Individual Coverage Health Reimbursement Arrangements (ICHRAs) – What Are They, How Can an Employer Use Them, and What Might Their Future Be

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ICHRAs

- Stands for "Individual Coverage Health Reimbursement Arrangements"
- Basic idea is simple: Employer replaces its traditional group health plan with a program to pay employees amounts that they can use to purchase their own health insurance
  - For all employees, or just for some (but with strict rules to follow if only some employees are provided an ICHRA, and other keep traditional group health plan)
  - Open to employers of all types and sizes, without restriction
  - Not a completely new idea, but has recently morphed into something very substantial, complicated, and perhaps for some controversial

ICHRAs

- Regulations permit effective 1/1/2020
- Potential benefits for employers and employees
  - Employer can maintain the same financial commitment to employees' health coverage needs while ***drastically*** reducing administrative costs and risks of having a health plan
    - If you are an employer and you want to get out of the employee health insurance business with its attendant administrative costs and risks of litigation, ICHRAS could be for you
  - Employer may be able to more easily, over time, decouple its financial commitment to employees' health coverage from medical cost inflation
    - If your employees are represented by a union, or even if they aren't, they can see this coming by a mile
  - Employees may be able to better tailor their health plan coverage to their and their families' needs

ICHRAs

- So far there does not appear to have been a huge take-up of ICHRAs by larger employers, probably due to:
  - Institutional inertia:
    - ICHRAs are new and employers and the insurance industry have little experience with them
    - Benefits professionals working for large employers and brokers selling large or small group plans have little personal interest in "disrupting" existing employer health insurance market
    - Most long-term employees with stable jobs are unused to having to go into the individual market to buy their own coverage
  - More fundamentally:
    - Uncertainty regarding future viability of ICHRAs because of switch to Biden administration
    - Individual insurance coverage is probably substantially more expensive than traditional employer group coverage in most markets, although this could change
    - Lack of "push" individual health insurance market apart from federal and state exchanges

ICHRAs

- Nevertheless, at this point in time, while we do not know if ICHRAs will be a “flash in the pan” or something more lasting, it can be said that ICHRAs have the potential, at least, to be fundamentally disruptive of traditional employer health coverage
- If the Biden administration and Congress remain friendly, or even just tolerant, of ICHRAs, they may eventually have an effect on traditional employer group coverage similar to the effect that 401(k) plans had on traditional pension plans beginning in the 1980’s
  - Today, traditional defined benefit pension plans are still dominant among state and local government employers and in some heavily unionized industries, but elsewhere, not so much

An Ancient History Lesson

- In 1961, Rev. Rul. 61-146 said that an employer could reimburse one, several, or all of its employees for their own purchases of health insurance coverage on the open market and treat such reimbursement as, or as part of, the employer's "health plan" for purposes of IRC §§ 105 and 106, which together exclude both the premiums paid for coverage and the benefits received by the employee from gross income, thus providing the "tax-free" employee health insurance coverage we take for granted with a conventional employer group plan
- The IRS never revoked Revenue Ruling 61-146, even though how such arrangements might comply with ERISA (after its enactment in 1974) or COBRA (after its enactment in 1985) was never sufficiently clarified by the DOL or IRS

An Ancient History Lesson (cont'd)

- In 1961, when Rev. Rul. 61-146 was published, and really until the enactment of the Affordable Care Act (ACA) in 2010, the individual health insurance market was characterized by traits that would have made it very unattractive for most employees when contrasted with traditional employer-based group coverage:
  - Individual medical underwriting might make coverage unavailable at reasonable cost
  - Exclusion of pre-existing conditions
  - Lack of uniformity in coverage and exclusions
  - Purchases from individual brokers (time-consuming and difficult to compare competing offerings)
  - High administrative and sales costs
- Result was that Rev. Rul. 61-146 arrangements were a little-known and even less-used tool in the employee benefit plan toolkit

Enter HRAs (a somewhat less ancient history lesson)

- In IRS Notice 2002-45, the IRS confirmed the federal income tax consequences of a type of employer health plan that had recently become popular, called a "health reimbursement arrangement," or "HRA"
  - Employer annually contributes a fixed dollar amount to an employee notional health reimbursement account
  - Amounts accumulated by employee in HRA can be spent by employee only on medical expenses for self and family
  - Unlike cafeteria plan flexible spending account ("FSA"), no "use it or lose it" rule; i.e., unused amounts can carry over from year to year at option of employer in designing arrangement
  - Reimbursable medical expenses could, if employer permitted, include individual health insurance premiums
  - HRA could replace, or supplement, traditional employer group coverage
- Introduction of HRAs was largely an attempt by employers to move to a "defined contribution" health plan, like 401(k)'s did in retirement plan arena, in order to be able to decouple employer's financial commitment to employee health coverage from medical price inflation, which typically year-to-year significantly outpaces general consumer price and wage inflation

Enter the ACA (a history lesson from near modern times)

- Politically polarizing and subject to legal and political uncertainties during the entire decade since its enactment in 2010, the ACA is now on firmer political and legal footing; it seems here to stay
- Among other things, the ACA effectively forced employers with 50 or more full-time employees (so-called "Applicable Large Employers, or "ALEs") to provide health plan coverage to at least 95% of their full-time employees, or pay a substantial penalty if they do not
  - An ALE that does not offer minimum essential coverage ("MEC") to at least 95% of its full-time employees must pay a 2021 penalty of $2,700 per full-time employee, including for any to whom it does offer MEC
  - An ALE that offers MEC to 95% or more of its full-time employees must still pay a 2021 penalty of $4,060 for each full-time employee for whom the offer of coverage did not provide minimum value ("MV') or for which the offer was "unaffordable," if the employee declines coverage and obtains subsidized exchange coverage
- An employee's offer of employer coverage is "unaffordable" in 2021 if the amount the employee must pay (i.e., the portion of the premium not paid by the employer, and typically paid by the employee through pre-tax contributions under a §125 "cafeteria" plan) for the employee's own "self-only" coverage under the lowest cost option available to the employee providing MV exceeds 9.83% of the employee's W-2 pay, or a comparable amount under an alternative safe harbor

Enter the ACA (a history lesson from near modern times) (cont'd)

- At the same time as it introduced new mandates for employer coverage in the 50 and over employer market, the ACA created a robust, transparent, easily accessible, and secure market for individual and family (hereinafter, "individual") health insurance coverage, requiring
  - Guaranteed issue and community rated premiums (i.e., no medical underwriting)
  - No exclusion of pre-existing conditions
  - Mandated coverage of essential health benefits
  - Online policy selection and purchasing using easily accessible tabular comparisons of policy provisions and costs (the internet helped here also, of course, but it got a boost from the ACA)
  - Low administrative and sales costs
- These reforms of the private health insurance market affected both the federal and state exchanges mandated by the ACA and the off-exchange private health insurance market

The ACA Meets HRAs – ACA Knocks Out HRAs in the First Matchup

- Many small and medium-sized ALEs, faced with the requirement to confront health insurance for all of their full-time workforce for the first time, and given the fact that the employer mandate amounts were, for many, significantly less than the cost of health insurance, might have been tempted to meet the requirements of the recently enacted ACA by funding HRAs and allowing their employees to buy their own coverage in Rev. Rul. 61-146 arrangements, on the exchanges or in the private market
- But after some initial uncertainty, the IRS, DOL, and CMS (the "Tri-Agencies) in 2013 published guidance that essentially outlawed an employer's use of a Rev. Rul. 61-146 arrangement after the enactment of the ACA, for all or any subset of employees
  - The Tri-Agencies said that in the case of a Rev. Rul. 61-146 arrangement, whether offered directly or wrapped in an HRA, the employer "health plan" that would need to comply with the ACA's new mandates (e.g., no annual or lifetime caps on benefits) was the arrangement or HRA itself, not the combination of the HRA and the individual insurance policy that might be purchased using contributions made under the arrangement or to the HRA
  - This would result in the arrangement's or HRA's generating penalties for the employer offering it of $100 per day per employee
- HRA's that were "integrated" with traditional employer group health plans were allowed to continue

The ACA Meets HRAs – ACA Knocks Out HRAs in the First Matchup (cont'd)

- Why did the Tri-Agencies block the use of Rev. Rul. 61-146 arrangements in this manner?
  - If left to their own devices, employers that had traditional group health plans might keep them for most of their employees, but tried to push off the worst health risk in their employee populations into Rev. Rul. 61-146 arrangements, e.g. by creating very generous HRA's for certain classes of employees
    - Aka "risk dumping" into the federal and state exchanges
    - Would drive up premiums on the exchanges, which were already high, undermining the success of the ACA
  - Employers that were already contributing towards their employees' health coverage more than the ACA mandated amounts might see the Rev. Rul. 61-146/HRA strategy as a way to reduce their financial contribution towards their employees' coverage
    - President Obama had promised that "If you like the plan you've got, you can keep it"

Brief Detour – QSEHRAs

- At the end of 2016, Congress revived the use of HRAs to purchase individual health insurance policies for small employers by enacting rules for "QSEHRAs"
  - Available only to non-ALEs (i.e., fewer than 50 full-time employees; not subject to ACA employer mandate)
  - Must be employer's only health plan (i.e., owners and key employees cannot have fully insured carve-out)
  - All full-time employees 25 years old or older must be covered after 90 days on the same terms
  - Statutory limits on employer contribution amounts
    - $4,950 for self-only coverage (indexed for inflation; $5,300 for 2021)
    - $10,000 (indexed for inflation; $10,700 for 2021) for family coverage
- Still in effect; can be good solution for non-ALE employer that wants to help all of its full-time workforce to have health coverage and has difficulty finding affordable small group coverage
- See IRS Notice 2017-67 for comprehensive discussion of QSEHRA rules
- If you are a small employer and think that a QSEHRA might be for you, just Google the term
  - You will find several TPA/brokers competing online ready to help you with comprehensive, "turnkey" offerings

The ACA Meets HRAs – Rematch and Possible Revival

- After Donald Trump's election as President in 2016, protecting the ACA and the federal and state exchanges were no longer a priority
- While pursuing an unsuccessful attempt to repeal the ACA in Congress, the Trump Administration also initiated several regulatory initiatives that it thought could act as free-market alternatives to lower the cost of healthcare
  - Expansion of permissible short-term limited duration insurance (STLDI)
  - Association health plans
  - Expanded use of HRA's
- It is ironic to note that the initiative to expand HRA's (articulated in Executive Order 13813) ended up potentially doing that (i.e., the ICHRA regulations that we will now turn to), but in a way that integrates HRA's with the ACA and relies on the reformed market for private health insurance brought about by the ACA

The ACA Meets HRAs – Rematch and Possible Revival (Cont'd)

- After comprehensive proposed regulations in 2018, the Tri-Agencies published final ICHRA regulations in 2019 that made ICHRA's available beginning in 2020
- The heart of the ICHRA scheme is that the employer makes a contribution to an HRA for its employees, the employees may also contribute to the HRA, and the employee must use some or all of the contributions to the HRA to purchase ACA-compliant individual health insurance on an exchange or in the private health insurance market
- If the employer's contributions to the HRA meet the ACA employer mandate requirements, the employer may satisfy the ACA employer mandate using the ICHRA
- In order to prevent employers from using ICHRAs to dump risk into the exchanges, as well as to avoid discrimination among employee groups that might create a two-tier employer health coverage regime, a complex set of requirements is put in place under the regulations governing the employer's determination of which employee groups will be provided ICHRAs vs. traditional group health plan coverage

Which Employers Can Sponsor ICHRAs?

- Any U.S. Employer can sponsor an ICHRA for some or all of its employees
  - There are no size or any other requirements
  - Employers with 2 employees or 1,000's or 10,000's can use
  - Open to for-profit employers, nonprofits, and state and local governments

How Are ICHRAs Structured?

- Like any other ERISA-covered employee benefit plan, the employer must have a plan document
  - However, the ICHRA plan document will be short
    - Employee eligibility requirements
    - Employer contribution requirements
    - Requirement that employee must acquire individual health insurance in order to access contributions
  - Will not contain any of the typical group health plan rules
    - ~~Covered expenses~~
    - ~~In- and out-of-network benefits and provider rules~~
    - ~~Benefit exclusions~~
    - ~~Deductibles and Co-pays~~
    - ~~Pre-certification requirements~~
  - All of the typical group health plan provisions will be contained in the employees' individual policies, and the employer will not be concerned with those
    - Will differ among employees, according to their needs, preferences, and budgets
  - The HRA accounts that are a part of the ICHRA are notional, so there is no trust; like a Section 125 "cafeteria plan" in this respect

Employer Has Manageable Requirement to Verify Employees' Individual Insurance Purchases

- Employer can accept employee's attestation that has coverage
- Alternatively, employee can present proof of acquisition of coverage, e.g. a document from insurer or a screen print showing acquisition of exchange coverage
- If employee loses individual coverage, e.g. because stops paying premiums, employer must stop its contributions to HRA

Individual Health Insurance Attested to by Employee Must Meet Minimum Requirements

- The coverage must constitute "MEC" (minimum essential coverage)
- Cannot be STLDI (short-term limited duration insurance)
- The MEC requirement does not set a high bar, but it does not need to, because, on account of the ACA, all individual health insurance currently sold in the U.S., other than STLDI, must meet substantial quality requirements
  - Coverage of essential health benefits (EHB's)
  - Minimum Value (MV)
  - First dollar coverage of preventive services
  - Prohibition of annual or lifetime caps
  - No preexisting condition exclusions
  - And of course, all ICHRA-covered employees can acquire this coverage, because all polices are guaranteed issue, subject only to open enrollment rules
- Medicare-eligible employees can use ICHRA contributions to pay Medicare premiums, which would be a great advantage to "working elderly" employees who often have subsidized employer coverage that is redundant (and primary) to the Medicare coverage they have or could enroll in
  - Unfortunately, "Medicare eligible employees" is not one of the permitted ICHRA classes, as discussed in later slides, so this benefit would just be a happy byproduct of a situation in which Medicare eligible employees were included in a class of employees that employer wanted to cover with an ICHRA for an independent reason

Does the Employer Have to Make All of the Contributions to the ICHRA, or Can the Employee Also Make Pre-Tax Contributions Through a Section 125 Cafeteria Plan?

- There is no minimum or maximum amount that the employer must contribute
  - Employer contributions for employees must be uniform and nondiscriminatory, as explained in detail in a later slide
  - Employers will likely want to contribute enough to make the coverage affordable in order to avoid ACA penalties, also as explained in detail below
- Employees may make their own pre-tax contributions through a Section 125 “cafeteria plan,” but if they do so the contributions must be used for private market insurance, not to acquire a policy on a federal or state exchange (IRC §125(f)(3)(A))
- Employees may of course supplement HRA using personal, after-tax funds to acquire coverage

Employer Contribution Uniformity/ Nondiscrimination Requirements

- Employer contributions must meet uniformity requirements, but some variation is permitted
  - If employer has multiple permitted "classes" of employees covered by ICHRA, it can vary the amount contributed for each separate class
    - The ICHRA permitted classes of employees will be detailed in a later slide
    - But, for example, an employer could make one uniform level of ICHRA contribution for full-time employees, and a lower level for part-time employees, if it extended ICHRA coverage to part-time employees

Employer Contribution Uniformity/ Nondiscrimination Requirements (cont'd)

- Within a particular class of employees covered by ICHRA, employer can vary employer contribution level uniformly based on family size
- Also within a particular class of employees, and in addition to differentiating based on family size, an employer may vary contributions based on age
  - Employer contributions for oldest employees within class cannot exceed three times the amount for youngest, same as rule for exchange policies under ACA
    - Contributing higher amounts for older employees would expose what is often a hidden subsidy in conventional employer group health plans, flowing from younger to older employees
    - Employer is not required to contribute higher amounts for older employees, however; could contribute flat amount for all ages without violating ADEA, even though individual policies purchased by employees will be more expensive for older employees, on or off exchange, or at least the EEOC has opined to that effect (EEOC Op. 1/7/2021)

Can Employer Have an ICHRA for Some Employees and a Traditional Group Health Plan for Others?

- Yes, but see later slides for “class” requirements
- Also, employers may not offer employees a choice between ICHRA or traditional group health coverage

Classes of Employees that Employers May Use to Differentiate Their Health Coverage Offering Between ICHRA and non-ICHRA Coverage, or for Purposes of Varying Contribution Levels

- These are the different ways that an employer may classify its employees
  - Full-time
  - Part-time
  - Salaried
  - Non-salaried/hourly
  - Seasonal
  - Coverage by a particular CBA (not simply all union employees)
  - Employees who have not yet satisfied waiting period for traditional group health plan
  - Nonresident aliens without U.S. source income
  - Employees in a particular health insurance rating area
- Special rules
  - New hires in any class form their own class
  - A temporary staffing company can treat the employees it places with clients (as distinguished from the staffing company's own sales and administrative workforce) as an ICHRA-permitted class

Classes of Employees that Employers May Use to Differentiate Their Health Coverage Offering Between ICHRA and non-ICHRA Coverage, or for Purposes of Varying Contribution Levels (cont'd)

- Note that the enumerated classes are exclusive
  - They can be combined, e.g. you could treat all salaried and all seasonal employees as a single class and offer the same ICHRA to them as their only employer health plan offering (although you could also offer each of them different ICHRAs), but you cannot create additional classes based on the intersection of two classes, e.g. you could not say that all seasonal salaried employees form their own separate class for ICHRA purposes

Minimum Class Size Rules

- In additional to following the enumerated types as explained above, each class of employees covered by an ICHRA must generally meet a minimum class size requirement
  - If the employer has fewer than 100 employees, each class offered an ICHRA must have at least 10 employees
  - If the employer has from 100 to 200 employees, the minimum class size is 10% of the total number of employees, rounded down to nearest whole number (e.g., minimum class size for an employer with 118 employee is 11)
  - If employer has 200 or more employees, minimum class size is 20

Minimum Class Size Rules (cont'd)

- Minimum class size rules have important exceptions
  - If the ICHRA is the employer's only plan, there is no minimum class size, e.g. the 10 employee minimum class size would not preclude an employer with from 2 to 9 employees from having an ICHRA as its only health plan offering
  - A class of employees based on insurance rating area has no minimum class size if the rating area is an entire state or a combination of two or more states
  - The minimum class size requirements do not apply to classes of employees consisting of those who have not satisfied the traditional group health plan's eligibility waiting period or who are new hires

How Does an ICHRA Satisfy the ACA's Employer Mandate?

- Because the ICHRA, at any employer contribution level, is an employer-sponsored health plan, it is MEC and so if offered to 95% or more of the employer's employees, or if part of an offering to 95% of the employer's employees, along with traditional group health plan coverage, will shield the employer from the employer mandate "sledge hammer" penalty (as previously stated, $2,700 per year per employee in 2021 if the employer is under the 95% mark)

How Does an ICHRA Satisfy the ACA's Employer Mandate? (cont'd)

- The way an ICHRA satisfies the "rifle shot" employer mandate penalty ($4,060 in 2021 for each full-time employee for whom the offer of coverage does not provide minimum value ("MV") or for which the offer is "unaffordable," if the employee declines coverage and obtains subsidized exchange coverage) is slightly more complicated
  - Because all individual health insurance sold in the exchanges or private markets, other than STLDI, must provide MV, the ICHRA automatically provides MV
  - However, because the employer is not actually making an MV offering to the employee, you need a reference plan in order to determine whether the amount that the employee must pay to secure his or her own coverage exceeds the threshold (e.g., in 2021, 9.83% of the employee's W-2 pay)
    - Generally, regardless of where the employee actually acquires his or her coverage, or the type of coverage he or she purchases, the ICHRA rules use the lowest cost silver plan available to the employee for the rating area where he or she works as the benchmark for determining affordability
    - Note that this benchmark plan will be more expensive for older employees (up to 3x the cost for youngest employees), so employer will either need to provide higher contributions to ICHRA for older employees, or pay a uniform amount than is higher than it needed to pay to avoid penalties for younger employees
      - EEOC has opined that either approach is OK for ADEA (EEOC Op. 1/7/2021)

What About Compliance With the Self-Insured Health Plan Nondiscrimination Rules of IRC § 105(h)? What About HSA Compatibility?

- New Treas. Reg. § 1.105-11(c)(3)(i)(B)(2) provides that employer contributions to an ICHRA that comply with the ICHRA uniformity rules are nondiscriminatory for purposes of Section 105(h)
- Whether an employee who purchases individual coverage through an ICHRA has a high deductible health plan (HDHP) so as to qualify to make HSA contributions in any year is determined by the deductible and out-of-pocket maximum under the underlying health insurance policy purchased with the ICHRA funds, so ICHRAs are compatible with HSAs, and may even enable employees to have HSAs if the employer's traditional group health plan did not have an HDHP option

How Does COBRA Apply to ICHRAs?

- Barely; the ICHRA is an employer-sponsored health plan, and so subject to COBRA, but the "plan" for COBRA purposes is the HRA, i.e., the system for contributing money to the HRA and using it to pay premiums for individual coverage, not the underlying individual health insurance
- So qualified beneficiaries who have COBRA-qualifying events must be permitted to continue to use their HRA for the COBRA period (e.g., 18 or 36 months, or less if they obtain other employer coverage, whether an HRA or a conventional group health plan), but will have to make all their own contributions, plus 2%, so seems unlikely that COBRA will be elected often for ICHRAs
  - The employee's individual coverage previously purchased, wholly or partly, with ICHRA contributions, will not be affected by the qualifying beneficiary's COBRA-qualifying event, and if the qualifying beneficiary can afford to do so, he or she can just keep paying his or her own premiums
  - Only situation where electing COBRA for an ICHRA might be advantageous for employee would be in situation where ICHRA included other health benefits, in addition to premium payment, and the employee had a positive balance in his/her HRA at the time of the COBRA qualifying event

How Does ERISA Apply to ICHRAs?

- As with COBRA, an ICHRA is an employer-sponsored health plan, and so subject to ERISA, but as long as certain requirements are met, the "plan" for ERISA purposes is only the HRA, i.e., the system for the employer's contribution of money to the HRA so that the employee may use it to pay premiums for individual coverage, not the underlying individual health insurance
- The requirements that must be satisfied in order that the employer has no fiduciary or other responsibility for any aspects of the underlying insurance purchased by employees (e.g., disputes over coverage, claims payment, etc.) are:
  - The employee's purchase of the policy through the ICHRA must be voluntary
  - The employer must not select or endorse any particular insurance policy or insurer
  - The only benefit offered under the ICHRA must be the payment of premiums for individual insurance constituting MEC
  - The employer must not receive any consideration (cash or anything else of value) in connection with the employee's selection or retention of the individual insurance policy selected by him or her
  - The employee covered by the ICHRA must receive an annual notice explaining that the individual policy purchased by him or her using the ICHRA is not subject to ERISA

How Does ERISA Apply to ICHRAs? (cont'd)

- The forgoing requirements are quite liberating for the employer
  - In the long term, requiring that the employer have a completely hands-off approach regarding its employees' selection of individual coverage forces the employer to avoid any temptation to help its employees find and manage their coverage, thus producing a great administrative savings for the employer
    - The exchanges and private health insurance market are able to offer employees a much more diverse set of insurance offerings than the employer could, or would be able to advise on, and as time goes on automated policy selection tools should make it possible for employees to select optimal policies without any help from the employer
  - However, in the short-term, one result may be that employers intent on pursuing an ICHRA strategy must stand back and wait for the insurance markets to stand up marketplaces purpose-built to offer individual coverage to employees covered by ICHRAs

How Does ERISA Apply to ICHRAs? (cont'd)

- If the forgoing requirements are met by the employer, the effect on the extent of the employer's involvement in its employees' health plan would be breathtaking in its simplicity. The employer would no longer be involved in:
  - ~~Health plan design~~
  - ~~Coverage disputes~~
  - ~~Claims adjudication~~
  - ~~HIPAA compliance with respect to is health plan~~
  - ~~Complex 5500 reporting requirements,~~ although a very simple 5500 form would still be required for ICHRAs covering 100 or more employees
  - The employer's ~~ERISA litigation exposure~~ with respect to its employee health plan coverage would appear to be all but eliminated

In What Situations Do ICHRAs Seem A Compelling Solution Today?

- Certainly an employer with a traditional group health plan tied to a strong provider network in the locality where most of its employees reside, but that has a small group of employees in a single different rating area, may wish to offer that group an ICHRA, rather than trying to secure a provider network for that small group, or requiring them to routinely use out-of-network benefits
- An employer with a traditional group health plan for its long-term, full-time employees might want to offer part-time and short-service employees an ICHRA to help them pay for their own individual coverage on a tax-favored basis

Might ICHRAs Ever Become the "401(k)" of Employer Group Health Plans?

- If the use and acceptance of ICHRAs could be expanded in the way that 401(k)'s have expanded in the last four decades so as to largely replace traditional defined benefit pension plans in the private, nonunion workforce, there would likely be significant advantages for employers and employees
  - Employers would be spared the substantial administrative and legal resources they now spend on their group health plans
    - These resources are largely duplicative of the resources already expended on employee health coverage by insurers and regulators, so the net effect on the U.S. economy would likely be positive
  - Over time, employees would probably benefit from being in direct contact at all points with their insurers for both coverage acquisition and administration, and would have a much greater range of choice as to coverage
  - Market costs would be more apparent, as hidden subsidies in current group health plans for larger families and older individuals would be exposed
- Employees and state regulators would no longer face the wall of ERISA preemption, and employers would no longer care

Might ICHRAs Ever Become the "401(k)" of Employer Group Health Plans? (cont'd)

- But there are also substantial impediments to widespread expansion of ICHRAs
  - In most cases, the same coverage is cheaper today if acquired through a large employer group health plan instead of on an exchange or the private market
    - Large employers' employee populations are healthier than the general population of individual insureds
      - Obviously, this is somewhat of a chicken and egg situation, since if large employer use of ICHRAs became substantial, it would insert a significant portion of this healthier population segment back into the individual market
    - There may also be some administrative savings for a large employer group vs. a large number of individual policy acquisitions, although that may not really be the case, even today, as individual policy acquisition is accomplished more and more by means of automated online systems

Might ICHRAs Ever Become the "401(k)" of Employer Group Health Plans? (cont'd)

- Employees, employee groups, brokers, insurance representatives, and benefits departments may be resistant to disruptive change
- There are still legislative and regulatory uncertainties
  - The Biden administration has obviously pushed back on many Trump administration health policy initiatives, but not yet on ICHRAs
  - KHN (aka, Kaiser Health News) keeps a very helpful running score for all the various initiatives here: https://khn.org/news/article/trump-health-orders-undone/

Might ICHRAs Ever Become the "401(k)" of Employer Group Health Plans? (cont'd)

- Might some in Congress at some point see ICHRAs as a way to strengthen the healthcare exchanges, e.g. by amending Section 125(f)(3)(A) to permit employees to use funds contributed to ICHRAs on a pre-tax basis to purchase exchange coverage, while simultaneously increasing the amount an employer must contribute to an HRA to make coverage "affordable?"
- Time will tell

More Detail Available

- This presentation is adapted from the author's article "Individual Coverage Health Reimbursement Arrangements: A New Alternative for Employer-Provided Health Coverage" in the January/February 2021 edition of Thompson Reuters Checkpoint Corporate Taxation; interested attendees may contact lbailey@clarkhill.com for a copy of the article.

THANK YOU

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