
## Carrier Premium Credits and ERISA Fiduciary Obligations

Due to COVID-19 and state and local stay-at-home orders, utilization of group medical and dental insurance benefits is down. As a result, some carriers recently notified employers that they will be issued premium credits. When asking how these premium credits should be treated by the employer, we often compare then to the ACA's medical loss ratio (MLR) rebates. While these premium credits are not MLR rebates, a similar decision must be made to determine whether they, like MLR rebates, are ERISA plan assets.

### Background

As background, the Affordable Care Act's MLR rule requires health insurers to spend a certain percentage of premium dollars on claims or activities that improve health care quality, otherwise they must provide a rebate to employers. At the same time the U.S. Department of Health and Human Services issued the MLR rule, the U.S. Department of Labor (DOL) issued Technical Release 2011-04 (TR 2011-04), which clarifies how rebates should be treated under ERISA. Under ERISA, anyone who has control over plan assets, such as the plan sponsor, has fiduciary obligations and must act accordingly.

Clearly, the premium credits we are seeing are not subject to the MLR rule; however, a similar analysis applies. TR 2011-04 clarified that insurers must provide any MLR rebates to the policyholder of an ERISA plan. However, while the DOL's analysis was focused on MLR rebates, it recognized that distributions from carriers can take a variety of forms, such as "refunds, dividends, excess surplus distributions, and premium rebates." Regardless of the form or how the carrier describes them, to the extent that a carrier credit, rebate, dividend, or distribution is provided to a plan governed by ERISA, then the employer must always consider whether it is a "plan asset" subject to Title I of ERISA. If it is, then as the party with authority and control over the "plan assets," the employer is a fiduciary subject to Section 404 of ERISA and bound by the prohibited transactions provisions of Section 406. In other words, to the extent that a refund is a plan asset, it must be used for the exclusive benefit of plan participants, which may include using it to enhance plan benefits or returning it to employees in the form of a premium reduction or cash refund.

## Treatment of Premium Credits to Employers

In situations where an employer uses a trust to hold the insurance policies, the DOL's position is that the rebates are generally assets of the plan. However, in situations where the employer is the policyholder, the employer may, under certain circumstances, retain some or all of a rebate, credit, refund, or dividend. When considering whether a rebate is a plan asset, the terms of the plan should be reviewed. As discussed below, some employers draft their plan documents in a manner that allows them to retain these types of refunds. If the terms of the plan are ambiguous, the DOL recommends employers use "ordinary notions of property rights" as a guide.

When determining whether carrier credits, dividends, distributions or rebates are ERISA plan assets, the DOL will look to the terms of the documents governing the plan, including the insurance policy. If these governing documents are silent on the issue or unclear, then the DOL will take into consideration the source of funding for the insurance premium payments. In such situations, the amount of a premium credit that is not a plan asset (and that the employer may therefore retain) is generally proportional to the amount that the employer contributed to the cost of insurance coverage. For example, if an employer and its employees each pay a fixed percentage of the cost, a percentage of the premium credit equal to the percentage of participants' cost would be attributable to participant contributions. In the event that there are multiple benefit options, a premium credit attributable to one benefit option cannot be used to benefit enrollees in another benefit option.

## The Plan Document

Employers can draft their plans to make it clear that the employer retains all rebates, credits, distributions, etc. if the rebates, credits, distributions, etc. do not exceed the employer's contribution towards the benefit. If given this flexibility in the plan, the employer may not have to return a portion of the premium credit to employees or use the credit to provide a premium reduction. While this gives employers more flexibility, employers should consider that carriers communicate some premium refunds, such as an MLR rebates, to both the policyholder and participants, therefore employees know the employer received money back from the carrier and they may expect something in return. Therefore, there is the potential for employee relations issues with this approach.

If the plan document does not provide this flexibility to the employer, is silent with regard to the use of such funds, or is unclear about how such funds are allocated, then the employer should treat any premium credits like they are ERISA plan assets (to the extent they're attributable to employee contributions) and allocate them accordingly.

## Allocating the Employees' Share of a Premium Credit

The portion of the premium credit that is considered a plan asset must be handled according to ERISA's general standards of fiduciary conduct. However, as long as the employer adheres to these standards, it has some discretion when allocating the premium credit.

If an ERISA plan is 100 percent employee paid, then the premium credit must be used for the benefit of employees. If the cost of the benefit is shared between the employer and participants, then the premium credit can be shared between the employer and plan participants.

There is some flexibility here. For example, if the employer finds that the cost of distributing shares of a premium credit to former participants approximates the amount of the proceeds, the employer may decide to distribute the portion of a premium credit attributable to employee contributions to current participants using a "reasonable, fair, and objective" method of allocation. Similarly, if distributing cash payments to participants is not cost-effective (for example, the payments would be *de minimis* amounts, or would have tax consequences for participants) the employer may apply the premium credit toward future premium payments or benefit enhancements. An employer may also vary the premium credit so that employees who paid a larger share of the premium will receive a larger share of the premium credit.

Ultimately, many employers provide the employees' share of the premium credit in the form of a premium reduction or discount to all employees participating in the plan at the time the premium credit is distributed. Employers should review all relevant facts and circumstances when determining how such a credit will be distributed.

Regardless, to avoid ERISA's trust requirement, the portion of a premium credit that is plan assets must be used within three months of receipt by the policyholder.

## Conclusion

Employers that would like additional flexibility in how to treat carrier premium credits should work with counsel to update their plan documents. Even for plans with flexibility built into the terms, we encourage consultation with counsel to review the facts and circumstances surrounding any such premium credits to ensure compliance with ERISA.

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