

EMPLOYMENT, LABOR & BENEFITS LEGAL UPDATE



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Health Care Reform Offers Group Health Plan Sponsors Financial Assistance - Program Opens June 21, 2010

It is understandable that group health plan sponsors are feeling that there is a lot for them to “give” when reviewing the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act. These two laws (“Health Care Reform”) do impose mandates on group health plan sponsors. See our earlier update entitled [“Federal Agencies Issue Important Guidance on Health Care Reform’s Extension of Health Coverage to Young Adults”](#) for a discussion of one of these mandates. In some good news for health plan sponsors, there is some “take” in Health Care Reform also, and one opportunity is fast approaching.

ERRP

Part of Health Care Reform is the establishment of the Early Retiree Reinsurance Program (ERRP). ERRP is available to all employment-based group health plan sponsors, public and private. The purpose of the reinsurance program is to provide reimbursement to participating employment-based health plans for a portion of the cost of providing health insurance coverage to “early retirees.” The idea is to encourage employers to continue such plans until 2014, when the state based exchanges will be fully operational.

Health Care Reform requires that ERRP be established by the Department of Health and Human Services (HHS) by June 21, 2010, and while guidance in the form of an interim final rule has been issued, the actual application process has not yet been announced. Because reimbursements are limited to those group health plan sponsors who apply, and applications are acted upon in the order received, it is anticipated that plan sponsors will be applying immediately upon the opening of the program.

THE HEALTH PLAN MUST BE AN EMPLOYMENT BASED PLAN

The group health plan applying for the program must be an employment-based health plan.

THE PLAN MUST BENEFIT EARLY RETIREES

The plan must benefit “early retirees,” defined as any retiree of the employer who is at least 55 years old and who is not eligible for Medicare coverage. Early retirees cannot be active employees of the employer maintaining the plan. The spouse, surviving spouse, and dependents of an early retiree (regardless of age and/or Medicare eligibility) are also considered “early retirees”

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for purposes of ERRP. While the Health Care Reform law refers to “retirees,” the interim final rule guidance issued by the HHS makes it clear that an employer is allowed to define “retiree” as it sees fit. This would seem to mean that an employer could consider any former employee who is covered under the employer’s group health plan (and meets the age and Medicare coverage requirements) as an “early retiree,” even if such former employee did not satisfy the employer’s requirements for “early retirement,” and even if the former employee is only covered under the employer’s group health plan because of COBRA coverage.

It’s anticipated that most group health plan sponsors that maintain a true “retiree” health program should be able to take advantage of ERRP provided that the other requirements are met. Most such programs do offer coverage to former employees to bridge them to Medicare eligibility, thus satisfying the age and Medicare coverage requirements of ERRP. It is important to remember that spouses and dependents of such early retirees (regardless of age) are considered early retirees for purposes of ERRP, thus increasing the potential for reimbursement.

THE PLAN MUST HAVE PROGRAMS/PROCEDURES TO GENERATE COST SAVINGS FOR CHRONIC AND HIGH-COST CONDITIONS

In order for the plan sponsor to be eligible for ERRP reimbursements, the employment-based health plan must have programs and procedures in place which are intended to generate cost savings for participants with chronic and high-cost conditions. The interim rule defines the term “chronic and high-cost condition” to mean a condition for which \$15,000 or more in health benefit claims are likely to be incurred in a plan year by any one participant. A claim includes all medical, surgical, hospital, and prescription drug expense relating to the chronic and high-cost condition. It is important to note that the plan does not have to have programs and procedures in place to generate cost savings for all chronic conditions in order to be eligible for the reimbursement. Most if not all group health plans employ some type of case management feature which should constitute a program or procedure that is intended to generate cost savings.

The Secretary of the HHS has the authority to audit records of the plan sponsor to determine compliance with the above requirement. Also, the plan sponsor is required to have a written agreement with its health insurer (if any), which requires the insurer to disclose information which the plan sponsor would otherwise be required to turn over to HHS under its audit authority. For self-insured plans, the business associate agreement between the plan and the third party administrator (TPA) will be used to force the TPA to turn over the relevant information to HHS for this purpose.

WHAT REINSURANCE AMOUNTS ARE AVAILABLE

If a valid claim for reimbursement is made, ERRP will reimburse 80% of the portion of the health benefit costs (net of negotiated price concessions with the provider of the health services) attributable to the claims for each early retiree that exceed \$15,000 (the “cost threshold”), but are below \$90,000 (the “cost limit”). The cost threshold and cost limit will be indexed for inflation beginning with plan years beginning on and after October 1, 2011. The focus is not on discreet claims, but rather the cumulative claims incurred by each early retiree during the plan year. The out-of-pocket costs which were paid for by the early retiree are included in determining the amount of claims. This would mean any deductibles and copays paid by the early retiree for example would count toward the cost threshold. Claims must have been incurred in the applicable plan year in order to be eligible for reimbursement (and actually paid, although not necessarily in the same plan year).

The mechanics for determining the amount of reimbursement available for any particular early retiree is as follows. First, determine the cost for health benefits the plan provided (net of negotiated price concessions) within the applicable plan year for each early retiree, and then subtract amounts below the cost threshold (\$15,000) and above the cost limit (\$90,000). 80% of those costs are then eligible for reimbursement by ERRP. All claims

incurred by the particular retiree under all benefit options available to that retiree (e.g major medical, prescription drug), are combined for this purpose. For insured plans, the premium cost (whether paid by the employer or the retiree) is not included in determining the “cost.”

It is important to note that while in order to have access to ERRP, the plan sponsor must certify that the plan has programs and procedures to generate cost savings for chronic and high-cost conditions, the cost threshold and cost limit apply to all claims of the early retiree, not just chronic and high-cost condition claims.

If a plan’s 2010 plan year started before June 1, 2010, claims incurred before that date will count toward the \$15,000 cost threshold and the \$90,000 cost limit. However, those claims prior to June 1, 2010 are not eligible for reimbursement. The example given in the interim rule is a plan year beginning July 1, 2009 and ending June 30, 2010, where the early retiree has claims of \$120,000 from July 1, 2009 through June 1, 2010, and then another \$30,000 in claims during June 2010. The sponsor has met the \$15,000 cost threshold in this example, and therefore 80% of the claims incurred after June 1, 2010 will be eligible for reimbursement.

As to the negotiated price concessions, HHS intends to issue more guidance, since often these adjustments are made long after the claim is incurred and payment is made. The application is anticipated to require that these post point of sale negotiated price concessions be disclosed to HHS.

SUBMISSION OF CLAIMS FOR REIMBURSEMENT

There can be no submission of claims for reimbursement until the employer’s application has been approved. Also, claims for any particular early retiree cannot be submitted until the cost threshold (\$15,000) is met for the year. Of course, claims below the cost threshold must be submitted so that HHS can determine that the cost threshold has been met. Once the cumulative claims for an early retiree have exceeded the \$90,000 cost limit, no more claims should be submitted.

Claims submitted must be based on the amounts actually paid. Documentation of the claims paid by the plan must be submitted (in the form and manner determined by HHS). Prima facie evidence of payment of costs by the early retiree must also be submitted.

The actual process for submitting claims has not yet been announced by HHS, but it is expected that an announcement will be made in the very near future.

RESTRICTION ON USE OF REIMBURSEMENTS BY PLAN SPONSOR

Health Care Reform provides that reimbursements under ERRP be used to lower costs of the plan, including reducing premium costs for the plan sponsor. The interim final rule expands on this to provide that payments can also be used to reduce the sponsor’s health benefit premiums or health benefit costs, or to reduce premium contributions, co-pays, deductibles, coinsurance, or other out-of-pocket costs, for plan participants. Any combination of the permitted uses can also be implemented. Since Health Care Reform does NOT focus on early retiree plan participants when discussing the use of reimbursements, the interim final rule makes it clear that the plan sponsor can use the reimbursements to lower health benefit costs for all participants in the plan, not just early retirees. Using the reimbursements as general revenue for the plan sponsor is strictly prohibited.

It is “expected” that the plan sponsor will use the reimbursement to maintain its level of contribution to the plan. This maintenance of effort requirement is not found in the rules concerning the use of the reimbursements, but rather appears in the list of items the employer must include in the ERRP application (the application must demonstrate “how the sponsor will use the reimbursement to maintain its level of contribution to the applicable plan.”)

THE APPLICATION PROCESS

In order to be eligible for the reinsurance reimbursement, the plan sponsor must first apply for ERRP. One application is required for each plan for which the sponsor seeks reimbursement. Once the plan is certified as being eligible for reimbursement, reimbursements will continue so long as the plan continues to be eligible. Because applications will be reviewed on a first come, first served basis, and the program will be discontinued once HHS determines that the applications already approved will be projected to exhaust the ERRP funds available, it is important for sponsors to submit applications as soon as the program is officially open.

The final application for ERRP has not yet been issued, but a draft application is available at <http://www.hhs.gov/ociio/Documents/application.pdf>. Draft instructions for the application are available at http://www.hhs.gov/ociio/Documents/application_instructions.pdf. According to HHS, the draft application is anticipated to be the final application with the exception of the inclusion of the address where the application should be mailed.

From the draft application it appears that the application will require the employer's EIN, name and address, and contact information. The application will also require the applicant to summarize how the employer intends to use the reimbursement proceeds (discussed above). The application must project the employer's anticipated reimbursement amounts for the first two plan year cycles in the application. All benefit options available to any early retiree must be identified, as well as the programs and procedures that have generated or have the potential to generate cost savings with respect to individuals with chronic and high-cost conditions (discussed above). The employer must also attest that there are fraud, waste and abuse policies and procedures in place under the terms of the health plan. Finally, the employer must sign a plan sponsor agreement which states that if any information submitted turns out to be false or inaccurate, the Secretary of HHS can reopen the application and deny reimbursement.

HHS will terminate the program once applications have been submitted which would be expected to use up the program's \$5 billion in funding, and again it is first come, first served as far as applications go. Recent estimates have found that the \$5 billion in reimbursements will probably be exhausted within the first two years of the program.

ADDITIONAL RECORDKEEPING REQUIREMENTS

The plan sponsor must maintain records relating to its participation in the program, for six years after the expiration of the plan year in which the costs were incurred. Also, the plan sponsor must notify HHS in the event that ownership of the plan sponsor changes (to avoid reimbursement requests by entities that are not legitimate).

Group health plan sponsors with former employees still participating in the sponsor's group health plan (whether traditional "retirees" or not) have an opportunity to be reimbursed for some claims incurred by such individuals and use those reimbursements to reduce costs associated with the coverage (whether the employer's costs, the retirees' costs, or even the active employees' costs). Because of the limited nature of ERRP, sponsors who could benefit from these reimbursements are encouraged to be ready to submit an application once the program is open.

Ruder Ware is ready to assist group health plan sponsors with the ERRP application process. Please contact Mary Ellen Schill at meschill@ruderware.com or (715) 845-4336 for assistance. 💎

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