Benefits Briefing: Proposed Rules on Application of Employer Mandate & Nondiscrimination Rules to Individual Coverage HRAs

Rachel Leiser Levy
Seth Perretta
December 3, 2019
Overview

- Scope of NPRM
- “Refresher”
  - 4980H affordability
  - 36B tax credit eligibility
- Overview of NPRM
  - Affordability rule and safe harbors
  - Minimum value rule
  - 105(h)
  - 125
  - Applicability date and reliance rule
Scope of ICHRA NPRM

- ICHRA Integration rules previously finalized
- This NPRM is focused on:
  - Affordability determination for 4980H purposes
  - Minimum value determination for 4980H purposes
  - Application of 105(h) nondiscrimination rules
  - Application of 125 nondiscrimination rules
  - ... And some other stuff too....
Refresher on 36B and 4980H(b)
Refresher on 36B and 4980H(b)

Note: For purposes of 4980H(a), simply offering an ICHRA would qualify as offer of MEC
Refresher on 36B and 4980H(b)

4980H(b)

- Generally, to avoid 4980H per-FT employee penalty, the employer must offer:
  - MEC,
  - that is “affordable”; and
  - that provides “minimum value”,
- OR – the employee is enrolled in MEC regardless of affordability or minimum value.
4980H(b)

- Generally, to avoid 4980H per-FT employee penalty, the employer must offer:
  - MEC,
  - that is "affordable"; and
  - that provides "minimum value",
  - OR – the employee is enrolled in MEC regardless of affordability or minimum value

36B

- An employee is only eligible for 36B tax credits if he/she:
  - Meets certain income tests based on their modified adjusted gross household income ("MAGHI"),
  - Is not enrolled in MEC; and
  - Is not offered by their employer MEC that is "affordable" and provides "minimum value"
Refresher on 36B and 4980H(b)

4980H(b)

- Generally, to avoid 4980H per-FT employee penalty, the employer must offer:
  - MEC,
  - that is “affordable”, and
  - that provides “minimum value”, or
- OR – the employee is enrolled in MEC regardless of affordability or minimum value.

Base Rule: Employee’s cost for the coverage under his/her employer’s lowest-cost, self-only option that provides “minimum value” does not exceed a stated percentage of their MAGHI.

4980H(b) Safe Harbors:
- W-2
- Regular rate of pay
- Federal poverty line
Generally, to avoid 4980H per-FT employee penalty, the employer must offer:
- MEC,
- that is “affordable”; and
- that provides “minimum value”,
- OR – the employee is enrolled in MEC regardless of affordability or minimum value.

**Base Rule**: The MEC plan provides “minimum value” if (1) the plan’s share of the total allowed costs of benefits provided under the plan is at least 60% of such costs, and (2) the plan provides substantial coverage of inpatient hospitalization and physician services.

**4980H Safe Harbor**: Use of MV calculator.
NPRM – ICHRA “Affordability”

- **Affordability** = By month, the employee’s share of the cost for self-only individual market coverage for the lowest-cost, silver option in the rating area in which the employee resides is less than indexed percentage of household income
  - Note: Comments requested regarding need for use of “snapshot” approach regarding place of employee’s residence

- Proposed safe harbors
  - Location Safe Harbor – **YES** (based on primary site of employment)
    - But **NO** employer, nationwide or state-based safe harbor
  - Age Safe Harbor – **NO** (but NPRM clarifies age can be determined once at first day of plan year)
  - Look-Back Month Safe Harbor – **YES**
  - Can apply (or not) safe harbors by integration class
NPRM – ICHRA “Affordability”

- Location Safe Harbor
  - **NO** employer, nationwide or state safe harbor
  - Proposed safe harbor based on employee’s “primary site” of employment
    - “Primary site” is *where reasonably expected by the employer to provide services*
    - “Primary site” is determined on the start of the plan year
    - If the employee’s “primary site” of employment changes mid-year, NPRM requires that affordability be based on new work location by the first day of the second calendar month after change in work location (or start of new plan year if sooner)
    - **Teleworking rule:** Look to site where employee is reasonably expected to “report” to work; if not required to report to another location, employee residence is work site.
NPRM – ICHRA “Affordability”

- Look-Back Month Safe Harbor
  - Calendar Year Plans:
    - Use the monthly premium for the lowest-cost silver plan option for **January of the prior year** in determining what is affordable coverage for each of the 12 months of the current plan year
      - Example: In determining what is affordable coverage for 2021 calendar year plan, the employer would look to the respective premium cost in January 2020
  - **NON-**Calendar Year Plans
    - Different rule applies – Look to January of the year in which the plan year begins.
      - Example: For a plan year with a July 1 start date, the employer would look to January of 2020 in determining what is affordable for purposes of each month of its plan year beginning July 1, 2020
  - Note: No adjustment required to look-back premium amount
NPRM – ICHRA “Affordability”

- Tobacco Users
  - Allows employer to disregard tobacco surcharges applicable in the individual insurance market when determining whether the ICHRA offers “affordable” coverage
Wellness Incentives

- Applies to ICHRA general rules regarding how wellness incentives must be considered when determining affordability
  - Generally, must disregard wellness incentives
  - EXCEPT, may assume wellness incentives are earned for qualifying tobacco cessation programs
NPRM – ICHRA “Affordability”

- **Example:** Joe is a full-time employee. He works for a NY employer with an Atlanta office, but he telecommutes from his condo in downtown Savannah. His birthdate is April 15, 1955. The employer sponsors a calendar year plan.
Example: Joe is a full-time employee. He works for a NY employer with an Atlanta office, but he telecommutes from his condo in downtown Savannah. His birthdate is April 15, 1955. The employer sponsors a calendar year plan.

Affordability using NO safe harbors:
- Look to rating area in which Joe resides (downtown Savannah, GA)
- Look to cost of self-only, lowest-cost silver option for the current year
- Consider age-rated premium costs based on Joe’s age of 64 as of January 1 of plan year; but no need to adjust mid-year when Joe turns 65 on April 15th
Example: Joe is a full-time employee. He works for a NY employer with an Atlanta office, but he telecommutes from his condo in downtown Savannah. His birthdate is April 15, 1955. The employer sponsors a calendar year plan.

Affordability using proposed safe harbors:
- Look to rating area of Joe’s primary site of employment (here, Atlanta if that is where he may be required by his employer to report)
- Look to cost of self-only, lowest-cost silver option in the rating area for January of the prior year
- Consider age-rated premium costs based on Joe’s age of 64 as of January 1 of plan year; but no need to adjust mid-year when Joe turns 65 on April 15th
NPRM – ICHRA “Minimum Value”

- **Minimum Value** = Any ICHRA that is “affordable” (including use of safe harbors)
NPRM – ICHRA and 105(h) Compliance

- Generally provides that so long as the ICHRA complies with the “same terms” contribution requirements of the ICHRA integration final rule, then any resulting variances shall not result in a section 105(h) violation.
- **Not** proposed: Specific age safe harbor for 105(h) purposes as set forth in IRS Notice 2018-88.
- Treasury/IRS notes that ICHRAs may still violate 105(h) rules in practice.
  - “Thus, among other situations, if a disproportionate number of HCIs qualify for and utilize the maximum amount allowed under the same terms requirement based on age in comparison to the non-HCIs who qualify and use lower HRA amounts based on age, the [ICHRA] may be found to be discriminatory.”
Sponsors of ICHRAs may make available an IRC section 125 “cafeteria plan” for use by ICHRA enrollees in paying their share of individual market coverage on a pre-tax basis.

However, per the ACA itself, employees are NOT permitted to utilize a cafeteria plan to pay for premiums on a pre-tax basis with respect on-Exchange coverage.

Comments are requested regarding any “specific issues raised by the application of the section 125 cafeteria plan rules ... for which clarification is needed or for which a modification of the applicable rules may decrease burdens”
NPRM – Applicability Date and Reliance

- Applicability Date:
  - Generally – For periods after 12.31.19
  - 105(h) – For plan years beginning after 12.31.19

- Reliance
  - 4980H – For periods during any plan year beginning before the date that is six months following the publication of final regulations
  - 105(h) – For any plan year that begin before the start of the sixth month following the publication of the final regulations
Individual Coverage Health Reimbursement Arrangement (ICHRA) Employer LCSP Premium Look-up Table Overview

Department of Health & Human Services
Centers for Medicare & Medicaid Services
Center for Consumer Information and Insurance Oversight
Overview

1. URL Location and Setup Steps
2. Look-up Table Use Steps
3. Accessing the Full Lowest Cost Silver Plan (LCSP) List
4. Data Sources & Update Frequency
5. Questions
### Look-up Table URL Location and Setup Steps

<table>
<thead>
<tr>
<th>Where to access the Look-up table on the Web</th>
<th>Look-up Table Setup Steps</th>
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<tbody>
<tr>
<td>• Plan Year 2019 Look-up Table URLs:</td>
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<td>o <a href="VND.MS-EXCEL.SHEET.MACROENABLED.12">ICHRA Employer Lowest Cost Silver Plan Premium Lookup Table</a></td>
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<td>o <a href="PDF">ICHRA Employer Lowest Cost Silver Plan Premium Look-up Table Data Dictionary</a></td>
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<tr>
<td>o <a href="PDF">ICHRA Employer Lowest Cost Silver Plan Premium Look-up Table Data Dictionary</a></td>
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<tr>
<td>1. Download tool to a preferred location [Desktop, Network LAN, etc.]</td>
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<tr>
<td>2. Open the MS Excel based tool [*run on MS Excel 2007 or later]</td>
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<tr>
<td>3. Enter Geographic information and desired Age output</td>
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</tr>
<tr>
<td>4. View the LCSP rates by Geographic location and Age</td>
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### Look-up Table Use Steps

#### 1. Enter geographic information and desired Age

<table>
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<tr>
<th>Individual Coverage Health Reimbursement Arrangement Employer Lowest Cost Silver Plan Premium Look-up Table Instructions</th>
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<tr>
<td><strong>1.</strong> Purpose and Overview: This workbook serves as the mechanism to help employers access individual market Qualified Health Plans (QHPs) Lowest Cost Silver Plan (LCSP) data by geographic location.</td>
</tr>
<tr>
<td><strong>1a.</strong> The Individual Coverage HRA Employer Lowest Cost Silver Plan Premium Look-up Table contains Federally-facilitated Exchange (FFEs) data and State-based Exchanges on the Federal Platform (SBE-FFPs) data.</td>
</tr>
<tr>
<td><strong>1b.</strong> Rates are those for the silver plan that is the lowest premium at the 0-14 age band.</td>
</tr>
<tr>
<td><strong>2.</strong> Instructions: To use this tool, enter the &quot;State Code&quot;, &quot;County Name&quot;, &quot;ZIP Code&quot; and &quot;Age.&quot; Click &quot;Find Rates&quot; to generate the associated lowest cost silver plan rate.</td>
</tr>
<tr>
<td><strong>2a.</strong> All input fields are required.</td>
</tr>
<tr>
<td><strong>2b.</strong> Incorrect input values will generate an error message. Please check your input data.</td>
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**Plan Year 2020 Rating Dates as of: 10/09/2019**

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<th>Find Rates</th>
<th>Clear Rates</th>
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**INFORMATION NOT RELEASABLE TO THE PUBLIC UNLESS AUTHORIZED BY LAW:** This information has not been publicly disclosed and may be privileged and confidential. It is for internal government use only and must not be disseminated, distributed, or copied to persons not authorized to receive the information. Unauthorized disclosure may result in prosecution to the full extent of the law.
### Look-up Table Use Steps

2. Click the ‘Find Rates’ button to display the LCSP based on the inputted geographical and age information.

### Individual Coverage Health Reimbursement Arrangement

**Purpose and Overview:** This workbook serves as the mechanism to help employers access individual market Qualified Health Plans (QHPs) Lowest Cost Silver Plan (LCSP) data by geographic location.

**1a.** The Individual Coverage HRA Employer Lowest Cost Silver Plan Premium Look-up Table contains Federally-facilitated Exchange (FFE) data and State-based Exchanges on the Federal Platform (SBE-FPs) data.

**1b.** Rates are those for the silver plan that is the lowest premium at the 0-14 age band.

**2. Instructions:** To use this tool, enter the "State Code", "County Name", "ZIP Code" and "Age." Click "Find Rates" to generate the associated lowest cost silver plan rate.

2a. All input fields are required.

2b. Incorrect input values will generate an error message. Please check your input data.

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

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<tr>
<th>State Code</th>
<th>Rating Area Id</th>
<th>County Name</th>
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Look-up Table Use Steps

3. Click the ‘Clear Rates’ button to clear previously displayed information and inputs.
## Accessing the Full Lowest Cost Silver Plan (LCSP) List

The complete LCSP list by state, county, and ZIP codes can be found in the ‘States’ worksheet.

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Data Sources & Update Frequency

- Plan data is aggregated from the following data sources within an issuer's submitted QHP Application:
  - Plans and Benefits
  - Rates
  - Service Area
- How frequently is the Look-up Table data updated?
  - Data is initially available in late August of each plan year and updated periodically throughout the year
  - Employers should use the latest tool published on the Employer Initiatives webpage: