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HHS Releases Final Application and FAQs for Early Retiree Reinsurance Program

The Department of Health and Human Services (HHS) has issued the final application for the early retiree reinsurance program (ERRP) included in the new health reform law. Importantly, HHS also issued FAQs clarifying that eligibility for reimbursement through ERRP will be based on when claims are filed and processed and not when the application to participate in the program is submitted.

Background

The new health reform law includes a retiree reinsurance program for early retirees (pre-Medicare) and dependents under which employers can receive reimbursement of 80% of the costs of an individual's health claims between $15,000 and $90,000 per year. The program, which is intended to help employers maintain early retiree programs until insurance exchanges become available in 2014, went into effect June 1, 2010 and will end on the earlier of January 1, 2014 or when the allocated $5 billion in funding is expended. (See our May 6, 2010 *For Your Information*.)

On June 29, HHS issued the final application, instructions, and updated FAQs which provide significant details on ERRP and the application process. Importantly, eligibility for reimbursement through ERRP will be based on when claims are filed and processed and not based on the order that applications are received and approved. Although the FAQs do not provide much additional information on the claim reimbursement process, FAQs and a webinar on this process are expected to be announced on the HHS website. However, the timing is uncertain.

HHS Guidance

First-Come, First-Serve Basis for Applications and Reimbursements

Most significantly, the FAQs clarify that the "first-come, first-serve" process applies for claims submissions and reimbursements, and not for applications. In one FAQ, HHS says –

> *"All qualified applications will be approved. Applications will be processed in the order in which they are received."*

In another FAQ, HHS says –

> *"Payments are made based on when claims are submitted, not when the employers' applications for the program were submitted. The critical step in receiving reimbursement is actually the submission of the*

request for claims reimbursement. All qualified claims submitted by participating employers will qualify for reinsurance. If the $5 billion in Federal funding available for the program is spent before the program's end in 2014, then the Secretary can stop accepting applications and reinsurance payments for qualified claims will end."

Application

The final application and instructions are substantially the same as the draft application issued in early June, but the FAQs provide important new guidance on how the application must be completed.

BUCK COMMENT. *After the application was first posted on the HHS website, two updates were posted later that week (the most recent on July 2) with limited comments on the changes made. It will be important for plan sponsors to regularly check the HHS website for updates and additional guidance. Plan sponsors that submitted their application before the FAQs were posted may need to update their application. The FAQs, as well as informal comments by HHS, indicate that future guidance will clarify how to update an application.*

The final application specifies that it should be mailed to HHS (through use of the U.S. Postal Service).

The FAQs indicate that an application is required for each plan for which the plan sponsor seeks ERRP reimbursements and that guidance provided in regulations under COBRA can be used for determining the number of separate plans a sponsor maintains.

BUCK COMMENT. *In identifying the plan for purposes of the application, a plan sponsor will need to coordinate carefully any actions that are being considered in implementing "retiree-only plans" to avoid health reform market mandates. As discussed below, for some plan sponsors the determination of the plan will be a critical step in completing the application.*

One significant and confusing item in the FAQs is the definition of a benefit option. Each benefit option under the plan must be uniquely identified in the application, by name and with a Unique Benefit Option Identifier (UBOI), similar to the Retiree Drug Subsidy (RDS) program. However, rather than requiring a UBOI for each different plan design, the application should include a UBOI for each carrier, TPA or vendor administering the benefits.

BUCK COMMENT. *The FAQs provide examples of this definition. A plan that has a Third Party Administrator A for medical, and Prescription Benefit Manager D would have two benefit options for ERRP purposes – "Third Party Administrator A" and "Prescription Benefit Manager D." Most plan sponsors had assumed this would be one benefit option.*

Similarly, if a plan offers both a low and high medical option through Insurer C with prescription drug benefits through Prescription Benefit Manager E, there would also be two benefit options – "Insurer C" and "Prescription Benefit Manager E" – notwithstanding the fact that Insurer C offers both a low and high coverage option.

The application and FAQs indicate that programs for chronic and high cost conditions must be in place when the application is submitted. In addition, the application requests a description of all of the following –

- how the conditions addressed were determined (i.e., likely to generate at least $15,000 in claims)
- how the programs will generate cost savings
- who will benefit from the cost savings.

Programs to detect and reduce fraud, waste and abuse must be in place when the application is submitted, but do not need to be developed specific to ERRP.

Use of ERRP Reimbursements

The FAQs confirm that the ERRP reimbursements can be used to (1) reduce the plan sponsor's health benefit premiums or costs, (2) reduce plan participants' health premium contributions, deductibles, copayments and other out-of-pocket costs, or (3) reduce any combination of the plan sponsor and participant costs. However, the FAQs include some important limitations on the use of reimbursements. A plan sponsor that uses some or all of the reimbursements to reduce participant out-of-pocket costs "must do so for all plan participants, and not just early retirees." This would include active employees and Medicare retirees if they are in the same plan.

BUCK COMMENT. *This unexpected requirement may make it more difficult for some plan sponsors to share the reimbursements with plan participants. How a plan sponsor defines the plan for ERRP purposes also will be important. It is not clear if reimbursements can be used to offset prospective as well as retrospective employee cost sharing.*

The FAQs also indicate that ERRP reimbursements cannot be used to offset increases in administrative costs for the plan or to pay expenses related to participation in ERRP.

Maintenance of Effort Requirement

If some or all of the ERRP reimbursements are used to reduce the plan sponsor's health benefit premiums or costs, sponsors "must maintain their level of financial effort in supporting the applicable plan." In implementing this requirement, the regulations and FAQs require that the reimbursements be used "only to offset increases in the sponsor's health premiums or health benefit costs." The FAQs provide much needed guidance on the "maintenance of effort" requirement –

- The plan sponsor must describe in the application how the maintenance of effort requirement will be satisfied.

BUCK COMMENT. *The FAQs clarify that if ERRP reimbursements exceed the employer cost increase in a plan year, overages can be applied to the next plan year or used to reduce participant costs, but that these are not the only alternatives.*

- The baseline period for determining if the maintenance of effort requirement is satisfied is the plan year cycle that ended immediately before the application submission date.

BUCK COMMENT. *For calendar year plans this will generally mean that 2009 will be the base period. However, the guidance also permits a plan sponsor to use a plan budget that was approved before June 1, 2010.*

- The maintenance of effort requirement must be satisfied based on aggregate dollar costs for all participants in the plan, and not based on a per capita cost or a percentage of total plan costs. It involves the benefits of all participants – early retirees, Medicare retirees and active employees. Percentage of cost or per capita maintenance of effort is not sufficient.

BUCK COMMENT. *The requirement that the total dollar spend for the plan has to be maintained can be problematic for employers with shrinking populations, for example due to layoffs or corporate restructuring. Moreover, the maintenance of effort provision should be considered in light of other health care reform issues, such as grandfathering or whether to establish separate retiree-only plans to avoid certain of the insurance market reforms.*

- If an employer contributes to a VEBA or other fund in which funds may only be used for health benefits and can not revert to the employer, maintenance of effort requirements apply based on the contributions to the fund, not on the amount spent on benefits. If funds are used for other benefits in addition to health benefits, the requirements apply based on the amounts spent on benefits, not employer contributions to the trust.
- A multi-employer trust applying for the reimbursement must meet the same maintenance of effort requirements as a single-employer sponsor. Employers contributing to the trust are bound by the collective bargaining agreements regarding levels of contributions to the trust.

Claim Submission and Reimbursement Process

The FAQs provide limited information on when claim submissions can be made for reimbursement and the process that will be used. As noted above, HHS states that further guidance will be provided in the future.

Conclusion

The final application and FAQs have eliminated the urgency surrounding the “first-come, first serve” application process and provide employers with additional time to accurately complete their applications. However, the requirements included in the FAQs will require many employers to rethink their ERRP strategy, and may result in some employers deciding to not participate.

Buck’s consultants are available to assist you in reviewing this new guidance and developing your strategy.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.