

REFORM *Update*

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The government recently released guidance addressing the Early Retirement Reimbursement Program (ERRP) and Multiple Employer Welfare Arrangements (MEWAs). This *Reform Update* reviews this new guidance.

ERRP

The federal health care reform legislation created ERRP to help employers reduce the cost of providing retiree health benefits to early retirees. The plan provided an 80% reimbursement of claim payments, between \$15,000 and \$90,000 per qualifying retiree during the plan year. Employers were required to provide claim lists and summary cost data reports as part of the application process to secure ERRP funds.

Funding for the program was capped at \$5 billion. Anticipating the imminent exhaustion of funds, CMS announced it would stop accepting new employer applications to the ERRP program as of May 6, 2011. Per the most recent guidance, CMS will reject any ERRP reimbursement requests in their entirety if the request includes claims incurred after December 31, 2011. For employers who are submitting claim lists as part of a reimbursement request, it is imperative that they do not include any claims incurred on or after January 1, 2012.

CMS will issue additional guidance if the availability of ERRP funds changes. At this point, they anticipate that funds will be exhausted by claim activity incurred before the end of 2011.

MEWAs

Health care reform added new enforcement authority and reporting requirements applicable to certain MEWAs. The new requirements apply to MEWAs that control the assets of ERISA-covered plans established and maintained by others. These rules do not apply to MEWAs that provide coverage in connection with governmental or church plans, or that provide coverage to comply with workers' compensation laws. These rules do not include a MEWA that is licensed or authorized to operate as a health insurance issuer in the states in which it provides medical coverage.

MEWAs are broadly defined as an employee welfare benefit plan or arrangement that is established or maintained to provide welfare benefits to two or more employers. MEWAs are provided to benefit employees, and benefits include health plan benefits. A few plans are excluded from MEWA designations:

1. Plans maintained pursuant to one or more collective bargaining agreements
2. Plans maintained by a rural electric cooperative
3. Plans maintained by a rural telephone cooperative association

In addition, the IRS control group rules are used to determine a single employer. It is not uncommon for different employers to be covered under one plan if the employers share some level of common ownership or control. As long as the IRS control group rules are met, these plans are not considered MEWAs. Specific to this guidance, common control should not be based on an interest of less than 25%.

MEWAs have a number of administrative and reporting requirements. The reporting gauges the MEWA's ability to carry out their financial and legal obligations. If a MEWA becomes insolvent, the impact on plan participants is dramatic. In many cases, claims expenses will simply not be paid. Employers and employees pay premiums to MEWAs and expect coverage for medical expenses.

The new guidance establishes two new enforcement tools for the Department of Labor (DOL):

1. The Secretary of Labor can issue a "cease and desist" order. The regulations defining the grounds in which this can be issued include:
 - a. Fraudulent conduct
 - b. Conduct that creates an immediate danger to public safety or welfare
 - c. Conduct that causes or can reasonably be expected to cause significant, immediate or irreparable injury

The cease and desist order can halt activities that may be considered fraudulent, and might provide broader relief in order to protect participants and employers. The order may prohibit a specific person from taking specific action in relation to the plan. It may also bar a specific service provider from working with the plan.

2. The Secretary of Labor can authorize a summary seizure of plan assets. An asset seizure will be authorized in situations where the Secretary determines the MEWA is in a financially hazardous condition. A summary seizure order can be issued if there is probable cause that a MEWA:
 - a. Is in danger of becoming unable to pay benefit claims as they become due
 - b. Has sustained or is in danger of sustaining a significant loss of assets

The government may seize books, documents, records, property and financial accounts for the purposes of transferring authority to a court-appointed receiver.

This new enforcement authority was added because of some MEWAs' fraudulent and abusive practices. Historically, some self-funded MEWAs have failed to use sound underwriting practices and have paid excessive fees to service providers. The current enforcement and reporting structure was not sufficient to take immediate action on mismanaged or financially challenged MEWAs.

The new regulations allow a person that is adversely affected by a cease and desist order to request an administrative hearing, which is handled by the Office of Administrative Law Judges (OALJ). These regulations include the procedures the OALJ must follow. A hearing must be requested within 30 days of receipt of a cease and desist order. If a party requests an administrative hearing, the order is not final until the conclusion of the hearing. However, it remains enforceable during the administrative review process.

These new enforcement options do not limit any existing enforcement tools. They are instead designed to address situations where there may be imminent harm to plan participants.

The DOL also proposed a new reporting requirement that requires most MEWAs to register with the Secretary of Labor prior to initiating operations. MEWAs will register by electronically filing a Form M-1 with the DOL. The Form M-1 was modified as part of the new requirement.

The government has requested comments from stakeholders on these new enforcement options.

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