



# Carrier Premium Credits and ERISA Fiduciary Obligations

During times of low utilization of benefits, either with economic downturns or a healthy employee population, a carrier may issue a premium credit to an employer. When asking how these premium credits should be treated by the employer, we often compare them to the ACA's medical loss ratio (MLR) rebates. While these premium credits are not MLR rebates, a similar decision must be made to determine whether they, like MLR rebates, are ERISA plan assets.

## Background

As background, the Affordable Care Act's MLR rule requires health insurers to spend a certain percentage of premium dollars on claims or activities that improve healthcare quality; otherwise they must provide a rebate to employers. At the same time the U.S. Department of Health and Human Services issued the MLR rule, the U.S. Department of Labor (DOL) issued [Technical Release 2011-04](#) (TR 2011-04), which clarifies how rebates should be treated under ERISA. Under ERISA, anyone who has control over plan assets, such as the plan sponsor, has fiduciary obligations and must act accordingly.

Standard premium credits are not subject to the MLR rule; however, a similar analysis applies. TR 2011-04 clarified that insurers must provide any MLR rebates to the policyholder of an ERISA plan. While the DOL's analysis was focused on MLR rebates, it recognized that distributions from carriers can take a variety of forms, such as "refunds, dividends, excess surplus distributions, and premium rebates." Regardless of the form or how the carrier describes them — to the extent that a carrier credit, rebate, dividend or distribution is provided to a plan governed by ERISA — then the employer must always consider whether it is a "plan asset" subject to Title I of ERISA. If it is, then as the party with authority and control over the "plan assets," the employer is a fiduciary subject to Section 404 of ERISA and bound by the prohibited transactions provisions of Section 406. In other words, to the extent that a refund is a plan asset, it must be used for the exclusive benefit of plan participants, which may include enhancing plan benefits or returning it to employees in the form of a premium reduction or cash refund.

## Treatment of Premium Credits to Employers

In situations where an employer uses a trust to hold the insurance policies, the DOL's position is that the rebates are generally plan assets. However, in situations where the employer is the policyholder, the employer may, under certain circumstances, retain some or all of a rebate, credit, refund or dividend. When considering whether a rebate is a plan asset, the employer should examine the plan terms. As discussed below, some employers draft their plan documents in a manner that allows them to retain these types of refunds. If the terms of the plan are ambiguous, the DOL recommends employers use "ordinary notions of property rights" as a guide.

When determining whether carrier credits, dividends, distributions or rebates are ERISA plan assets, the DOL will reference the documents' terms governing the plan, including the insurance policy. If these governing documents fail to address the issue or remain unclear, the DOL will consider the funding source of insurance premium payments. In such situations, the portion of the premium credit deemed not to be a plan asset (and therefore eligible for retention by the employer) generally corresponds to the proportion of the insurance coverage cost contributed by the employer.

For example, if both the employer and employees pay a fixed percentage of the cost, the portion of the premium credit allocated to participant contributions would align with that percentage. If there are multiple benefit options, a premium credit attributable to one benefit option cannot be used to benefit participants in another benefit option.

## The Plan Document

Employers can draft their plans to make it clear that the employer retains all rebates, credits, distributions, etc. if the amount of those rebates does not exceed the employer's contribution towards the benefit. If the plan provides this flexibility, the employer may not have to return a portion of the premium credit to employees or use the credit to provide a premium reduction. Wrap documents created in AleraHR have the standard applicable language to allow employers to retain these credits, but it is the employer's duty to confirm language in their specific wrap document.

Employers should also consider that carriers communicate some premium refunds, such as MLR rebates, to both the policyholder participants. Consequently, employees are aware that the employer received money from the carrier and may expect a return. Employers should therefore consider potential employee relation issues associated with this approach.

If the plan document is silent with regard to the use of any potential credits or is unclear about how such funds are allocated, then the employer should treat any premium credits like they are ERISA plan assets (to the extent they're attributable to employee contributions) and allocate them accordingly.

## Allocating the Employees' Share of a Premium Credit

The portion of the premium credit that is considered plan assets must be handled according to ERISA's general standards of fiduciary conduct. Employers have some discretion when allocating premium credit if they adhere to ERISA standards.

If an ERISA plan is 100% employee paid, then the premium credit must be used for the benefit of employees. If the cost of the benefit is shared between the employer and participants, then the premium credit can be shared between the employer and plan participants.

There is some flexibility here. For example, if the employer finds that the cost of distributing shares of a premium credit to former participants approximates the amount of the proceeds, the employer may decide to distribute the portion of a premium credit attributable to employee contributions to current participants using a "reasonable, fair, and objective" method of allocation.

Similarly, if distributing cash payments to participants is not cost-effective (i.e., if the payments would be de minimis amounts, or would have tax consequences for participants), the employer may apply the premium credit towards future premium payments or benefit enhancements. An employer may also vary the premium credit so that employees who paid a larger share of the premium will receive a larger share of the premium credit.

Ultimately, many employers provide the employees' share of the premium credit in the form of a premium reduction or discount to all employees participating in the plan at the time the premium credit is distributed. Employers should review all relevant facts and circumstances when determining how such a credit will be distributed.

Finally, employers should note that to avoid ERISA's trust requirement, the portion of a premium credit that is plan assets must be used within three months of receipt by the policyholder.

## Conclusion

Employers seeking additional flexibility in managing carrier premium credits should work with counsel to update their plan documents, or with their Alera Group agent to update the applicable wrap document in AleraHR. Even for plans with flexibility built into the terms, we encourage consultation with counsel to review the facts and circumstances surrounding any such premium credits to ensure ERISA compliance.