

ICHRA Guide for Employers:

The Health Plan 401(k) Has Arrived

2024 Edition



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Guide Topics

**Individual Coverage
Health Reimbursement
Arrangements (ICHRA):**
Are ICHRAs the new
health plan version of the
401(k)?

1

The ICHRA Revolution Reverses Friday the 13th Guidance

- HRA integration with an individual policy unlocks a reservoir of potential

2

The 401(k) Connection

- Six crucial fast facts that highlight the comparison between ICHRAs and 401(k) plans

3

The Defined Contribution (DC) Allure

- Why both employers and employees may be clamoring for defined contribution health plan

4

The Individual Market Then and Now

- Why is this time different?

5

The Last Big Hurdle

- How ACA employer mandate affordability still presents some significant concerns

6

Mountains or Molehills?

- The top twelve other remaining issues that ICHRAs face before mainstream adoption



01

The ICHRA Revolution

Full Reversal of Prior ACA Rules



ACA Background: Prior Individual Coverage Guidance

The Friday the 13th Guidance (September 13, 2013)

IRS Notice 2013-54; DOL Technical Release 2013-03

- The beginning of a long series of (particularly IRS) guidance confirming the ACA prohibition of individual coverage payment/reimbursement by employers
- **Guidance provided that employers cannot directly purchase individual policies or reimburse employees for the cost of individual policies through an “Employer Payment Plan” or a “Non-Integrated HRA”**

The IRS ACA Potluck Guidance (2015)

IRS Notice 2015-17; IRS Notice 2015-87

- Additional guidance reiterating the IRS prohibition of Employer Payment Plans and Non-Integrated HRAs
- Confirmed that even taxable reimbursements are prohibited, and that integration rules apply to employees, spouses and dependents

Penalties

IRC §4980D

- Employers offering an Employer Payment Plan or Non-Integrated HRA for employer reimbursement of individual policies violates the ACA market reform rules
- **Penalty is \$100/day/employee excise taxes—resulting in potential penalties of \$36,500 per employee per year**



Prior (Pre-2020) ACA State of the Law: HRA “Integration” Required

The Prior ACA HRA Integration Rules

MV Integration Requirements

1. Employer offers major medical that provides minimum value (MV) to the employee
2. Employee covered by HRA is also enrolled in a group major medical plan that provides MV—whether through that employer or a spouse/DP/parent
3. HRA is available only to employees enrolled in a group major medical plan that provides MV—whether through that employer or a spouse/DP/parent
4. Employee is permitted to permanently opt-out of HRA at least annually and upon termination

Non-MV Integration Requirements

1. Employer offers major medical to the employee
2. Employee covered by the HRA is also enrolled in group major medical—whether through that employer or a spouse/DP/parent
3. HRA is available only to employees enrolled in a group major medical plan—whether through that employer or a spouse/DP/parent
4. HRA reimburses only cost-sharing amounts under the major medical and/or non-essential health benefits
5. Employee is permitted to permanently opt-out of HRA at least annually and upon termination

Prior (Pre-2020) ACA State of the Law: HRA “Integration” Required

Summary of the Prior ACA HRA Integration Rules

Non-Integrated HRA Prohibition

- Employers offering an HRA have had to meet the “integration” requirements stemming from the Friday the 13th Guidance
- Those rules generally require that the employee be enrolled in an employer-sponsored major medical group health plan meeting certain requirements to be eligible for reimbursement
- **Most important piece is that HRAs could not be integrated with individual market coverage**

Why Prohibited?

Non-integrated HRAs cannot satisfy the ACA market reform requirements for group health plans:

1. Does not comply with the ACA prohibition of annual limits on the dollar amount of essential health benefits; and
 2. Does not satisfy the ACA requirement to provide certain preventive services without imposing any cost-sharing requirements for the services
- Potential Penalties: \$100/day/employee excise tax under §4980D (\$36,500/employee/year!)

The (Less-Than-Ideal) Workaround Pre-ICHRRA: Increase in Employee Compensation

Increases in Employee Taxable Compensation Permitted

- Employers may increase an employee's standard taxable compensation to assist an employee with payments of individual market coverage
- Such additional compensation cannot be conditioned on the purchase of the individual health coverage
- Also cannot otherwise endorse a particular policy, form, or issuer of health insurance
- Only permitted to inform employee about the Marketplace and §36B premium tax credit

Practical Result

- Employers can provide a bonus or a raise intended to address the cost for the employee to purchase individual coverage—but in no way actually tied to such coverage
- Employees may use the bonus/raise money to buy individual coverage or a plane ticket to Maui—employer cannot in any way monitor/enforce/condition payment for health coverage

Checklist to Avoid Prohibited Employer Payment Plan

- Payment is standard taxable income (subject to withholding and payroll taxes)
- Employee has an unrestricted right to receive the compensation as cash
- Employee not required to use the compensation to purchase health coverage
- No health plan-related conditions on the employee receiving the additional compensation
- Employee never required to substantiate the purchase of individual market coverage

Executive Order 13813: Direction to Issue New Regulations

EXECUTIVE ORDERS

Presidential Executive Order Promoting Healthcare Choice and Competition Across the United States

HEALTHCARE | Issued on: October 12, 2017



Sec. 4. Expanded Availability and Permitted Use of Health Reimbursement Arrangements. Within 120 days of the date of this order, the Secretaries of the Treasury, Labor, and Health and Human Services shall consider proposing regulations or revising guidance, to the extent permitted by law and supported by sound policy, to increase the usability of HRAs, to expand employers' ability to offer HRAs to their employees, and to allow HRAs to be used in conjunction with nongroup coverage.

Individual Coverage HRAs: The New Landscape

Final Rules Were Effective Plan Years Beginning On or After January 1, 2020:

Individual Coverage HRAs (ICHRAs)
Permitted With Seven Conditions

1

Employees Covered by ICHRA Must Be Enrolled in an Individual Policy or Medicare (Parts A and B or Part C)

- Employees who lose coverage under the individual policy forfeit the HRA

2

Employees Must Not Be Eligible for Both ICHRA and Traditional Plan

- Must **exclude employees eligible** for the ICHRA from eligibility for the traditional employer-sponsored major medical group health plan (GHP)
- Specific class rules on which employees can be offered the ICHRA vs. the traditional group health plan (GHP)
- Specific class size rules to ensure that the classes are legitimate
- Employers may also set any date on or after January 1, 2020 for which new hires as its own separate class are offered the ICHRA, while still offering the traditional GHP to employees hired prior to that date

3

Employers Must Offer the ICHRA on Same Terms to Each Employee Class

- Cannot offer a more generous ICHRA based on adverse health conditions
- Can increase ICHRA allocation based on age or number of dependents
- Larger allocations of **up to 3x the youngest participant permitted for older employees** (no set limit on dependent adjustment allocations)

Individual Coverage HRAs: The New Landscape

Final Rules Were Effective Plan Years Beginning On or After January 1, 2020:

Individual Coverage HRAs (ICHRAs) Permitted With Seven Conditions

4

Opt-Out Required

- Employees must have the option to opt-out of the HRA coverage to maintain eligibility for subsidies on the Exchange (the §36B premium tax credit)

5

Employee Pre-Tax Contributions Permitted Off Exchange

- ACA added §125(f)(3) prohibiting employee pre-tax salary reduction contributions toward coverage on the Exchange
- However, employer may permit employees to use Section 125 cafeteria plan to contribute on a pre-tax basis to non-Exchange individual market coverage
- Important because ICHRA may not cover the full cost of the premium

6

Substantiation and Verification of Individual Coverage Required

- ICHRA must have reasonable procedures in place to verify that employees are actually enrolled in individual policy
- Can include third-party (carrier) documentation or employee attestation
- Model attestation forms (annual and monthly) available from the DOL

7

Notice Requirement

- Employer must provide written notice to eligible employees at least 90 days prior to the start of each plan year describing the ICHRA terms
- Model notice available from the DOL



ICHRA Class Rules

Classes determine which employees will be eligible for the ICHRA vs. the traditional GHP, as well as how much will be made available under the ICHRA.

Permitted Classes

- Full-time employees*
- Part-time employees*
- Employees in a geographic region*
- Seasonal employees
- Collective Bargaining Agreement (CBA) unit of employees
- Employees in their waiting period for traditional GHP coverage
- Non-resident aliens with no U.S.-based income
- Salaried employees*
- Non-salaried employees*
- Outside staffing firm temps
- Any combination of classes*

*Minimum Class Size

Employers with <100 Employees

- 10 employee minimum

Employers with 100-200 Employees

- 10% of the total number of employees minimum

Employers with >200 Employees

- 20 employee minimum

Notes

- Employer size determined in advance of the ICHRA plan year based on expected employee count on first day of plan year
- Class size is based on the employer's offers of ICHRA coverage on first day of plan year (not actual enrollment)
- *Minimum class size does not apply for geographic region class if the class is a State or combination of States



What About Age 65+ Employees?

ICHRA Will Reimburse Medicare Premiums for Medicare-Eligible Employees/Dependents

In most cases, the Medicare Secondary Payer (MSP) rules prohibit employers from encouraging Medicare enrollment with financial or other incentives. However, ICHRA rules are an exception—but must follow class rules on prior slide!

General MSP Anti-Incentive Rules for Age 65+ Employees/Dependents

Applies to Employers with 20+ Employees

No Medicare or Medicare Supplement Reimbursement:

- Employer cannot pay for Medicare or Medicare supplement premiums

No Coverage Designed to Supplement Medicare:

- Employers cannot provide coverage to active employees that is designed to supplement Medicare

No Special Opt-Out Credits:

- Any opt-out credit must be available equally to all employees regardless of Medicare eligibility

Special ICHRA Rules

MSP Exception to Reimburse Medicare

Medicare Anti-Duplication Rules Still Apply

- For age 65+ employees/dependents, the ICHRA will reimburse Medicare instead of individual market policies
- Medicare's anti-duplication rules prohibit access to individual policies for age 65+ individuals

Important Notes

- Employer cannot establish an age-based or Medicare-eligibility based ICHRA class
- All the class rules from prior slide still apply to prohibit use of ICHRAs as a workaround from key MSP rules
- *Cannot use an ICHRA just to pay for age 65+ employees' Medicare or Medicare supplement premiums!*

Individual Coverage HRAs: The New Landscape

The Notice Requirement

- Employers must provide written notice to each eligible employee at least 90 days prior to the start of each plan year describing the ICHRA terms
- Employees who become newly eligible mid-year (or after the 90-day period prior to the start of the year) must receive the notice no later than the date ICHRA takes effect



Required Notice Content (Ten Items)

The notice must include the following ten provisions (and may include any additional information that does not conflict with the required content):

1

A description of the terms of the HRA

- The maximum dollar amount available for each participant (including proration for mid-year entry, if any)
- Whether the cost of individual coverage for family members are also eligible expenses
- A statement that the ICHRA is not a Qualified Small Employer HRA (QSEHRA)
- A statement that the HRA requires the participant and any dependents to be enrolled in individual health coverage
- A statement that Short Term Limited Duration Insurance (STLDI) and excepted benefits are not eligible expenses
- A statement that the individual coverage reimbursed by the ICHRA is not subject to ERISA
- The ICHRA coverage effective date (including mid-year enrollees), plan year date, and the dates on which new amounts will be made available under the ICHRA

2

A statement of the right of the employee to opt-out of the ICHRA

Individual Coverage HRAs: The New Landscape

The Notice Requirement

- Employers must provide written notice to each eligible employee at least 90 days prior to the start of each plan year describing the ICHRA terms
- Employees who become newly eligible mid-year (or after the 90-day period prior to the start of the year) must receive the notice no later than the date ICHRA takes effect



Required Notice Content (Ten Items Cont'd)

3

A description of the potential availability of the §36B premium tax credit (PTC) if the employee opts-out of the ICHRA and the ICHRA is unaffordable

- Including a statement that the employer's offer of ICHRA coverage—even if the employee opts-out—will prohibit the employee from receiving the PTC if the ICHRA is affordable
- Including a statement of how the participant may find assistance determining affordability
- Also a statement that when the employee terminates employment, the affordable ICHRA offer will no longer render the former employee ineligible for the PTC
- A statement that Medicare enrollment blocks the PTC regardless of the ICHRA status

4

A statement that if the employee does not opt-out of the ICHRA, the employee cannot claim the PTC for any month the ICHRA coverage is in place (regardless of affordability)

5

A statement that ICHRA participants must inform the Exchange of the ICHRA amount available for the plan year if applying for advance payments of the PTC

- Must include whether the ICHRA is also available to dependents
- The date on which ICHRA coverage is effective, and the plan year beginning and end date
- Whether the participating is a current or former employee

Individual Coverage HRAs: The New Landscape

The Notice Requirement

- Employers must provide written notice to each eligible employee at least 90 days prior to the start of each plan year describing the ICHRA terms
- Employees who become newly eligible mid-year (or after the 90-day period prior to the start of the year) must receive the notice no later than the date ICHRA takes effect



Required Notice Content (Ten Items Cont'd)

6

A statement that the participant should retain the notice in case it is needed to determine eligibility for the Premium Tax Credit (PTC) on the individual tax return

7

A statement that the ICHRA will not reimburse any expense that is unsubstantiated

8

A statement that if the individual coverage ceases, the ICHRA will not reimburse any medical expenses incurred after coverage ceases

- Including a statement that the participant must inform the ICHRA if coverage terminates retroactively (and the date of such retroactive termination)

9

The contact information (including a phone number) for an individual or group of individuals who participants may contact to receive additional information about the ICHRA

10

A statement of the availability of a special enrollment period to enroll in or change individual health insurance coverage (on or off the Exchange) for the participant and any dependents who newly gain access to the ICHRA and are not already covered by the ICHRA

ICHRA Notice Timing

Employers must provide the required notice to ICHRA-eligible employees within specific set timeframes to ensure timely enrollment in individual coverage.

General 90-Day Rule

90-Day Requirement

- Employer must provide the notice to ICHRA-eligible employees **at least 90 calendar days before the beginning of each plan year**

Calendar-Year ICHRA

- Provide notice to ICHRA-eligible employees **no later than October 3**

Exceptions

Employees Not Eligible to Participate at Start of Plan Year

- Employer must provide the notice no later than the date on which the ICHRA may first take effect for the employee (includes new hires)

New Employer First ICHRA Plan Year

- For a new employer that is established less than 120 days before the start of the first ICHRA plan year, employer must provide the notice no later than the date on which the ICHRA may first take effect

Individual Coverage HRAs: The New Landscape

ICHRA Model Notice

<https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/Health-Reimbursement-Arrangements>



Individual Coverage HRA Model Notice

USE THIS NOTICE WHEN APPLYING FOR INDIVIDUAL HEALTH INSURANCE COVERAGE

[Enter date of notice]

You are getting this notice because your employer is offering you an individual coverage health reimbursement arrangement (HRA). Please read this notice before you decide whether to accept the HRA. In some circumstances, your decision could affect your eligibility for the premium tax credit. Accepting the individual coverage HRA and improperly claiming the premium tax credit could result in tax liability.

This notice also has important information that the Exchange (known in many states as the "Health Insurance Marketplace") will need to determine if you are eligible for advance payments of the premium tax credit. An Exchange operates in each state to help individuals and families shop for and enroll in individual health insurance coverage.

You may also need this notice to verify that you are eligible for a special enrollment period to enroll in individual health insurance coverage outside of the annual open enrollment period in the individual market.

Individual Coverage HRAs: The New Landscape

ICHRA Model Annual Attestation Form

<https://www.cms.gov/CCIIO/Programs-and-Initiatives/Health-Insurance-Market-Reforms/Health-Reimbursement-Arrangements>



Individual Coverage HRA Model Attestation: Annual Coverage Substantiation Requirement

Instructions: You have been offered an individual coverage health reimbursement arrangement (HRA) to help you pay for medical care expenses. To enroll in this individual coverage HRA, you must be enrolled in individual health insurance coverage, Medicare Part A (Hospital Insurance) and B (Medical Insurance), or Medicare Part C (Medicare Advantage). You should have received a notice that describes the individual coverage HRA that you are being offered. If you have not, or if you have questions about the individual coverage HRA, contact [add contact information].

If you plan to enroll in the individual coverage HRA, you must complete this form to confirm that you will have individual health insurance coverage, Medicare Part A and B, or Medicare Part C while you are covered by the HRA. If your family members will also be covered by the individual coverage HRA, you need to fill out the applicable section of this form on their behalf.

You must sign and date the form. Your family members do not need to sign or date the form. Please return the completed form to [add instructions for returning the form]. You must return the form by [add deadline for returning the form.]

I attest to the following:

I, _____, am covered (or will be covered) by the following health
(insert name)

coverage: _____
(insert name of insurance company or indicate "Medicare")

This health coverage began (or will begin) on _____
(insert date coverage began or will begin)

Individual Coverage HRAs: The New Landscape

DOL ICHRA Model Monthly Attestation Form

<https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/faqs/health-reimbursement-arrangements.pdf>

Individual Coverage HRA Model Attestation: Ongoing Substantiation Requirement

Instructions: To receive reimbursement for medical care expenses under your individual coverage health reimbursement arrangement (HRA), you must complete this form for each request for reimbursement.

The individual coverage HRA will reimburse you for a medical care expense incurred during a month only if you have (or had) individual health insurance coverage, Medicare Part A (Hospital Insurance) and B (Medical Insurance), or Medicare Part C (Medicare Advantage) during that month. Similarly, the individual coverage HRA will reimburse you for a medical care expense your family member incurred during a month only if the family member has (or had) individual health insurance coverage, Medicare Part A and B, or Medicare Part C during that month. In this form, you are attesting that you (or your family member) meet this requirement. *[If this form is not combined with the form used to seek reimbursement of medical care expenses, add a statement that the reimbursement form is separate.]*

You must sign and date this form. Your family member does not need to sign or date the form. Please return the completed form to *[add instructions for returning the form, including any applicable deadline]*.

Complete the following if you're requesting reimbursement of your medical care expense from the individual coverage HRA.

I attest to the following:

I, _____, am requesting reimbursement for a medical care
(insert name)
expense incurred during _____, and for that month I am (or was) covered under
(insert month, year)
the following health coverage: _____
(insert name of insurance company or indicate "Medicare")

ICHRA Special Enrollment Periods

New Special Enrollment Period (SEP) for Individual Coverage

- Permits employees/dependents to enroll in individual coverage outside of the standard open enrollment period when an employee/dependent newly gains access to an ICHRA (the “triggering event”)

Special Enrollment Period Timing

General Rule—60 Days In Advance of Event: The general rule is that employees have 60 days before the triggering event (i.e., date the ICHRA coverage is effective) to select a plan for **special enrollment effective as of the date of the triggering event** (or first of the month following if the triggering event is mid-month, which would be unusual for an ICHRA effective date)

Calendar Plan Year ICHRA Example

- Employer will provide ICHRA notice to employees no later than October 3 (90 days in advance of plan year)
- Employee has special enrollment period from November 2 – December 31 (60 days in advance of triggering event)
- **Individual policy and ICHRA coverage are both effective January 1 (the “triggering event” date)**

Exception—60 Days Before or After Event: If the employer doesn’t have to provide the notice until the day ICHRA coverage takes effect (e.g., newly eligible employees), the special enrollment period is extended to 60 days before or after the triggering event

- **Plan selection in the SEP that is 60 days on or after the triggering event will result in coverage that is effective as of the first day of the month following the date of plan selection**

New Hire ICHRA Example

- **Employee is hired July 15 and is eligible for ICHRA coverage effective August 1 (the triggering event date)**
- Two SEP options: July 15 – July 31 (prior to triggering event) or August 1 – September 30 (60 days after triggering event)
- Plan selection on or before July 31 (prior to triggering event) would provide for an August 1 effective date
- Plan selection on September 30 (last day of the post-triggering event SEP) would mean an October 1 policy effective date



Individual Coverage HRAs: ERISA Application

The ICHRA is an ERISA Group Health Plan

As with all HRAs, an ICHRA is a group health plan subject to ERISA

The Underlying Individual Coverage is Not an ERISA Group Health Plan

Five conditions to avoid application of ERISA to the individual coverage:

1. Purchase of individual coverage is **completely voluntary**
 - Conditioning ICHRA participation on purchase of individual coverage is still voluntary
2. **No employer endorsement** of any particular insurance carrier or coverage
 - Employer may provide general information including how to access healthcare.gov or the uniform glossary of medical terms that applies to SBCs
3. Reimbursement of premiums is **limited solely to individual health insurance coverage**
4. The employer receives **no consideration (cash or otherwise)** in connection with the employee's selection or renewal of the individual coverage
5. The employer provides **notice annually** to each participant that the individual health insurance coverage is not subject to ERISA (model language below)
 - "The individual health insurance coverage that is paid for by this plan, if any, is not subject to the rules and consumer protections of the Employee Retirement Income Security Act. You should contact your state insurance department for more information regarding your rights and responsibilities if you purchase individual health insurance coverage."

Excepted Benefit HRA (EBHRA): Alternative Vehicle for Other Health Expenses

EBHRAs Became Available in 2020:
Four Conditions to Avoid ACA Market
Reform Provisions as an “Excepted
Benefit” and Avoid ACA Integration Rules

1

EBHRA is Not Integral to Part of the Plan (Eligibility for Traditional GHP)

- Only Employees eligible for the traditional GHP can be eligible for the EBHRA
- Employees do not have to enroll in the traditional GHP (unlike ACA integration rule for non-excepted HRAs)

2

EBHRA Must Provide Benefits that Are Limited in Amount

- Amounts made newly available for a plan year cannot exceed \$2,100 (plan years beginning in 2024)
- Limit is indexed annually for inflation and released in same IRS document as the HSA limits
- The relatively low cap is a major barrier on usefulness of EBHRAs, which are not commonly offered in practice

3

EBHRA Cannot Reimburse Premiums (Individual or Group)

- The only permitted premiums would be excepted benefits like dental/vision coverage, COBRA premiums, and in some cases short-term limited duration insurance (STLDI) premiums

4

EBHRA Must Be Available Under Same Terms to Similarly Situated All Individuals

- The EBHRA must be available to all similarly situated individuals on the same terms regardless of any health factor



02

The 401(k) Connection

The Obvious Comparison with ICHRAs



The 401(k) Connection: Effective Dates



FAST FACT #1

- The §401(k) provisions took effect January 1, 1980
- The ICHRA provisions took effect January 1, 2020
 - Exactly 40 years later!

The 401(k) Connection: Big Employers Jump In



FAST FACT #2

- Many large companies developed 401(k) plans in the immediate aftermath of the rules taking effect on January 1, 1980
 - Johnson & Johnson, FMC, PepsiCo, JC Penney Honeywell, Savannah Foods & Industries, Hughes Aircraft Company, Coates, Herfurth, & England
 - Many of these plans were up and running in the first half of the 1980s
 - Took only a few years after the rules taking effect
- The **ICHRA** provisions took effect **January 1, 2020**
 - Which big companies will be the first to roll out an ICHRA?
 - Look to a few years after rules taking effect as a potential inflection point

Source: Employee Benefit Research Institute, "History of 401(k) Plans: An Update" (Nov. 5, 2018). Available at: https://www.ebri.org/docs/default-source/fast-facts/ff-318-k-40year-5nov18.pdf?sfvrsn=1b773e2f_6

The 401(k) Connection: Defined Benefit Decline



FAST FACT #3

- From the introduction of the 401(k) plan in 1980 to 2008, the percentage of private-sector workers **participating in defined benefit (DB) plans** fell significantly:
 - 1980: 38% of the private workforce
 - 2008: 28% of the private workforce
- The percentage went into freefall to 2018:
 - **2018: 13% of the private workforce covered by DB plan**

Sources:

- Social Security Office of Retirement and Disability Policy, "The Disappearing Defined Benefit Pension and Its Potential Impact on the Retirement of Baby Boomers" (2009). Available at: <https://www.ssa.gov/policy/docs/ssb/v69n3/v69n3p1.html>

- U.S. Department of Labor, Bureau of Labor Statistics, "National Compensation Survey: Employee Benefits in the United States, March 2018," Private Industry Tables, Table 2. Available at: <https://www.bls.gov/ncs/ebs/benefits/2018/ownership/private/table02a.htm>

The 401(k) Connection: The DC Spree



FAST FACT #4

- From the introduction of the 401(k) plan in 1980 to 2008, the percentage of private-sector workers **participating in defined contribution plans** increased significantly:
 - 1980: 8% of the private workforce
 - 2008: 31% of the private workforce
- The percentage jumped dramatically to 2018:
 - **2018: 47% of the private workforce covered by DC plan**

Sources:

- Social Security Office of Retirement and Disability Policy, "The Disappearing Defined Benefit Pension and Its Potential Impact on the Retirement of Baby Boomers" (2009). Available at: <https://www.ssa.gov/policy/docs/ssb/v69n3/v69n3p1.html>

- U.S. Department of Labor, Bureau of Labor Statistics, "National Compensation Survey: Employee Benefits in the United States, March 2018," Private Industry Tables, Table 2. Available at: <https://www.bls.gov/ncs/ebs/benefits/2018/ownership/private/table02a.htm>

The 401(k) Connection: The ICHRA Parallel



FAST FACT #5

- Treasury Department 2020 Projections (Under Age 65)
 - **Group Health Plans:** 150 million persons covered
 - **Individual Market:** 15 million persons covered
- DOL/HHS/IRS First Five Years of ICHRA Projections (2020 – 2024)
 - **ICHRA Enrollment:** 11 million persons covered
 - **Group Health Plans:** Decrease of 7 million persons covered

Sources:

84 Fed. Reg. 28888, 28968 (June 20, 2019)

84 Fed. Reg. 28888, 28965 (June 20, 2019)

The 401(k) Connection: The ICHRA Effect



FAST FACT #6

- DOL/HHS/IRS Estimate of Overall Group Health Plan Risk Profile
 - **Relatively Healthy Individuals:**
80% of covered individuals
 - **Relatively Unhealthy Individuals:**
20% of covered individuals
- If **5 Million** Individuals Moved from GHP Coverage to ICHRA Coverage:
 - **Effect on Individual Market Rates:**
3% Decrease
 - **Note 1:** Assumes same 4-to-1 ratio of healthy to unhealthy
 - **Note 2:** Departments expected 11 million covered by ICHRA in first 5 years

03

True Defined Contribution

The Allure for Employers *and* Employees



The 401(k) Connection: The DC Allure for *Employers*

Employers have long desired a health plan approach that is truly akin to the 401(k)—the employee directs the funds to an underlying product not maintained by the employer.

401(k) Advantage

Limited Employer Responsibility

- Employer's main obligation with respect to designated investment alternatives offered (typically mutual funds) are the fiduciary duties
- Employers have duties of loyalty, prudence, and diversification in setting appropriate fund menu

Huge Advantage Over DB Plans

- Reduced costs, administrative burdens, compliance issues, etc.
- Employer not directly responsible for the actual benefit

Similar ICHRA Advantage

Reduced Employer Responsibility

- ICHRA similarly directs employees to choose their own underlying product as an individual health insurance policy
- Actually more advantageous because employers have no ERISA fiduciary duties with respect to the individual coverage

Huge Advantage Over GHPs

- Streamlined administrative and compliance requirements compared with traditional plan
- Employer cost fixed at amount of ICHRA allocation (as with a standard 401(k) match or nonelective contribution)
- Remains tax-advantaged and can avoid any ACA employer mandate penalties

The 401(k) Connection: The DC Allure for *Employees*

Perhaps the biggest question for ICHRAs to rise to prominence will be with respect to employees. There are reasons to believe the ICHRA appeal will be strong for employees, too.

Increased Plan Options

Creating a True Marketplace

- Most employers offer only a small handful of medical plan options to choose from
- For example, PPO, HMO, HDHP
- Employees with an ICHRA will have the full array of carriers and plan options on the individual market available to select

401(k) Comparison

- Allows employees to invest in whatever manner they chose

Portability

If You Like Your Plan...

- In a labor market where most employers begin to offer ICHRAs, employees could plausibly retain the same plan offering throughout their entire career
- Avoids the need to constantly change carriers and plan types when moving job to job
- Avoids the reliance on COBRA as an imperfect portability tool to maintain coverage through a prior employer

401(k) Comparison

- DB plans created job-lock issues to reach vesting status and maximum benefits
- 401(k) provides maximum portability with potential to consolidate in rollover IRAs

04

The Individual Market

“This Time It’s Different”



The Individual Market: *Pre-ACA* Issues

John Templeton is widely credited with the famous quote: “**The four most dangerous words in the English language are ‘This time it’s different.’**” Is this time actually different?

1

Problem: Pre-Existing Condition Exclusions and Medical Underwriting

The ICHRA Solution:

- The ACA prohibits medical underwriting and pre-existing condition exclusions in the individual market

2

Problem: No Tax Parity

The ICHRA Solution:

- ICHRAs permit tax-free reimbursement of individual policy premiums
- Employees may pay pre-tax through Section 125 cafeteria plan
- Addresses the “historical accident” since WWII-era wage controls led to enactment of §106 with no comparable individual tax deduction

3

Problem: Adverse Selection

The ICHRA Solution:

- Government estimates that each ICHRA shift of 5 million individuals from GHPs to the individual market reduces premiums by about 3%

The Individual Market: *Post-ACA* Issues

John Templeton is widely credited with the famous quote: “**The four most dangerous words in the English language are ‘This time it’s different.’**” Is this time actually different?

1

Problem: ICHRAs Prohibited

The ICHRA Solution:

- Executive Order 13813 and the resulting final regulations designed to override the “Friday the 13th Guidance” and permit ICHRAs as of 1/1/20

2

Problem: Employer Mandate

The ICHRA Solution:

- Offering an ICHRA to employees is treated as an ACA offer of coverage (§4980H(a) penalty)
- Can also be designed to provide minimum value and be affordable (§4980H(b) penalty)
- Employers can avoid all employer mandate penalties with an ICHRA

3

Problem: Limited Choices and Narrow Networks

The ICHRA Solution:

- Government estimates that 11 million individuals will be covered by an ICHRA within first five years (with far better risk profile)
- Likely to drive demand for carriers to supply a wider variety of individual policy options that more closely resemble GHPs than Medicaid

05

The Big Remaining Hurdle

ACA Affordability Issues



The ACA's Employer Mandate

“Pay or Play” §4980H Penalties

§4980H(a)—The “A Penalty” Aka: The “Sledgehammer Penalty”

- **Failure to offer MEC to at least 95% of all full-time employees (and their children to age 26)**
- The A Penalty is triggered by at least one such full-time employee who is not offered MEC enrolling in subsidized exchange coverage
- **2024 A Penalty liability is \$2,970 annualized (\$247.50/month) multiplied by all full-time employees**
 - **30 full-time employee reduction from multiplier**

§4980H(b)—The “B Penalty” Aka: The “Tack Hammer Penalty”

- Applies where the employer is not subject to the A penalty
- **Failure to:**
 1. **Offer coverage that's affordable;**
 2. **Offer coverage that provides MV; or**
 3. **Offer MEC to a full-time employee (where employer offers at a sufficient percentage to avoid A Penalty liability)**
- The B Penalty is triggered by any such full-time employee enrolling in subsidized exchange coverage
- 2024 B Penalty liability is \$4,460 annualized (\$371.67/month) multiplied by each such full-time employee who enrolls in subsidized exchange coverage
- Note that although the B Penalty amount is higher (\$4,460 vs. \$2,970), the multiplier is generally much lower (only those full-time employees not offered affordable/minimum value coverage who enroll in subsidized exchange coverage)

The ACA's Employer Mandate

“Pay or Play” §4980H Penalties

§4980H(a)—The “A Penalty” Aka: The “Sledgehammer Penalty”	§4980H(b)—The “B Penalty” Aka: The “Tack Hammer Penalty”
Simplified Version	Simplified Version
<ul style="list-style-type: none">• To avoid the “A Penalty” must offer MEC to at least 95% of full-time employees and their children to age 26• 2024 A Penalty liability is \$2,970 annualized (\$247.50/month) multiplied by all full-time employees (reduced by first 30)	<ul style="list-style-type: none">• To avoid the “B Penalty”, the offer of MEC must:<ul style="list-style-type: none">• Be affordable; and• Provide minimum value (MV)• 2024 B Penalty liability is \$4,460 annualized (\$371.67/month) multiplied by each such full-time employee who enrolls in subsidized exchange coverage

The ACA's Employer Mandate Penalties

§4980H(a)—The “A Penalty” Aka: The “Sledge Hammer Penalty”

ICHRA Version

Must offer MEC to at least 95% of full-time employees

- IRS Notice 2013-54:
 - “Note that coverage provided through an HRA, other than coverage consisting solely of excepted benefits, is an eligible employer-sponsored plan and, therefore, minimum essential coverage under Code §5000A.”
- Proposed ICHRA §4980H Regulations:
 - “[A]n offer of an individual coverage HRA constitutes an offer of an eligible employer-sponsored plan for purposes of section 4980H(a). Consequently, if an ALE offers an individual coverage HRA to at least 95 percent of its full-time employees (and their dependents), **the ALE will not be liable for an employer shared responsibility payment under section 4980H(a) for the month...**”

§4980H(b)—The “B Penalty” Aka: The “Tack Hammer Penalty”

ICHRA Version

- The offer of MEC must:
 - a) **Be affordable; and**
 - b) **Provide minimum value (MV)**
- Minimum Value: **Easy!**

Proposed ICHRA §4980H Regulations:

- “An individual coverage HRA that is affordable for a calendar month under...any applicable safe harbors...**is treated as providing minimum value....**”
- Affordability: **Complicated!**
 - See following slides

General ACA Affordability Safe Harbors

The employer mandate affordability safe harbors are indexed to a metric based on the rate of premium growth over the rate of CPI growth for the preceding year. For 2024, the applicable percentage decreases significantly to **8.39%** (down from 9.12% in 2023).

Full Details Available Here: [The Ultra Low 2024 ACA Affordability Percentage](#)

- **2024 Federal Poverty Line Safe Harbor:** 8.39% of the Federal Poverty Line
 - Prior-Year Federal Poverty Line (Contiguous 48 States): \$14,580
 - 2024 Monthly Employee-Share of Premium for Lowest-Cost (Minimum Value) Plan Limit: **\$101.93**
 - *Action Item: Always use this approach where the employer offers plan option at a cost that does not exceed \$101.93/month*
- **2024 Rate of Pay Safe Harbor:** 8.39% of Rate of Pay
 - Hourly Employees: 8.39% of Employee's Hourly Rate of Pay x 130 Hours (regardless of actual hours of service)
 - Salaried Employees: 8.39% of Employee's Monthly Salary
 - *Action Item: Use this approach where the employer's cheapest (minimum value) plan option costs employees more than \$101.93/month*
- **2024 Form W-2 Safe Harbor (Not Recommended):** 8.39% of Box 1 Wages
 - Disadvantage #1: Retrospective Determination—Form W-2 safe harbor provides no predictability because Box 1 unknown until January of following year (i.e., employer will not know until January 2025 whether it met the Form W-2 safe harbor for 2024)
 - Disadvantage #2: Disregarded Compensation—Box 1 does not include many forms of compensation, including 401(k) deferrals and Section 125 salary reductions for health and welfare plan coverage
 - Disadvantage #3: Fixed Premium—The employee-share of the premium must remain consistent as an amount or percentage for the full plan year, which means employers cannot make mid-year adjustments to address lower-than-anticipated Box 1 amounts



ICHRA ACA Affordability Safe Harbors

The IRS has proposed created three additional ICHRA safe harbors in the proposed §4980H regulations to address the affordability issues unique to HRAs.

These are based on the “**HRA affordability plan**”, which by default is the lowest cost silver plan for the employee for self-only coverage offered by the Exchange for the rating area in which the employee resides.

1

Proposed Worksite Location Safe Harbor

- HRA affordability plan may be based on the lowest cost silver plan on the Exchange **in the rating area of the employee’s primary site of employment**
- Based on the worksite on the first day of the plan year (or first day of ICHRA coverage for employees who become eligible mid-year)
- For teleworkers, use office location to which the employee would report

2

Proposed Calendar Plan Year Safe Harbor (January Look-Back)

- Employers with a calendar plan year ICHRA may base HRA affordability plan cost on **the premium in effect for January of the prior calendar year**
- Designed to address the fact that Exchange plan premiums are not available until October, which would not provide sufficient planning time for employers
- Use employee’s age in current plan year, location in current calendar month

3

Proposed Non-Calendar Plan Year Safe Harbor (January Look-Back)

- Employers with a non-calendar plan year ICHRA may base HRA affordability plan cost on **the premium in effect for January of the current calendar year**
- Addresses complications with Exchange premiums changing mid-year



ICHRA ACA Affordability: A Major Issue

The options available to employees are mutually exclusive when it comes to achieving the two primary goals of ICHRAs:

1) **Reduced Cost**, and 2) **Simplified Administration**

Reduced Cost...

But Increased Administration

The Employee-By-Employee Approach

- “Under the final PTC regulations, for any given employee, the premium for the PTC affordability plan is based on the particular employee’s relevant circumstances, including the particular employee’s age. Consequently, even for employees residing in the same location (or working at the same location if the location safe harbor is applied), the cost of the applicable affordability plan is determined on an employee-by-employee basis.”

Regarding the Employee’s Age...

- Results in a different ICHRA allocation for each age of employee!
- Needs extensive analysis, coordination, systems support, etc.

Simplified Administration...

But Increased Cost

The One-Size-Fits-All Approach

- “The Treasury Department and the IRS also note that as a practical matter, if an employer wants to make a single amount available under an individual coverage HRA to a class of employees and ensure it avoids an employer shared responsibility payment under section 4980H(b), in general, the employer can use the age of the oldest employee in the class of employees to determine the amount to make available under the HRA to that class of employees.”

As a Practical Matter...

- Causes unrealistic cost increase and needs regional adjustments

ICHRA and the ACA Employer Mandate: Affordability Alleviation

CMS CCIIO Develops Lowest Cost Silver Plan Premium Look-Up Table

- <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Employer-Initiatives/Employer-Initiatives>
- Designed to provide employers with easy access to the lowest cost silver plan premium data by geographic location
- Contains the rates based on each employee's age and geographic location, as needed to make affordability determinations for ICHRA allocations
- Significantly reduces the burden of determining the HRA affordability plan premium amount for every geographic region where available (updated annually for current year rates)

Major Drawbacks

- Data field is limited to states that use healthcare.gov
- States with their own Exchanges are not included in the table
- Still on your own to use that data to determine allocation needed for every age employee

Sample Output

Plan Year 2020 Rating Dates as of: 10/09/2019

State Code:	GA	County Name:	Cobb	ZIP Code:	30008	Age:	45
State Code	Rating Area Id	County Name	FIPS Code	ZIP Code	Plan ID	45	
GA	Rating Area 3	Cobb	13067	30008	70893GA0010022	472.99	

06

Mountains or Molehills?

Multiple Other Lingering Concerns and Issues



Mountains or Molehills?—The Other Concerns

Issue #1: COBRA for ICHRAs

- **What is the appropriate COBRA rate for an ICHRA?**
 - All HRAs are group health plans subject to COBRA
 - This includes an ICHRA
 - » IRS guidance is notoriously vague in determining COBRA rate for an HRA
- **Likely Practical Result**
 - Employers often set HRA COBRA rate at 60% to 80% of the amount made available under the HRA as a reasonable estimate
 - » This rule of thumb should be fine for ICHRAs unless experience shows that to be unreasonable, or the IRS provides better guidance

Mountains or Molehills?—The Other Concerns

Issue #2: Non-Medical Health Benefits

- **Should the employer offer group dental, vision, health FSA, EAP?**
 - The ICHRA rules center on medical but leave little thought to other lines
 - Should employers go pure defined contribution for all health benefits?
 - » Or does it make more sense to keep group plans for non-medical?
- **Likely Practical Result**
 - Employers will likely continue to offer at least the health FSA to ICHRA employees to take advantage of the tax savings for employers and employees
 - » The dental and vision question will likely be determined as to whether the individual market is viable/desirable for those lines

Mountains or Molehills?—The Other Concerns

Issue #3: The Special Rule for New Hires

- **Should the employer sub-divide ICHRA eligibility based on hire date?**
 - The ICHRA class rules allow for a “special rule” to sub-divide divide a particular class into ICHRA or traditional group plan based on hire date
 - For example, hourly employees hired on or after ICHRA effective date are eligible for the ICHRA, whereas existing hourly remain in traditional plan
 - » Employers can discontinue the special rule at any time, at which point the sub-class disappears and all employees in the class are moved into ICHRA
- **Likely Practical Result**
 - Employers will consider grandfathering existing employees into traditional group health plan when dipping their toe into the ICHRA waters
 - » Success of the ICHRA will ultimately depend on both employer and employee desiring to break down the special rule for grandfathered class

Mountains or Molehills?—The Other Concerns

Issue #4: The Third-Party Administrator

- **Which vendor will become the most common TPA for ICHRAs?**
 - Likely any other type of HRA, employers generally are not going to have any interest in self-administering an ICHRA
 - The industry has not yet sorted out which type of vendor is in the best position to administer ICHRAs
 - » The FSA/COBRA/Commuter FSA vendors are competing against new specialty ICHRA vendors that offer alternative new options
- **Likely Practical Result**
 - Employers have to weigh the cost/benefit of relatively cheap FSA TPAs vs. the specialty ICHRA vendors that cost more but offer more employer and employee services
 - » There will likely be significant M&A activity by large players if ICHRAs take off and upstarts demonstrate a strong appeal and market share

Mountains or Molehills?—The Other Concerns

Issue #5: The 90-Day Notice

- **Will employers make decisions quickly enough to comply?**
 - The ICHRA rules unfortunately require that employers provide the ICHRA notice to employees 90 days in advance of the first day of the plan year
 - For a calendar-year ICHRA (which the vast majority will be), this means employers must notify employees of the ICHRA no later than October 3
 - » This creates an arbitrarily early decision point requirement for employers
- **Likely Practical Result**
 - Employers will have to have the ICHRA consideration in mind well before the standard renewal season discussions to prepare for possibility
 - » Unless and until the Departments relax the rule, the 90-day barrier continues to result in many employers delaying ICHRA implementation to subsequent year

Mountains or Molehills?—The Other Concerns

Issue #6: The 120-Day Notice

- **Why does so much industry confusion surround the new employer notice rule?**
 - The ICHRA rules permit a relaxed notice timing requirement for “an employer that is first established less than 120 days before the beginning of the first plan year of the HRA.”
 - This rule applies to new employers only—it does not relax the notice timing rules for an existing employer newly establishing an ICHRA
 - » Where applicable, permits notice by the date the ICHRA is to take effect
- **Likely Practical Result**
 - The Departments are likely to clarify that the 120-day rule does not apply to existing employer starting an ICHRA for the first time
 - » However, employers’ desire to rely on the 120-day rule may cause them to consider relaxing the overly restrictive 90-day rule

Mountains or Molehills?—The Other Concerns

Issue #7: Other Medical Expenses

- **Will employers allow ICHRAs to reimburse expenses other than premiums?**
 - Employers can limit the ICHRA to just the individual policy premium amount
 - ICHRAs become much more flexible if they can also be used for cost-sharing (e.g., deductibles) or other §213(d) expenses of any time
 - » The rules permit offering HSA-compatible ICHRAs (e.g., post-deductible)
- **Likely Practical Result**
 - Employers will consider the budgetary effect of expanding ICHRAs to include additional medical expenses because employees will have increased claims
 - » This will ultimately become an important recruiting/retention feature for employers to distinguish their ICHRA from other employer offerings

Mountains or Molehills?—The Other Concerns

Issue #8: Carryover Amounts

- **Will employers allow ICHRA to carry over unused amounts?**
 - Employers can set the ICHRA annual allocation to be use-it-or-lose it
 - ICHRA (as with any other form of HRA) do permit employers the option to offer the carryover of unused amounts to subsequent years
 - » The rules provide that the carryover must be on the same terms to employees
- **Likely Practical Result**
 - Employers will consider the budgetary effect of permitting ICHRA carryovers—because it provides a potential incentive for employees to limit costs
 - » This will ultimately become an important recruiting/retention feature for employers to distinguish their ICHRA from other employer offerings

Mountains or Molehills?—The Other Concerns

Issue #9: Employee Pre-Tax Contributions

- **How will employers facilitate employee pre-tax salary reduction contributions?**
 - The ICHRA rules permit employees to contribute toward the cost of the underlying individual policy on a pre-tax basis through the §125 cafeteria plan
 - This presents a novel issue for employers—how will they administer pre-tax payroll contributions for a plan not maintained by the employer?
 - » Key limitation: Policy must be purchased off-Exchange to qualify
- **Likely Practical Result**
 - Employers will outsource the administrative burden of processing the pre-tax salary reduction contribution reimbursements to the ICHRA TPA
 - » The TPA can verify and reimburse the qualifying premium expense claimed by the employee based on the combined ICHRA and salary reduction contribution amounts available to the employee

Mountains or Molehills?—The Other Concerns

Issue #10: Added ACA Reporting Complexity

- **ALEs Still Have to Complete the Forms 1094-C and 1095-C When Offering an ICHRA**
 - There are 10 additional codes for ICHRA coverage (1L-1U) to use in Line 14 of the Form 1095-C
 - Employers also have to add the employee's age (top of Part II) and zip code (Line 17), which is only for ICHRAs
 - **Most painfully, Line 15 requires a custom entry for each employee based on the cost of the lowest cost silver plan where the employee resides or the employee's primary worksite, after reducing by the monthly ICHRA amount**
 - » This is a lot of work because the lowest cost plan available will be different for each employee based on their age and location—unlike traditional large group plans where the lowest-cost plan is fixed across all employees
- **Likely Practical Result**
 - Employers will outsource the administrative burden to the ICHRA TPA or an ACA reporting TPA
 - » **This is not an area that has been adequately addressed by many vendors yet, leaving many employers with a last-minute administrative headache**

Mountains or Molehills?—The Other Concerns

Issue #11: Political Uncertainty

- **Does the Biden Administration Support ICHRAs?**

- ICHRAs were developed under the Trump Administration, which means they are by default a potential target for political disagreement with the Biden Administration
- The Biden Administration has already taken one step to undermine ICHRAs by withdrawing the ICHRA affordability regulations issued at the end of the Trump Administration. They also issued a Statement of Administration Policy in June 2023 strongly opposing House efforts to codify ICHRAs into statute (CHOICE Arrangement Act).
- » Mostly it seems that the Biden Administration has simply ignored ICHRAs. That's better than undermining, but it falls short of the full endorsement and attention needed to drive the fledgling offerings into the mainstream spotlight

- **Likely Practical Result**

- The ICHRA industry will continue to develop without significant political interference or turbulence, but without any significant assistance from regulators during the Biden presidency
- » Industry trade groups will play a more important role in the interim, with groups like the HRA Council supporting ICHRAs and groups like Keep Us Covered advocating for their elimination

Mountains or Molehills?—The Other Concerns

Issue #12: The Proposed HSA Alternative

- **Will legislation make HSA contributions a more attractive alternative to the ICHRA?**
 - The Graham-Cassidy bill represented the GOP's last gasp of an effort for an ACA repeal/replace bill
 - It's no longer under consideration of course, but it shows some sense of a possible GOP direction in the future
 - The bill would have doubled the HSA contribution limit (to over \$16,000 for family coverage), and permitted tax-free HSA distributions for premiums
 - » HSAs have key ownership and investment employee advantages over HRAs
- **Likely Practical Result**
 - If these HSA changes ever become law, employers will likely consider HSA contributions as the defined contribution holy grail (even more than ICHRA!)
 - » Employers could simply deposit a set sum in employees' HSA upon verification of HDHP enrollment, with no other administrative or compliance burdens—and employees would probably love it!

WRAP-UP

Takeaways



The ICHRA Revolution: Has the Health Plan 401(k) Arrived?

THREE KEY POINTS TO REMEMBER

In the same manner as the 401(k)'s introduction exactly 40 years earlier (effective January 1, 1980), ICHRAs have the potential to radically transform the current paradigm that is dominated by traditional employer-sponsored major medical group health plans.

Like 401(k) plans, ICHRAs are generally less expensive, less administratively burdensome, and present less of a compliance challenge for employers than a traditional group health plan. Employees may discover that they relish the broader field of underlying health coverage options and greatly enhanced portability that ICHRAs offer much in the same way employees control their 401(k).

Over the past 40 years, participation in defined benefit pension plans has decreased from 38% of private sector workers to 13%. Meanwhile participation in defined contribution 401(k)-style plans has increased from 8% of private sector workers to 47%. The stars are aligned for ICHRAs to follow the same path to defined-contribution prominence on the health side in the coming years.

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ICHRA for Employers

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Thank you



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