



## Compliance Corner Webinar:

### HRA Final Rule

July 18, 2019

**Q1.** Are the 2019 QSEHRA limits \$5,150 and \$10,450?

A: Yes, that is correct.

**Q2.** Can an ICHRA be used to pay for other 213D expenses or is it specifically earmarked for individual health premiums.

A: Each plan sponsor may alternatively allow the ICHRA to reimburse medical care expenses as well as limit an ICHRA to allow reimbursements only for premiums. The plan sponsor may limit the ICHRA reimbursements only for cost sharing or may decide which particular medical care expenses will be reimbursable and which will not be reimbursable. In doing so, any arrangement would also need to comply with other laws and regulations, such as HIPAA, ACA affordability rules, and Medicare Secondary Payer rules (MSP).

**Q3.** Do the ownership rules as far as participation still apply (more than 2% shareholders of an S-corp cannot use)?

A: Ownership rules have not changed.

**Q4.** I would like to have further understanding of the MSP. I am not clear if a large employer can provide an ICHRA without being in violation of the MSP rules.

A: The prohibition for the employer subject to MSP is that s/he may not incent an employee off the group health plan. When the employer is offering an ICHRA, the HRA is a group health plan so the prohibition would not apply. The ICHRA, in and of itself, does not create a violation of MSP rules. If, however, the employer's offer of the ICHRA incents an employee to drop the group health coverage, that action would violate MSP rules.

**Q5.** Did I hear you correctly, if an employee is offered an ICHRA, regardless of dollar amount, they are not eligible for any APTC's on the marketplace?

A: ICHRA is considered MEC. Employees offered MEC are not eligible for a premium tax credit on the exchange marketplace. That is why there is a mandatory opt out provision. If the employee opts out and waives all future reimbursements for that year, they would be eligible for the tax credit.

**Q6.** If employee waives HRA from employer, will they be eligible for Marketplace tax credit?

A: Current employees may be allowed the PTC if they are otherwise eligible (based on their household income), they opt out of, and waive, future reimbursements from the HRA, and the HRA is unaffordable.

**Q7.** Are you saying that a large employer can offer an ICHRA to pay for Medicare or an Advantage Plan? What about Supplements? There may not be "equal" plans available but what if it is better? Isn't that then incentivizing an active employee to drop the group plan and enroll as Medicare primary?

A: The prohibition for the employer subject to MSP is that s/he may not incent an employee off the group health plan. When the employer is offering an ICHRA, the HRA is a group health plan so the individual would not be dropping their group plan to choose Medicare as primary. Therefore, the prohibition does not apply.



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**Q8.** It was commented that for an ICHRA the plan must substantiate that employee has individual coverage on a regular basis AND each time they get a reimbursement. Are there any guidelines on what is considered to validate coverage?

A: not at this time The final rule states that employers can use reasonable means to verify coverage, including an employee's attestation, electronic information, like debit card receipts, or other third party documentation. This applies to both the annual substantiation and substantiations for specific claims.

**Q9.** Can you class out by job description? For example, managers, truck drivers, etc.?

A: No, the ONLY classes permitted are shown on slide 17

- Full-time employees (using either the 105(h) or 4980H definition);
- Part-time employees (using either the 105(h) or 4980H definition);
- Seasonal employees (using either the 105(h) or 4980H definition);
- Compensation type (e.g. salaried or non-salaried);
- Employees whose primary employment site is in the same rating area;
- Employees covered by a collective bargaining agreement (CBA);
- Employees who have not satisfied a waiting period;
- Non-resident aliens with no U.S.-based income (generally, foreign employees who work abroad);
- Individuals placed for temporary employment that are not common law employees
- Participants in a combination of two or more classes above

**Q10.** What is the difference between 105H and 4980H defections?

A: Definitions under 4980H:

- Employee == common law employee
- Full-time employee --- an individual who average 30 hours or more of service per week
- Part-time employee – an individual who average less than 30 hours of service per week
- Seasonal employees - an individual who, is in a position for which the customary annual employment is six months or less and the employment coincides with a true “seasonal” period

Definitions under 105(h)

- Employee = common law employee, self-employed individual who is treated as an employee §401(1), or leased employee who is treated as an employee under §414(n)(2) or 414(o)(2)
- Full-time - an individual whose customary weekly employment is 35 hours or more per week
- Part-time - an individual whose customary weekly employment is less than 35 hours per week unless there are no other employees doing similar work with same employer for more than 35 hours, then may designate as 25 hours
- Seasonal – an individual whose customary annual employment is less than 9 months unless there are no other employees doing similar work with the same employer for more than 9 months, then may designate as 7 hours.



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**Q11.** For individual HRA, EEs can use the fund to pay for copay or deduction and not just individual policy premiums, correct?

A: Yes. The employer determines whether the HRA will reimburse deductible, copays, and/or individual policy premiums

**Q12.** If an employer just offers the ICHRA, how does that differ from a QSEHRA?

A: The ICHRA may be offered by any sized employer.

The ICHRA may be offered to one class and the traditional employer group plan to another class.

Only non-ALEs are eligible for the QSEHRAs and the employer may NOT offer any group plan of any kind, health or ancillary.

**Q13.** Would a group with fewer than 20 employees be allowed to offer an ICHRA for someone who is on Medicare, as long as they offer the same benefit to all Medicare enrollees? What if some prefer the group plan vs. a Medicare Supplement plan? And, how does this apply for ALE employers?

A: Any size employer may offer the ICHRA. Employees do not have a choice of group plan v the ICHRA.

The employer designates who is offered the ICHRA or the traditional group health plan.

The ALE that offers an ICHRA is offering MEC and will satisfy Penalty A of the Employer Shared Responsibility "mandate". See slide 26. See slide 27 re affordability in relation to Penalty B. Affordability of the ICHRA and the affordability safe harbors under 4980H are not the same.

**Q14.** Can a participant enroll in the Exchange and get a subsidy, use the HRA to pay those premiums?

A: The ICHRA is considered MEC. Employees offered MEC are not eligible for a premium tax credit on the exchange marketplace. That is why there is a mandatory opt out provision. If the employee opts out, they would be eligible for the tax credit.

**Minimum Class requirement Question:** If I have a group under 100 employees, would they need at least 20 employees, 10 in each class?

- A: Remember that the Minimum Class Size ONLY applies if a plan sponsor offers a traditional group plan to one or more classes of employees AND offers an individual coverage HRA to one or more other classes. The minimum ONLY applies to the class offered the ICHRA so that an employer with under 100 employees would have to offer the ICHRA to at least 10 of a class.
- Minimum does not apply to those offered the traditional group health plan.



**Q15. Please clarify the "subset rules" of the minimum class requirements again?**

A: This response assumes the requester meant "subclass". The final rules provide that a plan sponsor that offers a traditional group health plan to a class of employees may prospectively offer employees in that class hired on or after a certain date in the future (the new hire date) an individual coverage HRA (the new hire subclass), while continuing to offer employees in the class hired before the new hire date a traditional group health plan (the special rule for new hires). A plan sponsor may set the new hire date prospectively for a class of employees as any date on or after January 1, 2020. A plan sponsor may set different new hire dates prospectively for separate classes of employees.

In other words, an employer can decide to replace their group health plan, for a particular class of employees, with an ICHRA and do so effective with a future date leaving existing employees in the traditional plan and all newly hired in the ICHRA.

**Q16. If an employer has to have at least ten employees in a class, would smaller businesses with fewer than 10 total employees therefore not be able to offer an individual coverage HRA?**

A: The minimum class rules only apply to employers who are offering the ICHRA to the following classes: full-time (unless part-time are not offered coverage), part-time, salaried/non-salaried (only if one class is offered a traditional group plan and the other is offered the ICHRA), employment site in same rating area (unless it is state or multiple states), and any of this combined with another allowable class. So, small employers could choose the ICHRA as long as it's not offered to one of these classes.

**Q17. Can an employer that only offers an ICHRA also offer a Healthcare FSA?**

A: from page 161 of the Final Rule

Thus, nothing in the final rules prohibits employees in a class of employees offered an individual coverage HRA from participating in a health FSA through salary reduction in a cafeteria plan.

**Q18. Who is responsible to make sure an employee does not take PTC and use the HRA for the balance of the premium? The Employer?**

A: 1095 reporting requirement will allow the IRS to connect the dots.

Remember that HRAs are self-funded plans and are therefore required to report.

**Q19. For persons who purchase an Off Exchange Individual Plan, and have their portion of the premiums deducted pre-tax via Section 125, is there guidance for employers on how to get those funds to the insurer? Would employer pay carrier, would they then give the monies to the employee, upon proof that they have actually enrolled and paid monthly premiums?**

A: nothing is mentioned about the logistics of this Based upon the substantiation rules and the fact that the employee needs to prove they have coverage, it appears most likely that the individual would need to purchase the coverage first and then receive the ICHRA reimbursement from the employer. The employer should avoid paying the carrier directly to avoid any potential endorsement of the individual plan which would result in the plan becoming an ERISA plan.



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Q20. There was a comment about certain classes where class size requirements need not be met. The speaker mentioned this at the end of the slide where class size minimums were discussed. Not clear on what was meant by that comment. This was not related to the point where a non ICHRA is exempt from class size requirements.

- A: Remember that the Minimum Class Size ONLY applies if a plan sponsor offers a traditional group plan to one or more classes of employees AND offers an individual coverage HRA to one or more other classes. The minimum ONLY applies to the class offered the ICHRA so that an employer with under 100 employees would have to offer the ICHRA to at least 10 of a class.
- Minimum does not apply to those offered the traditional group health plan.
- Class requirements need only be met if the class being offered the ICHRA is based on full-time, part-time, salaries/non-salaried, geographic rating area (excluding state or multiple states), or when any two categories (other than waiting period) are combined

Q21. Who is the best employer for the new ICHRA's? If a group has a current group plan, what are a couple reasons they would look at an ICHRA? Thanks

A: offering coverage to part time to recruit and retain  
Variable hour employees who would not be eligible for a group health plan

Q22. Is it correct that if the ICHRA is deemed affordable but waived by a person, no premium tax credits can be taken by a person but if the ICHRA is deemed unaffordable and waived, then the premium tax credits can be used?

A: That is correct .

Q23. Is the ICHRA subject to ERISA if the employer allows pretax salary deductions for non-marketplace plans?

A: No. please see slide 23 regarding ERISA implications  
Individual health insurance coverage reimbursed by a plan will not be treated as part of a group health plan if:

1. Coverage purchased is voluntary for employees;
2. Employer/plan sponsor does not select or endorse an issuer/carrier
3. Reimbursement for non-group health insurance premiums is limited only to individual coverage
4. Employer/plan sponsor receives no consideration

Each participant is notified annually that

Q24. ICHRAs were designed to help individual consumers and yet the most affordable way of individual's getting coverage is via the marketplace and using APTCs yet the ICHRA makes them not eligible. No one can afford an individual plan without APTC help.

A: Noted.

Q25. Does the ICHRA replace the QSEHRA or do they work together? I also thought with QSEHRA that employees could use the premium tax credits if they purchased an individual health plan on the Exchange

A: QSEHRA only applies to non ALEs.

The employer offering QSEHRA may not offer any health or ancillary group plan of any kind.

The QSEHRA also has affordability rules regarding any premium tax credit and uses the same affordability calculation as the new ICHRA i.e. household income.



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**Q26.** COBRA can be calculated at 100% + 2%, not necessarily having to use the 75% rule?

A: correct. The employer may use the FSA COBRA calculation.

**Q27.** Can the employer calculate the COBRA premium using the FSA method?

A: Yes.

**Q28.** On a typical group plan, the employee is responsible for 100% of the COBRA premium. With an ICHRA, does the employer still need to make an ICHRA contribution?

A: No.

**Q29.** Is ICHRA only available to employers that have group health plans that are Medicare Primary?

A: No. The MSP prohibition is that employers may not incent the Medicare bene employee off the health plan. Since an HRA is a group health plan, the prohibition does not apply.

**Q30.** With open enrollment in January, when would this come into play? End of year? If the employer decides to drop the group, thus everyone losses coverage?

A: Employers may begin to offer the ICHRA 1-1-2020. Employers would have to provide 90 notice prior to the individual plan open enrollment season that begins 11-1-2019 to allow employees time to understand the change and enroll into individual coverage for 1-1-2020.

**Q31.** An Individual HRA is subject to COBRA even though it'll be exempt from ERISA?

A: Yes. All HRAs with the exception of the QSEHRA are subject to Federal COBRA if the employer has 20 or more on payroll for more than 50% of the preceding calendar year.

**Q32.** Is there a special rule to the 90 day notice for the first year the ICHRA is offered? Basically you have some leeway the first year and can provide it within 90 days the first year only.

A: HRAs sponsored by employers that are first established within a short period of time prior to the first plan year of the HRA may not have an adequate amount of time to provide a notice to participants at least 90 days prior to beginning of the first plan year.

Therefore, the final rules provide that in the case of an individual coverage HRA sponsored by an employer that is established less than 120 days prior to the beginning of the first plan year of the HRA, the notice may be provided no later than the date on which the HRA may first take effect for the participant, for that first plan year of the HRA.

**Q33.** Is there a \$ maximum for the ICHRA?

A: no minimum. No maximum.





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**Q34.** If the ICHRA is considered a group health plan, wouldn't that alleviate participation concerns as a legitimate waiver? "Being covered by another group health plan sponsored by your employer"

A: Employees covered by an individual plan are not considered waivers for group health plan participation. Additionally, the ICHRA is self-funded and we have not seen that an employer offered self-funded with a traditional health plan is afforded such leniency.

**Q35.** If ICHRA is offered with an effective date of April 1 will this open a SEP for employees to elect coverage?

A: 1. Allows employees and their dependents to enroll or change individual health insurance coverage outside of the individual market annual open enrollment period if they gain access to an HRA integrated with individual health insurance coverage

1. Applies new special enrollment period to individuals who are provided QSEHRAs

Slide 25

**Q36.** Since an employer cannot offer both the ICHRA and EBHRA to the same class of employees, does an employee in their waiting period for coverage qualify under a different class? Meaning an employer could offer the excepted benefit HRA to those during their waiting period to purchase a limited duration STM plan?

A: Correct

**Q37.** Under the limited exempted benefit HRA, considering guidelines, how is a "similarly situated employee" defined?

A: Page 188 -189 of the Final HRA rule:

*One commenter suggested that the Departments should issue additional guidance and resources about the definition of similarly situated individuals to ensure that this requirement is properly implemented. In response to these comments, the final rules define similarly situated individuals by reference to the definition found in the HIPAA nondiscrimination rules, as was proposed.<sup>225</sup> Those rules generally provide that group health plans may, subject to an anti-abuse provision for discrimination directed at individuals, treat groups of participants as distinct groups if the distinction is based on a bona fide employment-based classification consistent with the employer's usual business practice. Whether an employment-based classification is bona fide is determined based on all the relevant facts and circumstances, including whether the employer uses the classification for purposes independent of qualification for health coverage (such as, determining eligibility for other employee benefits or determining other terms of employment). Examples in the HIPAA nondiscrimination rules of classifications that may be bona fide, based on all the relevant facts and circumstances, include full-time versus part-time status, different geographic location, membership in a collective bargaining unit, date of hire, current employee versus former employee status, and different occupations.*

**Q38.** For employers in 2019 that are already offering an HRA to employees enrolled in a group health plan and that are already putting more than \$1,800 into that HRA currently, can they continue this HRA in 2020 not what the expanded HRA will be available?

A: Existing HRA arrangements are not affected by these newly permitted arrangements.



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**Q39.** An employee leaving an employer that offers HRA prx reimbursement is not guaranteed of that prx help with another employer so portability loses a lot of its steam in my view, is this accurate?

A: Correct. ICHRA's are employer dollars. As such, each employer will determine whether they are providing an ICHRA and how much it will cost.

**Q40.** Can't an employee decide that they would rather be on Medicare than the group health plan if they want if they work for an employer over 20 employees?

A: Yes. Employees may opt out. Employers subject to MSP rules just need to make sure they haven't incented them to do so.

**Q41.** Is this affecting the QSEHRA?

A: NO.

**Q42.** Can substantial participation affect participation in the underlying group plan?

A: Absolutely. Persons with individual coverage count against group health plan participation. It will be important to understand how your carrier will count participation across multiple classes with different offerings.

**Q43.** Please explain the 10 minimum eligible requirement

A: see Q #2

- A: Remember that the Minimum Class Size ONLY applies if a plan sponsor offers a traditional group plan to one or more classes of employees AND offers an individual coverage HRA to one or more other classes. The minimum ONLY applies to the class offered the ICHRA so that an employer with under 100 employees would have to offer the ICHRA to at least 10 of a class.
- Minimum does not apply to those offered the traditional group health plan.
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**Q44. When you note under "Cons" of "Who does this fit?" Employers must substantiate for reimbursement of claims. Will the employer and/or employees be required to complete a form along with original or copies of receipts?**

A: see slide 32 for the model attestation form

ICHRA participants must substantiate their enrollment in individual coverage at least annually.

Methods of substantiation

- 1) a document from a third party (for example, the issuer or Exchange) showing that the participant and any dependent(s) covered by the individual coverage HRA are, or will be, enrolled in individual health insurance coverage during the plan year (for example, an insurance card or an explanation of benefits pertaining to the plan year or relevant month, as applicable); or
- 2) an attestation by the participant stating that the participant and any dependent(s) are, or will be, enrolled in individual health insurance coverage, the date coverage began or will begin, and the name of the provider of the coverage. For the ongoing substantiation requirement, the proposed rules permitted that substantiation could be in the form of a written attestation by the participant, which could be part of the form used for requesting reimbursement

The Departments have issued a model attestation form. The model annual substantiation form identifies who is covered by the individual insurance, the name of the insurance company, and when coverage began.

Individual Coverage HRA Model Attestations

[PDF](#)

[DOCX](#)

Ongoing substantiation, i.e. substantiation with each request for reimbursement, is required for all HRAs. This is because all employer-provided accident or health plans may only reimburse substantiated expenses for medical care to satisfy IRS requirements to exclude the benefit from taxable income. The same options listed above for annual substantiation may also be used for ongoing substantiation. Additionally, other appropriate methods could be used by employers, including copies of electronic debit or premium payment transactions or other types of documentation.

**Q45. Can you separate classes out where one of the classes CAN get the APTC through the Marketplace?**

A: No. Creating a class that is made up solely of individuals eligible for the PTC would not be considered a bona fide classification of employees under this rule or HIPAA since it is not a normal business classification of employees.

**Q46. If the employer can only pay \$1,800, how can they be penalized that the coverage is not affordable?**

A: Excepted benefits HRA (EBHRA) and Individual coverage HRA (ICHRA) are not the same thing. These are two separate forms of HRAs. The EBHRA is not MEC as it is only reimbursing excepted benefits.

Only the ICHRA is considered MEC and / or affordable, i.e. affordability only applies to MEC coverage – the ICHRA.

**Q47. You said that the employer could not offer the ICHRA and the SEBHRA to the same person. What if you offer the ICHRA and the employee opts out of it. Can the employer offer the SEBHRA to those who opt out of the ICHRA?**

A: No. The employee does not have a choice



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**Q48. Is it correct in assuming there would no longer be a use or value in maintaining a MEC plan. Is there a minimum amount that employer must reimburse in the Individual Medical HRA?**

A: MEC plans served the purpose, prior to this rule, to provide an option of offering MEC without providing full coverage. These plans avoided the (a) penalty for employers but do not avoid the (b) penalty unless considered minimum value, which was a short-time rare exception for these plans. The MEC plans are group plans. The ICHRA now bridges to offer a way to avoid both penalties by integrating with individual coverage. A consideration for employers between MEC and ICHRA plans will be the group vs. individual nature of these two options. Brokers should focus on networks, overall benefit levels, how robust the individual market is in relationship to where the group is located, etc. to decide the appropriate type of plan to offer.  
No minimum. No maximum.

**Q49. Would this be a good option for 1099 employees?**

A: Typically a 1099 individual is not an employee. Independent contractors are not employees so, therefore, will not satisfy the definition of an employee under either the 4980H definition or 105(h) definition. Both these define these as common law employees.

**Q50. For employers subject to ADEA and in relation to the Individual Medical HRA, can the employer provide a flat amount benefit even though the rates are member level rated by age?**

A: the 3:1 is permitted but not mandatory. In other words, an employer who chooses to offer an HRA that provides increasing dollar amounts as participant ages increase will not fail to be offering the HRA on the same terms to a class of employees provided that everyone of a particular age and coverage type (e.g. single, family, etc.) is offered the same dollar amount AND the amount offered to the oldest participant is no more than three times the amount offered to the youngest participant.

**Q51. How does it work for employers who have self-funded medical plans?**

A: Not sure what this question is in reference to.

**Q52. If an employee uses full amount of HRA, can they opt out mid-year and go to Exchange for the tax credit?**

A: No, under this rule, the employee may opt in or out annually but not at multiple times during the plan year. The only exception to this would be upon termination of employment. At that time, the individual would be allowed the opportunity to opt out and forfeit any other reimbursements. This allows that person the opportunity to be eligible for the tax credit.

A second consideration that also reinforces this annual only election is for employers allowing employees to run the balance of the premiums after the HRA through their cafeteria plan. Here we note that, consistent with section 125 rules, individuals electing pretax deductions through their cafeteria plan make an annual irrevocable election that can only change if the individual has a midyear change in status that is allowed by the plan document. If satisfied, however, this, though, would only apply to the employee's election and premium deduction and would not apply to the HRA dollars offered by the employer.



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Q53. What are the \$ limits for the ICHRA?

A: No minimum. No maximum.

Q54. HRA is Affordable, MV coverage for all employees based on calculation. The employee is not eligible for a PTC, period?

A: Correct.