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How Employers Should Handle MLR Rebates

The Affordable Care Act (ACA) requires health insurance issuers to spend a minimum percentage of their premium dollars on medical care and health care quality improvement. This percentage, or medical loss ratio (MLR), is **85 percent** for issuers in the large group market and **80 percent** for issuers in the small and individual group markets. Issuers that do not meet the applicable MLR standard must provide **rebates** to consumers.

The MLR requirements, which are enforced by the Department of Health and Human Services (HHS), became effective for issuers in 2011. Rebates must be paid by August 1 following the end of the MLR reporting year. Thus, issuers are required to pay rebates by **Aug. 1, 2012**, based on their 2011 MLRs.

In a report on 2011 MLR data, HHS noted that the vast majority of individuals are insured by issuers that met or exceeded the applicable MLR standard. However, for 2011, issuers in the large and small group markets are still expected to return \$386 million and \$321 million, respectively, in rebates.

Employers with insured group health plans may receive rebates this summer based on their issuer’s 2011 MLR data. Issuers were required to submit their 2011 MLR reports to HHS by June 1, 2012, so they may already know whether they will be issuing rebates by Aug. 1, 2012. Employers that expect to receive rebates should become familiar with the MLR rebate rules and should decide how they will administer the rebates. For assistance with rebates, please contact your Seubert & Associates representative.

MLR REBATES

An issuer that does not meet its MLR standard must provide a rebate to the policyholder, which is typically the employer that sponsors the plan in the group health plan context. For current enrollees, issuers may provide rebates in the form of a **lump-sum payment** or a **premium credit** (that is, a reduction in the amount of premium owed).

Also, to avoid having to pay a rebate, an issuer may institute a **“premium holiday”** during an MLR reporting year if it finds that its MLR is lower than the required percentage. According to HHS, an issuer may use a premium holiday only if it is permissible under state law. Also, any issuers using premium holidays must meet certain other requirements, such as providing the holiday in a nondiscriminatory manner and refunding premium overpayments.

How an employer should handle any MLR rebate it receives from an issuer depends on the type of group health plan (an ERISA plan, a non-federal governmental group health plan or a non-ERISA, non-governmental plan) and whether the rebate is considered a plan asset.

ERISA Plans

Most, but not all, group health plans are governed by ERISA. Employers with ERISA plans should not assume that they can simply deposit an MLR rebate check into their general business bank account. The Department of Labor (DOL) issued [Technical Release 2011-4](#) to explain how ERISA’s fiduciary duty and plan asset rules apply to MLR rebates. **Any rebate amount that qualifies as a plan asset under ERISA must be used for the exclusive benefit of the plan’s participants and beneficiaries.**

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Is the Rebate a Plan Asset?

According to Technical Release 2011-4, in the absence of specific plan or policy language addressing these types of distributions, whether the rebate will constitute a plan asset depends, in part, on the **identity of the policyholder** and on the **source of premium payments**.

- If the plan or its trust is the policyholder, the policy is an asset of the plan and the entire rebate must be treated as a plan asset.
- If the employer is the policyholder, as is most often the case, the portion of the rebate that must be treated as a plan asset depends on who paid the insurance premiums. For example:
 - If the premiums were paid entirely out of trust assets, the entire rebate amount is a plan asset;
 - **If the employer paid 100 percent of the premiums**, the rebate is not a plan asset and the employer can retain the entire rebate amount;
 - **If participants paid 100 percent of the premiums**, the entire rebate amount is a plan asset; and
 - **If the premiums were paid partly by the employer and partly by the participants**, the percentage of the rebate equal to the percentage of the cost paid by participants is a plan asset.

How Should the Rebate be Used?

Once an employer determines that all or a portion of an MLR rebate is a plan asset, it must decide how to use the rebate for the exclusive benefit of the plan's participants and beneficiaries. DOL Technical Release 2011-04 identifies the following methods for applying the rebates:

- The rebate can be **distributed to participants** under a reasonable, fair and objective allocation method. If the employer finds that the cost of distributing shares of a rebate 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 give rise to tax consequences to the participants, the employer may utilize the rebate for other permissible plan purposes, such as applying the rebate toward **future participant premium payments** or toward **benefit enhancements**.

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

Is There a Time Limit for Using Rebates?

To the extent a rebate qualifies as a plan asset, ERISA would generally require the amount to be held in trust. However, most group health plans receiving rebates do not maintain trusts because their premiums are paid from the employer's general assets (including employee payroll deductions). In Technical Release 2011-4, the DOL provides relief from the trust requirement for premium rebates that are used within **three months** of their receipt.

In addition, directing an issuer to apply the rebate toward future participant premium payments or toward benefit enhancements adopted by the plan sponsor would avoid the need for a trust and, in some circumstances, may be consistent with the employer's fiduciary duties. Employers that decide to take this approach should coordinate with their insurance issuers to establish the process for handling rebates.

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Non-federal Governmental Plans

Group health plans maintained by non-federal government employers (for example, state and local governments) are not governed by ERISA's fiduciary standards. HHS' [interim final regulations](#) on the MLR rules address how rebates for these plans should be handled.

Under these regulations, employers must use the portion of the rebate attributable to the amount of premium paid by employees for the benefit of its employees covered under the policy. This portion of the rebate must be applied to reduce employees' premiums or must be provided to these employees as a cash refund. Under either option, the rebate may be applied to employees enrolled during the year in which the rebate is paid, rather than during the MLR reporting year.

Non-ERISA, Non-governmental Plans

HHS has also addressed rebates for non-governmental group health plans that are not subject to ERISA, such as church plans. Under HHS [final regulations](#), an issuer may make a rebate payment to the policyholder (typically, the employer sponsoring the plan) if it receives the policyholder's written assurance that the rebate will be used for the benefit of current subscribers using one of the options described above for non-federal governmental plans. Without this written assurance, issuers must pay the rebate directly to employees covered under the policy during the MLR reporting year.

TAX TREATMENT OF REBATES

On April 19, 2012, the Internal Revenue Service (IRS) issued a set of [frequently asked questions](#) (FAQs) addressing the tax treatment of MLR rebates. In general, the rebates' tax consequences depend on whether employees paid their premiums on an after-tax or a pre-tax basis.

After-tax Premium Payments

If premiums were paid by employees on an after-tax basis, the rebate will generally not be taxable income to employees and will not be subject to employment taxes. This tax treatment applies if the rebate is paid in cash or if it is applied to reduce current year premiums. However, if an employee deducted the premium payments on his or her prior year taxes, the rebate is taxable to the extent the employee received a tax benefit from the deduction.

Pre-tax Premium Payments

If premiums were paid by employees on a pre-tax basis under a cafeteria plan, the rebate will generally be taxable income to employees in the current year and will be subject to employment taxes. This is the case whether the rebate is paid in cash or is applied to reduce current year premiums. A premium reduction in the current year will reduce the amount that an employee can contribute on a pre-tax basis. Thus, there is a corresponding increase in the employee's taxable salary that is also wages subject to employment taxes.

ADDITIONAL GUIDANCE

A copy of DOL Technical Release 2011-4 is available at: www.dol.gov/ebsa/newsroom/tr11-04.html.

A copy of the IRS' FAQs is available at: www.irs.gov/newsroom/article/0,,id=256167,00.html.

More MLR guidance is available from HHS at: <http://cciio.cms.gov/programs/marketreforms/mlr/index.html>.

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