

# How Employers Can Use Medical Loss Ratio Rebates and Other Health Insurer Refunds



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# Agenda

- What is the Medical Loss Ratio (MLR)?
- What do employers do with a MLR rebate?
- How does an employer use its share of the rebate for ERISA vs. non-ERISA plans?
- Tax treatment for the various methods of distribution
- How employer should handle a rebate under different scenarios
- Action items for employers

- The Affordable Care Act requires health insurance issuers to publicly report on major categories of spending of policyholder premium dollars.
  - Clinical services provided to enrollees
  - Activities that improve health care quality
- Medical Loss Ratios are designed to bring down the cost of health care coverage.
- Insurers who do not meet the MLR percentage requirements in a state must provide rebates to enrollees in that state on a pro rata basis.



# What are Medical Loss Ratios?

- $MLR = (\text{claims} + \text{amounts to improve health care quality}) \div (\text{total premiums} - \text{specified taxes and fees})$
- Issuers in a **large group markets** are required to spend 85% of premiums on health care services.
- Issuers in **small group and individual markets** are required to spend 80% of premiums on health care services.
- MLR reporting year is the calendar year during which group or individual coverage is provided by an insurer.

# What GHPs Qualify for Medical Loss Ratios?

- Eligible GHPs
  - Fully-insured
  - Grandfathered Plans
  - Mini-Med and Expatriate Plans (with special rules)
- Ineligible GHPs
  - Self-funded plans
  - Excepted Benefits

# What Notice Requirements Apply?

- Carrier notice to subscribers must:
  - Explain general concept of rebate and how calculated
  - Address the fact that the total rebate is provided to employer/policyholder rather than subscribers
- Must be provided to all “subscribers” in the group health plan in the MLR reporting year except those no longer enrolled at the time of the notice (insurer may elect to include all subscribers in the MLR reporting year, even if not enrolled or currently employed)
- Employer not required to provide notice, but may be helpful to address questions in advance, particularly if rebate is not a plan asset or too small to distribute

# What Notice Requirements Apply?

- Carrier notice to GHP Participants:
  - If GHP subject to ERISA, the notice must include a statement that ERISA fiduciary duties apply to disposition of rebate
  - If the policyholder is a non-federal governmental plan, the notice must state that the portion of the rebate attributable to participant contributions must be used for the benefit of participants, as provided by the regulations
  - If neither of the above apply (e.g., many church plans), the notice must state either that the policyholder has provided written assurance that the portion of the rebate attributable to participant contributions will be used for the benefit of current participants, as provided by the regulations, or, if no written assurance, a statement saying that the insurer must distribute the rebate evenly among the participants covered by the policy during the MLR reporting year on which the rebate is based.

# What do Employers need to do with MLR rebates?

- Rebates may be in the form of a premium credit or a lump-sum payment
  - HHS allows advance premium credits (i.e. in MLR reporting year) to avoid rebates
- Generally paid to policyholder for GHP
  - Policyholders for covered group health plans are typically the **employer** sponsoring the plan.
- ERISA Employers who receive an MLR rebate must first determine who owns the insurance policy and whether the rebates/credits are plan assets.
  - If the plan, or the plan's trust is the policyholder → policy will be a plan asset
  - If the employer is the policyholder → determine whether the plan language provides that some or all of the MLR rebate may be retained by the employer
  - If silent, DOL default guidance applies



- Distributions from insurance companies take many forms to their policyholders, including but not limited to, “refunds, dividends, demutualization payments, rebates, and excess surplus distributions.”
- Applicable to health insurance, life insurance, and long-term disability insurance as addressed by DOL and courts.
- The DOL guidance for handling MLR Rebates is based on historical rulings relating to these other insurer refunds, dividends, rebates and, in particular, demutualization payments.

# ERISA Group Health Plans Receiving MLR Rebates

- Existing ERISA fiduciary duty rules apply:
  - Act prudently
  - Act solely in the interest of the plan participants and beneficiaries
  - Act impartially
  - Act in accordance with the plan terms (to the extent they are consistent with ERISA)
- Employers must determine if the rebate, or any part of it, is a plan asset. Any person with control over handling the MLR rebate is a plan fiduciary – even if not named in plan documents
- Trust requirement applies to any portion of rebate determined to be plan assets - MLR guidance from DOL provides non-enforcement of trust requirement if rebate distributed or used within **90 days**.

# Determining if the MLR Rebate is a Plan Asset



- Several factors help determine whether a rebate is a plan asset:
  - Is the insurance policy issued to the plan itself, or a related trust?
  - Do the terms of the group health plan's governing documents state whether rebates are plan assets? (Insurance policy/wrap)
  - Are insurance premiums paid from trust assets? (amounts "set aside")
- If the plan (or its trust) is the policyholder or if premiums under a plan are paid entirely from plan assets, then the MLR rebates will be treated as plan assets.
- Mere fact that the policy is issued to the employer does not, by itself, give the employer an ownership interest in the rebate

If	Then
Policyholder is plan or trust and plan is silent on ownership of rebate	Entire rebate is a plan asset
Policyholder is plan or trust and plan or policy language assigns ownership of some or all to employer	Rebate is not a plan asset to extent assigned to employer
Policy issued to employer; plan or policy language gives employer ownership	Not a plan asset to the extent plan or policy language gives employer ownership
Policy issued to employer, but premiums paid entirely from plan assets and no plan language assigning to employer	Entire rebate is a plan asset



If	Then
The plan or policy is silent	Must follow DOL guidelines that apportion employer and employee share on a pro rata basis based on premium payments
- Premiums paid 100% by employer	Rebate is not a plan asset
- Premiums paid 100% by participants	Entire rebate is a plan asset
- Premiums shared by employer and participants fixed percentage (e.g., employer pays 70%, participant pays 30%)	70% belongs to employer and 30% is a plan asset
- Employer pays fixed dollar amount of premiums, participants pay balance (e.g., employer pays \$6,000 per year toward coverage and participant pays balance)	Only the portion of the rebate exceeding employer's entire premium contribution is a plan asset.
- Participants pay fixed amount of premiums, employer pays balance (e.g., participant pays \$2,000/year toward coverage; employer pays balance)	Only the portion of the rebate exceeding employer's entire premium contribution is a plan asset.

# ERISA's Exclusive Benefit Rule

- Employers may not receive a rebate amount that exceeds the total amount of premiums and plan expenses paid by the employer.
- DOL guidance – an allocation does not necessarily violate the exclusive benefit rule merely because it doesn't reflect the premium amounts paid by participants:
  - “The plan fiduciary may properly 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.”
- In determining how to allocate MLR Rebate, employer may consider tax consequences to participants

# Tax Treatment of Pre-Tax Premium Payments

- Increase in employee's taxable wages equal to the amount of the MLR Rebate or premium holiday if employees pay their portion of the premiums for employer-sponsored health coverage on a pre-tax basis under a cafeteria plan
- IRS guidance does not address distributions to former employees – only current subscribers.

# Tax Treatment of After-Tax Premium Payments

- MLR rebate or premium holiday is treated as a return of amounts already subject to federal employment taxes, and will not be subject to federal employment taxes if employees pay their portion of the premiums on an after-tax basis
- MLR rebates that relate to premium payments that were deducted on the employee's federal income tax return are subject to federal income tax to the extent the employee received a tax benefit from the deduction.
- IRS guidance does not address distributions to former employees – only current subscribers



# ERISA's Exclusive Benefit Rule

## De minimis

- De minimis amounts - if the cost of making refunds to participants is not cost-effective the rebate may be used for other permissible plan purposes, such as reductions in future participant contributions or future benefit enhancements
- No specified amount is considered de minimis- typically weigh cost of distribution to amount distributed

# ERISA's Exclusive Benefit Rule Former Employees/COBRA

- ERISA does not require plans to include or exclude former participants. DOL states that a fiduciary may decide to distribute a rebate to only current participants
- No specific guidance regarding distribution to COBRA Beneficiaries

# ERISA Obligations - Multiple Policies/States

- Use of a rebate generated by one policy to benefit the participants of another plan is a breach of the duty of loyalty to the participants in the policy generating the rebate.
- If policy covers employees in multiple states, rebate should be shared with all participants equally regardless of where they live.

- DOL Technical Release 92-01 - generally excuses insured group health plans from the obligation to hold participant contributions in trust and from the obligation to file Form 5500 as a funded plan if certain conditions are met
- Tech. Rel. 92-01 will be treated as applying to MLR rebates if the rebates are used within 90 days of receipt to pay premiums or refunds
- Fiduciaries may consider the cost of establishing a trust to comply with ERISA when deciding how to handle rebates.



# Non-Federal Governmental Group Health Plans

- HHS requires the plan policyholder to use the portion of rebates attributable to the amount of premium paid by subscribers for the benefit of current participants
- Three options:
  1. Policyholder may reduce participants' premiums in the next policy year by allocating the rebate among all covered participants at the time the rebate is received.
  2. Policyholder may reduce participants covered under the policy to which the rebate is attributable at the time the rebate is received.
  3. Policyholder may make a cash refund to the participants covered under the policy to which the rebate is attributable at the time the rebate is received.
- Must use for the benefit of subscribers no later than 90 days after receipt.

# Non-ERISA, Non-Governmental Plans

- Insurer may make rebate payments to a policyholder **only** if the insurer receives **written assurance** from the policyholder it will be used in the same way a rebate to a non-federal governmental plan could be used.
- If no written assurance:
  - Insurer must pay rebate directly to the plan participants covered by the policy during the MLR reporting year on which the rebate is based
  - Insurer divides the entire rebate, including any portion attributable to premiums paid by the policyholder, equally among all participants entitled to a rebate.
- Policyholder may want to refuse giving written assurance to avoid administrative burden of allocating the rebate among participants

- HHS requires policyholders of Non-ERISA group health plans to use the rebate for the benefit of subscribers no later than **90 days** after receipt.
- As an alternative to providing cash rebate to subscribers enrolled in the plan option at the time the policyholder receives the rebate, policyholders may instead provide a cash rebate to the subscribers who were enrolled in the plan option during the MLR reporting year that generated the rebate.

# Plans that Have Been Terminated at the Time of Rebate

- If the insurer cannot, despite reasonable efforts, locate the policyholder (i.e. employer):
  - The insurer must distribute the entire rebate directly to the participants who were enrolled in the terminated plan by dividing the rebate equally among the individuals entitled to a rebate
- If the insurer is able to locate the policyholder of a terminated ERISA plan:
  - The policyholder must comply with ERISA's fiduciary provisions when handling any rebate
  - Plan document should be followed
  - If no guidance in the plan document, the policyholder may need to determine whether it is cost effective to distribute the plans portion of the rebate to the relevant former participants in the plan
- Applies to both ERISA and Non-ERISA plans



# Summary of Permitted Uses of Rebates

Permitted Use	Available to Following Plans	Considerations
Reductions in future premiums for current participants	ERISA; Governmental; Church (if written assurance provided) – use in 90 days	Simple administration – taxable if pre-tax, but shouldn't impact 125 plan
Benefit enhancements	ERISA	Administratively easy, no tax issues
Payment of reasonable plan expenses	ERISA	Not specifically approved or disapproved
Payments to current participants	ERISA; Governmental; Church (if written assurance provided)	Creates tax and administrative issues
Payments to former participants	ERISA; Church (required if no written assurance provided)	Creates tax and administrative issues

# Steps for ERISA Plans

1. Understand the DOL plan asset rules and application to MLR rebates as well as other insurance carrier refunds.
2. Know your policy language regarding refunds and rebates and adopt amendments or a wrap plan document to clarify how premiums are divided between employer and participants.
3. Determine whether the plan meets the conditions to qualify for the trust exception under DOL Technical Release 92-01.
4. Stay on top of MLR rebates by reviewing likelihood of a rebate with your broker.
5. Address up front any expectations with third parties (example TPA/consultants) that will be expected to assist in handling rebates.

# Steps for Non-Federal Governmental Plans

1. Understand the limitations on permissible uses of rebates.
2. Speak with insurers (brokers or agents) early to determine whether the plan is likely to receive a rebate.
3. Address up front any expectations with third parties (example TPA/consultants) that will be expected to assist in handling rebates

# Steps for Non-ERISA, Non-Governmental Plans

1. Understand the written assurance rule that applies to the insurer and decide whether to provide the written assurance.
2. Speak with insurers (brokers or agents) early to determine whether the plan is likely to receive a rebate.
3. Address up front any expectations with third parties (example TPA/consultants) that will be expected to assist in handling rebates

# Final Questions

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# Thank You



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