Early Retiree Insurance Coverage:

Temporary Federal Program Allows Employers to Recover Eligible Costs

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On March 23, 2010, President Obama signed into law the controversial Patient Protection and Affordable Care Act of 2009 ("Act"). Along with its other myriad effects, the Act authorizes the creation of a short term Program entitled the *Early Retirees Reinsurance Program* ("Program"). According to the Department of Health and Human Services ("HHS"), "the Early Retiree Reinsurance Program provides needed financial help for employer-based plans to continue to provide valuable coverage to plan participants, and provides financial relief to plan participants." The Act authorizes employers, including governmental entities, to apply to the Program for reimbursement of 80% of the cost of providing health-care benefits to early retirees (age 55 through 64).

The Program went into effect on June 1, 2010. It expires on January 14, 2014, or whenever its five billion dollar find is depleted, whichever comes first. Thus, the Program will be administered on a "first come, first served" basis. While in effect, the Program will be administered by the HHS.

The HHS has recently issued regulatory guidance regarding the Program. The HHS has also recently published the application for participation in the Program. The application is available online at: www.hhs.gov/ociio/Documents/application.pdf .

At this time, there are still a lot of "unknowns" about the Program. However, the language in the Act, official White House publications, the newly published regulations, and the HHS application, help to clarify some elements of the Program.

1. Participation in the Program

In order to participate in the Program, an employer, including any political subdivision, must offer an "employment based plan" that satisfies certain requirements contained in the Act. An "employment based plan" is defined as a "group health benefits plan" that provides "medical, surgical, hospital, prescription drug," and other benefits approved by the HHS. "Employment based plans" include self-funded plans and plans that provide health insurance.

In other words, any employer with a plan that provides health insurance to its employees, or directly pays for its employees' medical expenses, is eligible to participate in the plan, if the plan meets the other requirements established by the Act.

In order to be eligible to participate, an employer's plan must: (1) implement "programs and procedures to generate cost-savings with respect to participants with chronic and high-cost conditions;" (2) submit documentation of the actual costs of medical claims involved; and (3) be certified by the HHS.

The Program application form describes the requirements for HHS certification of a plan and lists the types of information that an employer is required to submit with its application. Among other required information, a plan must demonstrate its compliance with the Health Insurance Portability and Accountability Act ("HIPAA"), and document the steps it has taken to "generate cost-savings with respect to participants with chronic and high-cost conditions." A plan must also provide an estimate of the amount of benefit that it expects to receive from the Program, and describe its intended use of such benefits.

2. Reimbursement of Expenses

Once the HHS has approved its plan to participate in the Program, a municipality may submit claims for reimbursement. Claims must be submitted on an individual basis; meaning that a municipality must submit a separate claim for each early retiree receiving health benefits under its plan. According to a video provided by HHS, this Program is aimed at providing federal reimbursement for individual, high cost claims. Claims are submitted for the "plan year" in which they occur. The municipality's health benefits plan will define its plan year. Typically, a plan year commences on January 1. In order to qualify for reimbursement, an individual claim must be for at least $15,000. Because the Program went into existence on June 1, 2010, the HHS will consider any portion of a claim that was incurred during the current "plan year" for the purpose of meeting the $15,000 threshold. However, the HHS will only reimburse costs for claims that were incurred after June 1, 2010.

For example, if a municipality's plan year started on January 1, 2010, and it incurred $10,000 in "actual costs" for an individual early retiree between January 1 and June 1, 2010, the HHS would count that cost towards the $15,000 threshold. However, the HHS would not reimburse any of that $10,000 because it was incurred prior to the Program's start.

Claims must be submitted with documentation of the "actual cost" of providing health benefits to an early retiree. As used in the Act, the "actual cost" of providing health benefits includes costs incurred by the municipality and deductibles, co-payments, or co-insurance payments made by the plan participant. In regulations issued June 1, 2010, HHS clarified that insurance premium payments are not considered "actual costs."

For example, if an early retiree pays $20,000 for co-payments, deductibles, or other "actual costs" during a plan year, and the municipality pays $5,000 in "actual costs" for that retiree during the plan year, the municipality could submit the entire $25,000 to the HHS for reimbursement. This assumes that all costs were incurred after June 1, 2010.

It is important to note that the "actual costs" incurred by a municipality likely do not include any contributions made to a healthcare savings account ("HSA") or similar account. Such accounts do not directly provide healthcare benefits. Therefore, they are probably outside of the definition of an

"employment based plan." In the future, the HHS might clarify the interaction between HSAs and the Program. However, for the time being, municipalities should conservatively assume that any contributions made to an HSA will not be reimbursed by the Program, or count towards the minimum amount for reimbursement of other claims.

The HHS will not reimburse any claim that exceeds $90,000. This limit, as well as the $15,000 claim minimum, will be adjusted annually until the Program's expiration.

3. Use of Reimbursements

Any funds received through the Program maybe used to reduce the municipality's insurance premium costs "or to reduce premium contributions, co-payments, deductibles, co-insurance, or other out-of-pocket costs" incurred by an early retiree participating in the plan. The HHS has not yet provided any guidance on how reimbursements are to be divided between early retirees and their employers. It has, however, "encouraged" employers to use Program funds to reduce its insurance costs, as well as the early retiree's costs. As part of its initial application to participate in the Program, plans must submit the proposed use of Program funds.

However, the Act is clear that payments made to employers may not be used as general revenue. The Act also directs the HHS to develop a mechanism to monitor the use of funds paid by the Program. The HHS will likely implement such a mechanism at approximately the same time as it starts making payments.

4. Medical Information

In order to submit a claim, a municipality must provide the HHS with supporting documentation. This documentation will contain medical information protected by the Health Insurance Portability and Accountability Act ("HIPAA"). New HHS regulations address the methods in which employers can transmit protected medical information.

The regulations do not authorize insurance companies or health care providers to give medical information to employers. Instead, employers are required to enter into a written agreement with the insurance or medical provider governing the release of information. This agreement must provide for the disclosure of necessary information to the HHS. The disclosure provision must be sufficiently flexible to allow the insurance or medical provider to disclose information in the time and manner specified by the HHS.

5. Conclusion

Many municipalities provide individual early retirees with health benefits. The cost of providing those benefits may, when combined with costs to early retirees, fall within the $15,000 - $90,000 range governed by the Program. Therefore, the Program potentially allows those entities to recover 80% of those costs from the federal government.

Because the Program is operated on a "first come, first served" basis, if a municipality believes that it might have claims that fall within the Program, it is in the municipality' s interest to complete the application as quickly as possible. Additional information regarding this Program will be available at www.healthreform.gov.

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