

## How Employers Should Handle MLR Rebates

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Employers who sponsor a fully-insured group health plan may soon be receiving a Medical Loss Ratio (MLR) rebate from their insurers. Self-insured medical benefit plans are not subject to these requirements. For employers who need a refresher on exactly how to handle the rebates, we've provided some background on the MLR rebate and have also answered several common questions.

### Updates Due to COVID-19

On June 12<sup>th</sup>, 2020 the Centers for Medicare & Medicaid Services (CMS) issued a bulletin<sup>i</sup> announcing a "Temporary Period of Relaxed Enforcement for Submitting the 2019 MLR Annual Reporting Form and Issuing MLR Rebates in Response to the Coronavirus Disease 2019 (COVID-19) Public Health Emergency." The bulletin announced several changes that may impact employers who sponsor a fully-insured group health plan. First, CMS extended the deadline for health insurance companies to submit the 2019 MLR Annual Reporting Form from July 31, 2020 to August 17, 2020.

Second, CMS will permit health insurance companies to "prepay to enrollees a portion or all of the estimated MLR rebate for the 2019 MLR reporting year to support continuity of coverage for enrollees who may struggle to pay premiums because of illness or loss of income resulting from the COVID-19 public health emergency." In other words, in past years health insurance companies have been required to submit the MLR Annual Reporting Form to the U.S. Department of Health and Human Services (HHS) before providing employers with the rebate that is owed. However, carriers are permitted to prepay the rebate amounts this year as long as they follow guidance in the CMS bulletin. This means that employers may end up receiving multiple MLR payments from carriers.

### Background

The Affordable Care Act (ACA) included rules requiring health insurance companies to disclose the amount of medical plan premiums spent on paying claims and quality improvement initiatives versus the portion spent on administration, marketing, and insurance company profit. Under the MLR rules, insurers in the large group market must prove that at least 85% of premiums are spent on claims (the "loss ratio"), whereas insurers in the individual and small group markets must achieve a loss ratio of at least 80%.

By July 31<sup>st</sup> (August 17<sup>th</sup>, 2020 for calendar year 2019), every insurance company offering health insurance coverage is required to report its prior year MLR data to HHS. If the minimum loss ratios are not met, premium rebates must be provided to policyholders (employers) by September 30<sup>th</sup>.

### How Much (if any) of the Rebate Must Be Distributed to Plan Participants?

The portion of the rebate that is attributable to participant contributions must be treated as "plan assets," and will typically be returned to plan participants. ERISA requires that plan assets not inure to the benefit of the plan sponsor, and may be used only for the exclusive benefit of the plan participants.

If a plan sponsor paid the entire cost of the insurance (i.e. there were no participant contributions), none of the rebate would be considered plan assets, and the employer could retain the entire MLR rebate amount. It is more common, however, that both the plan sponsor and the participants contributed toward the cost of the coverage. In this case, the plan sponsor must determine the portion of total plan cost contributed by participants so that the MLR rebate can be appropriately allocated between the participants and the employer.

Plan sponsors must first determine total participant contributions for the year used to calculate the MLR rebate (2019), including employee payroll deductions and any other premium payment made by a participant (e.g. COBRA premiums or premiums paid during FMLA-protected leave). The plan sponsor should then calculate the percentage of total plan premiums paid to the carrier that were participant

contributions. The resulting ratio is then applied to the rebate to determine the portion that must be treated as plan assets.

Example

- Total premiums paid to carrier for a plan with 100 covered employees during 2019 = \$1,000,000.
- Total participant contributions during 2019 = \$250,000.
- Participants paid 25% of total plan premiums for the year (\$250,000 / \$1,000,000).
- The employer receives a \$15,000 rebate from the carrier in 2019.
- A total of \$3,750 is considered plan assets (25% of the \$15,000).

### **Which Plan Participants Should Receive a Distribution?**

As plan sponsors develop an allocation method, they also need to determine which plan participants will receive a distribution and how much of the distribution each plan participant should receive.

The rebate should go to plan participants of the plan for which the rebate was received. So when a plan provides multiple benefit options under separate policies, the participants' share of the rebate must be distributed to the participants and beneficiaries covered under the policy to which the rebate applies. There is some flexibility regarding whether former participants are included. The most commonly chosen options are to:

1. Return the rebate to participants covered by the plan in the year in which the rebate is received (current plan year participants in 2020, including COBRA participants); or
2. Return the rebate to individuals who participated in the plan both in the year in which the rebate is received (2020 in this case) and in the year used to calculate the rebate (2019).

DOL guidance states: *If [an employer] finds that the cost of distributing shares of a rebate to former participants approximates the amount of the proceeds, the fiduciary may properly decide to allocate the proceeds to current participants [only]...* In most cases, the amount of the rebate on a per participant basis is so small that the administrative cost of distributing it to former participants will exceed the value of the rebate. NOTE: "Former plan participants" refers to previous plan year participants, not to COBRA participants or former employees, so current COBRA participants should be included in the distribution.

### **How Should the Participant Portion (Plan Assets) Be Distributed?**

The most common approach is to return the plan assets to plan participants either as a (i) premium holiday; or (ii) additional taxable compensation. Although technically plan assets may be used toward improving plan benefits, because the amount of the rebate is generally so small and guidance is limited in how this may be accomplished, this method is not recommended.

Some plan documents are written to define the ownership and handling of the portion of the MLR rebate that is determined to be a plan asset. The plan can reserve the right for the employer to retain the entire rebate, including the plan asset portion, as long as the rebate is not used in a manner prohibited by ERISA. Unfortunately, many plan documents do not contain language to properly address and allow this.

The distribution allocation method is not required to exactly reflect the premium activity of individual plan participants. DOL guidance states, *In deciding on an allocation method, the plan fiduciary may properly 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.* In many situations, the most fair, reasonable, and objective method of allocation may be to divide the rebate evenly over all current plan participants, even if those participants made different contributions to the plan, which can simplify the administration of the distribution.

### **How quickly must I distribute the participants' share?**

ERISA plan assets must generally be held in trust; however, because of DOL guidance released a number of years ago, most employer-sponsored group health plans are not required to maintain trusts. Employers are not required to hold the rebates in trust as long as they are distributed to participants **within three months of receipt** by the plan sponsor.

## Summary

Due to the COVID-19, employers may receive multiple MLR payments from carriers. Employers should be aware that insurance carriers are required to send notices of rebates to plan participants. The notices sent by carriers will not include the amount of the rebate, but will state that the rebate was sent to the employer and that a portion may be distributed to participants.

Although there aren't any specific notice requirements for employers, it may be worthwhile to send an employee communication that clarifies whether, and how, employees can expect to receive their portion of the rebate. Employers may also want to point out that the rebate will usually be a relatively small amount on a per-participant basis. Employees may incorrectly assume that they will be receiving a significant rebate based on the information included in the carrier notices.

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<sup>i</sup> <https://www.cms.gov/files/document/Issuing-2019-MLR-Rebates-in-Response-to-COVID-19.pdf>