the Timberland Group
Employee Benefits & Consulting

Timber Alert

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Premium Credits Related to COVID-19 ERISA Fiduciary Rules

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The COVID-19 pandemic has significantly decreased health care utilization, as health care providers and patients have canceled appointments and postponed elective procedures. Because employees are not using their insurance benefits, some group medical, dental and vision carriers are providing employers with a credit against future premiums owed under their insurance contracts.

Employers receiving these premium credits should consider their fiduciary obligations under ERISA when determining how to apply the credits. Any credit amount that qualifies as a plan asset under ERISA must be used for the exclusive benefit of the plan's participants.

Department of Labor (DOL) guidance on medical loss ratio (MLR) rebates generally indicates that employers must share the premium savings with plan participants based on their plan's contribution strategy. This means that, if the employer and participants both contribute to the premium cost, the premium credit should be shared with plan participants. For example, the credit could be shared with participants in the form of a premium holiday, reduced payroll deductions or benefit enhancements.

In addition, ERISA's fiduciary duty rules prohibit employers from retaining employees' payroll deductions for plan premiums. These contributions must be used for paying plan benefits and expenses, and not for the employer's own purposes. To comply with ERISA, employee contribution amounts must be forwarded to the carrier within 90 days or placed in a trust account.

Action Steps

Employers that receive premium credits should comply with ERISA's fiduciary duty rules when using the credits and administering employees' payroll deductions for plan premiums.

ERISA Fiduciary Rules

ERISA sets standards of conduct for those who manage employee benefit plans and their assets, called fiduciaries. Fiduciaries have important responsibilities and are subject to standards of conduct because they act on behalf of participants in a group health plan and their beneficiaries. These responsibilities include:

- ☑ Acting solely in the interest of plan participants and their beneficiaries and with the exclusive purpose of providing benefits to them;
- ☑ Carrying out their duties prudently;
- ☑ Following the plan documents (unless inconsistent with ERISA);
- ☑ Holding plan assets (if the plan has any) in trust; and
- ☑ Paying only reasonable plan expenses.

Fiduciaries who do not follow the basic standards of conduct may be personally liable for restoring any losses to the plan, or for restoring any profits made through improper use of the plan's assets resulting from their actions. A fiduciary's liability for a breach may also include a **20% penalty** assessed by the DOL, removal from his or her fiduciary position, and, in extreme cases, criminal penalties.

Employee Contributions

Employee contributions to the plan are always considered plan assets that are subject to ERISA's exclusive benefit rule. These contributions can **only be used for plan purposes**. To comply with ERISA's fiduciary rules and avoid having to place the contributions in a separate trust account, these contributions must be **forwarded to the insurance carrier within 90 days**. Employers that mishandle employee contributions (for example, by retaining them for their own purposes) violate ERISA's exclusive benefit rule.

Fiduciary Rules for Premium Credits

The DOL has not issued guidance that specifically addresses how employers should handle any COVID-19-related premium credits under ERISA. However, the DOL has addressed how ERISA's fiduciary rules apply to MLR rebates that employers receive from their carriers. While the premium credits are not the same as MLR rebates (for example, the credits are applied to future premium obligations and not actually paid out to the employer), the same general fiduciary rules should apply to both situations.

The DOL issued Technical Release 2011-4 (TR 2011-4) to explain how ERISA's fiduciary duty and plan asset rules apply to MLR rebates.

Plan Asset Determination

In TR 2011-4, the DOL provides steps that an employer should take to determine whether the rebate (or any portion of the rebate) is a plan asset under ERISA. This is a crucial process because any rebate amount that qualifies as a plan asset must be used for the exclusive benefit of the plan's participants. Employers cannot retain any portion of the rebate that is a plan asset. According to TR 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 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 **employer and participants each paid a fixed percentage of the premiums**, the percentage of the rebate equal to the percentage of the cost paid by participants is a plan asset.

MLR Rules

The Affordable Care Act (ACA) established the MLR rules to help control health care coverage costs and ensure that enrollees receive value for their premium dollars. The MLR rules require health insurance issuers to spend 80-85 percent of premium dollars on medical care and health care quality improvement, rather than administrative costs. Issuers that do not meet these requirements must provide rebates to policyholders, including employers that sponsor group health plans.

Also, if the employer was required to pay a fixed amount and participants were responsible for paying any additional costs, the portion of the rebate that does not exceed the participants' total amount of contributions for the MLR reporting period would be a plan asset. If participants paid a fixed amount and the employer was responsible for paying any additional costs, the portion of the rebate that does not exceed the employer's total amount of contributions during the MLR reporting year would not be 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*.

Using Plan Asset Rebates

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 TR 2011-4 identifies the following methods for applying the rebates:

The rebate can be distributed to participants under a reasonable, fair and objective allocation method.

If distributing payments to participants is not cost-effective because the amounts are small or would cause tax consequences for the participants, the employer may use the rebate for other permissible plan purposes, such as applying it toward **future participant premium payments or 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.