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CMS Releases Guidance on Complying with Prohibition on Using ERRP Reimbursements as General Revenue

CMS has provided guidance on complying with the requirements for use of ERRP reimbursements. The guidance provides considerable flexibility for plan sponsors but will require documentation of the plan sponsor's compliance approach.

Background

The Patient Protection and Affordable Care Act (PPACA) created the Early Retiree Reinsurance Program (ERRP) for early retirees (pre-Medicare) and their dependents under which employers can receive reimbursement of 80% of the costs of health claims between \$15,000 and \$90,000 per year for each eligible retiree or dependent. 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 ends on the earlier of January 1, 2014 or when the allocated \$5 billion in funding is expended. It is anticipated that the program will end before 2014. As of June 10, 2011, ERRP has disbursed \$2.7 billion of the appropriated \$5 billion.

Plan sponsors are prohibited from using the reimbursements as general revenue. The Department of Health and Human Services (HHS) issued regulations in May 2010 (May 2010 regulations) providing that ERRP reimbursements may only be applied to reduce:

- The plan sponsor's health benefit premiums and/or costs;
- Plan participants' health benefit premium contributions, copayments, deductibles, coinsurance, or other out-of-pocket costs; or
- A combination of the above.

(See our May 6, 2010 [For Your Information.](#))

To ensure that a plan sponsor uses ERRP reimbursements to reduce the plan sponsor's health benefit premiums and/or costs and does not use the funds as general revenue, the May 2010 regulations require plan sponsors to "continue to provide at least the same level of contribution to support the applicable plan, as it did before the program." This is commonly referred to as the "maintenance of contribution" requirement.

The Centers for Medicare & Medicaid Services (CMS) recently posted additional [guidance](#) on the ERRP website (www.errp.gov) that sets out what plan sponsors who use ERRP reimbursements to reduce their health benefit premiums and/or costs must do to comply with the prohibition of using ERRP reimbursement as general revenue.

CMS also posted additional guidance in the form of [Common Questions](#). These new questions address issues relating to the use of ERRP reimbursements, required plan sponsor notices, claim submissions and reimbursements. The guidance is important as employers make plans for using the reimbursements.

Guidance on Maintenance of Contribution Requirement

The guidance addresses a number of issues related to the maintenance of contribution requirement.

Plan Years to Which the Maintenance of Contribution Requirement Applies

A plan sponsor must provide at least the same level of contribution, net of any ERRP reimbursements, to support the plan that it provided before participation in ERRP. The guidance clarifies that this requirement applies to:

- Plan years for which the plan sponsor receives ERRP reimbursements;
- Plan years during which the plan sponsor receives ERRP reimbursements; and
- Plan years for which the plan sponsor possesses ERRP reimbursements that have not yet been used for permissible purposes.

BUCK COMMENT. *The maintenance of contribution requirement will apply not only to the plan years during which the plan is directly participating in ERRP but also to any subsequent plan years in which the plan sponsor continues to hold ERRP reimbursements that have not been used as permitted. The guidance makes it clear that the requirement applies regardless of how many days during the plan year that the sponsor held the reimbursements. Plan sponsors will need to document for which plan years ERRP funds were used to determine when the maintenance of contribution requirement no longer applies.*

Costs Used to Determine a Sponsor's Level of Contribution to the Plan

Claims eligible for ERRP reimbursements are generally limited to health benefit items and services covered under Medicare Parts A, B, and D. Therefore, costs for services such as vision, hearing, dental, in-vitro fertilization, abortion, and prescription drugs not covered under Part B or D are not eligible for ERRP reimbursements.

Plan sponsors can only use health premiums and/or costs eligible for reimbursement under ERRP, and not total plan costs, to satisfy the maintenance of contribution requirement. However, CMS realizes that a plan sponsor may have difficulty determining the amounts that were allocated for or spent on eligible health premiums and/or costs during a plan year subject to the maintenance of contribution requirement. Therefore, the guidance allows plan sponsors to use any reasonable methodology to estimate or extract the eligible health benefits premiums and/or costs from all health premiums and/or costs.

BUCK COMMENT. *Plan sponsors will need to document the methodology used to estimate eligible expenses and provide this upon request on audit.*

Baseline Period for Determining the Plan Sponsor's Contribution Level

To determine whether they satisfy the maintenance of contribution requirement, plan sponsors will need to compare health benefit premiums and/or costs to those in the baseline period. Any of the following periods can be used as the baseline period for determining the plan sponsor's contribution level:

- *A period consisting of the most recent 12-month plan year that ended before the date the plan sponsor submitted its ERRP application.* For example, if the plan is a calendar year plan and the plan sponsor submitted its application any time during calendar year 2010, the baseline period would be the January 1, 2009 – December 31, 2009 plan year. The plan sponsor would be required to demonstrate that it has spent as much in health benefit premiums and/or costs in each applicable year as it did in the baseline year.
- *A period consisting of up to five of the most recent consecutive 12-month plan years, including the plan year that ended immediately before the date the plan sponsor submitted its ERRP application.* Under this approach the plan sponsor may select up to five consecutive plan years, including the plan year that ended immediately prior to the submission of the ERRP application. To determine the baseline amount, the plan sponsor would average the amount of health benefit premiums and/or costs over the period selected.
- *A period consisting of a single 12-month plan year for which the plan sponsor's budget for health benefits and/or premiums was finalized, or for which a collective bargaining agreement was ratified, before June 1, 2010.* Some plan sponsors may have finalized a budget or ratified a collective bargaining agreement prior to June 1, 2010 that set maximum health benefit cost and/or premium spending levels for plan years for which the plan sponsor could otherwise participate in ERRP. If the plan sponsor cannot satisfy the maintenance of contribution requirements using one of the above two methods, it can use as its baseline period the 12-month plan year ending after June 1, 2010 for which the budget was finalized or a collective bargaining agreement was ratified prior to June 1, 2010. A similar approach would apply for multi-year budgets or collective bargaining agreements.

Permissible Maintenance of Contribution Methodologies

In past guidance, CMS indicated that plan sponsors may use either aggregate or per capita spending trends to demonstrate satisfaction of the maintenance of contribution requirement. The new guidance expands on these two general approaches and allows the following methodologies:

- *Aggregate Spending Trend, Percentage Methodology.* Under this approach, the plan sponsor must demonstrate that it spent at least the same percentage in the aggregate across the plan for each year in which the plan sponsor was required to satisfy the maintenance of contribution requirement as it spent in the baseline year. For example, if the plan sponsor paid on average 70% of the plan cost in the baseline year, it would need to pay at least 70% of plan costs in each year that the plan sponsor is required to satisfy the maintenance of contribution requirement.

- *Aggregate Spending Trend, Total Dollars Methodology.* Under this approach, the plan sponsor must demonstrate that it spent at least the same dollar amount in the aggregate across the plan for each year in which the plan sponsor is required to satisfy the maintenance of contribution requirement as it spent in the baseline year. For example, if the plan sponsor paid \$1,000,000 of the plan cost in the baseline year, it would need to pay at least \$1,000,000 of plan costs in each year that the plan sponsor is required to satisfy the maintenance of contribution requirement.
- *Per Capita Spending Trend, Percentage Methodology.* Under this approach, the plan sponsor must demonstrate that it spent at least the same percentage per plan participant for each year where the plan sponsor is required to satisfy the maintenance of contribution requirement as it spent in the baseline year. For example, if the plan sponsor paid on average 70% of the plan cost in the baseline year per plan participant, it would need to pay at least 70% of plan costs per participant in each year that the plan sponsor is required to satisfy the maintenance of contribution requirement.
- *Per Capita Spending Trend, Total Dollars Methodology.* Under this approach, the plan sponsor must demonstrate that it spent at least the same dollar amount per plan participant across the plan for each year where the plan sponsor is required to satisfy the maintenance of contribution requirement as the amount it spent in the baseline year. For example, if the plan sponsor paid \$1,500 of the plan cost in the baseline year, it would need to pay at least \$1,500 of plan costs per capita in each year that the plan sponsor is required to satisfy the maintenance of contribution requirement.

BUCK COMMENT. *Plan sponsors will need to decide which approach to take for satisfaction of ERRP requirements, complete tests to ensure compliance, and document their methodology and results in case of CMS audit.*

The above approaches provide plan sponsors with several ways of demonstrating satisfaction of the maintenance of contribution requirements. However, if a plan sponsor cannot satisfy the maintenance of contribution requirement using one of these methodologies, it can use another reasonable alternative methodology. The plan sponsor would need to be prepared to explain on audit its alternative methodology.

In addition to the above approaches, a sponsor of a self-funded plan can compare the amount spent in the baseline period to the amount that it allocated (set aside) to spend on health benefits for each year. However, to take this approach the plan sponsor would need to demonstrate that the full amount of such funds was available in a trust or fund whose terms limited the use of the funds to paying health claims.

Additional Guidance

CMS also posted additional guidance in the form of Common Questions on the ERRP website. The guidance addresses a number of issues, including:

ERRP Funds and Stop-Loss Insurance

The guidance states that ERRP funds may be used to purchase stop-loss insurance coverage. It also states that a plan sponsor does not use ERRP funds in an impermissible manner if pursuant to its contract with a stop-loss carrier, it refunds the amount of any claims that the sponsor or stop-loss carrier recovers from a third party to the carrier, even if the sponsor had previously received ERRP reimbursements for any amount of such claim.

Allocation of ERRP Reimbursements to Health Reimbursement Accounts

The guidance states that making ERRP funds available to a plan participant through a health reimbursement account (HRA) can be a permitted method for use of ERRP reimbursements. However, the HRA funds can only be used for ERRP permissible purposes (i.e., reducing participants' health benefit premium contributions, copayments, deductibles, coinsurance, or other out-of-pocket expenses).

BUCK COMMENT. *As long as amounts remain in the HRA and have not been used for a permissible purpose, the plan sponsor will be subject to the maintenance of contribution requirement. Thus, funding the HRA with ERRP funds may not be advisable.*

Required Notice to Plan Participants

Plan sponsors participating in ERRP must provide all plan participants with a form notice that informs participants that the plan sponsor may use any reimbursements it receives through ERRP either to reduce or offset increases in participant cost-sharing or to reduce or offset increases in its own costs for maintaining health coverage. (See our October 5, 2010 [For Your Information](#).) The new guidance confirms that the form notice provided by CMS cannot be changed in any way. While the form notice does not need to be provided annually, it must be provided to all new enrollees in the plan, including in some cases new dependents added to coverage.

Conclusion

The new guidance provides several options and considerable flexibility for plans sponsors to satisfy the ERRP maintenance of contribution requirement. However, plan sponsors will need to document the methodology and results used to support compliance.

Buck's consultants are available to assist with these requirements, including providing documentation of satisfaction of the maintenance of contribution requirement.

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