

October 9, 2020

Dear Secretary Mnuchin and Commissioner Rettig:

We write to thank you for your work and that of your staff in expanding access to Health Reimbursement Arrangements (HRAs) in 2019. In particular, the new individual coverage HRA (ICHRA) substantially expands employers' ability to offer health coverage to their workers, increases workers' choice of coverage, and has reduced the number of people without health insurance.

We represent a group of ICHRA administrators and practitioners that draw from our own experiences with clients this past year as ICHRA has begun to take hold in the market. While the market reaction to ICHRA has been a positive one, being in at the ground level has afforded us unique insights for opportunities for improvement.

Collectively, we are committed to building the infrastructure that eases employers' ability to offer and workers' ability to benefit from the ICHRA. For ICHRAs to meet their full potential, however, it is vital that you issue final regulations (Application of the Employer Shared Responsibility Provisions and Certain Nondiscrimination Rules to Health Reimbursement Arrangements and Other Account Based Group Health Plans Integrated with Individual Health Insurance Coverage or Medicare) that clarify employers' responsibility with respect to the employer responsibility provisions and that minimize their administrative burden in offering ICHRAs. Moreover, we urge you, along with the Departments of Health and Human Services and Labor, to reduce the length of the notice period for employers that chose to take advantage of the ICHRA before the coverage commences.

Last week, President Trump signed an Executive Order for 'An American-First Healthcare Plan.' Section 3 of the order directs "the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services [to] maintain and build upon existing actions to expand access to and options for affordable healthcare." Finalizing the ICHRA employer shared responsibility rule and improving upon some of the policies in the proposed rule is consistent with the President's directive.

The key aspect of the rule are safe harbors that provide employers certainty that their offer of an ICHRA satisfies the employer responsibility provision and will not subject them to potential penalties under this provision years later. Many of the components of proposed rule should be finalized as proposed. These include the proposed affordability safe harbor, the 105(h) safe harbor, and the calendar-year lookback safe harbor. These safe harbors should be allowed in combination with each other. Moreover, employers should not be required to independently verify premium information made available by the exchanges.

Brian Blase, who served at the White House National Economic Council when the HRA rule was finalized in June 2019, has written that several modifications to the proposed rule are needed for ICHRAs to maximize their potential. We strongly agree that the

modifications he suggests would help employers offer ICHRA and fulfill the president's recent directive to "build upon existing actions to expand access to and options for affordable healthcare."

Flexibility for people who work from home, in a remote office, or telework

"It is important to provide employers with a safe harbor for location given the burden of employee-to-employee determinations of ICHRA affordability based on employee residence. In most cases, employees live reasonably close to work and live in the same rating area as the location where they primarily work or in a neighboring rating area, which probably has similar premiums.

For employees who work remotely from home or at an off-premises worksite, the proposed rule uses the employee's residence as the primary site of employment. This creates greater administrative burden on employers that would like to offer the ICHRA. Treasury and IRS should create a *de minimis* standard to aid employers in offering the ICHRA. If less than 20 percent of the employer's workforce that is offered the ICHRA works from home or at an off-premises worksite, the employer should be allowed to utilize the premium in the employer's location for the purpose of determining affordability."

We would note here that this recommendation is even more important given the coronavirus pandemic and the much greater reliance on work from home and special consideration should be given to whether the percentage should be increased during the ongoing fight against the global pandemic.

Provide greater flexibility around non-calendar year look back

"The proposal to allow calendar year plans to look back to the value of the plan in the previous calendar year for the purpose of determining ICHRA affordability provides necessary flexibility and should be maintained. This is important since individual market premiums are not generally known until shortly before the open enrollment period begins on November 1st. The 90-day notice requirement for employers to provide information about the ICHRA to employees makes it impossible to comply without a look back. As proposed, employers should be able to use the previous calendar year's monthly premiums for all calendar months of the subsequent plan year when the ICHRA is offered. In addition to maintaining this flexibility, Treasury and IRS should not include an annual adjustment for premiums of the lowest-cost silver plan from one year to the next for the purpose of determining the affordability of the ICHRA. Doing so will add tremendous complexity for employers' decisions to utilize the ICHRA and offer affordable coverage.

Treasury and IRS should provide additional flexibility for plans that are not offered on a calendar year basis. Like the calendar year look back, plans with a start date in the first half of a calendar year should also be allowed to rely on the cost of plans in the previous

year for the purposes of affordability. Plans with a start date in the second half of a calendar year would have time to be able to use the cost of plans from that preceding January, but that is not reasonable for plans that start in the first half of the year.”

Avoid using mid-year re-determinations

“Treasury and IRS have proposed conducting mid-year determinations for employees who move during the year. This is unduly burdensome on employers offering an ICHRA, and it should not be finalized. Employees may move for a variety of reasons without changing the employer- employee relationship, and employers are not manipulating peoples’ mid-year housing decisions to lower their health insurance costs. The ICHRA affordability calculation should therefore be an annual determination.”

Create an age-based safe harbor

“Treasury and IRS sought comment on an age-based safe harbor. In the proposed rule, the agencies noted limits in their authority to deviate significantly from current premium tax credit rules, which require affordability to be determined by the employee’s age. In order to provide reasonable flexibility to employers while adhering to these limits, the agencies should extend an age-based safe harbor that allows employers to use bands of either 5 or 10 years and that selects the premium for the lowest-cost silver plan for the median employee age within that age band to determine the affordable HRA amount for everyone in a class of an age within the age band. This provides a less administratively burdensome process for employers.”

Use of median-cost bronze plan as an alternative for measuring affordability

“In order to satisfy the employer mandate, large employers need to offer traditional group plans that meet minimum value and is affordable. The ACA defines minimum value as a plan with an actuarial value of at least 60 percent. And plans of minimum value must be affordable.

In the HRA proposed rule, the Departments defined minimum value as the lowest cost silver plan, which has an actuarial value of approximately 70 percent. We understand the rationale for the Departments of HHS, Labor, and the Treasury using the lowest cost silver plan in a rating area for the purposes of determining the ICHRA’s affordability. A bronze plan would have provided maximum flexibility for employers to offer ICHRAs, but some bronze plans may have actuarial values below 60 percent—the requirement for coverage to be minimum value.

Treasury and IRS should permit employers to utilize an alternative benchmark plan for the purposes of determining the affordability of the ICHRA for three reasons. First, the decision to use the lowest cost silver plan to determine affordability disadvantages ICHRAs relative to traditional group plans. Second, as a result of “silver loading,” silver plans, particularly in the exchanges, have risen significantly in price over the past few years relative to the increase in other metal-level plans. Third, based on the 2020

enrollment experience, the relatively high cost of silver plans discouraged some employers from offering any health coverage.

In order to reduce the regulatory advantage that traditional plans have over ICHRAs and to encourage employers to offer coverage, we make two recommendations. First, Treasury and IRS should clarify that the lowest cost silver plan can be an off-exchange, ACA-compliant plan since premiums tend to be less expensive off-the-exchange than on-the-exchange. Second, Treasury and IRS should permit affordability for the purposes of satisfying the employer mandate to be measured by the *cheaper* of the lowest-cost silver plan or the median-cost bronze plan in an area. The median-cost bronze plan would significantly reduce the concern that a plan could have an actuarial value a few percentage points below 60 percent. The median cost bronze plan in an area is perhaps the most reasonable method for approximating the true ‘minimum value’ standard of a 60 percent actuarial value plan. Our recommended approach would also increase overall insurance coverage by making it easier for employers to afford to offer an ICHRA. Since the plan cost would generally be the one for the previous year, employers and entities working with employers will know the cost.”

At a minimum, Treasury and IRS should utilize the lowest-cost silver plan, regardless of whether it was sold on or off the exchange. The lowest-cost silver plan will meet the minimum value requirements and represents a more expansive benchmark for determining affordability than is required of employers that offer a traditional plan. Moreover, since most employees using the ICHRA will be purchasing coverage off-the-exchange, using the lowest-cost silver plan in a market makes much more sense.

Finally, in addition to the items raised in the comment letter, we urge you to shorten the ICHRA notice period to 45 days. As we work with small and mid-sized businesses to provide education about the ICHRA opportunity, the 90-day notice has emerged as a leading obstacle to adoption. This is because many employers only think about health coverage once a year when they receive their renewal letter with the premium increase from their insurer or third-party administrator. Typical renewal notices on the current group plan from the insurer or third-party administrator usually are sent out approximately 60 days before the start of the next plan year. That means employers are not able to compare their expected group insurance plan premium with an ICHRA option because by the time they have the information they need to do the comparison, it’s technically too late to consider an ICHRA for a January 1 start date. If the Departments adopt a 45-day notice period, employees will have at least 30 days during open enrollment to shop for coverage.

Again, to fulfill the directive on expanding affordable options, it’s crucial that the 90-day notice be reduced. For employers who want to switch to an ICHRA mid-year, 90 days is an exceedingly long advance notice period, which bears zero connection to the ACA open enrollment period, as these employees will enroll through a special enrollment period. Employees should not need to wait 90 days in order to receive coverage.

In closing, we are writing because we are working around the clock to help employers and workers benefit from the Administration's groundbreaking HRA rule. Working on this through ICHRA's first year has given us a good indication of what's working and what needs to be changed in order to fulfill the ICHRA's goal of creating an improved way for hundreds of thousands of employers and millions of workers to get health insurance coverage. We urge you to take the steps outlined in the letter above, so we can have the most successful possible 2021 open enrollment period and build toward the long-term success of the HRA rule.

Sincerely,

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