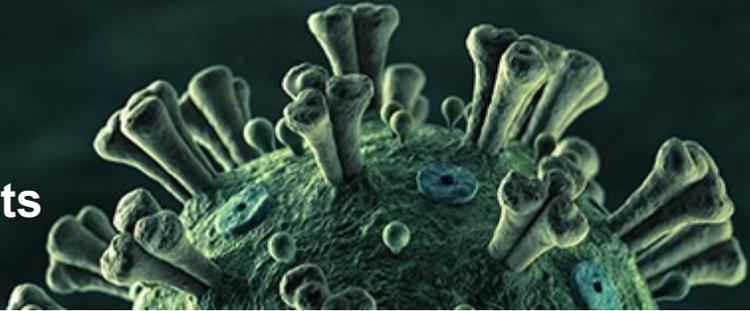




COVID-19 Latest Insights



Compliance Considerations on Insurance Carrier Refunds in the COVID-19 Environment

UPDATED AS OF JULY 31, 2020

In response to the decreased utilization of non-emergency health care services during the first months of the COVID-19 pandemic, some insurance carriers have issued refunds to employers in the form of discounts, premium credits, or actual refund checks. These carrier refunds may apply to fully-insured medical, dental, and vision plans as well as ASO contracts or TPA vendor services related to self-funded health plans. Unlike true Medical Loss Ratio (MLR) rebates, which are regulated under ERISA and the ACA and pertain exclusively to fully-insured medical plans, the spring/summer 2020 premium refunds are wholly discretionary on the part of the carriers and, if offered, are calculated according to carrier-specific methodologies. Employers that receive such refunds must consider several compliance issues when deciding how to use the refund, since those refunds could be considered plan assets under ERISA (and therefore must be used for the benefit of plan participants and any related administrative expenses). The four steps below, which follow the same principles that apply to MLR rebates, provide a guide for employers that receive such refunds:

Step 1: Determine the plan to which the refund applies. The employer will have to determine the plan to which the refund applies (and therefore also which employees are participants of that plan for the relevant refund period).

Step 2: Determine the portion of the rebate that relates to employer versus employee contributions towards the plan's premiums. If the employer paid the entire premium, then the refund is simply returned to the employer's general assets (the employer can keep the full refund). If employees (including COBRA participants) contributed towards premiums, though, then the employee-paid portion would be considered 'plan assets'. For example, if employees contribute 30% of the premium, then 30% of the rebate would need to be used for the benefit of plan participants. Notably, if the employer has changed their contribution design during the year (for example, the employer paying the full cost of coverage for a period due to COVID-19), additional considerations and analysis must be performed to determine the percentage allocable to employees.

If an ASO carrier is refunding administrative fees, the employer should carefully consider whether employees contribute to the cost of those fees. A good indicator of such would be whether the fees are built into the premium equivalent for contribution design and COBRA rate purposes.

If a stop loss carrier refunds premiums or proceeds, the employer should take special precaution in determining whether any amount should be treated as plan assets. There are special rules to consider. If the policy is issued in the name of the plan (versus the employer) or participants contribute to the cost of stop loss coverage, then the policy is likely considered a plan asset. The refund amount must not only be distributed to participants, there might also be Form 5500 reporting for the stop loss policy.

Step 3: Determine the participants to whom the employer will distribute the refund. The allocation method must be reasonable, fair, and objective (so it could be a flat amount or a percentage of actual contribution). If the cost of distributing to former participants approximates or exceeds the refund amount, then the employer can decide to limit the refund only to current participants.

Step 4: Determine the method for distributing the refund to plan participants. The methods can include premium reductions for plan participants, benefit enhancements to the plan (adding a benefit/service), a refund back to plan participants (either through cash or check), or a premium holiday. Generally speaking, if the refund is given back as a cash/check to plan participants, the refund would be taxable (unless the employees or COBRA participants paid the original premiums post-tax). Importantly, there is no 'de minimis' amount which allows employers to just keep the refund — even where the refund is a very small amount per employee, the amounts must be distributed to plan participants in some manner. Refunds to eligible plan participants must be distributed within three months of the employer's receipt of the premium credit or refund from the carrier.

Ultimately, employers should review their plan document to see if it addresses use of carrier refunds. If not, the employer can rely on the four steps above in determining what to do with the refunds. Employers should keep records describing how the refund payable to plan participants was determined and to whom it was distributed, and should work with outside counsel if they have specific questions.

This information has been provided as an informational resource for PPI clients and business partners. It is intended to provide general guidance, and is not intended to address specific risk scenarios. Regarding insurance coverage questions, each specific policy must be reviewed in its entirety to determine the extent, if any, of coverage available for the impact of the Coronavirus.
