The Early Retiree Reinsurance Program: First Come, First Served ... Until the Money Runs Out

The Patient Protection and Affordable Care Act (Act), signed into law on March 23, 2010, created the Early Retiree Reinsurance Program (ERRP) to provide $5 billion in financial assistance to employer health plans that offer coverage to early retirees. The ERRP is a temporary program and ends on the earlier of January 1, 2014, or the date that the $5 billion is exhausted. On May 5, 2010, the Department of Health and Human Services (HHS) issued final interim regulations, effective June 1, 2010, implementing the ERRP (the “regulations”). A draft version of the application form to participate in the program and the related instructions are currently available on the Office of Management and Budget’s web site. HHS also recently issued an FAQ relating to the application process. According to the FAQ, a final application form will be released later in June, and the only change to the draft form will be the addition of the address where completed forms should be sent. HHS’s web site states that applications will begin being accepted no later than June 30, 2010.

The regulations provide that applications to participate in the ERRP and claims for reimbursement thereunder will be processed in the order in which they are received. The Secretary of HHS (Secretary) has the authority to stop accepting applications at any time based on the availability, projected or actual, of the $5 billion. In addition, HHS has stated that it expects requests for reimbursements to exceed available funds. Hence, employers who intend to apply to participate in the program should begin gathering the information that will be needed to complete the application form and should complete and submit an application as soon as HHS begins accepting them.

This Legal Update summarizes the information and materials that will be required to complete the application, the application and reimbursement processes, the ongoing responsibilities of a plan sponsor under the ERRP, and the consequences of failing to comply with the ERRP requirements.

Background

The ERRP is intended to encourage sponsors of health plans to provide coverage to early retirees who, due to their age or chronic health conditions, often find it difficult to obtain private health care coverage before they become Medicare-eligible. Under the program, HHS will reimburse plan sponsors of “certified” employment-based plans for 80 percent of the cost of health benefits provided during a plan year to an early retiree and the early retiree's spouse, surviving spouse, and dependents, to the extent that such cost (net of negotiated price concessions) in the aggregate exceeds $15,000, but is not in excess of $90,000. The $15,000 “threshold” and $90,000 “limit” on reimbursable costs are indexed for plan years beginning on or after October 1, 2011. Special rules apply for plan years beginning prior to June 1, 2010 and ending thereafter. See below. Reimbursements received under the ERRP are not taxable income to the plan sponsor.

“Employment-based plans” are generally defined as all group health plans maintained by private employers, state and local governments, employee organizations, voluntary employees’ beneficiary associations (VEBAs), committees and boards of individuals appointed to administer such plans, and multiemployer plans (as defined in the Employee Retirement Income Security Act of 1974, as amended (ERISA)). The term does not include federal plans, and certain types of benefits excepted under the Health Insurance Portability and Accountability Act (HIPAA) regulations,
such as long-term care benefits, are not covered by the program. The term “plan sponsor” is defined by reference to ERISA, with some modifications, but is generally the employer maintaining or contributing to the maintenance of a plan, and includes private employers, as well as state and local governments. An “early retiree” is defined as an individual who is age 55 or older, enrolled in an employment-based plan, not an active employee of the plan sponsor, and not eligible for Medicare. As used in the regulations and in this Update, the term also includes such retiree’s spouse, surviving spouse, and dependents who are covered by the employment-based plan, even if they are under age 55 and/or are Medicare eligible.

Reimbursements under the program are paid by HHS to the plan sponsor and must be used (i) to reduce the plan sponsor’s health benefit premiums or costs, (ii) to reduce participants’ premium contributions, copayments, deductibles, or other out-of-pocket costs, or (iii) any combination thereof. The preamble to the regulations makes clear that reimbursements can be used to reduce costs for all participants, not just early retiree participants. The Act provides that reimbursements may not be used as general revenue of the plan sponsor; in order to enforce this requirement, the regulations include a requirement that the sponsor continue to provide the same level of contribution to support the plan as it did before participating in the ERRP. For example, in the case of an insured plan, if the insurance premium increases, program funds may be used to pay the sponsor’s share of the increase.

**Eligibility Requirements**

In order for a plan sponsor to receive reimbursements under the ERRP, with respect to an employment-based plan, the following requirements must be satisfied:

- The plan must have programs and procedures in place to generate cost savings for participants with chronic and high-cost conditions. The regulations define a chronic and high-cost condition as a condition for which $15,000 or more in health benefit claims are likely to be incurred during a plan year by one participant, such as diabetes and cancer. Recognizing that conditions that meet this criteria may vary by geographic location and other factors, HHS does not expect a plan sponsor to have programs and procedures in place for every condition satisfying the definition; however, plan sponsors are expected to take a reasonable approach in indentifying the conditions for which the plan sponsor will implement programs and procedures for generating cost savings. Plan sponsors should be aware that they will be required to demonstrate, on audit, that the programs and procedures either have generated or have the potential to generate cost savings.

- The plan sponsor also must implement procedures to protect against fraud, waste, and abuse, such as procedures to verify the identities and eligibility of individuals for whom reimbursements are being requested. According to the FAQ, such policies and procedures do not have to reference, or be specifically designed for, the ERRP (i.e., they could be existing policies and procedures), but they must have the ability to effectively detect and reduce fraud, waste, and abuse with respect to the ERRP.

- Proper safeguards against unauthorized use and disclosure of the information provided under the application process must be established by the plan sponsor. The plan sponsor must certify that its employment-based plan has established and implemented appropriate safeguards in compliance with the administrative simplification, privacy and security rule of HIPAA and, if the plan sponsor participates in the administration of the plan, the plan sponsor must advise any and all personnel interacting with protected health information of the confidential nature of the information, the applicable safeguards required to protect the information, and the administrative, civil and criminal penalties for noncompliance with applicable federal laws.

- The plan sponsor is required to have in place written agreements with health insurance carriers and employment-based plans, as applicable, requiring disclosure to the Secretary of documents, data, and records that are necessary for the plan sponsor to comply with the requirements of the ERRP.

- Lastly, the plan sponsor must submit an application that meets the requirements described below, and the plan and plan sponsor must be certified by HHS.
The Application Process

A draft version of the application to participate in the ERRP is currently available for review. A separate application must be submitted for each employment-based plan, and it must be signed by an authorized representative of the plan sponsor who attests to the truth and accuracy of the information contained therein to the best of the representative's knowledge and belief. Applications will be processed in the order in which they are received. The plan sponsor must also designate an account manager (an employee or a nonemployee) who coordinates, and is the primary contact for the HHS with respect to, the application process on behalf of the plan sponsor. Once an application for an employment-based plan is approved, it will not be necessary for the plan sponsor to resubmit an application annually. Incomplete applications will be rejected, and the applicant will be required to submit a new application that will be processed based on the date the new application is received. There is no ability to supplement or cure an incomplete application. Therefore, it is imperative that plan sponsors submit complete applications.

As part of the application process, the plan sponsor will be required to provide the following information, representations, and materials:

- Certain identifying information of the applicant (name, address, taxpayer identification number, and contact information).
- Certain identifying information of the applicant’s authorized representative and account manager (including the date of birth and social security number of each individual).
- The plan year of the employment-based plan.
- Assurance that the sponsor has a written agreement (described above) with its health insurance issuer or employment-based plan, regarding disclosure of information to HHS.
- An acknowledgement that the information is being provided to obtain federal funds.
- An attestation that policies and procedures (described above) are in place to detect and reduce fraud, waste and abuse.
- A summary of
  - how the applicant will use reimbursements received under the ERRP to meet the requirements under the program, specifically, how the reimbursement will be used to reduce premium contributions, co-payments, or other out-of-pocket costs for plan participants, to reduce health benefit or health benefit premium costs for the sponsor, or a combination thereof;
  - the cost-saving procedures or programs with respect to chronic and high-cost conditions (described above); and
  - how the reimbursement will be used to maintain the plan sponsor’s level of effort in contributing to the plan.
- Projections regarding the amount of reimbursements to be received during each of the first two plan years. (These projections will be used to determine when the Secretary should stop accepting applications based on the availability of the $5 billion.)
- A list of all benefit options under the employment-based plan under which reimbursement may be claimed for an early retiree.
- A plan sponsor agreement executed by the authorized representative under which the plan sponsor (i) provides assurances that there is a written agreement with insurers or employment-based plans requiring information disclosure to HHS, (ii) an attestation that policies are in place to reduce fraud, waste, and abuse (discussed above), and (iii) an acknowledgement that the information in the application to participate in the ERRP is for the purposes of obtaining federal funds and that all subcontractors acknowledge that information provided in connection with the subcontract is used for the purposes of obtaining federal funds. The draft application includes the plan sponsor agreement.
Any other information that the Secretary may require.

The Secretary can reopen an approved or denied application for any reason within one year following the determination, within four years if the evidence considered in reviewing the application is erroneous on its face, and at any time in the event of fraud or similar fault.

**The Reimbursement Process**

Reimbursements under the ERRP are conditioned upon the submission of accurate information by the plan sponsor or its designee and on the availability of funds under the ERRP. A reimbursement request consists of a list of the early retirees for whom claims are being submitted, as well as the related documentation of the actual costs of the health benefit items and services. For an insured plan, the required information may be submitted directly by the insurer.

As with applications to participate in the ERRP, the Secretary has the authority to reopen and revise a reimbursement determination within either one or four years, depending on the circumstances, following a determination, or, if fraud is involved, at any time following the determination.

Plan sponsors should coordinate with insurance carriers and other third-party providers to confirm that the information required for reimbursement requests exists and can be made readily available for reimbursement requests.

**Timing of Reimbursement Request.** A plan sponsor’s application must be approved, and the plan and the plan sponsor must be certified before a reimbursement request can be filed. A request for reimbursement for an early retiree for a plan year is not filed until the health benefit costs of the retiree (including the costs of the retiree’s spouse, surviving spouse, and/or dependents) that have been incurred during the plan year and paid exceed $15,000. When a reimbursement request is filed, information related to all costs, including those for the $15,000 of costs that are not reimbursable, are included. Once an early retiree’s health benefit costs reach $90,000, no further reimbursement requests should be filed in that plan year for that early retiree.

**Form and Manner of Reimbursement Request.** At this time, the form for making a request for reimbursement has not been issued by HHS.

**Reimbursable Costs.** Only health benefit costs that were incurred during the applicable plan year and paid are reimbursable under the ERRP. Reimbursable costs are the health benefit costs, including cost-sharing amounts paid by an early retiree, net of any negotiated price concessions in the applicable plan year. If cost-sharing amounts paid by the early retiree are included in a reimbursement request, the plan sponsor must produce *prima facie* evidence, such as a payment receipt, that the early retiree has actually paid such amounts. Negotiated price concessions that reduce reimbursable health benefit costs include post-point-of-sale price concessions, such as prescription drug discounts. These types of price concessions may occur after reimbursement has been made, and HHS has indicated that the form and manner in which such amounts must be disclosed will be the subject of future guidance. As a result of such post-reimbursement disclosure by a plan sponsor, HHS may reopen and revise a reimbursement determination and recoup funds from the plan sponsor.

**Transition Rules.** Reimbursement requests can be made for plan years beginning prior to June 1, 2010, provided that the plan year ends after that date. Health benefit costs incurred prior to June 1, 2010, count toward the $15,000 threshold; however, no health benefit costs incurred prior to June 1, 2010, are reimbursable.

**Appeals.** Due to the temporary nature of the ERRP, HHS established a simple, one-level appeals process directly to the Secretary. A plan sponsor can appeal an adverse reimbursement determination (partial or complete) to the Secretary unless the adverse determination is due to the exhaustion of the $5 billion in funding for reimbursements. The Secretary’s determination on appeal is final and binding, absent fraud.
An appeal must be made in writing by a plan sponsor within 15 calendar days after receipt of an adverse reimbursement determination. The appeal request must specify the findings or issues with which the plan sponsor disagrees and the reasons for such disagreements. Any supporting documentation should also be included with the request, or else a date specifying by when the documentation will be sent. Oral argument or testimony will not be accepted. Because time is of the essence with respect to ERRP funding, notification of the Secretary’s decision may be given orally, in writing, or by electronic means. If a plan sponsor requests a response in writing, one will be provided.

Ongoing Responsibilities of Plan Sponsors
Plan sponsors have certain ongoing responsibilities under the ERRP. Because advanced planning and coordination may be necessary to satisfy these responsibilities, plan sponsors should begin reviewing policies and practices to identify where changes will be necessary for compliance.

Record Maintenance. The regulations require a plan sponsor to maintain all documentation, data, and other information related to the ERRP, as well as any other records specified by the Secretary, for six years after the end of the plan year in which costs are incurred, or longer if required by law. The plan sponsor must also require its insurers and the employment-based plan, as applicable, to maintain such records for the requisite period.

Duty to Disclose Inaccurate Data. Plan sponsors must disclose any data inaccuracies upon which a reimbursement determination was based. Such data inaccuracies include post-point-of-sale price concessions.

Advanced Notice of Change in Ownership. A plan sponsor is required to provide 60 days’ advance notice prior to the effective date of a change in ownership that is being considered or negotiated. For this purpose, a change in ownership includes certain changes in a partnership, the sale or transfer of substantially all a plan sponsor’s assets, and a sponsoring corporation’s merger into, or consolidation with, another corporation resulting in a new corporate body. If a change in ownership occurs that results in a transfer of the liability for health benefits, the sponsor agreement is automatically assigned to the new owner. Failure to provide the advanced notice can result in recovery by the Secretary of reimbursed funds.

Audits. The Secretary is required to conduct audits to ensure that employment-based plans participating in the ERRP are in compliance with its requirements. Among other things, this means that plan sponsors will be required to demonstrate that the programs and policies implemented for chronic and high-cost conditions have generated, or have the potential to generate, cost savings for participants with such conditions. Plan sponsors also will be required to substantiate the effectiveness of policies and procedures to prevent fraud, waste, and abuse. The agreements required under the regulations (the plan sponsor agreements and the agreements between plan sponsors, insurance carriers and plans) are intended to ensure that the information necessary for the Secretary to conduct these audits is available.

Consequences of Failing to Comply with the ERRP Requirements
Failure to comply with requirements of the ERRP can result in revocation of a plan sponsor’s certification to participate in the ERRP as well as having reimbursement funds recouped and/or withheld. Any findings of fraud, waste, or abuse by the Secretary can have similar consequences.

Conclusion
Due to the temporary nature of the ERRP and its limited funding, it is imperative for sponsors of health plans providing coverage to early retirees to begin preparations for the application process since only certified plan sponsors are eligible to submit reimbursement requests. Certified plan sponsors should be prepared to submit reimbursement requests for an early retiree as soon as the early retiree’s health
benefit costs exceed the threshold as reimbursement requests will be processed in the order received and only until the $5 billion has been exhausted. At a time when plan sponsors are struggling to find relief from skyrocketing health care costs, the ERRP reimbursement represents a significant, albeit temporary, opportunity for such relief.

Endnote

For more information about the ERRP, or any other matter raised in this Legal Update, please contact the member of our Employment and Benefits Department who regularly advises you or one of the lawyers listed below.

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