

EARLY RETIREE REINSURANCE PROGRAM BENEFITS ARE LIMITED TO MEDICARE-ELIGIBLE SERVICES: WATCH OUT FOR COMPLIANCE WITH ADDITIONAL GOVERNMENT ISSUANCES

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RESOURCE LINKS

Early Retiree
Reinsurance Program
www.errp.gov

IMPORTANT DATES

January 1, 2014
ERRP Ends

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The Affordable Care Act (“**ACA**”) provides \$5 billion in financial assistance to employers, unions, and state and local governments to help them maintain health insurance coverage for early retirees age 55 and older who are not yet eligible for Medicare.¹ According to a report published by the Department of Health and Human Services (“**HHS**”) on March 2, 2011, almost 5,500 plan sponsors were approved to participate in the Early Retiree Reinsurance Program (“**ERRP**”) as of December 31, 2010.² Compliance is essential for those participating in the ERRP, especially when Medicare rules are relevant to this federal program.

The ERRP allows plan sponsors to use reimbursement payments to reduce either the costs of health care for plan participants or the costs to the plan sponsor. The ERRP is a temporary program that is expected to benefit more than 4.5 million early retirees, their spouses, surviving spouses, and dependents, as well as active workers, before the ERRP ends on January 1, 2014. At that time, early retirees will be able to choose from additional coverage options offered through the state health insurance exchanges that are expected to be operational by 2014.

Through the end of 2010, \$535 million was paid to 253 approved sponsor applications as reimbursement for claims associated with 60,859 individuals.³ The largest share of 2010 reimbursements went to state and local governments, including school districts and other local agencies, for their early retirees, but approved sponsors also included for-profit companies, unions, religious organizations, and other nonprofits.

¹ See ACA Section 1102 and the implementing regulations codified at 45 C.F.R. Part 149. See also 75 Fed. Reg. 24,450 (May 5, 2010).

² HHS, “Report on Implementation and Operation of the Early Retiree Reinsurance Program During Calendar Year 2010” (Mar. 2, 2011), available at <http://www.healthcare.gov/center/reports/retirement03022011a.pdf>.

³ *Id.* at 4.

The amount of reimbursement to the employer or union is 80 percent of medical claims costs for the health benefits expended for a covered early retiree between \$15,000 and \$90,000. Significantly, HHS has determined that health benefits claims that qualify for reinsurance payments are only those for medical services that would have been covered by the Medicare program, even though the ERRP is unrelated to the Medicare program.

In fact, ACA does not specify that the claims that qualify for ERRP payments must be Medicare-eligible benefits but rather defines “health benefits” as “medical, surgical, hospital, prescription drug, and such other benefits as shall be determined by the Secretary, whether self-funded, or delivered through the purchase of insurance or otherwise.”⁴ The implementing regulations at 45 C.F.R. Part 149, similarly, do not mention that ERRP reimbursement has to be based on Medicare-eligible benefits.⁵ Initially appearing as guidance in the “Common Questions” section of the ERRP website, HHS clarified that the “health benefits” that HHS will reimburse under the ERRP are “items and services for which Medicare would generally reimburse.”⁶ Subsequently, HHS issued further subregulatory guidance clarifying the ERRP reimbursement policy.⁷

Medicare imposes amount, duration, and scope limits on certain items and services that employers and/or third-party administrators are likely not familiar with as more robust employment-based health plans generally do not apply these same limitations. Therefore, it is very important for sponsors participating in the ERRP to understand what is eligible for ERRP reimbursement and to be diligent in

⁴ See ACA Section 1102(a)(2)(A).

⁵ “Health benefits” are defined at 45 C.F.R. §149.2 as “medical, surgical, hospital, prescription drug, and other benefits that may be specified by the Secretary, whether self-funded or delivered through the purchase of health insurance or otherwise. Such benefits include benefits for the diagnosis, cure, mitigation, or prevention of physical or mental disease or condition with respect to any structure or function of the body. Health benefits do not include benefits specified at 45 C.F.R. 146.145(c)(2) through (4) [excepted health benefits under the Health Insurance Portability and Accountability Act].” See 75 Fed. Reg. at 24,466.

⁶ See “Common Questions, Costs and Reimbursement,” available at http://www.errp.gov/faq_costs.shtml. A question, originally posted on August 31, 2010, and updated on December 2, 2010, asked, “For what types of health benefit items and services can a sponsor receive reimbursement?” The answer states:

A sponsor can receive reimbursement for health benefit items and services for which Medicare would reimburse under Parts A, B, and D. For general reference as to what items and services are covered by Medicare Parts A and B, please refer to the Centers for Medicare & Medicaid Services’ (CMS) Medicare & You 2010 and Your Medicare Benefits publications, which are available on the Medicare.gov website. For information on certain items and services that are excluded from Medicare Parts A and B, see the HHS guidance document [Claims Eligible for Reimbursement Under the Early Retiree Reinsurance Program](#). [Click here for a detailed listing of procedure codes that ERRP will not credit towards the cost threshold or reimburse](#). Generally, to determine whether a given drug is a Part D drug, ERRP plan sponsors should first review the regulatory definition of a Part D drug found at 42 CFR §423.100. ERRP plan sponsors may also wish to review the relevant provisions of Chapter 6 of the Medicare Part D Manual, which can be found at http://www.cms.hhs.gov/PrescriptionDrugCovContra/12_PartDManuals.asp#TopOfPage. Ultimately, it is the ERRP plan sponsor’s obligation to determine whether a given drug is a Medicare Part D drug, and to ensure that it is not submitting claims for non Part D drugs. Further guidance will be provided in the near future on what health benefit items and services may be credited towards the cost threshold and reimbursed, and on what Detailed Claims Data will be required when submitting a reimbursement request.

⁷ HHS, “Claims Ineligible for Reimbursement under the Early Retiree Reinsurance Program” (Sept. 28, 2010), available at [http://www.errp.gov/download/Claims_Eligible_for_Reimbursement\[1\].pdf](http://www.errp.gov/download/Claims_Eligible_for_Reimbursement[1].pdf).

the processing of claims in a manner that is consistent with the government's requirements for the expenditure of these federal funds.

While HHS states that ERRP reimbursement is based on Medicare-eligible benefits, the HHS guidance issued on September 28, 2010, provides information about Medicare payment policies that will not be applied to ERRP claims.⁸ For example, the HHS guidance states:

- Some of the amount, duration, and scope limits in Medicare do not apply to the ERRP. Examples provided are home health and skilled nursing facility services.
- Limits set under the employment-based health plans will be applied, rather than Medicare frequency or maximum limits. The guidance acknowledges that tracking such limits across plan years is not administratively feasible.
- HHS will not apply Medicare medical necessity determinations to ERRP claims. HHS will defer to the determinations made by the applicable sponsor's plan.
- Medicare benefit restrictions that would require sponsors and HHS to develop a claims history will not be imposed. The example provided is the requirement that an individual must have been in the hospital prior to admission to a skilled nursing facility.
- Medicare restrictions on the site or circumstances of care do not apply to the ERRP. Items or services of providers not participating in Medicare will count toward the cost threshold and be reimbursed, if they are otherwise valid ERRP claims.
- Prescription drugs not covered under Medicare Part A or Part B will be reimbursed only if they would be covered under a standard Medicare Part D drug plan.

The HHS guidance also describes specific items and services that will not be covered. HHS has issued an additional guidance document providing a list of Current Procedural Terminology (“**CPT**”) and Healthcare Common Procedure Coding System (“**HCPCS**”) codes that are excluded under Medicare and, therefore, will not be credited toward the ERRP cost threshold or reimbursed as part of the ERRP claims submission process.⁹ Further, the HHS guidance states that sponsors must comply with applicable state and federal requirements regarding benefits. It is unclear what these other applicable state and federal requirements could be; in any event, they would be employer-plan specific. Even though an item or service may not be reimbursed under the ERRP, a sponsor may still cover the item or service in its health benefits plan. In addition, sponsors must pay attention to the restrictions on how the federal funds under this program may be used.¹⁰

The ERRP already has experienced broad participation from all major sectors of the economy and has had a demonstrated impact on the continuation of health benefits coverage for a large number of

⁸ *Id.*

⁹ HHS, “Claims Ineligible for Reimbursement under the Early Retiree Reinsurance Program, Coding Details for Ineligible Services under Medicare which will apply to ERRP” (Oct. 18, 2010), available at <http://www.errp.gov/download/cpt/ProcedureCodesIneligibleForReimbursement.pdf>.

¹⁰ For example, 45 CFR §149.200 states that “a sponsor must use the proceeds under this program: (1) To reduce the sponsor's health benefit premiums or health benefit costs, (2) To reduce health benefit premium contributions, copayments, deductibles, coinsurance, or other out-of-pocket costs, or any combination of these costs for plan participants, or (3) To reduce any combination of the costs specified in (a)(1) and (a)(2) of this section.” Further, “[p]roceeds under this program **must not be used as general revenue** for the sponsor” [emphasis added].

early retirees and their families. Although this ERRP is time limited, employers and/or the third-party administrators participating in the program should closely follow both the HHS regulatory and subregulatory guidance and pay attention to the particular details of the applicable Medicare payment policies to ensure compliance with the ERRP requirements. This is particularly the case whenever there is an application to the federal government for the use of federal funds. Finally, additional guidance is possible as HHS gains more experience with the program. Therefore, it is important to watch for updates and announcements on the ERRP website (www.errp.gov).

For more information about this issue of *IMPLEMENTING HEALTH AND INSURANCE REFORM*, please contact one of the authors below or the member of the firm who normally handles your legal matters.

Lynn Shapiro Snyder

Member
EpsteinBeckerGreen
Washington, DC
202//861-1806
LSnyder@ebglaw.com

Lesley R. Yeung

Associate
EpsteinBeckerGreen
Washington, DC
202/861-1804
LYeung@ebglaw.com

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Kristi Swanson
Marketing Coordinator
National Health Care & Life Sciences Practice
Epstein Becker & Green, P.C.
1227 25th St., NW, Suite 700
Washington, D.C. 20037
phone 202/861-4186 -- fax 202/861-3086
kswanson@ebglaw.com

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