

IRS Proposes Individual Coverage HRA Regulations on ACA Employer Mandate

October 2019

The Treasury Department and the Internal Revenue Service (IRS) have proposed regulations clarifying the application of the Employer Shared Responsibility (ESR) mandate and nondiscrimination rules to individual coverage health reimbursement arrangements (IC-HRAs) and to provide related safe harbors easing the administrative burdens of ESR and income tax compliance under the nondiscrimination rules. These regulations build upon the principles offered in last year's IRS Notice 2018-88, which finalized regulations on how employers could use IC-HRAs to subsidize employees' purchase of individual health insurance policies without violating the Affordable Care Act (ACA), ERISA, or the Internal Revenue Code.

Under the proposed regulations, the offer of a compliant IC-HRA is an offer of an eligible employer-sponsored plan for purposes of the ESR mandate, without regard to whether the employee accepts the offer. To avoid excise tax liability under Code Section 4980H(b), the IC-HRA must also be affordable and provide minimum value. To satisfy these requirements, employers may apply specific safe harbors to IC-HRAs that differ from those available for group health plans.

Affordability Safe Harbors

Under the proposed regulations, an IC-HRA will be affordable if the cost of the individual health insurance coverage minus the HRA amount provided by the employer (the employee's "required HRA contribution") does not exceed the "required contribution percentage" (9.78% for 2020) of the employee's household income. To determine affordability, an employer must determine:

- The policy to be used;
- The rating location of the policy;
- The cost for a specified period of coverage; and
- The age of the covered employee.

These data points vary from employee to employee. For administrative simplicity, the proposed regulations offer optional safe harbors to determine these data points:

- **Look Back Month:** The cost of the applicable plan is determined as of January of the prior calendar year for calendar-year plans, or January of the current calendar year for non-calendar-year plans.
- **Affordability:** The group health plan affordability safe harbors for determining an employee's household income under Code Section 4980H (IRS Form W-2, the rate of pay, and the federal poverty line safe harbors) are modified for IC-HRAs to relate to the employee's required HRA contribution taking into account other IC-HRA safe harbors.
- **Location:** The employee's location (rating area) is the primary site of employment, including the location an employee could be requested to report. If an employee works remotely and has no office space available or no particular location to report, the employee's residence is the applicable location.
- **Age:** The employee's age is determined as of the first day of the plan year or, for newly eligible employees, the first day of eligibility.

- *Applicable Plan:* Affordability would be determined using the lowest-cost silver plan for self-only coverage offered by the Exchange for the employee's location. As used for employees of all ages, this is the plan for the lowest age band.
- *Required HRA Contribution:* The required HRA contribution would be determined based on such lowest-cost silver plan and the monthly premium for the employee's applicable age.

Applying these safe harbors, the IC-HRA is affordable if the employee's required contribution (determined as the monthly premium for the applicable plan, less the employer's monthly HRA amount), does not exceed the required contribution percentage of the employee's household income. An IC-HRA that is affordable is also treated as providing minimum value for each calendar month.

Nondiscrimination Rules and the IC-HRA

Since the price of individual health insurance is rated according to an individual's age and the cost of the insurance increases as the individual's age increases, an employer might design an IC-HRA that provides greater contributions for older employees. An HRA, however, is subject to the nondiscrimination rules of Code Section 105(h), which prohibit self-funded plans from discriminating in favor of highly compensated individuals in eligibility or benefits, and prohibit a self-funded plan from basing employer contributions on age or years of service. Failure to satisfy these rules would cause a highly compensated individual to include payments from an HRA in income.

The proposed regulations allow IC-HRAs to differentiate among specific classes of employees. An employer would be able to provide different levels of HRA contributions to each of those specific classes, as long as the same HRA contribution is provided on the same terms to all employees within a class.

To address the increasing cost of individual insurance as age increases, the proposed regulations create an exception to the nondiscrimination rules that would permit the maximum IC-HRA dollar amount made available to an employee for any plan year to increase as the age of the employee (and therefore the price of the applicable individual health insurance coverage) increases. Such an increase must be made available to all employees who are members of the same class who are the same age, and the maximum dollar amount available to the oldest participants cannot exceed three times the maximum dollar amount available to the youngest participants.

Reporting

These proposed regulations do not amend the reporting provisions under the ACA. The IRS anticipates that future guidance will address reporting the affordability of IC-HRAs on Form 1095-C.

Applicable Date

The proposed regulations providing the safe harbors may be relied upon for periods beginning after December 31, 2019, and any plan year of IC-HRAs beginning before six months after the publication of final regulations. The nondiscrimination provisions may be relied upon for plan years beginning after December 31, 2019, and any plan year of IC-HRAs beginning before six months after the publication of final regulations.

Resources

The proposed regulations are available [here](#).

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