

ICHRAs and the Employer Mandate

Here's how the IRS says an ICHRA can keep an employer out of harm's way under the ACA employer mandate:

- Simply offering the ICHRA is an offer of minimum essential coverage (MEC) for purposes of tier 1 of the employer mandate. That is, it is adequate to help the employer meet the obligation to offer at least MEC to 95% or more of its ACA full-time employees and their children through the month they attain age 26.
- The offer of an ICHRA may also satisfy tier 2 of the mandate, the obligation to offer ACA full-time employees minimum value medical coverage (aka bronze-level coverage, or 60% actuarial value coverage) at an affordable cost to the employee.

The ICHRA is not itself major medical coverage, of course, so the rules deem the ICHRA to be an offer of minimum value and affordable coverage if the ICHRA benefit is enough to make affordable, to the employee, the lowest-cost individual silver policy (70% actuarial value) available through the ACA marketplace rating area in which the employee lives. Affordability is determined based on the employer mandate's affordability standards, using the cost of the individual policy's self-only coverage tier.

That sounds simple enough, but consider this: The amount of the ICHRA benefit needed to make the lowest-cost silver plan affordable to an employee will vary from employee to employee, because of the following:

- Employees might reside in any number of different ACA marketplace rating areas, where premiums for the lowest-cost silver policy might vary substantially.
- The cost of the least expensive silver policy can vary dramatically between employees, even within the same rating area, based on their age and other factors.
- The price of the lowest-cost silver policy for the upcoming year isn't announced until late in the previous year, making planning by the employer difficult.
- Unless the ICHRA plan year is the calendar year, the premium for the lowest-cost silver policy available to an employee might change during the ICHRA plan year. In that case the ICHRA plan year will encompass parts of two separate marketplace years, in which premium costs for the same policy will likely be different.

To tackle these challenges the IRS offers several shortcuts and safe harbors to make it somewhat easier for an employer offering an ICHRA to satisfy the affordability requirement of tier 2 of the ACA employer mandate.

Shortcuts and safe harbors

The lowest-cost silver plan: In some marketplace rating areas this cost might vary between age bands. To ease the employee-by-employee affordability determinations, the employer can choose the silver plan offered by the insurer that offers the lowest-cost silver plan in the lowest

age bracket. Then, the price of that plan for the specific employee, based on the employee's applicable age bracket, may be used to determine affordability.

- **Example:** The employer has five employees, ages 25, 35, 45, 48 and 52, for whom it is calculating affordability in the same rating area. For employees in the age 45, 48, and 52 rating bands, the least expensive silver plan is the ABC Insurance Co. Choice Plan. But for employees in the age 25 and 35 rating bands the least expensive silver plan is the XYZ Insurance Co. Prime Plan.

The critical analysis is based on the least expensive plan for the lowest age bracket. In this case, assume the least expensive silver plan in the lowest age bracket is also XYZ's Prime Plan. When determining affordability for its employees, the employer can use the cost of XYZ's Prime Plan even for those employees age 45, 48 and 52 who might pay a little more under that plan in their respective age rating bands than they would pay for the ABC Choice Plan.

Employee's age: The required premium for the lowest-cost silver plan available to any given employee will vary by the employee's age. When calculating affordability, the employer can use the rate based on the specific employee's age on the first day of the ICHRA plan year provided the employee is eligible for the ICHRA then. If the employee becomes eligible later in the year, the employer can use (for the rest of that year) the rate based on the employee's age on the date the ICHRA coverage could first be effective for the employee.

Location safe harbor: The ICHRA regulations issued last June say, when determining affordability, the premium required by an employee is determined by the lowest-cost silver plan in the ACA marketplace rating area in which the employee resides. That poses complexities for employers offering an ICHRA to employees who might work in the same place, but live in different ACA marketplace rating areas.

To address this complexity the newly proposed regulations allow employers, when assessing affordability, to use the ACA rating area for the employee's "primary site of employment." That's the place where, as of the first day of the ICHRA plan year (or if later, the first day the employee's ICHRA coverage would begin), the employer reasonably expects the employee to perform services. If the employee changes primary work sites permanently or indefinitely, the new work site is the primary site of employment not later than the first day of the second calendar month after the employee begins working there.

- **Example:** Ed works at Company, Inc. in Kansas City, Missouri, but lives across the river in Kansas. Scott also works at Company, Inc. in Kansas City, Missouri, but lives in Missouri. Company, Inc. offers Ed and Scott an ICHRA. To determine whether the ICHRA is offering Ed an "affordable" lowest-cost silver plan, Company, Inc. would normally have to look for the cost of that policy in the Kansas rating area where Ed lives, and look for the cost of that policy for Scott in the Missouri rating area where Scott lives. But because both Ed's and Scott's primary site of employment is Kansas City, Missouri, Company, Inc. can

look at policy prices in the single rating area in which Company, Inc. is located.

Scott convinces Company, Inc. to transfer him to Palm Springs, California on March 15, and Scott reports for duty there on that day. To determine whether Scott's ICHRA continues to allow him to buy an affordable, lowest-cost silver policy, Company, Inc. must look at the cost of that policy in the marketplace rating area in which Palm Springs falls, by May 1, the first day of the second calendar month after Scott begins working there.

What about remote workers? Their primary site of employment is the location they work from, unless the employer can require them to report to the employer's premises from time to time. In that case, the employer can consider that premises as the employee's primary work site.

Look-back month safe harbor: Because monthly premiums for policies in an ACA marketplace are announced just weeks in advance of the new year, planning and budgeting for employer mandate-compliant ICHRAs may be difficult for an employer.

The newly proposed IRS rules address this concern by allowing the employer, if its ICHRA runs on a calendar year plan year, to assume that the monthly cost of the cheapest silver policy for a given year is the monthly cost of that policy as of the first day of the previous year. Thus, in planning for 2020, an employer can look to marketplace prices as of Jan. 1, 2019. If the ICHRA runs on a non-calendar year plan year, the employer may use the monthly cost as of Jan. 1 of the current year.

Affordability safe harbor: When determining whether the net cost of the lowest-cost silver policy available to an employee in the relevant marketplace rating area is affordable to the employee, the employer may use the same affordability safe harbors available for determining affordability under a group medical plan. That is, the usual W-2, poverty level and rate-of-pay safe harbors remain available to the employer.

Use of any safe harbors described above (location, look-back month and affordability safe harbors) is optional, and the employer may apply more than one. The employer may use different safe harbors for different classes of employees as long as those classes are drawn along permissible lines, as explained in our Alert on the ICHRA regulations issued in June (e.g., salaried vs. hourly, full-time vs. part-time, bargaining unit vs. non-bargaining unit, seasonal vs. regular, temporary vs. regular, employees in one insurance rating area, state or multistate region vs. another, etc.).

ICHRAs and nondiscrimination

An ICHRA is, in essence, a little self-insured healthcare plan. Self-insured healthcare plans may not discriminate in favor of highly compensated individuals (basically, the top 25% ranked by pay). Employers are permitted to vary the amount of its ICHRA contributions to employees based on the employee's age and family size (because older employees and employees with

larger families will pay more for their individual medical insurance policy than younger employees or employees with smaller families). The newly proposed rules make clear that simply because a highly compensated individual might receive larger ICHRA contributions based on age or family size, the ICHRA is not automatically deemed to be impermissibly discriminatory.

Conclusion

The ICHRA rules, including the newly proposed regulations regarding application of the employer mandate, are complicated. Relatively few employers are likely to consider an ICHRA for a variety of reasons, so we expect most employers will not have to grapple with these rules. For those that do, however, it is advisable to invest some time to understand the rules before implementing the ICHRA.