



# IRS Requests Comments Regarding Application of Employer Shared Responsibility and Nondiscrimination Requirements to Individual Coverage HRAs

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The Internal Revenue Service (IRS) recently released proposed regulations regarding the ability to integrate health reimbursement arrangements and other account-based group health plans (HRAs) with individual health insurance coverage. IRS Notice 2018-88 sets forth anticipated guidance and requests comments on the application of the employer shared responsibility requirements in Internal Revenue Code (Code) Section 4980H and the nondiscrimination requirements of Code Section 105(h) to such HRAs. The Notice states that it cannot be relied upon by taxpayers with regard to Code Sections 4980H or 105(h), but gives an indication as to the IRS guidance that can be expected on these topics.

## Code Section 4980H Employer Shared Responsibility Requirements

Code Section 4980H(a) requires applicable large employers (ALEs) to offer at least 95% of their full-time employees (FTEs) an eligible employer-sponsored plan, and Code Section 4980H(b) requires such coverage offered to FTEs be affordable health coverage that provides minimum value. Notice 2018-88 addresses the application of Code Section 4980H to HRAs that are integrated with individual health insurance coverage (individual coverage HRAs or ICHRAs). The Notice confirms that an IHCRA is an eligible employer-sponsored plan for purposes of applying Code Section 4980H(a), and thus can be offered by ALEs to satisfy the requirement to offer coverage to at least 95% of FTEs.

### Affordability Safe Harbors

The Notice provides that the affordability of an IHCRA would be determined using the method set forth in the proposed Premium Tax Credit (PTC) regulations, which determine the “required HRA contribution” using a formula that incorporates the lowest cost silver plan for self-only coverage offered by the Exchange in the rating area in which the employee resides (the affordability plan). Recognizing the administrative burden that could result if an employer has to determine affordability on an employee by employee basis utilizing the method in the proposed PTC regulations, the Notice sets forth three anticipated safe harbors that could be used to determine whether an IHCRA is affordable: (1) Location Safe Harbor; (2) Calendar Year Safe Harbor; and (3) Non-Calendar Year Safe Harbor. The Notice provides that the Treasury Department and IRS anticipate issuing guidance on these safe harbors, and

it's anticipated that the Location Safe Harbor can be used by an employer in addition to the Calendar or Non-Calendar Year Safe Harbor.

The Location Safe Harbor would allow the employer to use the employee's primary site of employment (rather than the employee's place of residence) in applying the affordability rules in the PTC regulations. The IRS requests comments on this proposed safe harbor and whether an alternative safe harbor would be preferable. The Notice notes that it does not set forth a safe harbor related to the fact that the cost of the affordability plan is based on the employee's age, and requests comments on administrative burdens that may result from needing to separately determine the affordability of the individual coverage HRA for each employee based on the employee's age.

Realizing that employers generally determine the health benefits that will be offered in the upcoming plan year well in advance of the start of the plan year, the Calendar Year Safe Harbor would allow the affordability of an ICHRA that has a calendar year plan year to be determined based on the cost of the applicable affordability plan for the prior calendar year.

In the event that an individual coverage HRA has a plan year that spans two taxable years, the Non-Calendar Year Safe Harbor would allow an employer offering an ICHRA to assume that the cost of the affordability plan for the first month of the plan year will be the cost of the affordability plan for all of the months in the plan year.

The Treasury Department and IRS anticipate providing guidance clarifying that an ALE offering an ICHRA is permitted to use the existing household income safe harbors for purposes of Code Section 4980H.

### **Reporting Requirements**

The Treasury Department and IRS anticipate that in filing Forms 1095-C, applicable large employers will not be required to report the employee's required contribution calculated under the proposed PTC regulations and will instead report the required contribution calculated using the safe harbors set forth in the Notice, as applicable. Additional guidance on this issue is expected.

### **Minimum Value Safe Harbors**

The Notice provides that an ICHRA that is affordable will be treated as providing minimum value for purposes of Code Section 4980H. The applicable definition of "minimum value" for this purpose is the definition under the proposed PTC regulations.

### **Code Section 105(h) Nondiscrimination Requirements**

Regarding the requirements in Code Section 105(h) that ICHRAs not discriminate in favor of highly compensated individuals (HCIs), the Treasury Department and IRS anticipate issuing guidance providing that the ICHRA won't fail to satisfy the Code Section 105(h) requirements if it provides the same maximum dollar amount to all employees who are members of a particular class of employees (limited to the classes set forth in the proposed HRA integration regulations). In addition, if the maximum dollar amount is modified due to the employee's age, any increase in the maximum dollar amount available to a class of employees must increase in accordance with increases in the cost of individual health insurance policies based on the ages of the employees in the class, provided the same maximum dollar amount attributable to the increase in age is made available to all employees in a class who are the same age.

### **Request for Comments**

Comments on the issues set forth in the Notice must be submitted by December 28, 2018.

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