CLIENT ALERT

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MEDICAL LOSS REBATE....

AS AUGUST 1, 2012 APPROACHES, EMPLOYERS AND EMPLOYEES WILL HEAR MORE AND MORE ABOUT THE MEDICAL REBATES

THIS CLIENT ALERT PROVIDES A SUMMARY OF THE MEDICAL LOSS RATIO PROVISION UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA) AS WELL AS MORE DETAILED INFORMATION WITH REGARD TO WHAT CAN AND CANNOT BE DONE WITH THE REBATE

Under the MLR provision of PPACA, health insurers must spend a minimum percentage of premium dollars on health care claims and quality improvements in each of three markets, Individual, Small Group and Large Group. For the purposes of this Client Alert, we will only address the small and large group market, not the individual market. When the target percentage is not reached, the insurer must return excess premium dollars to the policyholder in the form of rebates. The MLR requirements impact insured health plans, including insured mini-med and insured expatriate plans. <u>The MLR requirements do not apply to self-insured plans.</u>

What is the timing of the MLR? The MLR is calculated based on the 2011 calendar year, with rebates due as of August 1, 2012.

How is the MLR Calculated?

$$\text{Medical Loss Ratio} = \frac{\text{Health Care Claims + “Quality Improvement expenses”}}{\text{Premiums – Taxes, Licensing \& Regulatory Fees}}$$

Quality Improvement Expenses include health improvement activities that lead to measurable improvements in patient outcomes or safety, prevention of hospital readmissions and wellness promotion. Also included is provider credentialing. (Fraud prevention activities are not considered Quality Improvements and some experts are concerned that as a result, insurers may reduce their fraud programs thus causing a rise in insurance premiums due to payment of fraudulent claims.)

How are large and small employers determined? The regulations define a large employer as one who has more than 100 employees and small employers as those with 100 or less. However, until 2016, states may use their definition, if they have a different definition of large and small. (NJ uses over and under 50 lives)

What is the definition of an employee for this determination? An employee is any person to whom a company issues a W-2, including full-time, part-time and seasonal employees.

What are the acceptable Loss Ratios? The MLR for the Large Group market is 85% and 80% for the Small Group market.

Is there a minimum rebate that the insurer does not need to return? If the insurer distributes the rebate to the policyholder and the total rebate owed to the policyholder and the subscribers combined is less than $20, then no rebate is owed. If the insurer distributes the rebate directly to the subscribers and the total rebate owed to each subscriber is less than $5, then no rebate is owed. These are called *De minimus rebates*.

What is the insurer's responsibility? The insurer must:

- Provide notice of the rebate to the policyholder and the enrollees
- All enrollees must be given information about the MLR including:
    - ü General explanation of the concept of the MLR
    - ü The purpose of establishing an MLR
    - ü The applicable percentage
    - ü The insurer's MLR
    - ü The Insurer's aggregate premium
    - ü The amount of the rebate
    - ü The fact that the rebate is being provided to the policyholder
    - ü The ways in which the rebate can be distributed to the employees

Sample letter - http://cciio.cms.gov/resources/files/mlr-notice-2-group-markets-rebate-to-policyholder.pdf. Or find a copy in the Client Alerts Section of our website, www.chb-group.com.

What is the employer/policyholder's responsibility? How rebates are treated is dependent on the type of employer. Requirements vary by the type of plan sponsor (i.e. private employers, state and local government plans or church plans), the premium contribution split between employee and employer and whether employee contributions are made pre or post-tax. In most cases, the employer will be obligated to use some or the entire rebate for the benefit of enrollees.

Most employers can be broken down to, Church Groups, Groups subject to ERISA and non-federal Government plans.

<u>ERISA Group Health Plans</u>: Technical Release 2011-04, issued by the DOL provides guidance on rebate distribution provided by insurers to ERISA covered plans. Portions of the Technical Release are provided/paraphrased below. We suggest that ERISA covered health plans review the Technical Release in its entirety either at http://www.dol.gov/ebsa/pdf/tr11-04.pdf, or in the Client Alerts Section of our website, www.chb-group.com

For ERISA based plans, to the extent that distributions, such as premium rebates, are considered to be plan assets, they become subject to the requirements of Title I of ERISA. Anyone with authority or control over plan assets is a “fiduciary,” and subject to the fiduciary responsibility provisions of ERISA. Plan assets must be used for the exclusive purpose of providing benefits to the employees.

Generally, the percentage of the cost of the plan that is paid for by the employees will be the percentage of the rebate that will be considered plan assets. Decisions on how to apply or expend the plan’s portion of a rebate are subject to ERISA's general standards of fiduciary conduct. Plan fiduciaries must act prudently and solely in the interest of the plan participants and beneficiaries.

With respect to these duties, a fiduciary also has a duty of impartiality to the plan's participants. 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.

For example, if a fiduciary 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 based upon a reasonable, fair and objective allocation method. Similarly, if distributing payments to any participants is not cost-effective (*e.g.*, payments to participants are of *de minimis* amounts, or would give rise to tax consequences to participants or the plan), the fiduciary may utilize the rebate for other permissible plan purposes including applying the rebate toward future participant premium payments or toward benefit enhancements.

Non-Federal Government Plans: The percentage of the employee’s contribution toward the premium, must be distributed to the employees in one of three ways:

1. **To reduce the premium for all employees covered under any option offered under the policyholder’s group health plan at the time the rebate is received**
2. **To reduce the premium for only those employees covered under the plan for which the rebate is based on**
3. **A cash refund to only those employees covered under the plan for which the rebate is based on**

The reduction in future premium or the cash refund may, at the option of the policyholder, be:

- **Divided evenly among employees;**
- **Divided based on each employee’s actual contribution; or**
- **Apportioned in a manner that reasonably reflects each employee’s contributions to premium.**

Are Rebate distributions to employees taxable? Whether a rebate is taxable or not will depend on whether the contribution was paid pre or post tax and if the contribution was post tax, whether the employee deducted their premium contributions on their 2011 Form 1040.

In general, if contributions are made subject to a Section 125 plan, then rebate distributions will be taxable to the enrollee. If contributions are post tax, then distributions will only be considered taxable if a corresponding deduction was take on the 2011 Form 1040. For more information see: http://www.irs.gov/newsroom/article/0,,id=256167,00.html, or go to the Client Alerts Section of our website, www.chb-group.com

Am I likely to get a Rebate? According to the Kaiser Foundation an estimated 1.3 billion dollars will be returned in the form of rebates, of that $541 million to large groups and $377 to small groups with the remainder going to individual policyholders. In our area, average anticipated rebates range from a low of $0 to a high of $142 per enrollee. Here’s how it looks by state. Keep in mind that if your particular insurer met the MLR, then no money will come your way.

Here is information provided by the Kaiser Foundation that summarizes by state the estimated rebate based on the large and small markets.

FOR THE LARGE GROUP MARKET

AREA	Total Estimated Rebate	Estimated Enrollment in Plans paying a Rebate	Average Estimated Rebate/Enrollee
Delaware	$56,167	5,874	$10
New Jersey	$58,970,008	775,492	$76
New York	$1,242,030,681	895,544	$142
Pennsylvania	$71,629,246	669,523	$107

FOR THE SMALL GROUP MARKET

AREA	Total Estimated Rebate	Estimated Enrollment in Plans paying a Rebate	Average Estimated Rebate/Enrollee
Delaware	$373	$0	$0
New Jersey	$412,871,461	598,951	$69
New York	$4,767,159	37,992	$125
Pennsylvania	$8,672,490	294,712	$29