# CUT AND PASTE POST
# OCTOBER 2020

## Learn Something New Every Day:
## Medical Loss Ratio (MLR) Rebates under the ACA

**Background**

Under the Affordable Care Act (ACA), health insurers must spend the majority of the premiums they collect providing health benefits. The percentage of premium spent on claim payments and other benefits is called the Medical Loss Ratio (MLR). The MLR standard is 80 percent in the small group market or 85 percent in the large group market. States may also set their own MLR standards.

Insurers that don't meet the applicable MLR standard must refund the excess premiums to their policyholders. The federal government calls these refunds "rebates". According to ThinkHR, insurers could rebate as much as a quarter billion dollars this year.

**ERISA and What a MLR Rebate May Be Used For**

Health plans sponsored by private sector employers are subject to the Employee Retirement Income Security Act (ERISA). ERISA imposes rules on the use of "plan assets." In most cases, at least a portion of the MLR rebate will be a "plan asset", so ERISA rules will apply. The Department of Labor (DOL) provides guidance to employers who receive MLR rebates:

- The employer may retain the rebate to use at its discretion, but only if the plan's governing documents state that:
  - The rebate is an employer asset, not a plan asset; and
  - The amount of the rebate is less than the employer's total contribution during the relevant period.

- If the plan documents lack this required language, the plan sponsor/employer must use all or some of any rebate "solely in the interest of the plan participants" (employees, COBRA participants). The amount to be used is based on the percentage of premiums paid by those participants. For example, if the employer paid 70 percent of premium costs and employee payroll deductions and COBRA payments represented the other 30 percent, 30% of the total MLR rebate becomes an ERISA plan asset and must be used for the participants' sole interest.

  Options for using these plan assets include:
  - Providing additional plan benefits, such as reducing deductibles or copays.
  - Reducing future participant contributions, such as reducing future payroll deduction amounts and COBRA premiums or granting a premium holiday.
  - Cash refunds to plan participants. However, these are not generally advisable if the participants' original premium payments were made on a pre-tax basis.

*Inside:*

- ERISA requires plan assets to be held in trust, but this requirement may be avoided by using the assets within three months.

***Professional Pointer***: If MLR's are news to you, read the guidance, and consult with your attorney and CPA as needed. Self -funded and public sector plans may also want to consult with the proper professionals.

## U.S. DOL Revises FFCRA Regulations

The September 2020 *Cut N Paste Post* included a story about a judge in the Southern District of New York striking down some key elements of the paid leave provisions under the Families First Coronavirus Response Act (FFCRA.) Then, a story was posted on the SHRM website announcing that the U.S. Department of Labor (DOL) planned to revise its rules for paid leave under the FFCRA.

On September 16, 2020, the DOL published a revised FFCRA rule in the Federal Register. The Rule was effective on 9/16/2020.

In the revised rule, with few exceptions, the DOL reaffirmed is original rule. The one big exception is a change who qualifies as a "healthcare provider" exempt from FFCRA leave. The following chart is repeated from the September *Cut N Paste*, but the far right column has been added and summarizes the September 16, 2020 Rule change.

| Challenged Feature | Initial DOL Rule Said | New York Court Said | 9/16/20 Revised Rule Says |
|---|---|---|---|
| **Definition of Healthcare Provider** | Healthcare providers are exempt from Emergency Paid Sick Leave (EPSL) provisions of FFCRA. Healthcare providers include any employee of a healthcare facility. | Definition is too broad. Should not include individuals who do not provide healthcare services. The Court did not provide a new definition. | "Healthcare providers" must actually provide healthcare services.<br>• Non-healthcare providers working in the healthcare industry are no longer exempt from paid leave under FFCRA. This includes positions such as billing clerks and administrative personnel.<br>• Some positions will need evaluated on a case by case basis. (e.g., lab workers may or may not be providing healthcare services, and their eligibility for leave must be determined on a case by case basis.) |
| **Availability of work for EPSL and EFMLA leave eligibility**. | For an employee to use EPSL or Emergency Family Medical Leave (EFMLA), the employer must have work available during the time the leave is needed. A furloughed employee is not eligible for leave during the furloughed time. | Availability of work is irrelevant. Any employee who is still on the payroll, whether on the schedule or not, should be given FFCRA leave for qualifying reasons. | Reaffirmed initial rule: Employees may take FFCRA leave only when work is actually available to them. |

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| **Prior Approval for the use of Intermittent Leave** | Employees must have their supervisor's prior approval to use intermittent leave to care for their children when their school or place of care is unavailable because of COVID-19. | If the employee needs intermittent leave, s/he should be entitled to use it. | Reaffirmed initial rule: Employees must have their employer's approval to take intermittent FFCRA leave |
| **Documentation Before Use of Leave** | In order to obtain tax credits and to verify eligibility for leave, employers can require employees to provide documentation of the need for FFCRA leave. | The law says proof can be required to obtain tax credits, but the employee only needs to provide notice 'as is practicable' when taking EFMLA and after the first workday of leave when taking EPSL. | ▪ Clarified that the documentation required for leave under FFCRA does not need given "prior to" taking this leave, but may be given as soon as practicable,<br>▪ Clarified that employees who know they are going to need to take expanded family and medical leave must give notice as soon possible. (e.g.: An employee finds out on Monday night that daycare is closing Wednesday. That employee needs to inform their employer ASAP – so, Tuesday morning – of the need for leave. If the daycare center gives no advance notice, the notice and proof of need must be provided as soon as practical.) |

## SHRM COVID-19 Resources

SHRM has created and continues to update a massive collection of COVID-related information. Some of this is available only to SHRM members; some is available to any user. Go to the SHRM COVID Resource Center.

*Upcoming SHRM/CDC COVID Webcast*:


Employers in the United States continue to grapple with COVID-19. Will there be a second wave of illnesses? How should employers deal with the dual threats of COVID-19 and this year's flu season? How can companies keep their employees safe as they return to the workplace? Brenda L. Jacklitsch of the Centers for Disease Control and the National Institute for Occupational Safety and Health will answer pressing questions received by SHRM in recent weeks. She will be joined by Alexander Alonso, SHRM's chief knowledge officer, and Amber Clayton, director of SHRM's HR Knowledge Center. They will answer additional questions on best practices, safety and compliance during this challenging time for both employers and employees.

This webcast takes place on October 14, 2020 at multiple times. Register here.

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As always, please email me (bergpersonnelsolutions@live.com) with any suggestions for a *Cut N Paste* topic!

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