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News & Types: Employment, Labor & Benefits Update

Obamacare: We Received a Check From Our Insurance Company. Can We Keep The Money?

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Practices: Employment, Labor & Benefits

On March 23, 2010, the Patient Protection and Affordable Care Act ("PPACA") added Section 2718 to the Public Health Services Act ("PHSA"). The new section requires health insurance companies to submit an annual earned premium and expenditure report to the Department of Health and Human Services and comply with specific medical loss ratios (80% for employers with less than 100 employees and 85% for employers with more than 100 employees). If an insurance company's spending on reimbursement for clinical services, activities to improve health care quality and other non-claims costs fails to meet the required percentages (80% or 85%), the insurance company is required to refund part of the premium received to policyholders. The first premium refund was due and paid to some companies in August 2012.

As a result of this continuing healthcare reform mandate, on or about August 1, 2013, companies may have received a premium refund from its group medical insurance carrier if the carrier failed to meet the specified medical loss ratios. Below, we have summarized the analysis necessary to determine if the company can keep the refund in whole or in part:

1. **Plan Assets:** The first step is to determine who owns the refund. In accordance with the DOL's guidance (Technical Release 2011-04), the portion of the refund that is attributable to employee contributions would be considered plan assets. Therefore, if a company's employees contribute to the cost of the group medical insurance plan, they are likely entitled to a percentage of the refund in accordance with ERISA's fiduciary standards which require that the company to act prudently and solely in the interest of participants in allocating the refund.
2. **Allocating the Refund:** Secondly, the DOL has stated that an allocation of the refund does not fail to be impartial or "solely in the interest of participants" merely because it does not reflect the activity of plan participants. As a result, in deciding on an allocation method, companies can weigh the costs to the plan and the ultimate plan benefit as well as the competing interests of participants or classes of participants provided such method is reasonable, fair and objective. For example, if a company determines that the cost of distributing the refund to former participants approximates the amount of the refund, the DOL concludes that the company may allocate the proceeds only to current participants on a reasonable, fair and objective method. More directly, if distributing the payments to any participants is not cost effective (payments are of de minimis amounts or would give rise to tax consequences to

participants or the plan), companies may consider utilizing the refund for other permissible purposes including applying the refund toward future participant premium payments or toward benefit enhancements. The key point is that the company must perform this allocation analysis and should retain a written summary of the steps taken by it to allocate the refund on a reasonable, fair and objective basis.

3. **When Must The Refund Be Applied?** Generally, ERISA plan assets must be held in a trust. However, if the premium refund is allocated within 3 months of receipt, companies are permitted to rely on an exemption to the trust requirement. At this time, the DOL has not released any additional guidance that would permit a calendar year plan to retain the refund until January 1 in order to ease the administrative burden of applying the refund. Therefore, the premium refunds generally should be allocated no later than early November 2013.