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News & Types: Employment, Labor & Benefits Update

Insurance Premium Rebates, Can The Company Keep The Money?

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Practices: Employment, Labor & Benefits

Maybe. Recently, several clients have received large premium rebate checks from their group health insurance company and have asked for guidance on the proper use of these funds. First, as previously mentioned in this forum, the Patient Protection and Affordable Care Act ("PPACA") added Section 2718 to the Public Health Services Act ("PHSA"). This section requires health insurance companies to meet specific medical loss ratios (80% for employers with less than 100 employees and 85% for employers with more than 100 lives). If an insurance company does not meet the stated loss ratios, it is required to rebate part of the premium received.

As a result of this continuing healthcare reform mandate, we have summarized the basic analysis necessary to determine if an employer can keep the premium rebate in whole or in part:

1. Plan Assets: The first step is to determine who owns the rebate. In accordance with the DOL's guidance (Technical Release 2011-04), the portion of the rebate that is attributable to employee contributions is considered a plan asset. Therefore, if employees contributed to the cost of the group medical insurance plan, they are entitled a percentage of the rebate equal to the cost paid by the employees. If the employer paid the entire cost, then no part of the rebate would be attributable to employee contributions permitting the employer to retain the full rebate.
2. Allocating the Rebate: Secondly, the DOL has stated that an allocation of the rebate does not fail to be impartial or "solely in the interest of participants" merely because it does not reflect the activity of plan participants. As a result, in deciding on an allocation method, companies can weigh the costs to the plan and the ultimate plan benefit as well as the competing interests of participants or classes of participants provided such method is reasonable, fair and objective. For example, if the company determines that the cost of distributing the rebate to former participants approximates the amount of the rebate, the DOL concludes that a company may allocate the proceeds only to current participants on a reasonable, fair and objective method. More directly, if distributing the payments to any participants is not cost effective (payments are of de minimis amounts or would give rise to tax consequences to participants or the plan), companies may consider utilizing the rebate for other permissible purposes including applying the rebate toward future participant premium payments or toward benefit enhancements. The key takeaways are that companies: (1) must actually perform this allocation analysis and (2) should retain a written memorandum of the steps taken to allocate the rebate on a reasonable, fair and objective basis.

3. When Must The Rebate Be Applied? Generally, ERISA plan assets must be held in a trust. However, if the premium rebate is allocated within 3 months of receipt, companies are permitted to rely on an exemption to the trust requirement. At this time, the DOL has not released any additional guidance that would permit a calendar year plan to retain the rebate until January 1 in order to ease the administrative burden of applying the rebate. Therefore, the premium rebates generally should be allocated no later than early November 2014.

Should you have any questions, please call your relationship attorney.