Compliance Recap | September 2025

Oct. 5, 2025

September saw employers preparing for the distribution of potential MLR rebates, while New York City readies for an expansion to its Earned Safe and Sick Leave Act. Applicable employers prepare to comply with the Gag Clause Attestation due in December. Sponsors of dependent care FSAs considered how the higher limit in 2026 may impact the ability to pass non-discrimination testing. California group health plans lock in the federal preventive care and vaccine recommendations that were in effect as of January 1, 2025.

Understanding and Distributing MLR Rebates

Insurance carriers must issue Medical Loss Ratio (MLR) rebates by September 30 when too much of the prior year's premiums went to administrative costs or profit instead of claims and quality improvements. Employers who received MLR rebate checks will need to determine how much—if any—belongs to the plan and its participants.

How a rebate is treated depends on who paid the premiums:

- If the employer paid the full premium, the rebate is generally the employer's to manage.
- If employees contributed to premiums—even partially—the corresponding percentage of the rebate is considered a plan asset governed by ERISA. Those funds must be used solely for the benefit of participants.

To determine the plan asset portion, employers should:

1. Calculate the percentage of total premiums paid by employees (including COBRA, payroll deductions, and premiums paid under FMLA).
2. Apply that percentage to the rebate amount.

If multiple plans are covered under the same insurer, rebates must be allocated proportionally unless the carrier breaks them out by plan option.

How Employers Can Use the Plan's Share

When a portion of the rebate is considered a plan asset, there are two compliant options:

1. Enhance plan benefits.
2. Return funds to participants—either as a cash refund or a premium credit ("premium holiday").

Most employers favor returning rebates to participants because benefit enhancements are difficult to implement with small or inconsistent rebate amounts.

Tax treatment depends on how participants originally paid their share:

- If premiums are paid on a pre-tax basis, rebate amounts are taxable income.
- If premiums are paid after tax, rebates are not taxable.

Timing

Employers should distribute any plan asset portion within 90 days of receiving the rebate.

Employers can generally limit distributions to current participants in the year the rebate is received. While former enrollees may technically be considered, the Department of Labor acknowledges it is usually impractical when the per-person amount is minimal.

Rebates can be divided evenly among eligible participants, if the method is reasonable and impartial.

Employer Considerations

Carriers must notify participants that a rebate was issued to the employer, but the notice does not specify amounts or distribution details. Employers are encouraged—though not required—to communicate how and whether participants will receive any share. Setting expectations is helpful, as per-person amounts tend to be small.

Carriers are required to distribute MLR payments each year no later than September 30.

If your organization receives a rebate, determine how much of the rebate qualifies as plan assets and decide how those funds will be allocated. Because these assets may fall under ERISA rules, employers must follow specific guidelines. In most situations, any plan-related portion of the rebate must be disbursed within 90 days of receipt.

New York City Expands Safe and Sick Time Act

The New York City Council has approved amendments to the Earned Safe and Sick Time Act (ESSTA) that will take effect 120 days after the mayor signs the amendments. These updates expand employee leave rights, streamline overlapping laws, and introduce new obligations for employers.

Highlights of the Changes

- More Covered Uses.
  Employees will be able to use leave for a wider range of situations, including declared public disasters, government shelter-in-place orders, workplace violence, caregiving for children or dependents, and legal or housing-related proceedings.
- New Unpaid Leave Bank.
  Employers must provide a separate 32-hour bank of unpaid leave each year, available for use immediately upon hire. Unused hours will not carry over.
- Paid Prenatal Leave.
  Employees will be entitled to 20 hours of paid prenatal leave within a 52-week period, aligning with new state requirements effective January 1, 2025.
- End of Most TSCA Rules.
  The Temporary Schedule Change Act will largely fold into the ESSTA. While employees can still request temporary schedule changes, employers will no longer be required to approve them—but retaliation protections remain.

Employer Considerations

- Update your safe and sick time policies to align with the new requirements.
- Establish systems for administering the 32-hour unpaid leave bank.
- Train HR and managers on the expanded rules and employee protections.
- Watch for updated employee-rights notices from New York City and be prepared to share them with staff.

Prepare for Gag Clause Prohibition Attestations

Under the Consolidated Appropriations Act of 2021 (CAA), group health plans and insurers may not enter into agreements with providers, third-party administrators (TPAs), or other vendors that restrict access to cost or quality-of-care information—often referred to as "gag clauses."

To demonstrate compliance, plans must file an annual attestation with the Centers for Medicare and Medicaid Services (CMS) by December 31, 2025.

For 2025, CMS has not announced any changes to the submission process or requirements.

The rule applies broadly to:

- Fully insured and self-funded plans
- Grandfathered and grandmothered plans
- ERISA and non-ERISA plans

It does not apply to excepted benefits, retiree-only plans, or account-based arrangements such as HRAs or FSAs.

Employer Considerations

- Confirm that your plan documents and agreements do not contain gag clauses.
- Coordinate with your carrier, TPA, or consultant to ensure timely completion of the attestation.

Nondiscrimination Testing and the New Dependent Care FSA Contribution Limit

Beginning in January 2026, the maximum contribution to a Dependent Care Flexible Spending Account (DCFSA) will increase from $5,000 to $7,500 ($3,750 for married employees filing separately). This expanded limit offers employees greater tax savings for child and adult care expenses, but it also raises the stakes for employers when it comes to nondiscrimination testing (NDT).

Why This Matters

NDT rules haven't changed, and with higher contribution limits, plans may be more likely to fail the 55% Average Benefits Test, which requires that non-highly compensated employees (NHCEs) receive at least 55% of the benefits received by highly compensated employees (HCEs). Other tests, such as the More-Than-5% Owner Concentration Test and Eligibility/Benefits Tests, also continue to apply.

Employer Consideration

To reduce compliance risk and maintain plan balance, consider these proactive strategies.

- Encourage NHCE participation through targeted communication on the value of the DCFSA.
- Offer modest incentives for NHCEs, such as a small employer match.
- Set lower election caps for HCEs while allowing NHCEs to take advantage of the full IRS maximum.
- Run interim testing to catch potential issues before year-end.
- Customize maximums by employee group to promote equitable utilization.

While the higher contribution limit is a win for employees, it also makes careful planning and monitoring essential for employers. Reviewing plan design, updating documents where needed, and engaging in early testing can help ensure your DCFSA remains compliant while maximizing the benefit for your workforce.

California Enacts AB 144: New Standards for Preventive Health Coverage

On September 17, 2025, Governor Gavin Newsom signed AB 144, a new health budget law that reshapes how preventive services and immunizations are regulated for fully insured health plans in California. The legislation essentially locks in the federal preventive care and vaccine recommendations that were in effect as of January 1, 2025, while granting the state new authority to modify and supplement those guidelines going forward.

Under the law, the California Department of Public Health (CDPH) will oversee preventive care standards for fully insured health plans. CDPH may adopt additional evidence-based recommendations from respected medical organizations and will publish any updates or modifications, to become effective upon publication.

For employers, AB 144 ensures that non-grandfathered fully insured health plans must continue to cover a wide range of preventive services without cost sharing. These include all services, recommended immunizations, and screenings and preventive care supported by the Health Resources and Services Administration for women, infants, children, and adolescents, in effect on January 1, 2025. In addition, coverage without cost sharing will extend to immunizations recommended by the Advisory Committee on Immunization Practices for COVID-19 and for other diseases tied to any public health emergency declared by the California Governor.

The law extends liability protections for providers administering vaccines and other immunizations required by state law through January 1, 2030.

Employer Consideration

Looking ahead, AB 144 could result in California preventive care requirements diverging from federal rules or those of other states. This means employers with California-based employees should carefully review their health plan offerings to ensure compliance, stay alert to updates published by the CDPH, and prepare for potential differences in preventive care coverage across states.

Question of the Month

Q. The birth of a child is a qualifying life event, allowing an employee to change plans mid-year. Can an employee still change plans if they don't add the child to the medical plan?

A. The birth of a child is not only a qualifying life event, but it is a HIPAA special enrollment event. This means the employee has the right to change benefit options regardless of whether the employee adds the new child to the medical plan.

Answers to the Question of the Week are provided by Kutak Rock.