

# Benefits Alert

June 2010

## DOD Clarifies TRICARE/ Cafeteria Plan Relationship

Employees who retire from active military service are eligible for health benefits through the government's TRICARE program. If they're employed, they may also be eligible for employer-provided health benefits. *Wrinkle:* Under the 2007 John Warner Defense Authorization Act, employers with 20 or more employees can't offer incentives, such as cash, to TRICARE-eligible employees and their dependents to not enroll in employer-provided health plans. This law has raised questions regarding health benefits that are provided through cafeteria plans. Final regulations issued by the Department of Defense (DOD) state that cafeteria plan incentives offered to all similarly situated employees to not enroll don't violate this law.

### CAFETERIA PLAN MESS

The DOD is concerned that employers will offer retired military members and their dependents incentives to not enroll in the company's health plan, thus making TRICARE the primary payer. However, TRICARE, like Medicare, is always a secondary payer. *Hitch:* The incentive — primarily cash — is part of the bargain cafeteria plans offer employees. In addition, cafeteria plans that provide employees with a fixed amount per year to purchase benefits (so-called flex money) may give those who don't spend all their flex dollars the difference in cash.

According to the final regs, financial incentives (i.e., the traditional cash-or-benefit swap) that cafeteria plans offer to all similarly situated employees

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may be offered to TRICARE-eligible employees. *Key:* Cash payments made to employees must be based on their election to decline health benefits, and not on their TRICARE-eligible status. Additional requirements of any private health plan are permissible, provided the plan treats all similarly situated employees the same, and doesn't illegally take TRICARE eligibility into account. In this respect, the final regs adopt the Medicare-as-secondary-payer rules.



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## HHS Launches Early Retiree Reinsurance Program June 1

Included in the Patient Protection and Affordable Care Act, otherwise known as health care reform, is a temporary reinsurance program to assist sponsors of insured and self-insured employment-based plans with the cost of providing health benefits to retirees who are at least 55 years old and who aren't Medicare-eligible (retirees' dependents are eligible, too). The Department of Health and Human Services (HHS) has announced, through interim final regulations, that the program began on June 1, 2010, and, since funding is limited to \$5 billion, will accommodate applicants on a first-come-first-served basis. *Upshot:* In order to have a chance to participate in the program, your application must be complete the first time

around.

### REINSURANCE PROGRAM PARTICULARS

To a large extent, the HHS has patterned this program after the Medicare Retiree Drug Subsidy program, reasoning that many of the same plan sponsors will participate in both. Health benefits that qualify for reimbursement under the early retiree program include medical, surgical, hospital, prescription drug, and other benefits. Benefits that are considered excluded benefits under the Health Insurance Portability and Accountability Act are excluded from this program, as well.

Participants may be reimbursed for up to 80% of retirees' health claims between \$15,000

and \$90,000. The regs clarify that all of a retiree's medical expenses are added together to determine whether the \$15,000/\$90,000 thresholds are reached. *Transition relief:* Since the program is beginning mid-year, claims incurred between the start of the plan year and June 1 are credited toward the \$15,000 threshold for reimbursement, but only medical expenses incurred after June 1, 2010, are eligible for reimbursement.

### GETTING IN

The HHS says that applications will be available by the end of this month. At this point, it's unknown whether the application process will be strictly an electronic one. Reimbursements will be available for early retirees who have chronic or high-cost conditions, which the regs define as a condition for which \$15,000 or more in claims are likely to be incurred.

Applicants must submit the following information for each plan for which reimbursement will be requested. Sponsors don't have to apply for every plan year, however.

- The sponsor's tax identification number and name and address; and a contact person's name, phone number, and e-mail address.
- An assurance that the sponsor has a written agreement with its health insurance issuer or plan regarding the disclosure of information to the HHS.
- An attestation that the sponsor has policies and procedures to detect and reduce fraud, waste, and abuse, and that the sponsor will produce those policies and procedures, and other information, records,

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## DOD Clarifies TRICARE/Cafeteria Plan...(cont.)

### TRICARE SUPPLEMENTS OK

The final regs allow employers to offer TRICARE-exclusive supplement plans as a cafeteria plan benefit on a strictly voluntary basis. This is a departure from the proposed regs, which would have prohibited employer-provided TRICARE supplement plans because they couldn't qualify as cafeteria plan benefits due to the fact that they weren't open to everyone. The final regs allow employees to contribute to these plans on a pre-tax basis, but don't allow employers to make any contribution, matching or otherwise, toward these benefits. *Bottom*

*line:* The only involvement employers have with TRICARE-exclusive supplement plans is administrative.

Employers that want to offer TRICARE-exclusive supplement plans must sign certifications that they don't contribute to these plans and don't receive any direct or indirect consideration or compensation for offering these plans. The certification must be presented to the DOD on request. A civil fine of \$5,000 may be assessed against employers that violate these provisions.

The final regs become effective June 18, 2010. ♦

## New Dependent Health Care Coverage Rules Take Shape

Under the Patient Protection and Affordable Care Act, employees may continue to cover their adult children on their group health plan on a tax-free basis until the year their adult children turn 27. A new IRS notice, effective March 30, 2010, explains this provision.

### ADULT CHILDREN ISN'T AN OXYMORON

The notice clarifies that employees can continue to pay for their adult children until the year they turn 27 on a tax-free basis, regardless of whether their adult children meet the definition of “dependent” for income tax purposes. So, these adult children can live on their own and hold their own jobs, and still get their health care coverage through their parents. However, this isn't

the rule if these adult children are married. Employees who choose to cover their children's spouses must pay for that coverage with after-tax dollars. The IRS illustrates:

*Example.* Russ covers his son and daughter-in-law, Glen and Harriet, through his employer-provided plan. Russ may pay for Glen's coverage on a tax-free basis until the year Glen turns 27. However, the fair market value of Harriet's coverage must be included in Russ's income. Alternatively, Russ can pay for 100% of Harriet's coverage with after-tax dollars.

Unlike the requirement in the health care reform law that mandates that some group plans continue to cover dependents until they turn 26 if they don't have access to their own insurance, there is no require-

ment that children not have access to their own insurance, according to the IRS. How do you know when a child turns 27 and, therefore, ages out of tax-free coverage? The IRS says that you can take employees' word for it. The IRS also clarifies the following points.

- Employees' cafeteria plan and health flexible spending account (FSA) elections regarding coverage for adult children made before health care reform was enacted carry forward automatically. *Heads up:* Before changing elections, employees need to see if adult-child coverage is available, since not all plans offer this coverage.

- Employees can revoke their cafeteria plan elections only in very limited circumstances that involve a change in status. A change in the number of dependents is such a status change. Employees who wish to cover their adult children must revoke their current cafeteria plan elections and make new ones. The IRS says that it intends to issue regulations effective retroactively to March 30, 2010, to include change in status events affecting adult children who are newly eligible for coverage or eligible for coverage beyond the date on which the child otherwise would have lost coverage.

- Cafeteria plans may need to be amended to include employees' adult children. The IRS is making an exception to the rule that cafeteria plans can only be amended prospectively. *Bottom line:* You may allow employees to immediately make pre-tax deductions for their adult children and amend the plan later. *Catch:* Retroactive

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### HHS Launches Early Retiree Reinsurance... (cont.)

and data upon the HHS's request.

- A summary of how the sponsor will use its reimbursement to reduce premiums, co-payments, deductibles, co-insurance, or other out-of-pocket costs for plan participants; to reduce health benefit or health benefit premium costs for the sponsor; or to reduce a combination of those costs. The sponsor must also show how it will use reimbursements to maintain its level of contributions to the plan, and the projected amount of reimbursements to be re-

ceived for the first two plan year cycles, with specific amounts for each of those two cycles.

- A recitation of the sponsor's procedures or programs that have generated or have the potential to generate cost savings with respect to retirees with chronic and high-cost conditions (e.g., disease management for diabetes or cancer). The regs note that sponsors can take a reasonable approach to the conditions they will address. For example, sponsors can limit the choice to the conditions to which their retirees are prone. ❖

# Benefit\$ Alert

## New Dependent Health Care Coverage Rules Take Shape (cont.)

amendments must be made by December 31, 2010, and must be effective retroactively to the first date in 2010 when employees are permitted to make pre-tax deductions to cover their adult children, but not before March 30, 2010.

- The same rules that apply to cafeteria plans and FSAs apply to health reimbursement accounts, voluntary employees' beneficiary associations (VEBAs for short), and retiree health plans.

### IMPACT ON STATE LAWS

Raising the age limit for tax-free dependent coverage until the year adult children turn 27 immediately assists employees in states that already required plans to extend coverage to dependents who were older than

the old federal limits: 19 for non-students, 24 for students. *Not off the hook:* Although details vary, at last count, 17 states have laws that exceed even this new federal age cut-off.

- Ohio, until children turn 28;
- South Dakota, until children turn 29;
- Florida, New York, and Pennsylvania, until children turn 30;
- New Jersey, until children turn 31; and
- Georgia, Idaho, Indiana, Iowa, Massachusetts, Minnesota, Nevada, Ohio (again), Oregon, Rhode Island, South Carolina, and South Dakota (again), children can be any age if they have a disability.

Employees in these states, therefore, will need to continue

to pay for dependent coverage with after-tax dollars. ❖

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## COBRA Subsidy Extended Again

Under the Continuing Extension Act of 2010 (P.L. 111-157), employees terminated and eligible for COBRA between April 1, 2010, and May 31, 2010, are eligible for the 65% COBRA subsidy. Previously, the Temporary Extension Act of 2010 extended the cut-off date for subsidized COBRA benefits through March 31, 2010. The Department of Labor has updated its previous notices. ❖

## Ask The Experts

**Q.** *Regarding the article on health care reform in last month's **Benefit\$ Alert**, we were under the impression that employees' children can remain on their parent's policy, regardless of their dependent status and whether they're married. Are we correct?*

**A.** It depends. The health care reform law specifies that group plans must offer coverage to employees' dependent children until they turn 26, and these dependents may be married. *New* group plans must offer coverage to employees' dependent children until they turn 26. However, *existing grandfathered* group plans *don't* have to offer coverage, if these dependents are eligible to be covered under another plan.