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Regulations Confirm Need for Prompt Employer Action To Prepare for HHS Early Retiree Reinsurance Program

The Department of Health and Human Services ("HHS") has issued interim final regulations governing the Early Retiree Reinsurance Program (the "Program") added by the recent health care reform legislation. The Program, which is scheduled to begin on June 1, 2010, reimburses plan sponsors for a portion of large health claims incurred by early retirees (and their spouses and dependents) in order to encourage employers to maintain health plan coverage for such participants until other health coverage becomes available through health insurance exchanges in 2014.

In order to participate in the Program, a plan sponsor must submit an application to HHS and be accepted by HHS. A separate application is required for each plan, but will cover all benefit options under the plan and all future plan years. HHS has said that applications will be available by the end of June. The regulations provide that HHS will accept applicants on a first-come-first-served basis, and may stop accepting applicants when it projects that the entire $5 billion appropriated for the Program will be used up by the applications already accepted. Therefore, employers that would like to participate in the Program should act now to assemble the materials needed for the application so that their applications can be submitted on a timely basis.

Requirements for Participation in the Program

In order to participate in the Program, the plan sponsor and the plan must satisfy the following requirements:

- The plan must have (and the application must describe) programs and procedures that have the potential to generate cost savings with respect to plan participants with "chronic and high-cost conditions" (defined as a condition likely to cause an individual to incur health claims of $15,000 or more in a plan year). The regulations provide that programs and procedures can be either already in place or newly added to the plan, and that they can be aimed at plan participants generally, not just retirees. An example given by HHS is implementation of a diabetes management program that includes monitoring and counseling to prevent complications and unnecessary hospitalization. The regulations appear to provide that provisions that reduce costs paid by participants that have chronic and high-cost conditions also would satisfy this requirement.

- The plan must have policies and procedures to prevent fraud, waste, and abuse under the Program.

- The plan sponsor must determine (and describe in its application) how it will use any reimbursements obtained under the Program. Reimbursements may be used to reduce participant cost-sharing and/or to offset any future increases in employer costs. The funds may be used to reduce costs for all participants in the plan, not just retirees. They cannot be used to reduce the dollar amount of employer costs for the plan from that in effect prior to the Program.

- The plan sponsor must have a written agreement with either the insurer or the plan (as applicable) requiring the insurer or the plan to provide any information required by HHS in connection with the Program.

As part of the application, the plan sponsor must enter into an agreement with HHS in which it agrees to comply with all applicable requirements of the Program and acknowledges that it has the required agreements with the insurer or the plan and that the plan has the required policies and procedures to prevent fraud, waste, and abuse. The agreement must also acknowledge that the information in the application is being provided in order to obtain federal funds and that subcontractors providing information under the Program are aware that the information they provide is for the purpose of obtaining federal funds.

The application must also include a projection of the amount of reimbursements to be received under the Program for each of the first two plan years, as well as a list of all benefit options in which early retirees and their dependents may participate. The regulations provide that HHS may require additional information as part of the application process.

If HHS determines that an application is incomplete, it will be rejected. The plan sponsor will be required to submit a new application, which will be processed based on the filing date of the resubmission. Since funds for the Program are limited, and applications will be processed on a first-come-first-served basis, it is important that the application be complete when submitted.

Amount of Reimbursement

Under the Program, HHS will reimburse the plan sponsor of an insured or self-insured plan for certain health claims incurred by early retirees and their spouses, surviving spouses, and dependents. For this purpose an early retiree is an individual who is age 55 and older but not eligible for Medicare, and who is no longer an active employee of the plan sponsor.

The amount of reimbursement is equal to 80% of the portion of health benefit costs (other than for free-standing dental and vision benefits) of an early retiree or dependent (on a person-by-person basis) attributable to claims that in the aggregate for any plan year exceed $15,000 but are below $90,000. For this purpose health benefit costs are determined net of any "negotiated price concessions" (defined to include discounts, subsidies, rebates, and other cost reductions). The $15,000 and $90,000 amounts include amounts paid by the participants as well as the employer. (These amounts are indexed to track increases in the Medical Care Component of the Consumer Price Index, for plan years beginning on or after October 1, 2011.)

In a special transition rule for plan years spanning June 1, 2010, claims incurred in the portion of the plan year before June 1, 2010 are counted for purposes of the $15,000 threshold, but reimbursements will be made only on claims incurred on or after June 1, 2010.

No claims for reimbursement may be submitted until the plan sponsor has been accepted as a participant in the program by HHS. The initial claim for reimbursement in any plan year must be submitted together with claims up to the $15,000 threshold amount. No claim can be submitted for reimbursement until it has been paid. Claims must be submitted with appropriate documentation of costs, with the specific requirements still to be determined by HHS. The regulations provide that the submission must include prima facie evidence that the participant has in fact paid his or her portion of any required cost-sharing (though it is not clear what type of evidence is contemplated by this requirement).

The plan sponsor is required to notify HHS if it subsequently determines that information submitted in connection with a claim for reimbursement is not correct or if it obtains a negotiated price concession after the claim was submitted. Documents related to the Program are required to be maintained (and provided to HHS on request) for six years.

What Employers Should Do Now

In order to be in a position to submit an application for the Program as soon as possible after the application process opens, plan sponsors should begin taking the following steps now:

- Identify chronic and high-cost conditions of participants under the plan and discuss with the plan's insurer or third-party administrator the programs and procedures already in place or that could be implemented to limit costs for participants with such conditions.
- Prepare a projection of reimbursements expected under the Program for each of the 2010 and 2011 plan years.
- Begin considering how reimbursements from the Program will be utilized.
- Review the adequacy of the plan's policies and procedures to prevent fraud, waste, and abuse.

In addition, in order to be in a position to submit reimbursement claims promptly upon acceptance into the Program, the plan sponsor should begin gathering data with respect to claims incurred by early retirees and their dependents in the current plan year, including before June 1.

For more information about the Early Retiree Reinsurance Program, other aspects of health care reform, or Hughes Hubbard's employee benefits practice, please contact any of the following attorneys:

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