

The Early Retiree Reinsurance Program: Draft Application, Draft Instructions, and FAQs Have Been Posted

June 11, 2010

The application process for the Early Retiree Reinsurance Program (ERRP), part of the Affordable Care Act, is starting to unfold. A draft application and draft instructions for certification under ERRP have been posted on the Office of Management and Budget (OMB) website at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201005-0938-012 and on the U.S. Department of Health and Human Services (HHS) Office of Consumer Information and Insurance Oversight (OCIIO) website at <http://www.hhs.gov/ociio/regulations/index.html>. The final application is expected to be issued later in June and will be posted on the OCIIO website. The OCIIO website also includes recently issued FAQs regarding the application process.

The draft documents and FAQs provide some helpful information that plan sponsors should use to begin preparing their applications:

- According to the OMB website, until an online application is developed, applicants will need to submit a hard copy of the ERRP application to HHS. Given the first-come, first-served nature of the application process and the limited funds available, plan sponsors should be prepared to quickly complete and submit the paper application.
- According to the FAQs, the only anticipated change between the draft application and the final application is the inclusion in the final version of the address to which the application should be sent.
- The draft application and the FAQs indicate that the final application will be released later in June, with no specific date provided. The OCIIO website clarifies, however, that “[a]pplications will begin being accepted no later than June 30.”
- The draft instructions identify two roles, the authorized representative and the account manager. The **authorized representative** is the individual with legal authority to bind the plan sponsor, who will sign the Plan Sponsor Agreement in the application and certify that the information in the application is true and accurate. Examples of the authorized representative include a plan sponsor’s CFO, CEO, president, or human resources director; for a multiemployer plan, it may include a member of the board of trustees. The **account manager** is the person who will coordinate the application process and be the primary contact for HHS. The account manager may be an employee of the plan sponsor or a nonemployee, such as a consultant, who is assisting

with the application process. At this time, plan sponsors should be considering whom they should designate as their authorized representative and account manager.

- The draft application section that covers the programs and procedures that address chronic and high-cost conditions (conditions for which \$15,000+ in health benefit costs are likely to be incurred by one participant in a plan year) clarifies that such programs and procedures must be in place at the time the ERRP application is submitted. Further, the application form requires the plan sponsor to identify the conditions for which it has programs in place and to summarize the programs. In a new requirement, not included in the ERRP regulations, the plan sponsor also must explain how it determined that the conditions satisfy the \$15,000 threshold.
- The draft application requires an estimate of the plan's expected reimbursements for a two-year plan cycle. It permits, but does not require, an applicant to provide a range of expected reimbursement, including a low-end estimate, a likely estimate, and a high-end estimate.
- The draft application section regarding the use of reimbursements and maintenance of effort offers some insight into the maintenance of effort requirement. The language reiterates that reimbursements may be used to reduce the plan's health benefit or health insurance costs, the participant's costs, or a combination of the plan's and participant's costs. But, the draft application clarifies that the only permissible way to reduce the plan's costs is to use the reimbursements to offset increases in the plan's health premium costs (insured) or health benefit costs (self-insured). Stated another way, as the contribution level to the plan must be maintained, reimbursements cannot be used to decrease employer contributions. In addition, the draft application requires an explanation of how reimbursements will be used.
- The FAQs explain that an approved ERRP applicant that decides not to request reimbursement or stops requesting reimbursement does not relieve itself of any obligation it has under the program, such as records maintenance or data inaccuracy reporting obligations. The FAQ does not specifically address the extent to which or whether this rule applies to the maintenance of effort requirement.
- The draft application includes a Plan Sponsor Agreement, which requires the authorized representative to attest to a number of compliance representations, including but not limited to items related to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security rules, obtaining federal funds, and policies and procedures to detect fraud, waste, and abuse. The plan sponsor should carefully review the attestation for accuracy.
- The FAQs clarify that the policies and procedures that a plan sponsor must have in place to detect fraud, waste, and abuse need not specifically reference or be specifically designed for ERRP. They must, however, have the ability to effectively detect and reduce fraud, waste, and abuse related to ERRP.
- On June 3, HHS separately published a proposed "Notice of a New System of Records (SOR)" to govern the collection and maintenance of ERRP records. The notice explains that the purpose of the SOR is to collect and maintain information on early retirees (and spouses, surviving spouses, and dependents), retiree medical claims, and plan sponsor employees or representatives performing key tasks on the sponsor's behalf (i.e., the authorized representative and account manager) so that accurate and timely reimbursement may be made to plan sponsors. The notice also explains how the SOR will comply with the Privacy Act, identifies the information that will

be collected and maintained in the SOR, describes the permissible routine uses and disclosures of the information, and describes how the information will be safeguarded."

Due to the first-come, first-served nature of the application process and the program's limited available funding, plan sponsors should take this opportunity to use the draft ERRP application and instructions to begin to prepare their application responses."

To learn more about ERRP, see Morgan Lewis's May 14, 2010 LawFlash, "HHS Releases Interim Final Regulations on Temporary Early Retiree Reinsurance Program," regarding the program, available at http://www.morganlewis.com/pubs/WashGRPP_RetireeReinsurance_LF_14may10.pdf. To learn more about other Affordable Care Act issues for group health plans, please visit <http://www.morganlewis.com/healthcarereform>."

If you have any questions or would like more information on any of the issues discussed in this LawFlash, please contact the authors of this LawFlash, **Andy R0Anderson** (312.324.1177; aanderson@morganlewis.com), **Jessica R. Bernanke** (202.739.5447; jbernanke@morganlewis.com), and **Marianne Hogan** (202.739.5047; mhogan@morganlewis.com), or any of the following key members of our cross-practice Healthcare Reform Law resource team:"

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