SECTION 6055 AND SECTION 6056 REPORTING REQUIREMENTS

### Section 6056

Section 6056 requires ALEs to file with the IRS and furnish to full-time employees information about whether the employer offers coverage to full-time employees and, if so, information about the coverage offered. **An ALE that offers an ICHRA to its full-time employees is required to satisfy the Section 6056 reporting requirements.** ALEs use Form 1094-C and Form 1095-C to satisfy the section 6056 reporting requirements.

It is anticipated that additional administrative guidance, including forms and instructions, regarding reporting in connection with ICHRAs will be provided. It is also anticipated that the guidance would allow the reporting of the employee's required contribution based on the Section 4980H safe harbor(s) used by the ALE, rather than the employee's required contribution determined under the final PTC rules without application of the relevant safe harbors. The IRS continues to consider whether and how to revise the codes used on Form 1095-C to account for the new ICHRA safe harbors.

### Section 6055

Section 6055 requires all entities that provide minimum essential coverage (MEC) to an individual to report certain information to the IRS that identifies covered individuals and the period of coverage, and to furnish a statement to the covered individuals including the same information. Information returns under Section 6055 generally are filed using Form 1094-B and Form 1095-B. However, self-insured ALEs are required to file Form 1095-C and use Part III of that form, rather than Form 1095-B, to report information required under Section 6055.

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ICHRAs are group health plans and, therefore, are considered MEC. Accordingly, **reporting under Section 6055 is required for ICHRA**s. In general, the employer is the entity responsible for this reporting. Exceptions apply for certain duplicative coverage or supplemental coverage providing MEC. **However, these exceptions generally do not apply to ICHRA**s.

*An ALE that offers an ICHRA to its full-time employees is required to satisfy the Section 6056 reporting requirements.*

## SECTION 105(H) NONDISCRIMINATION REQUIREMENTS

Code Section 105(h) contains nondiscrimination rules prohibiting self-insured health plans from discriminating in favor of highly compensated individuals (HCIs) with respect to eligibility or benefits. The **eligibility test** looks at whether a sufficient number of non-HCIs benefit under a self-insured health plan, and the **benefits test** analyzes whether the plan provides HCIs with better benefits.

The benefits test includes a uniformity requirement that any maximum reimbursement limit attributable to employer contributions be uniform for all participants, and not vary based on a participant's age or years of service. If a plan fails the benefits test, benefits provided under the discriminatory plan will be taxable to the HCI.

The HRA final rule allows a plan sponsor to:

- + Limit the offer of the ICHRA to certain classes of employees and to vary the amounts, terms and conditions of individual coverage HRAs between the different classes of employees. However, within each class of employees, the plan sponsor would be required to offer the ICHRA on the same terms and conditions (including, generally, in the same amount) to all employees who are members of that class; and
- + Increase the maximum dollar amount made available to an employee for any plan year as the age of the employee increases (provided the same maximum dollar amount attributable to the increase in an employee's age is made available to all employees who are members of the same class of employees who are the same age).

To facilitate offering ICHRA, the proposed rule provides that a covered HRA would meet the uniformity requirement if the covered HRA:

- + **Provides the same maximum dollar amount to all employees who are members of a particular class of employees**, limited to the following classes specified in the HRA final rule: full-time employees, using either the Section 105(h) or 4980H definition; part-time employees, using either the Section 105(h) or 4980H definition; seasonal employees, using either the Section 105(h) or 4980H definition; employees covered by a collective bargaining agreement; employees who have not satisfied an ACA-compliant waiting period for coverage; employees who have not attained age 25 prior to the beginning of the plan year; foreign employees who work abroad; and employees whose primary site of employment is in the same rating area; and

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- + **Increases the maximum dollar amount made available to members of a particular class of employees in accordance with the increases in the price of an individual health insurance policy based on the ages of the members of that class**, provided that the same maximum dollar amount attributable to the age increase is made available to all members of that class of employees who are the same age.

The proposed rule notes that **satisfying the terms of these safe harbors does not automatically satisfy the requirement that the ICHRA be nondiscriminatory in operation**. Therefore, among other situations, 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 be found to be discriminatory. This means that excess reimbursements of the HCIs will be included in their income.

## APPLICATION OF SECTION 125 CAFETERIA PLAN RULES TO ICHRAS

Some employers may want to allow employees to pay the portion of the premium for individual health coverage that is not covered by an ICHRA, if any, through a salary reduction arrangement under a Section 125 cafeteria plan. Existing rules generally prohibit an employer from providing a qualified health plan (QHP) purchased through an Exchange as a benefit under its cafeteria plan. Therefore, an employer may not allow employees to make salary reduction contributions to a cafeteria plan to purchase a QHP (including individual health coverage) offered through an Exchange.

However, this rule does not apply to individual health coverage that is not offered through an Exchange. Therefore, **for an employee who purchases off-Exchange individual health coverage, the employer may allow the employee to pay the balance of the premium for the coverage through its cafeteria plan**. The IRS is requesting comments regarding any specific issues raised by the application of the Section 125 cafeteria plan rules to arrangements involving ICHRAs for which clarification is needed or for which a modification of the applicable rules may decrease burdens.