Subject: **1) 2020 Indexed Adjustments for MEC and ESR Penalties; 2) Proposed Rules for Individual Coverage Health Reimbursement Arrangements; and 3) FAQ Guidance Clarifies Cost Sharing – Prescription Drug Coupons**

Date: October 9, 2019

2020 Indexed Adjustments for Minimum Essential Coverage (MEC)

In **Revenue Procedure 2019-29**, the Internal Revenue Service released certain affordability standards for 2020 as they apply to the Affordable Care Act (ACA), as follows:

❑ **Affordability Standard – Employer Shared Responsibility Mandate**

Coverage under an employer-sponsored plan is deemed affordable to a particular employee if the employee's required contribution to the plan does not exceed 9.78% (indexed for 2020; decreased from 9.86% in 2019) of the employee's household income for the taxable year, based on the cost of single coverage in the employer's least expensive plan.

As background, employers subject to the ACA's employer shared responsibility mandate who fail to offer minimum essential coverage to their full-time employees or fail to offer adequate and affordable coverage may be subject to an excise tax if at least one of its employees qualifies for premium assistance through a marketplace. If an employer does not know an individual's household earnings, it can use one of three safe harbors for purposes of determining affordability; they are:

1. A *Form W-2 determination* in which the employer's lowest cost self-only coverage providing minimum value does not exceed 9.86% (for 2019; 9.78% in 2020), of the employee's Form W-2 wages (Box 1) for the calendar year.

2. A *rate of pay method* in which the minimum value cannot exceed 9.86% (for 2019; 9.78% in 2020), of an amount equal to 130 hours, multiplied by the employee's hourly rate of pay as of the first day of the coverage period. For salaried employees, the monthly salary is used instead of the 130 hour standard. An employer can apply this method to hourly employees if they experience a reduction in pay during the year; however, this methodology cannot be used for commissioned sales people.

3. A *Federal poverty line (FPL) standard* in which cost of single coverage does not exceed 9.86% (for 2019; 9.78% in 2020) of the individual federal poverty line rate for the applicable calendar year, divided by twelve. An employer is permitted to use the poverty guidelines in effect six months prior to the beginning of the plan year. The Department of Health and Human Services released the 2019 FPL standards in January, 2019 (see *2019 Federal Poverty Level Guidelines, Benefit Beat*, 2/12/19).

Plan Calendar Year	Prior Year's Federal Poverty Level (1 Person Household)	Affordability Percentage	Maximum Monthly Contribution (Self-Only Coverage
2020	$12,490	9.78%	$101.79
2019	$12,140	9.86%	$99.75
2018	$12,060	9.56%	$96.08

- **Premium Tax Credit.** The following contribution percentages are used to determine whether an individual is eligible for a premium tax credit for the 2019 and 2020 tax years:

Household income percentage of Federal Poverty Line)	Initial percentage *2019*	Final percentage *2019*	Initial percentage *2020*	Final percentage *2020*
Under 133%	2.08%	2.08%	2.06%	2.06%
Between 133% and 150%	3.11%	4.15%	3.09%	4.12%
Between 150% and 200%	4.15%	6.54%	4.12%	6.49%
Between 200% and 250%	6.54%	8.36%	6.49%	8.29%
Between 250% and 300%	8.36%	9.86%	8.29%	9.78%
Between 300% and 400%	9.86%	9.86%	9.78%	9.78%

Employer Shared Responsibility Penalties for 2020

The amount of penalties for purposes of calculating the 'no coverage' excise tax (Code Section 4980H(a)), and the 'inadequate or unaffordable' excise tax (Code Section 4980H(b)) is subject to annual indexing. Below is a chart reflecting the penalties for 2018 to 2020. These amounts are based on the HHS inflationary percentage contained in its annual benefit and payment parameter standards for the relevant year, and as officially released by the Internal Revenue Service.

'No Coverage' Excise Tax IRC Section 4980H(a)		*'Inadequate or Unaffordable' Excise Tax IRC Section 4980H(b)*	
2018	$2,320	2018	$3,480
2019	$2,500	2019	$3,750
2020	$2,570	2020	$3,860

Proposed Rules for Individual Coverage Health Reimbursement Arrangements (IC-HRA)

An individual coverage health reimbursement arrangement (IC-HRA) is an arrangement that is integrated with individual health coverage.

An Executive Order issued on October 12, 2017 called for expansion of existing rules to allow individual premium be reimbursed through health reimbursement arrangements. A set of non-reliance proposed regulations were issued on October 29, 2018 (summarized in *CBIZ Health Reform Bulletin 142*), setting forth the framework for two new additional types of HRAs:

- Individual-Coverage HRA ("IC-HRA"): An individually integrated HRA used with individual health coverage obtained via public marketplace or private market
- Excepted Benefit HRA ("EB-HRA"): A new type of stand-alone HRA that can be used to pay out-of-pocket medical expenses

The IRS issued implementation regulations for establishing these new types of HRAs on June 20, 2019 (see *CBIZ Health Reform Bulletin 144*). These rules apply to plan years beginning on or after January 1, 2020.

In a nutshell, an IC-HRA is deemed to be minimum essential coverage (MEC) for ACA purposes, as long as all of the requirements of an IC-HRA are satisfied. Employers of any size can offer an IC-HRA, which raises a question for an employer subject to employer shared responsibility requirements about how it can satisfy its obligations. As a reminder, an employer employing 50 or more full-time employees, while not required to offer health coverage to its employees, may be at risk of a tax penalty if adequate and affordable coverage is not offered to its full-time employees.

To provide clarification about this issue, the IRS published **proposed reliant regulations** on September 30, 2019. These regulations address two general topics, as further discussed below: the IC-HRA coordination with employer shared responsibility provisions, and the IC-HRA integration with the Code Section 105(h) discrimination rules.

Coordination with Employer Shared Responsibility Provisions

Generally, an IC-HRA will be deemed minimum essential coverage (MEC), as defined by the ACA. Therefore, if an employer offers an IC-HRA compliant plan, this should satisfy the Code Section 4980H(a) offer of MEC requirement. The question then becomes, *how can an employer satisfy the adequate and affordability requirement, i.e., the plan meets the minimum value standard that requires the plan to cover a minimum of 60% of the total allowed cost of benefits expected to be incurred under the plan, and the affordability standard, in order to avoid the risk of an IRC Section 4980H(b) penalty?*

According to these regulations, if IC-HRA meets affordability standards described below, it will be deemed to meet minimum value standard. As mentioned above, coverage under an employer-sponsored plan is deemed affordable to a particular employee if the employee's required contribution to the plan does not exceed 9.78% (indexed for 2020) of the employee's household income for the taxable year, based on the cost of single coverage in the employer's least expensive plan.

AFFORDABILITY SAFE HARBORS

Under an IC-HRA, the affordability standard is based on the excess of premium for self-only coverage under the lowest cost silver plan offered in the rating area where the employee resides, over the self-only amount the employer makes newly available to the employee under the IC-HRA. Notably, it is only new amounts added each year that are considered in the calculation of the employee's cost. If this amount does not exceed the indexed household income threshold, then the IC-HRA is deemed affordable. For this purpose, the employer can use any of the three safe harbors currently available, as outlined above (the Form W-2 determination, the rate of pay method, or the federal poverty line standard).

For purposes of determining the lowest cost silver plan for a location, the CMS Center for Consumer Information and Insurance Oversight (CCIIO) provides a "**Premium Lookup Tool**" (and related data dictionary) that can be used by individuals and employers. This tool allows users in states participating in the federal marketplace and state-based marketplaces using the federal platform to access the lowest cost silver plan data by geographic location. The CCIIO is working with states that operate their own marketplace platforms to provide similar information.

To illustrate the affordability calculation for purposes of an IC-HRA, following is one of several examples provided by CCIIO that is based on the employee's residence:

- *Jane (single, no dependents) estimated household income in 2020 is $51,000.*
- *Jane's employer offers its employees an IC-HRA starting on January 1, 2020 that reimburses $2,400 of medical care expenses for single employees with no children.*
- *The self-only monthly premium for the lowest cost silver plan (LCSP) offered through the marketplace for the rating area where Jane resides is $500.*
- *Jane's required contribution is $300, which is lower than the product of the required contribution percentage and her household income divided by 12.*

  The calculation would be:
  - *$500 - $200 = $300 (Jane's required contribution: self-only LCSP monthly premium – monthly ICHRA amount)*
  - *($51,000 x .0978)/12= $415.65 (1/12th of the product of Jane's household income for the tax year and the required contribution percentage)*

In this example, the ICHRA is deemed affordable, and Jane would not be eligible for the premium tax credit.

LOCATION SAFE HARBOR

These regulations propose that the employer can use the lowest cost silver plan rate, or the employment location to which the individual is required to report; thus, reducing the number of locations that the employer needs to calculate.

LOOK-BACK MONTH SAFE HARBOR

The proposed rules also provide a look-back month safe harbor wherein an employer with a calendar year plan can use the lowest cost silver plan for self-only coverage for January of the prior year. For a non-calendar year plan, the employer can use the lowest cost silver plan for January of the current year.

AGE-BASED SAFE HARBOR

These proposed rules do not include an age-based safe harbor. The IRS is seeking comments about how to coordinate this type of calculation with the current premium tax credit rules. Some suggested proposals are to use the lowest cost silver plan for the lowest age band in the individual market based on the employee's location, or calculate the rate based on the employee's age on the first day of the IC-HRA plan year.

Application of Code Section 105(h) Discrimination Rules

Generally, an HRA is self-funded health plan subject to the Code Section 105(h) discrimination rules which impose tax consequences if a plan discriminates in favor of highly compensated employees. According to these proposed regulations, an IC-HRA that only reimburses individual health premium will be exempt from these rules. If the IC-HRA reimburses expenses such as deductibles, co-pays, and the like, in addition to premium, it would be subject to the Section 105(h) discrimination rules. The regulations propose that as long as IC-HRA complies with the IC-HRA classification standards listed below, including the age-based standard (wherein the oldest age classification cannot exceed three times the youngest age classification), it would be deemed compliant with the Section 105(h) discrimination rules. Under an IC-HRA, permissible classes of employees include:

- ✓ Full-time, part-time and seasonal employees;
- ✓ Employees working in the same geographic location (generally, the same insurance rating area, state, or multi-state region);
- ✓ Employees in a unit of employees covered by a particular collective bargaining agreement;
- ✓ Employees who have not satisfied a waiting period;
- ✓ Non-resident aliens with no U.S.-based income;
- ✓ Salaried workers and non-salaried workers (such as hourly workers);
- ✓ Temporary employees of staffing firms; or
- ✓ Any group of employees formed by combining two or more of these classes.

The IC-HRA could also be offered to former employees, however, if it is offered to one or more former employees within a class of employees, then the HRA must be offered to the former employees on the same terms as to all other employees within the class.

Generally, class determination is based on the common law status of an employer. This is true even if the employer is part of a control group. For determining certain classes of employees, for example, full-time vs part-time employees, employees located within certain geographic areas, or salary vs hourly employees, a minimum class size equally the lesser of 20 employees, or 10% of the workforce, must be satisfied. This is to ensure that employers do not establish small classes targeted at certain populations.

Notice Obligation

Once an IC-HRA has been established, the sponsoring employer is obligated to provide a written notice about the availability of the program to all eligible employees at least 90 days prior to the beginning of each plan year. For the first year of compliance, if the employer adopts the IC-HRA within 120 days prior to the beginning of the plan, the 90-day advanced notice period can be shortened to the date that the individual first becomes eligible for the plan. The Department of Labor provides a model notice (**Word** and **PDF**) that can be used for this purpose which must be customized to the particular IC-HRA. In practicality, the employer should provide the notice in time for its employees to review their marketplace options. For coverage in 2020, the open enrollment period in the federal marketplace runs from November 1 through December 15, 2019.

Reporting and Disclosure Obligations

An employer establishing an IC-HRA would be subject to Code Section 6055 and 6056 reporting obligations. As background, the Forms **1094** and **1095** are used to satisfy the IRC Section 6055 and 6056 reporting requirements. The Form 1094-B and 1095 B-series is used for reporting minimum essential coverage (MEC) by insurers and sponsors of self-funded plans. However, self-insured applicable large employers file the Form 1095-C and use Part III of that form, rather than Form 1095-B, to report information required under section 6055. The Form 1094-C and 1095-C series is used for reporting employer provided coverage by an applicable large employer subject to the ACA's shared responsibility requirement. The IRS is currently reviewing the need to modify these reporting rules as they apply to an IC-HRA. This is due, in part, because the penalty for individuals who fail to obtain MEC has been reduced to zero. Until further guidance is provided, employers should be prepared to satisfy these future reporting obligations.

Effective Date

These regulations become effective for periods beginning after December 31, 2019. While these rules are proposed, they are reliant regulations. Therefore, an employer planning to establish an IC-HRA can rely on this guidance.

FAQ Guidance Clarifies Cost Sharing – Prescription Drug Coupons

In April, 2019, the Department of Health and Human Services issued a modified cost-sharing regulation as part of its 2020 Benefit and Payment Parameters addressing prescription drug manufacturer discounts, such as coupons and the like. This was addressed in *CBIZ Health Reform Bulletin 143* (5/10/19).

According to this modified rule, beginning in 2020, an insurer issuing both individual and group health plans of any size can, but is not obligated to, count manufacturer offsets, such as coupons and the like, toward an individual's maximum out-of-pocket limit under the health plan if there is a medically-appropriate generic drug available. The insurer cannot adopt these so-called accumulator programs if there is no generic equivalent available.

This modified rule created some lack of clarity and ambiguity with regard to the scope and application of this guidance. On August 26, 2019, the Departments of HHS, Labor and Treasury issued a **set of FAQs**, stating that they recognize the confusion, and anticipate issuing clarification when the 2021 Benefit and Payment Parameters are issued. Any modification to the rule would then take effect in 2021.

In the meantime, the FAQ guidance states that the governing agencies will not pursue any enforcement action against an insurer or group health plan if a plan excludes coupons from cost-sharing limitations, even if there is no medically-appropriate generic prescription drug available. Important to note, however, is that states continue to have authority to impose additional restrictions on plans subject to state insurance laws. Be aware that insured plans would need to comply if such law is imposed.

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