Overview

Is your company or organization the sponsor of an employment-based group health plan providing coverage to "early retirees?" If so, you may be eligible to receive reimbursement for a significant portion of the early retirees’ claims paid by your plan under a new program established under the provisions of federal health care reform. However, the funding is available on a first-come basis, so you need to treat this as a sprint – not a distance race – for the reimbursement dollars!

Section 1102 of the Patient Protection and Affordable Care Act (the "Act"), which was signed into law on March 23, 2010, established an Early Retirement Reinsurance Program (the "Program") under which reimbursements will be made available to sponsors of participating employment-based group health plans for qualifying medical claims incurred by plan participants who are early retirees. On May 4, 2010, the Department of Health and Human Services ("HHS") issued interim final regulations establishing the Program, which provide much of the detail for the Program’s implementation and administration.

Under the Program, reimbursements are available to sponsors of eligible employment-based group health plans. The reimbursable amount is equal to 80 percent of the claims incurred and paid on behalf of "early retirees" during the plan year that exceed $15,000 but do not exceed $90,000. The Program defines an "early retiree" as an individual who is age 55 or older but is not eligible for coverage under Medicare, and who is not an active employee either of the employer maintaining (or currently contributing to) the plan, or of any employer who has made substantial contributions to fund the plan. The term also includes the early retiree’s spouse, surviving spouse and dependents, if they participate in your plan.

The Program is effective June 1, 2010 and is temporary in nature. The Program will end on the earlier of: (1) the date that the Program has received requests for reimbursements that equal the $5 billion allocated to the Program or (2) January 1, 2014. Therefore, time is of the essence! It is essential to apply as early as possible to have access to the funding available for the reimbursements.

What Should Sponsors Do Now?

In order to participate in the Program, an "employment-based plan" must be certified by the Secretary of HHS (the "Secretary") and the sponsor must submit an application. Because the Program has limited funding and reimbursements will be made on a first-come basis, it is important for sponsors who provide health plan coverage to early retirees to immediately begin planning for the application and certification process, by reviewing their current early retiree benefit structure and implementing the policies and procedures necessary to participate in the Program.
While additional guidance and an application form are expected to be issued by the Secretary in the near future, we already know that as part of the certification process sponsors will need to take the following actions:

1. Determine whether their plan provides "health benefits" to early retirees, as defined in the Program, either on a self-funded or fully-insured basis.
2. Implement cost-saving procedures and programs with respect to chronic and high-cost conditions, as required by the Program, if such programs are not already in place.
3. Enter into all required agreements with the plan’s health insurance issuer and/or administrator (as applicable) which satisfy the Program requirements with regard to the maintenance of records and disclosure of information, data, documents and records to the Secretary, and develop similar procedures for maintenance of records and information disclosures to HHS by the sponsor.
4. Develop policies and procedures to protect against fraud, waste and abuse under the Program.
5. Finally, in order to be certified, plan sponsors must submit an application to the Secretary with respect to each plan for which it wants to receive reimbursements. Applications are processed in the order received.

The timing aspect of the completed application cannot be overemphasized, since applications are processed in the order received by HHS, and incomplete applications will be rejected, requiring a new application and relegating the sponsor to the back of the priority line. As part of the application process, the plan sponsor must estimate the amount of claims over a two-year period for which reimbursement will be sought. As these estimates are received, the Secretary will determine when estimated claims will exhaust the $5 billion allotted for the Program. Once that determination is made, the Program will stop accepting applications and the opportunity to participate will be lost.

An application for the Program and additional guidance regarding claims submission is expected to be issued by HHS very soon. Given the temporary nature of the Program and the first-in-line nature of the distribution of funds, you should begin to take action now to determine your plans' qualifications, so that you are ready to complete and submit the Program application as soon as possible after its release by HHS.

If you need more information about this topic or would like assistance with the Program’s application and certification process, please contact a member of our Employee Benefits and Executive Compensation Practice Group found in the listing below.

Attention 401(k) Plan Sponsors: Inquiring Minds (i.e. the IRS) Want to Know

Last week, the Employee Plans Compliance Unit of the Internal Revenue Service ("IRS") sent a letter to 1,200 companies which sponsor 401(k) plans requesting that they complete an on-line "401(k) Compliance Check Questionnaire." Citing prior research done by IRS Employee Plans Examinations, the IRS has characterized 401(k) plans as "by far the most non-compliant plan type in the retirement plan universe." The information the IRS is gathering is comprehensive and includes questions on the following topics – generally for the years 2006, 2007 and 2008.

• Demographics
The IRS says that it is requesting this information so it can develop its resources for "education, outreach, guidance and enforcement efforts." By using this compliance questionnaire rather than its audit enforcement efforts, the IRS can gather more data less expensively and determine if there are areas where 401(k) plans are particularly likely to be experiencing errors in their operation.

If you receive the letter and instructions for completing the questionnaire, you will have ninety days (plus extensions, if necessary) to complete the on-line questionnaire. The scope of the inquiry is extensive and it will take a bit of time to gather all of the requested information. If you do not respond as requested, including providing complete information, the IRS will take some further action, which will likely entail a full scale audit of your 401(k) plan.

Because the responses that you provide to the questionnaire could also trigger an IRS audit of your 401(k) plan, we recommend that you contact us if you receive the questionnaire. We will work with you to determine if the information you are going to provide to the IRS would raise any red flags so as to subject you to a likely audit of your 401(k) plan following your submission of the questionnaire, and determine whether it is necessary to voluntarily correct any operational errors that are discovered prior to submission of the questionnaire. It is important that you discover and correct any operational errors in your 401(k) plan in advance of an audit, so that you remain eligible for the least expensive voluntary compliance programs offered by the IRS. Operational failures discovered during an audit are much more costly to correct.

If you need more information about this topic, please contact a member of our Employee Benefits and Executive Compensation Practice Group.

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