ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: PRACTICAL Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, and Carolyn Smith provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley Gillihan and Carolyn Smith are senior members of the Health Benefits Practice. Answers are provided as *general guidance* on the subjects covered in the question and are *not provided as legal advice* to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

HANDLING INSURER REBATES

For a variety of reasons many employer plan sponsors may be pleasantly surprised when they are faced with potential insurer rebates and/or unexpected positive claims experience. In some cases, the positive claims experience may be attributable to the temporary and significant decline in utilization due to COVID interruptions. In addition to primary medical coverage, the excess amounts may be for ancillary coverage (e.g., dental or vision insurance). While there was great focus on the treatment of premium rebates after the ACA medical loss ratio (MLR) rules, many plan sponsors are surprised at the restrictions that ERISA may impose on the issue of such rebates. This article provides a high-level recap of the ERISA regulatory requirements.

IS THE REFUND AN ERISA PLAN ASSET?

Step 1: Who holds the policy? If the policy is in the name of the plan or the plan's trust, then all of the refund is likely an ERISA plan asset. If the employer is the policyholder go to step 2.

Step 2: If the employer is the policyholder then the plan document (along with certain other extra-contractual documents such as enrollment materials that reflect the parties' understanding and representations) will control the disposition of the assets. In many situations, however, plan documents will not adequately address the issue of disposition of rebates. In such cases, the DOL looks to the relative portion of the premium paid for by the employer and employees for the period that gave rise to the rebate, as follows:

IF	THEN
The plan or plan trust is the policyholder	The entire rebate is plan assets.
The employer pays the entire premium	No part of the rebate is plan assets; the employer is entitled to the entire rebate
The participants pay the entire premium	The entire rebate is plan assets.
The participants and employer each pay a fixed percentage of the premium	The percentage of the rebate equal to the percentage of the premium paid by participants is plan assets.
The employer pays a fixed amount and participants pay the rest	The rebate is plan assets, except to the extent the rebate exceeds the total amount paid by participants.
Participants pay a fixed amount and the employer pays the rest	The rebate belongs to the employer, except to the extent the rebate exceeds the total amount paid by the employer.

TO THE EXTENT A REBATE IS PLAN ASSETS, DOES THE REBATE HAVE TO BE HELD IN A TRUST UNTIL DISTRIBUTED?

ERISA generally requires that plan assets be held in trust. DOL Technical Release 2011-04 (the DOL Technical Release) describes two exceptions to this requirement that will be helpful for plan sponsors, recognizing that in many cases there is no trust maintained with respect to the group health plan (e.g., due to the cafeteria plan trust moratorium under Tech Rel 92-01).

First, the DOL Technical Release applies the same safe harbor to the trust requirement for rebates that currently applies with respect to cafeteria plan contributions and certain other contributory plans under Tech Rel 92-01. Thus, if a trust is not

established for the plan in reliance on Tech Rel 92-01, then the rebate does not have to be held in trust if it is used within three months of receipt by the policyholder. Note that the DOL Technical Release specifically says that, under this safe harbor, the rebate must be used within three months "to pay premiums or refunds." However, as discussed further below (under "To the extent a rebate constitutes plan assets, how can the rebate be used?"), rebates may be used for purposes other than payment of premiums or refunds. If a plan does have a trust, then this safe harbor does not apply.

PRACTICE POINTER:

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If a plan currently does not have a trust in reliance on the safe harbor the DOL has provided for cafeteria plan contributions, then rebates that are plan assets do not have to be held in trust if the rebates are used within three months of receipt by the employer in accordance with DOL guidance.

Second, under ERISA statutory rules referenced in the DOL Technical Release, the trust requirement does not apply to plan assets that are held by an insurance company. Thus, if the plan does not have a trust, another possibility is to have the insurance company hold the rebate to the extent it constitutes plan assets, and then distribute the rebate as directed by the employer/plan fiduciary. This avoids the need to incur costs associated with a trust when one is not otherwise established under the plan.

In either case, however, ERISA's fiduciary requirements would apply to the use of the rebate. The DOL Technical Release specifically states that such an approach may, depending on the circumstances, be consistent with fiduciary responsibilities.

TO THE EXTENT A REBATE CONSTITUTES PLAN ASSETS, HOW CAN THE REBATE BE USED?

The DOL Technical Release does not contain specific rules or safe harbors regarding permitted uses of rebates that are plan assets. Rather, the DOL Technical Release restates general guidance on ERISA fiduciary principles, much of which is based on prior opinions regarding the distribution of demutualization proceeds. Thus, the method of allocation among plan participants and the particular use of the rebates (e.g., to reduce premiums, to make cash distributions or for other permitted plan purposes) is to be determined in accordance with ERISA's general prudence standard. The plan fiduciary should take into account relative costs and benefits of different approaches. Based on the DOL Technical Release, as well as prior guidance, the following general principles emerge regarding the use of rebates that constitute plan assets:

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- ***Rebates do not have to be precisely allocated among plan participants based upon their premium payments.*** The allocation method must be reasonable, fair and objective, and cannot benefit a plan fiduciary who is also a plan participant at the expense of other participants.

- ***Rebates may be allocated to current plan participants if the cost of allocating a portion of the rebate to former plan participants who were in the plan for the year to which the rebate relates is unreasonable.*** Thus, tracking down former participants to pay rebates is not necessarily required.

- ***Rebates are not required to be used in any particular way. Rather, rebates may be distributed in cash or may be used to reduce future premiums, enhance benefits or for any other permissible plan purposes, providing such use is consistent with fiduciary requirements.*** The amount of the rebate will be a significant factor in determining an appropriate use of the rebate. For example, administrative costs of reducing future premiums or distributing cash rebates are likely to be prohibitive in many cases. Thus, other uses are permissible. For example, depending on the circumstances, it may be appropriate to provide a wellness benefit under the plan or to use a rebate to offset plan costs that are not the obligation of the plan.

- ***If reasonable, rebates should be used for the participants covered by the policy to which the rebate relates.*** Similarly, if benefits are provided under multiple policies, the fiduciary should generally allocate the plan's portion of the rebate for the benefit of participants who are covered by the policy to which the rebate relates. However, such an allocation is not required if the fiduciary determines that it is not prudent or in the best interests of plan participants. Thus, it may be prudent in some circumstances to use a rebate for all participants in a plan, not just those in the option that generated the rebate.

- ***In no event may the use of a rebate generated by one plan be used to benefit the participants in another plan.***

WHAT PORTION OF THE REBATE MUST BE USED BY THE POLICYHOLDER TO BENEFIT PLAN PARTICIPANTS?

The policyholder must use the amount of the rebate that is "proportionate" to the total amount of the premium paid by all subscribers under the policy, with respect to which the rebate is paid for the benefit of plan participants. Here is a very simple example of how this is determined. If the rebate with respect to a policy is $20,000 and the policyholder paid 40 percent of the total premium, then the policyholder is required to use $8,000 of the rebate for the benefit of plan participants.

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WHAT ARE THE PERMITTED MEANS OF USING THE PARTICIPANTS' PORTION OF A REBATE?

There are three different permissible distribution methods with respect to the portion of a rebate that is attributable to participants. The policyholder may choose any one of these three methods with respect to a particular rebate. In all cases, the rebate can be used to benefit current participants—meaning those covered at the time the rebate is received—so there is no need to track former participants who were in the plan in the year to which the rebate relates.

The policyholder may decide to distribute the participants' portion of a rebate in any one of the following ways:

- to reduce premiums for the subsequent plan year for all participants in the plan (regardless of whether the participant is covered under the option that generated the rebate);
- to reduce premiums for the subsequent policy year only for those participants who are in the plan option that generated the rebate; or
- to pay cash refunds to participants enrolled in the group health plan option that generated the rebate.

HHS provides options for how the policyholder may divide the participants' share among different participant groups. At the option of the policyholder, the rebate may be divided evenly among plan participants (e.g., on a per capita basis), divided based on each participant's actual contributions to the premium or apportioned in a manner that reasonably reflects each participant's contributions to the premium. ■