

Benefits Alert

February 2009

Group Health Plans Get Ready For Medicare Reporting

The federal government *always* wants Medicare to be the secondary payer. Under a new federal law, beginning January 1, 2009, all insured and self-insured group health plans must file reports with the Centers for Medicare and Medicaid Services (CMS) to ensure that Medicare stays second in line.

WHO REPORTS WHAT TO WHOM

Currently, many group health plans voluntarily report Medicare-as-secondary-payer information. The mandatory reporting process builds upon this existing voluntary process. Mandatory reporting applies to insurers and third-party administrators. For self-insured and self-administered plans, administrators or fiduciaries are on the hook.

Under the law, group health plans must secure from the plan sponsor and plan participants information that identifies situations in which the plan is or has been the primary payer to Medicare, and file that information with the CMS. Non-compliance will be costly. A \$1,000 civil fine applies for each day of non-compliance for each individual for whom the information should have been submitted.

The CMS has released a detailed 136-page User Guide, and has clarified that reports will be filed electronically on a quarterly basis. To facilitate e-filing, the CMS has launched a website through which plans will file their reports. The website, which is built to be a one-stop-shopping site, provides reporting instructions through clickable links or as a download-

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able document. The CMS has included the following information on its website:

- the data elements that plans will be required to report;
- definitions and reporting responsibilities, which should help plans determine whether they are reporting entities;
- an “ALERT” regarding the collection of Social Security Numbers (SSNs), Medicare Health Insurance Claim Numbers (HICNs), and Employer Identification Numbers (i.e.,



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Proposed Regs Firm Up 401(k) Distribution Notice Requirements

The 2006 Pension Protection Act (PPA) requires 401(k) plans to inform terminating employees with more than \$5,000 in their accounts of the (mostly) negative tax consequences that ensue if they take early distributions. The PPA also extends the time period during which plans must provide notices, including this notice. Plans had to implement these changes beginning with plan years after December 31, 2006, and could do so by adopting language contained in a safe harbor the IRS created in 2007. Proposed regulations build on the safe harbor's content requirements. Until final regs are issued, plans may rely on the 2007 safe harbor or these proposed regs.

CONTENT OF NOTICES

The proposed regs don't detail any particular language plans must use. The regs only state that notices must be designed to be easily understood. Plans must provide employees with a description of these specific

federal tax implications of failing to defer a distribution.

- The differences in timing of inclusion in taxable income of an immediately commencing distribution that isn't rolled over into an IRA (or isn't eligible to be rolled over) and a distribution that's deferred as long as possible; that a distribution may be subject to the 10% early withdrawal penalty; and the loss of future tax benefits if the distribution isn't rolled over.

- A statement that some current investment options in the plan may not be available on similar terms outside the plan. The notice must include contact information so the employee can obtain additional information on the availability outside the plan of currently available investment options in the plan.

- A statement that fees and expenses, including administrative or investment-related fees, outside the plan may be different from fees and expenses inside the plan. The notice must contain contact information so the employee may obtain ad-

ditional information on the fees that apply to his/her account.

- An explanation of plan provisions, and provisions of an employer-provided accident or health plan, which could reasonably be expected to materially affect an employee's decision to defer the distribution. These provisions include: plan terms under which an employee who fails to defer may lose eligibility for retiree health coverage, early retirement subsidies, or Social Security supplements; plan terms under which the benefits of a rehired employee who failed to defer may be adversely affected; and plan terms under which undistributed benefits that are otherwise non-forfeitable become forfeitable upon the employee's death.

This information must generally appear together, for example, in a list of consequences of failing to defer. However, the notice may include cross references to where the employee may find the required information in other notices or plan documents. *Key:* Plans that choose the cross-referencing route must ensure that the notice includes a statement of how the employee can obtain the referenced material free of charge, and explains why the referenced material is relevant to the employee's decision to defer.

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Group Health Plans Get Ready For... (cont.)

a company's federal tax ID number), which may be useful if a reporting entity receives questions about the collection of SSNs and/or HICNs;

- how to configure electronic record layouts;
- how reporting entities can register to report;
- time frames and time lines,

which detail when reporting entities must register, when reporting starts, time frames for testing, etc.; and

- a suggested model form for collecting Medicare beneficiary information.

The CMS's website is www.cms.hhs.gov/MandatoryINSRep/. ❖

TIMING OF NOTICES

The PPA expands the time for providing employees with notice of their distribution options to 180 days prior to the date of the distribution, from 90 days. The regs clarify that the 180-day time limit applies to notices that must be provided beginning with plan years after December 31, 2006. ❖

“Green” 401(k) Investment Options May Give You The Blues

Plan sponsors that seek to align their 401(k) plans’ investment options with political, corporate, or other goals — so-called economically targeted investments in companies that are “green” or pro-union, or sponsors that want to divest investments from countries with unsavory dictators or politics — may have a tough time justifying those choices. The Department of Labor (DOL), in an Interpretive Bulletin, has concluded that, by and large, fiduciaries may not select investments on the basis of factors outside of the economic interest of the plan.

ONE CHOICE PRECLUDES ANOTHER

Fiduciaries must always act in the best interest of the plan. According to the DOL, ERISA establishes a clear rule that requires fiduciaries to choose investment options based on economic factors. *DOL*: Because every investment necessarily causes a plan to forgo other

investment opportunities, an investment isn’t prudent if it would be expected to provide the plan with a lower rate of return than alternative investments with similar degrees of risk, or is riskier than alternative available investments with similar rates of return.

The DOL has left very little wiggle room. Fiduciaries would be prohibited from choosing economically targeted investments, even if that’s what participants want them to do. What little wiggle room there is depends on whether two (or more) investment alternatives are of equal economic value to the plan. All things being equal, the DOL has clarified that it wouldn’t be a breach of fiduciary duty to choose an investment that conforms with non-economic factors.

Choosing economically targeted investments, according to the DOL, should be a rare occurrence. It wouldn’t be enough, the DOL said, to limit investments to “green” companies. Fiduciaries would first have to

consider all investments that meet the plan’s prudent financial criteria. Fiduciaries could eliminate a non-green company from consideration only if they determine that investing in a “green” company would provide equal or better returns at the same or lower risks, and would play the same role in the plan’s portfolio.

The bulletin sets out the steps fiduciaries must take before selecting an economically targeted investment option.

- Fiduciaries must conclude that alternative options are truly equal by performing a quantitative and qualitative analysis of the economic impact on the plan.
- Fiduciaries must examine the level of diversification, degree of liquidity, and potential risk/return when comparing investment alternatives.
- Fiduciaries should develop a written record of their analyses.

SHAREHOLDER RIGHTS

In another Interpretive Bulletin concerning shareholder rights, the DOL updated prior guidance on how ERISA’s fiduciary standards apply to proxy voting. The updated bulletin

Ask The Experts

Q. We do business in Indiana. Starting next month, the company is going to dock each smoker’s pay \$30 a week until they quit. It’s the same for obese employees. This sounds fishy to our Payroll department. Is it?

A. It may be. While the federal Health Insurance Portability and Accountability Act allows surcharges as part of a wellness plan that includes a quit-smoking or similar program, it’s not at all clear what Indiana’s wage payment law will allow. For example, surcharges that are considered an increase in health premiums are permissible. But surcharges that are considered docking for fines are clearly not allowable. We suggest you pursue this matter further with the company’s legal counsel.

Congress Makes Technical Amendments To 401(k) Plan Rules

Before the 110th Congress officially adjourned last month, it passed the Worker, Retiree, and Employer Recovery Act of 2008. The law contains technical corrections to the 2006 Pension Protection Act, as well as relief for retirees who were required to take minimum required distributions from retirement accounts. Key provisions of the law include the following.

- Distributions from a Roth 401(k) can be directly rolled over into a Roth IRA, without regard to the income restrictions that

normally apply to Roth IRAs.

- Effective for plan years beginning after December 31, 2009, 401(k) plans must allow non-spouse beneficiaries to directly roll over a deceased employee's 401(k) assets.

- The law repeals the requirement that eligible automatic contribution arrangements abide by the Department of Labor's regulations on qualified default investment alternatives in order to permit employees who opt out of the plan to receive their previously withheld distributions.

- For 401(k) non-discrimination testing, the law provides that in the case of a distribution of an excess contribution and income allocable to that contribution, the income that must be distributed is the income allocable to the excess contribution through the end of the year for which the distribution is made (no gap period income).

- For calendar year 2009, 401(k) plans and IRAs are not required to make minimum required distributions to retirees. The next required minimum distribution would be for calendar year 2010. This relief applies to lifetime distributions to employees, IRA owners, and after-death distributions to beneficiaries. ❖

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"Green" 401(k) Investment Options May Give You The Blues (cont.)

reiterates that fiduciaries may never increase expenses, sacrifice investment returns, or re-

duce the security of plan benefits in order to promote legislative, regulatory, or public policy goals

that have no connection to the payment of benefits or a plan's administrative expenses. ❖