



## Broker Alert Memorandum 2020-3

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### Rebates From Insurance Carriers Can Be Plan Assets

COVID-19 has yielded numerous challenges for employers, ranging from employee layoffs and furloughs to new distribution and loan rules for retirement plans. The latest challenge involves rebates being issued by insurance carriers as a result of reduced medical, dental, and vision claims during the pandemic. If rebates are issued on an insurance policy that was paid, or partially paid, with employee premiums, some or all the rebate may be considered a “plan asset” under the Employee Retirement Income Security Act of 1974 (“ERISA”). How employers handle these plan assets implicate ERISA’s fiduciary rules, which essentially require that a percentage of the rebate be used exclusively for the participants and beneficiaries of the plan from which the rebate was generated. Precisely how an employer does this can be as challenging as many of the other pandemic issues affecting employers. Below are some guidelines to help employers navigate ERISA’s fiduciary rules when handling insurance rebates.

#### **STEP 1 – Determine what portion of the rebate constitutes “plan assets” and what portion constitutes the employer’s general assets**

As noted above, if the rebate constitutes plan assets, it must be allocated in accordance with ERISA’s fiduciary provisions. In contrast, if the rebate constitutes an employer’s general assets, the employer may retain the rebate for its own benefit.

- If a trust is the policyholder, 100% of the rebate constitutes plan assets to be held in the trust.
- If the employer is the policyholder, plan assets are generally identified by looking to the source of premium payments.
  - If the employer paid the entire cost of the insurance, 100% of the rebate is the employer’s general assets.
  - If employees paid the entire cost of insurance, 100% of the rebate constitutes plan assets.
  - If employees and the employer shared the cost of premiums, a percentage of the rebate equal to the percentage of the cost paid by employees would be classified as plan assets, and the percentage paid by the employer would be the employer’s general assets (e.g., 30% of a rebate would be plan assets when employees pay 30% of the cost of coverage).

#### **STEP 2 – Review the plan document**

- The insurance policy or plan document may dictate how a rebate should be distributed. If this is the case, the plan’s terms should be followed.

#### **STEP 3 – Determine the best way to expend the rebate**

Any portion of a rebate that constitutes plan assets *must be used according to ERISA fiduciary principles*. Accordingly, they must be used for the exclusive benefit of plan participants and beneficiaries. The Department of Labor (“DOL”) has authorized the use of plan assets to be used in the following ways:

- (1) Provide cash payments to participants;
- (2) Apply the rebate toward participants’ future premiums (a “premium holiday”);
- (3) Offer new or enhanced benefits to employees/participants, such as a wellness program; or
- (4) Use the rebate to pay for administrative costs that participants would have otherwise paid.

The DOL acknowledges that it may not be possible to dispense refunds to reflect the exact premiums a participant paid. For example, some employees who paid premiums resulting in the rebate may not be employed when the rebate is received. In deciding on an allocation method, plan fiduciaries may weigh the costs of an allocation method against the ultimate benefits, as well as the competing interests of participants or classes of participants, provided such method is *reasonable, fair and objective*. For example:

- It may be reasonable, fair, and objective to refund more money to participants who purchased family coverage than those who purchased employee-only coverage.
- If it is not cost effective to dispense rebates to former participants, a plan fiduciary may decide to allocate the rebate to current participants (through premium holidays or benefit enhancements) based on a reasonable, fair, and objective method.
- Distribution of rebates may not be fair with respect to newly hired or terminated employees, but fiduciaries should try to mitigate unfairness when reasonably possible.

#### **STEP 4 – Document the method used to allocate the rebate**

The mechanics of using the plan asset portion of any rebate can be very challenging. Payroll systems, vendor contracts and HRIS systems all pose unique challenges. The fiduciaries responsible for allocating the portion of the rebate constituting plan assets should document the analysis and ultimate decision made in handling the rebate. In the event of a DOL audit or a challenge by participants and beneficiaries, this documentation should illustrate the prudent process followed by the fiduciaries in handling the plan assets.

If you have any questions about allocating insurance rebates to plan participants and beneficiaries, please contact a member of the [Kutak Rock Employee Benefits Practice Group](#).

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