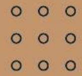

Stay compliant

Welcome to the UBA Partner Firm exclusive quarterly newsletter delivering insights about employee benefits and labor law compliance.

Benefits & Employment Briefing | Fall 2022

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IRS Announces 2023 ACA Affordability Safe Harbor

The Affordable Care Act (ACA) requires applicable large employers (ALEs) to make an offer of group health coverage to at least 95% of its full-time (i.e., regularly working at least 30 hours per week) employees or pay a shared responsibility penalty assessed by the IRS if at least one employee gets a premium tax credit (PTC) for Marketplace coverage. The ACA also mandates that ALEs who offer group health coverage must make sure the coverage is affordable and provides minimum value or pay a separate shared responsibility penalty for any individual who receives a PTC for Marketplace coverage.

The ACA provides that if the lowest-cost single only coverage offered to an employee does not exceed a threshold percentage of his or her household income, the Internal Revenue Service (IRS) will deem the coverage affordable. The ACA originally set the affordability percentage at 9.5%, but the IRS adjusts the amount based on medical inflation annually. The IRS recently announced that the 2023 ACA affordability threshold will decrease to 9.12%.

Historically, the affordability threshold has risen more often than it has fallen. The significant drop in the threshold for 2022 means employers must cautiously set the cost for 2023 coverage at a low enough level to avoid more employees triggering a potential shared responsibility penalty. The new threshold applies for plan years (including non-calendar year plans) that start on or after January 1, 2023.

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Plan Sponsors Should Prepare for Medical Loss Ratio Rebates in 2022

The Kaiser Family Foundation recently reviewed industry data submitted by insurance carriers to state regulators and has forecast that employers who sponsor fully insured group health plans should expect to receive historically large medical loss ratio (MLR) rebates starting in September. The total rebate amounts are not expected to be quite as large as the past two years, but insurance carriers are projected to issue approximately $275 million in rebates to small group policyholders, and $168 million to large group policyholders. Plan sponsors should be prepared to handle any MLR rebates according to applicable rules.

Background

The ACA requires health insurers to spend at least a certain percentage of the total premium they collect on medical care. This minimum required percentage, known as the MLR, is 80% for small group insurers and 85% for insurers in the large group market. The MLR rule does not apply to self-funded health plans or stop-loss insurance policies.

The ACA dictates that insurers not meeting the MLR standard must refund the excess premiums to their policyholders. Insurers can either offer rebates as cash refunds or as a credit on the employer's premium statement. Employers that receive a rebate must handle the funds appropriately, based on whether the Employee Retirement Income Security Act of 1974 (ERISA) applies to the plan.

ERISA Plans

Generally, group health plans sponsored by employers are ERISA plans (except for governmental entities and certain churches). Therefore, the U.S. Department of Labor (DOL) applies ERISA's general fiduciary duty and plan asset rules to MLR rebates, stating that a plan sponsor must use any rebate amount that qualifies as an ERISA plan asset for the exclusive benefit of the plan's participants.

When is an MLR rebate a plan asset?

Typically, a plan document will include clear language regarding MLR rebates, and it is presumed that the plan sponsor will follow the plan's written terms. Absent clear plan language regarding how to allocate an MLR rebate, DOL guidance states that classifying the rebate as a plan asset requires assessing who is the policyholder and the source of premium payments. If the plan or its trust is the policyholder, the policy is a plan asset; so, the entire rebate must be treated as a plan asset.

In most cases, however, the employer is the policyholder. Therefore, the portion of the rebate that must be treated as a plan asset depends on who paid the insurance premiums, as follows:

- If premiums were paid entirely out of trust assets, the entire rebate is a plan asset.
- If the employer paid 100% of the premiums, the rebate is not a plan asset, and the employer can retain the entire rebate amount.
- If participants paid 100% of the premiums, the entire rebate amount is a plan asset.

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- If the premiums were paid partly by the employer and partly by participants, the percentage of the rebate equal to the percentage of the cost paid by participants is a plan asset.

In any case, under the DOL's guidance, employers are generally prohibited from retaining a rebate amount greater than the total amount of premiums and other plan expenses paid by the employer.

How can an employer use the rebate?

After deciding whether all or just a portion of an MLR rebate is a plan asset, an employer must decide how to use the rebate for the exclusive benefit of plan participants as well as whether prior year participants will share in the rebate, or it will be limited only to current participants. The DOL has approved the following methods for this determination:

- Distributed to participants under a reasonable, fair, and objective method. If the employer finds that the cost of distributing shares to former participants approximates the amount of the proceeds, the fiduciary may decide to limit rebates to current participants.
- If distributing payments to participants is not cost-effective because the amounts are small or would have negative tax effects on affected participants, the employer may utilize the rebate for other permissible plan purposes (e.g., apply the rebate toward future participant premium payments or toward benefit enhancements).

If a plan provides benefits under multiple policies, the employer must allocate the rebate for each relevant policy only to participants who were covered by that policy. The DOL has offered that using a rebate generated by one plan to benefit another plan's participants would be a breach of fiduciary duty.

When must an employer dispose of an MLR rebate?

ERISA generally imposes a requirement that plan assets must be held in trust. However, DOL guidance provides that MLR rebate amounts that are plan assets do not have to be held in a trust provided that an employer disposes of the funds within three months of receipt. Further, directing an insurer to apply the rebate toward future participant premium payments or toward benefit enhancements adopted by the plan sponsor will avoid the need for a trust. Employers going this route should work closely with their issuers to properly handle MLR rebates.

Tax Treatment of Benefits

The Internal Revenue Service (IRS) has issued FAQs to explain the tax treatment of MLR rebates. In general, a cash refund to an employee would create a taxable event unless the worker had previously contributed the funds on a post-tax basis. For this reason, employers should avoid issuing cash refunds to participants except upon advice of legal counsel.

Governmental Entities and Churches

The MLR regulations specify how non-federal governmental and church plans must handle MLR rebates. Church plans will need to confirm at the insurer's request that they will follow the rules set forth above. If an

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insurer does not receive confirmation, it will distribute the entire rebate amount directly to the previous year's participants rather than to the policyholder.

For non-federal governmental plans, the portion of an MLR rebate attributable to employee contributions must benefit only current participants. Such employers must use the rebate either to reduce employee premium contributions in the next plan year or distribute the rebate amount as a cash refund to current participants.

Final Notes

Employers should maintain records to detail how they determined the MLR rebate payable to eligible plan participants and exactly who benefitted. Finally, employers should seek advice from outside counsel to help determine how to properly use any MLR rebate.

Employers Should Prepare to Issue Medicare Part D Notices

October 15 is just around the corner, so employers should already be planning to meet their annual Medicare Part D notice obligations. Under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA), employers that offer prescription drug coverage must notify Medicare-eligible individuals as to whether their prescription drug coverage is "creditable" or "non-creditable" for the upcoming calendar year. The Centers for Medicare and Medicaid Services (CMS) defines "creditable coverage" as prescription drug coverage that is actuarially equal to or greater than the prescription drug coverage provided under Medicare Part D.

Knowing a prescription drug plan's creditable status allows an individual to make an informed choice whether to enroll in a Medicare Part D prescription drug plan. Moreover, an individual who does not have creditable prescription drug coverage and who does not elect Medicare Part D before the end of his or her initial Medicare enrollment period must pay higher premiums if they enroll later in Medicare Part D. So, knowing the creditable status of an employer's drug coverage will help avoid costly penalties.

Disclosure to Individuals

For Medicare-eligible individuals to make informed and timely enrollment decisions, group health plan sponsors must disclose the status (creditable or non-creditable) of the plan's prescription drug coverage before the annual Medicare enrollment period which begins October 15 each year.

Medicare Part D notices must be provided to all Medicare Part D eligible individuals who are covered under or who apply for a plan's prescription drug coverage. The Medicare Part D notice is utilized to inform individuals about the plan's prescription drug coverage status for the next calendar year.

A "Medicare Part D eligible individual" is an individual who:

- is entitled to Medicare Part A or enrolled in Part B as of the effective date of coverage under the Part D plan, and
- resides in the service area of a prescription drug plan or Medicare Advantage plan that provides prescription drug coverage.

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Medicare Part D eligible individuals could include active employees, disabled employees, COBRA participants, retirees, as well as their covered spouses and dependents. Because employers usually do not know whether dependents are Medicare-eligible, the safest course is to distribute notices to all employees who are eligible to participate in a plan.

Notice Content

CMS has issued Model Part D notices for plan sponsors to disclose whether their plans' prescription drug coverage is creditable. Plans may use their own notices, but those substitute notices must include:

- A statement that the plan sponsor has determined that its prescription drug coverage is creditable or not creditable
- An explanation of creditable or non-creditable coverage
- A description of the beneficiary's right to a notice
- An explanation of the coverage options available to beneficiaries
- An explanation of why creditable coverage is important and advice that, even though coverage is creditable, an individual could be subject to higher Part D premiums if the individual subsequently has a break in creditable coverage of 63 continuous days or longer before enrolling in a Part D plan

Part D Notice Delivery

CMS does not require an employer to send the notice separately. However, if an employer chooses to include it with other plan information, it must be placed on the first page or, alternatively, prominently referenced in at least 14-point font in a separate box, bolded or offset on the first page.

In most cases, one Medicare Part D notice to the covered Medicare beneficiary and all of their Medicare eligible dependents will suffice. However, if a plan sponsor knows that a Medicare-eligible spouse or dependent lives at a different address, the rules require a separate notice to the Medicare-eligible spouse or dependent at that address.

Electronic Delivery

CMS allows health plan sponsors to make electronic disclosures by following U.S. Department of Labor (DOL) electronic disclosure rules. Thus, if participants have access to an employer's email system as part of their regular work duties, the employer can provide the notices electronically if certain other conditions are met. The rules for providing health plan notices and other documents electronically to employees without regular access to the employer's email system are more complicated. Consequently, most plan sponsors mail required notices to such employees.

Notice Timing

Employers must provide Medicare Part D notices:

- before October 15 each year
- prior to an individual's initial enrollment period for Part D
- in advance of the effective date of coverage for any Medicare-eligible individual who joins the plan

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- whenever a plan's prescription drug coverage ends or changes so that it ceases to be, or becomes, creditable
- upon a beneficiary's request

Many plan sponsors also include a Medicare Part D notice in new hire packets and with other plan enrollment materials. This helps to be certain that Medicare-eligible individuals get timely notice as to their prescription drug coverage's creditable status.

What's Next?

Employers should determine whether their health plans' prescription drug coverage is creditable for the upcoming calendar year and distribute Medicare Part D notices before October 15. Employers that distribute open enrollment materials prior to October 15 can include Medicare Part D notices with other required health plan notices. Employers with open enrollment starting October 15 or later will need to send a separate Medicare Part D notice before October 15.

IRS Releases Draft ACA Reporting Forms

The Internal Revenue Service (IRS) recently provided a first look at draft versions of Forms 1094-B and 1095-B and Forms 1094-C and 1095-C for employers to file in 2023 to report offers of coverage for 2022. Self-funded plan sponsors who are not applicable large employers (ALEs) will use Forms 1094-B and 1095-B (when finalized), whereas ALEs will use Forms 1094-C and 1095-C (when finalized). The draft forms contain no material additions this year, but the instructions have eliminated references to individual mandate penalties.

Employers should begin to familiarize themselves with the 2022 forms, especially if they are new to ACA reporting requirements. It is particularly critical for employers to understand the forms this year since the IRS continues to be less lenient with basic reporting errors. Confusion regarding the forms could lead to a simple and avoidable mistake creating costly consequences.

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